



## AGENDA REPORT

**Meeting Date:** September 15, 2009  
**Item Number:** F-15  
**To:** Honorable Mayor & City Council  
**From:** Daniel E. Cartagena, Sr. Management Analyst  
**Subject:** **AMENDMENT OF THE ENCROACHMENT AGREEMENT BETWEEN THE CITY OF BEVERLY HILLS AND RODEO-SANTA MONICA LLC FOR THE PROPERTY LOCATED AT 469 NORTH RODEO DRIVE**

**Attachments:**

1. Written Request to Amend Agreement
2. Revised Encroachment Agreement

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### **RECOMMENDATION**

It is requested the City Council of the City of Beverly Hills approve the proposed revision to an encroachment agreement between the City of Beverly Hills and Rodeo-Santa Monica LLC involving the property located at 469 N. Rodeo Drive. The amendment would allow an additional 1.5 inch encroachment of the front façade on the Rodeo side for a total of 7 inches.

### **INTRODUCTION**

The City of Beverly Hills has received a request from Rodeo-Santa Monica LLC to amend the existing encroachment agreement with the City involving its property at 469 N. Rodeo Drive located on the southwest corner of Rodeo Drive and S. Santa Monica Blvd.

On April 30, 2009, the City Council approved an encroachment agreement with Rodeo-Santa Monica LLC on behalf of their tenant Missoni SPA. The purpose of this agreement was to authorize the encroachment of an architectural element, the decorative façade, to protrude from the building into the public right-of-way along both the South Santa Monica Blvd and Rodeo Drive sides of the building. This agreement limited the encroachment to 5.5 inches. Also, the agreement required Rodeo-Santa Monica LLC to pay the City an annual fee of \$6,000 to cover the cost of occupying the right-of-way.

**DISCUSSION**

Missoni SPA has leased the property at 469 N. Rodeo Drive from Rodeo-Santa Monica LLC and intends to install a decorative façade that will fully cover the exterior walls of the building from the base to the top, running the length of two sides of the building. The original plans called for the façade will protrude 5.5 inches into the public sidewalk on both the S. Santa Monica Blvd and Rodeo Drive sides of the building.

Through the building inspection process, it was discovered that the actual encroachment along Rodeo Drive measures 7 inches. It is not unusual in construction projects where existing building elements constrain the placement of added structures to have minor variations to occur without detection until the inspections are conducted. Rather than tear out the entire façade and reconstruct it within the scope of the original approval, Rodeo-Santa Monica LLC is requesting to amend its existing agreement with the City.

In exchange for the increased area of the encroachment, Rodeo-Santa Monica LLC agrees to increase the annual fee by \$1,000. This will raise the annual fee from \$6,000 to \$7,000.

The original encroachment agreement, dated April 30, 2009, will be terminated at the time this revised agreement is executed.

**FISCAL IMPACT**

Rodeo – Santa Monica LLC agrees to increase the annual fee set in the original encroachment agreement by \$1,000 or from \$6,000 to \$7,000 per year.

\_\_\_\_\_  
Daniel E. Cartagena  
Approved By



# **Attachment 1**

Written Request to Amend Agreement

**RODEO-SANTA MONICA, LLC**  
9629 Brighton Way Beverly Hills, CA 90210  
Phone: (310) 275-9700 Fax: (310) 274-3730

September 8, 2009

Mr. Daniel E. Cartagena  
Assistant to the City Manager  
Office of the City Manager  
455 N. Rexford Drive, 3rd Floor  
Beverly Hills, CA 90210

VIA EMAIL:  
dcartagena@beverlyhills.org

**RE: Encroachment Agreement; Request for Modification  
Rodeo-Santa Monica, LLC ("Encroacher")  
469 N. Rodeo Drive, Beverly Hills**

Dear Mr. Cartagena:

Please be advised that the Encroacher respectfully requests a modification to the captioned Encroachment Agreement. Specifically, Encroacher needs the encroachment measurement for the Missoni store façade increased from 5.5 inches to 7 inches to accommodate its unique design. Please see attached revised façade drawing(s).

In this regard, Encroacher agrees to an additional \$1,000 annually, bringing the total encroachment payment to \$7,000 annually.

Cartagena, Daniel E.  
September 8, 2009  
Page 2

Please expedite our request, as Missoni is eager to open its flagship boutique on Rodeo Drive.

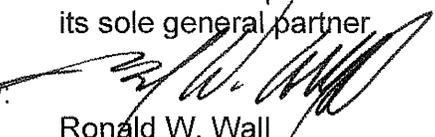
Sincerely,

RODEO-SANTA MONICA LLC  
a Delaware limited liability company

By: Fashion World-Santa  
a California limited partnership  
its sole managing member

By: Santa Properties  
a California limited partnership  
its sole general partner

By: Brighton-Santa Corporation  
a California corporation  
its sole general partner

By:   
Ronald W. Wall  
Chief Financial Officer

RWW/js

Encls.



ENCROACHMENT AGREEMENT

1. **Encroacher:** Rodeo-Santa Monica LLC  
  
Address for Notices:  
  
9629 Brighton Way  
Beverly Hills, CA 90210
  
2. **Date of this Agreement:** April 30, 2009
  
3. **Termination Date:** The earlier of (i) the date upon which the façade improvements described on Exhibit "A" attached hereto (the "Façade") are removed; (ii) the date on which "Missoni" ceases to operate its business at 469 North Rodeo Drive in Beverly Hills, California; or (iii) the date on which this Encroachment Agreement terminates or is terminated in accordance with its terms.
  
4. **Encroachment:** Commencing on the date on which the City of Beverly Hills ("City") issues the permits for the installment of the Façade (the "Permit Date"), the Façade may encroach into the area described on Exhibit "B" above the public sidewalk area adjacent to the street frontage of the structure located at 469 North Rodeo Drive, Beverly Hills, California (the "Premises").
  
5. **Encroachment Payment:** Commencing on the Permit Date, and thereafter on each anniversary of the Permit Date, Encroacher shall pay to the City at 455 North Rexford Drive, Third Floor, Beverly Hills, CA 90210, Attn: Director of Finance Administration, in advance (not in arrears), and without proration for any partial year at the end of the term of this Façade Agreement, the sum of \$6,000.00, increased on each anniversary of the Permit Date (each, an "Adjustment Date") by the estimated percentage increase in the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor ("Bureau") for Urban Wage Earners and Clerical Workers for All Items (CPI W) U.S. City average or successor thereto ("CPI") during the year ending on the applicable Adjustment Date, as determined by City by dividing the CPI published 3 months prior to the applicable Adjustment Date by the CPI published 15 months prior to the applicable Adjustment Date. (If the CPI is converted to a different standard reference base or otherwise revised, the determination shall be made with the use of such conversion factor, formula or table for converting the CPI as may be published by the Bureau, or if the Bureau should fail to publish the same, then with the use of such conversion factor, formula or table for converting the CPI as may be published by any nationally recognized publisher of similar statistical information. If the CPI ceases to be published and there is no successor thereto, then such other index selected by City in good faith

EXHIBIT A

shall be used.

- 6. **Additional Terms and Conditions:** The Additional Terms and Conditions attached hereto as Exhibit "C" are incorporated herein by reference.

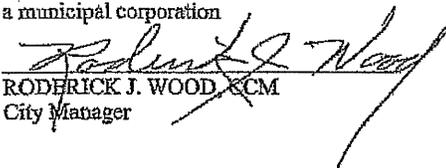
IN WITNESS WHEREOF, CITY and ENCROACHER have duly executed this Encroachment Agreement as of April 30, 2009.

"City":

"Encroacher":

CITY OF BEVERLY HILLS,  
a municipal corporation

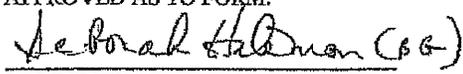
RODEO-SANTA MONICA, LLC,  
a Delaware limited liability company

  
 RODRICK J. WOOD, CCM  
 City Manager

By: Fashion World-Santa,  
a California limited partnership,  
its sole managing member

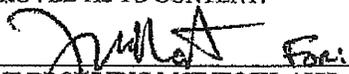
By: Santa Properties,  
a California limited partnership,  
its sole general partner

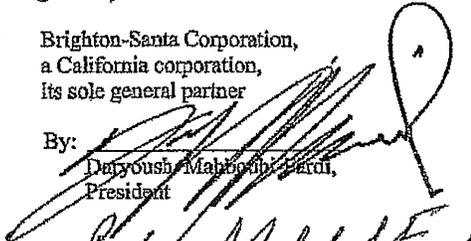
APPROVED AS TO FORM:

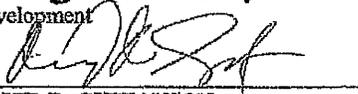
  
 LAURENCE S. WIENER  
 City Attorney

By: Brighton-Santa Corporation,  
a California corporation,  
its sole general partner

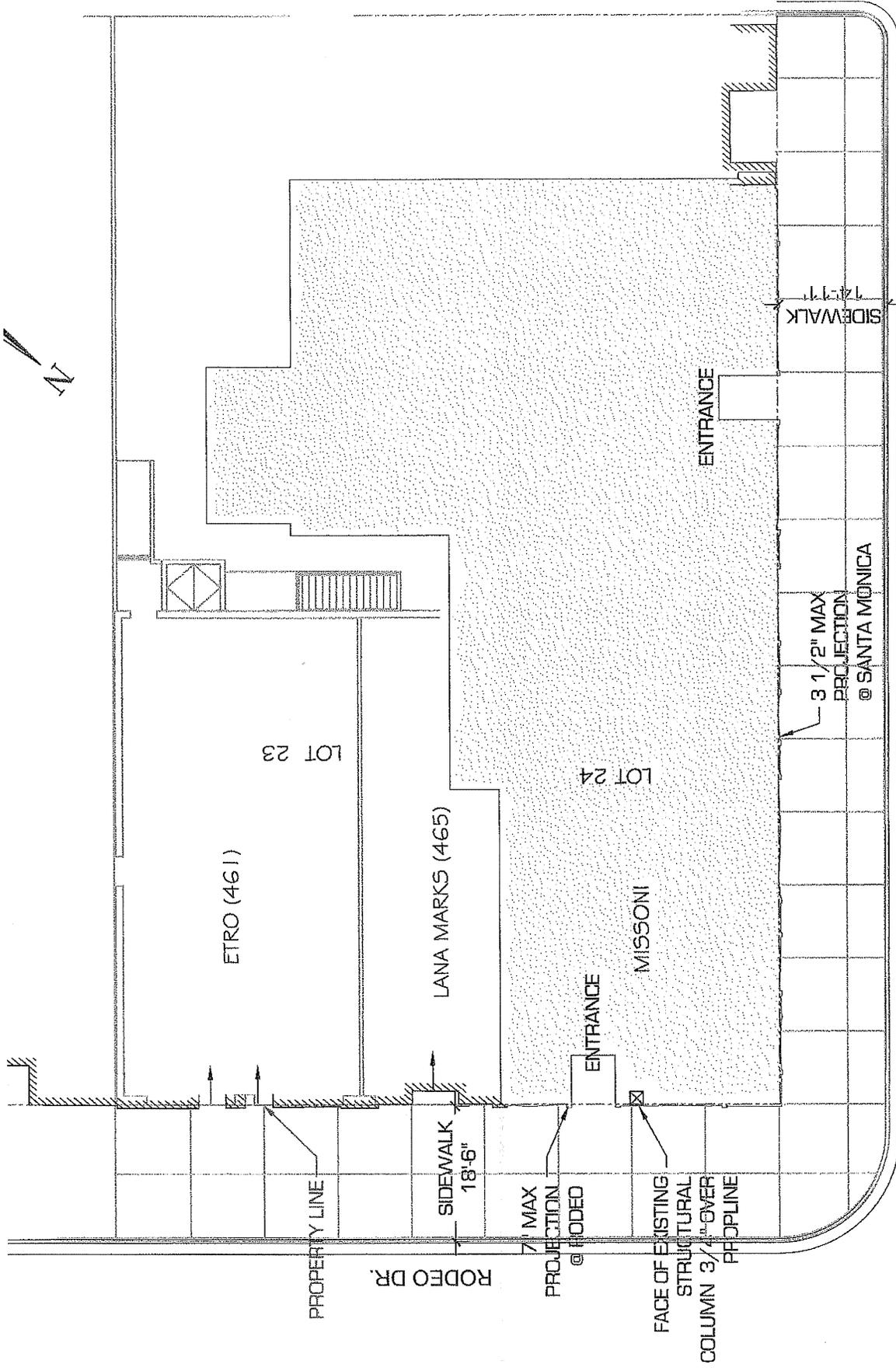
APPROVED AS TO CONTENT:

 For:  
 ANNE BROWNING MCINTOSH, AICP  
 Interim Director of Community  
 Development

By:   
Behrouz Mahboubi-Fardi,  
President

  
 DAVID D. GUSTAVSON  
 Director of Public Works and  
 Transportation

By:   
Behrouz Mahboubi-Fardi,  
Vice President

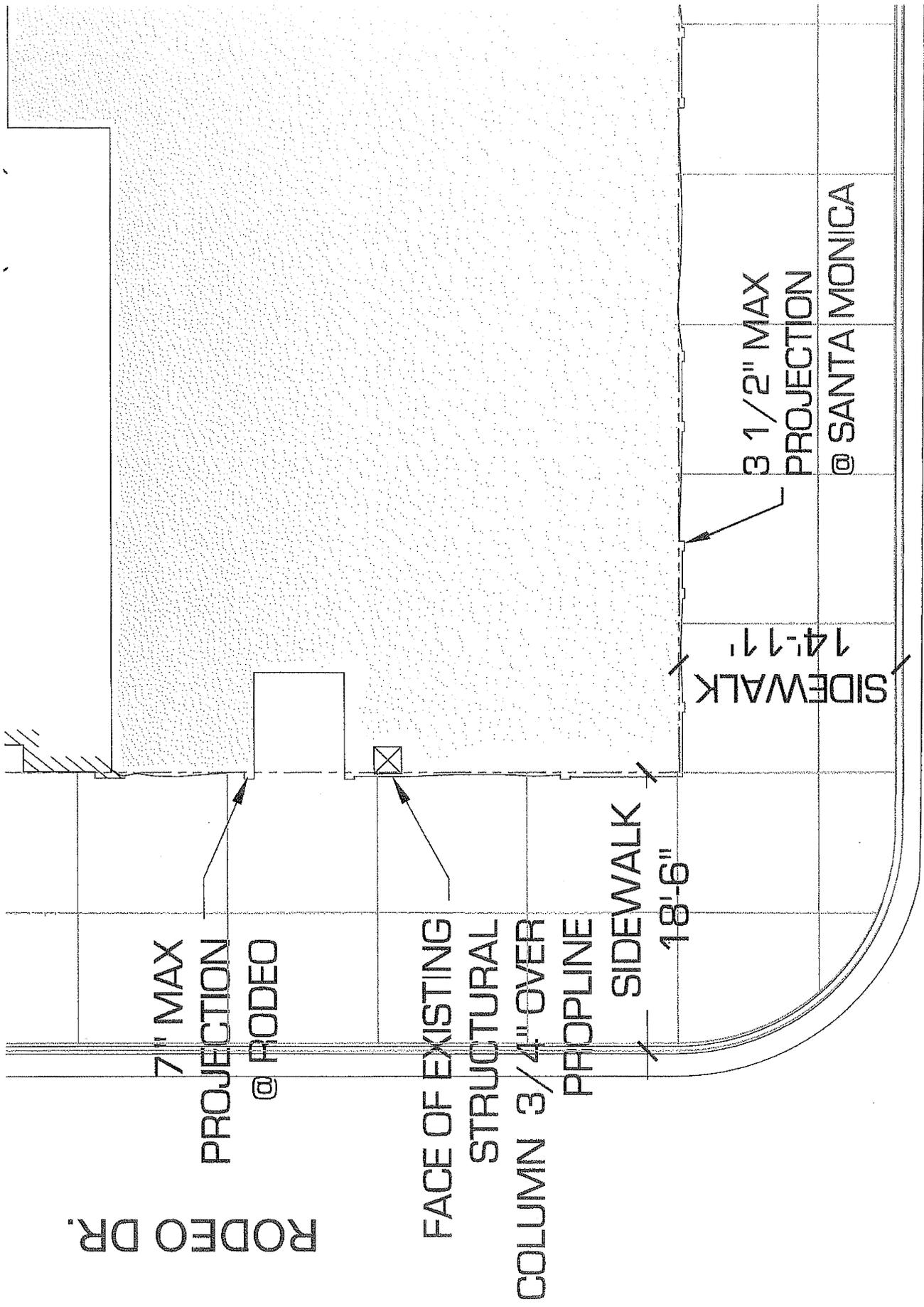


S. SANTA MONICA BLVD.

**MISSONI**  
 469 N. RODEO DR  
 BEVERLY HILLS,  
 CA 90210

**SPACE CA**  
 architecture • planning • interiors

8607 Venice Boulevard  
 Los Angeles, CA 90034  
 T: 310 202 0406  
 F: 310 202 0320



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 469 N. RODEO DR  
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8607 Venice Boulevard  
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T. 310 202 0406  
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## **Attachment 2**

### Revised Encroachment Agreement



## ENCROACHMENT AGREEMENT

- 1. Encroacher:** Rodeo-Santa Monica LLC  
Address for Notices:  
  
9629 Brighton Way  
Beverly Hills, CA 90210
- 2. Date of this Agreement:** September \_\_\_\_, 2009
- 3. Termination Date:** The earlier of (i) the date upon which the façade improvements described on Exhibit "A" attached hereto (the "Façade") are removed; (ii) the date on which "Missoni" ceases to operate its business at 469 North Rodeo Drive in Beverly Hills, California; or (iii) the date on which this Encroachment Agreement terminates or is terminated in accordance with its terms.
- 4. Encroachment:** Commencing on the date on which the City of Beverly Hills ("City") issues the permits for the installment of the Façade (the "Permit Date"), the Façade may encroach into the area described on Exhibit "B" above the public sidewalk area adjacent to the street frontage of the structure located at 469 North Rodeo Drive, Beverly Hills, California (the "Premises").
- 5. Encroachment Payment:** Commencing on the Permit Date, and thereafter on each anniversary of the Permit Date, Encroacher shall pay to the City at 455 North Rexford Drive, Third Floor, Beverly Hills, CA 90210, Attn: Director of Finance Administration, in advance (not in arrears), and without proration for any partial year at the end of the term of this Façade Agreement, the sum of \$7,000.00, increased on each anniversary of the Permit Date (each, an "Adjustment Date") by the estimated percentage increase in the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor ("Bureau") for Urban Wage Earners and Clerical Workers for All Items (CPI W) U.S. City average or successor thereto ("CPI") during the year ending on the applicable Adjustment Date, as determined by City by dividing the CPI published 3 months prior to the applicable Adjustment Date by the CPI published 15 months prior to the applicable Adjustment Date. (If the CPI is converted to a different standard reference base or otherwise revised, the determination shall be made with the use of such conversion factor, formula or table for converting the CPI as may be published by the Bureau, or if the Bureau should fail to publish the same, then with the use of such conversion factor, formula or table for converting the CPI as may be published by any nationally recognized publisher of similar statistical information. If the CPI ceases to be published and there is no successor thereto, then such other index selected by City in good faith shall be used.

**6A. Additional Terms and Conditions:**

The Additional Terms and Conditions attached hereto as Exhibit "C" are incorporated herein by reference.

**6B. Termination of Prior Encroachment Agreement**

The Encroachment Agreement dated April 30, 2009, between the City and Encroacher, also known as City Agreement No. 167-09, shall be terminated upon the date that this Agreement is executed.

IN WITNESS WHEREOF, CITY and ENCROACHER have duly executed this Encroachment Agreement as of September \_\_\_, 2009.

**"City":**

**"Encroacher":**

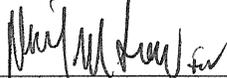
CITY OF BEVERLY HILLS,  
a municipal corporation

RODEO-SANTA MONICA, LLC,  
a Delaware limited liability company

\_\_\_\_\_  
RODERICK J. WOOD, ICMA-CM  
City Manager

By: Fashion World-Santa,  
a California limited partnership,  
its sole managing member

APPROVED AS TO FORM:

  
\_\_\_\_\_  
LAURENCE S. WIENER  
City Attorney

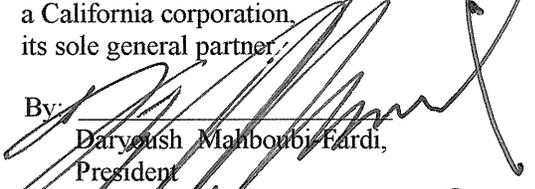
By: Santa Properties,  
a California limited partnership,  
its sole general partner

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
SUSAN HEALY KEENE, AICP  
Director of Community Development

  
\_\_\_\_\_  
DAVID D. GUSTAVSON  
Director of Public Works and  
Transportation

By: Brighton-Santa Corporation,  
a California corporation,  
its sole general partner:

By:   
\_\_\_\_\_  
Daryoush Mahboubi Fardi,  
President

By:   
\_\_\_\_\_  
Behrouz Mahboubi-Fardi,  
Vice President

**EXHIBIT "A"**

**DESCRIPTION OF PREMISES**  
**(i.e., the encroachment area)**

(Attached.)

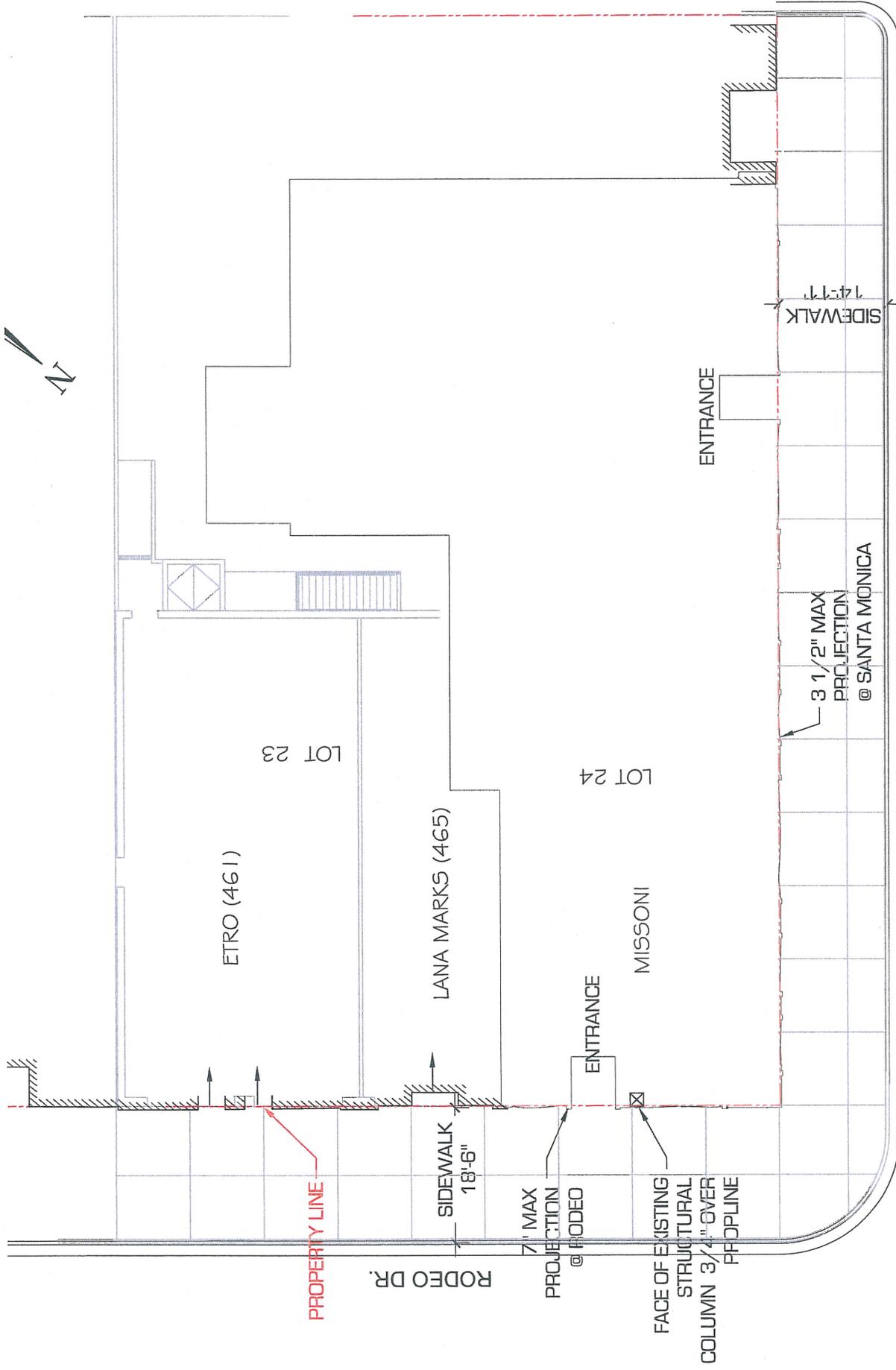


EXHIBIT A

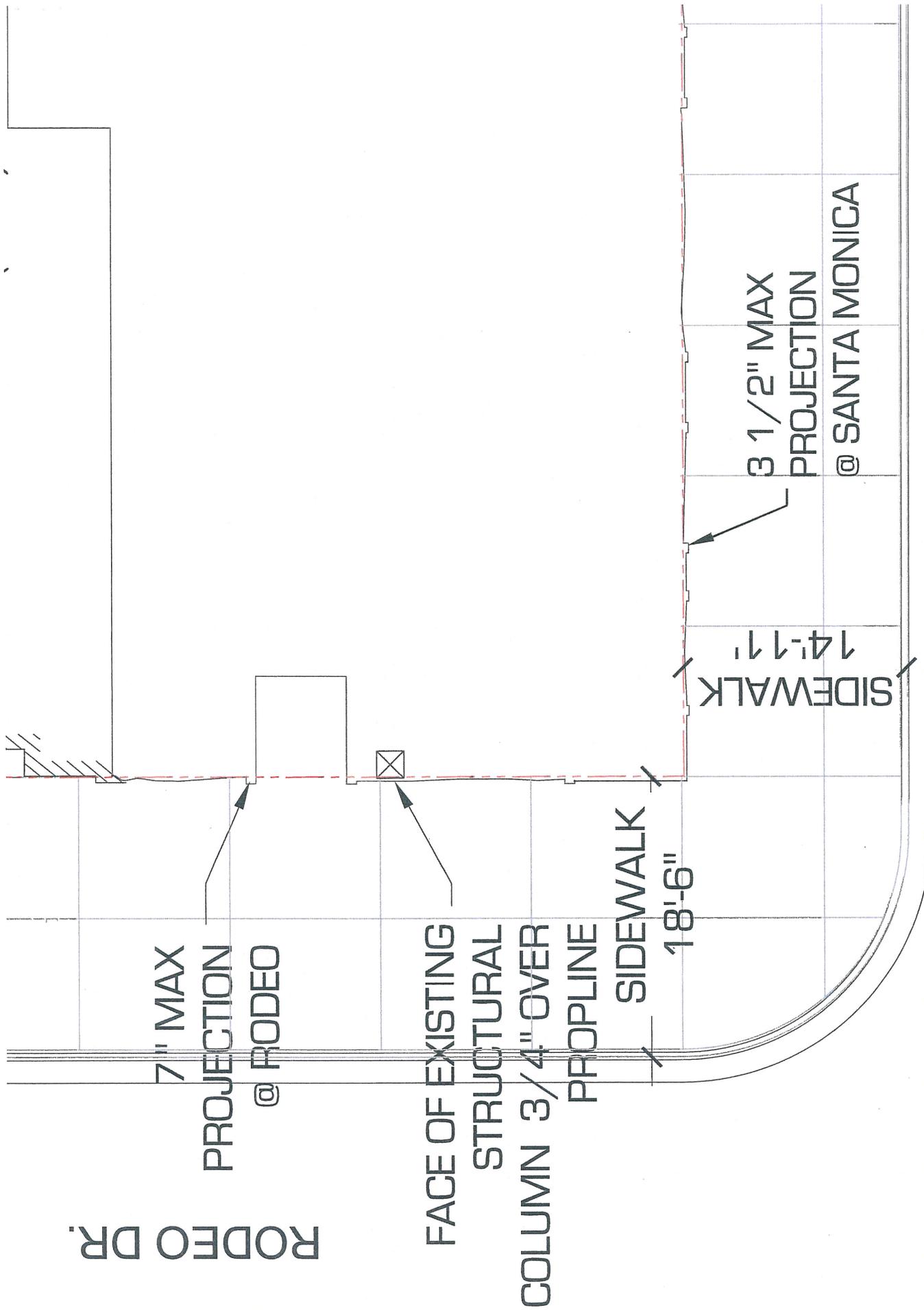
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 BEVERLY HILLS,  
 CA 90210

**SPACE CA**  
 architecture • planning • interiors

8607 Venice Boulevard  
 Los Angeles, CA 90034

T: 310 202 0406  
 F: 310 202 0320



RODEO DR.

7" MAX  
PROJECTION  
@ RODEO

FACE OF EXISTING  
STRUCTURAL  
COLUMN 3/4" OVER  
PROPLINE

SIDEWALK

18'-6"

SIDEWALK  
1/4"-1/4"

3 1/2" MAX  
PROJECTION  
@ SANTA MONICA

**EXHIBIT "B"**

**DESCRIPTION OF FACADE**

The façade treatment consists of rows of aluminum “ribbons,” each of which is approximately 4 inches in height and painted white. Each ribbon is wavy in texture and creates a three dimensional pattern along the walls that give the building a very distinct feel, almost like a woven pattern. Display windows are scattered along the Santa Monica and Rodeo faces and are framed by 8-inch wide white aluminum bands. The entries along these two sides are recessed and also framed by white aluminum bands.

EXHIBIT "C"

ADDITIONAL TERMS AND CONDITIONS

RECITALS

A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the laws of the State of California and the Beverly Hills Municipal Code.

B. City and Encroacher desire to enter into this Encroachment Agreement for a storefront façade on the real property located in the City, which is herein described, upon the terms and conditions set forth herein. To the extent the Façade encroaches on City sidewalks, it meets all the following criteria:

- (1) the encroachment use is consistent with the General Plan;
- (2) the encroachment use promotes the harmonious development of the area;
- (3) the encroachment use does not adversely interfere with the use and enjoyment of residential properties in the vicinity of the subject property;
- (4) the encroachment use does not create any significant traffic impacts, traffic safety hazards, pedestrian-vehicle conflicts, or pedestrian safety hazards;
- (5) the encroachment use does not impede the safe and orderly flow of pedestrians along the public right-of-way;
- (6) the encroachment use does not adversely impact parking in the vicinity as a result of employee or patron parking demands;
- (7) the encroachment use does not create a substantial adverse impact on persons or property; and
- (8) the encroachment use does not adversely affect the public health, welfare and safety.

7. GENERAL.

These Standard Terms and Conditions, and its attachments, shall be deemed fully incorporated in the Encroachment Agreement to which this Exhibit is attached, and these Standard Terms and Conditions and the Encroachment Agreement and its other Exhibits shall hereinafter be collectively referred to as the "Agreement." All terms shall, unless expressly provided to the contrary herein, have the same respective meaning as set forth in the Encroachment Agreement. The Section numbers of this Exhibit are a continuation of the Section numbers of the Encroachment Agreement.

8. CITY RIGHT TO TERMINATE.

Notwithstanding the Recitals above, in the event City hereafter determines that the Façade or the encroachment poses a threat to the health or safety of passersby or the community and Encroacher fails to commence to cure the threat within ten (10) days after written notice from City or fails to cure the matters giving rise to the threat within thirty (30) days after City's written notice, then City may terminate this

Agreement by further written notice to Encroacher. In the event of any such termination, Encroacher shall remove the Façade at its sole cost and expense (and in compliance with the other applicable terms of this Agreement).

9. ADDITIONAL CONDITIONS.

City may impose such conditions on the Façade and Premises as deemed necessary by City to protect City, persons, property, or the public health, welfare, and safety.

10. ADDITIONAL FEES.

Encroacher shall pay as additional fees, all taxes and assessments of any nature whatsoever levied upon the Premises, insurance premiums for all insurance required under this Agreement, and all fees and expenses relating to the use of the Premises, including, but not limited to, costs of permit fees.

11. MAINTENANCE.

Encroacher at its own expense shall keep the Premises in a clean and sanitary condition. If Encroacher does not keep the Façade clean, and fails to correct any unclean or unsanitary condition within 48 hours after being notified in writing to do so by City, City may enter the Premises and remedy the condition, or conditions, and charge the cost to Encroacher.

12. ALTERATIONS AND REPAIRS; REMOVAL OF FAÇADE.

Encroacher accepts the Premises in the condition they now are (without a representation or warranty, express or implied), and City shall not be required to make any alterations, improvements or repairs therein or thereon. Encroacher hereby waives any and all rights it may have to any expressed or implied warranties concerning the condition of Premises. Encroacher shall not make any changes to the Façade without first securing the prior consent of City in writing. All such approved changes or removals shall be at the sole expense of Encroacher. Encroacher may remove the Façade (upon at least 30 days' prior written notice to City), subject to Encroacher's compliance with the other terms of this Agreement.

13. SIGNS AND ADVERTISEMENTS.

No signs or advertising matter of any kind shall be permitted unless and until approved in writing by City. Notwithstanding the foregoing, Encroacher is encouraged to install Holiday Decorations in appropriate areas within Encroacher's business establishment in accordance with *Business Owner's Guide to Installing Holiday Decorations* or other rules as the City may establish from time to time.

14. CONDUCT OF BUSINESS.

Encroacher shall at all times conduct and operate its business in a quiet and orderly manner to the satisfaction of City so that same shall not become or constitute a nuisance either public or private.

15. EMPLOYEES AND MECHANICS' LIEN.

Encroacher shall keep said Premises and every estate, right, title and interest therein, or in or to any part thereof, at all times during the term of this Agreement, free and clear of any mechanics' liens and other liens, including, but not limited to, liens for labor, services, supplies, equipment, or material. Encroacher will at all times fully pay and discharge and wholly protect, defend, indemnify and hold harmless City with respect to such liens, and any claims, assertions or filing thereof.

16. TAXES.

Encroacher shall exonerate, indemnify and hold harmless City from and against, shall defend City from and against, and shall assume full responsibility for, payment of all wages or salaries and all federal, State, County and City taxes or contributions imposed or required under the Unemployment Insurance, Social Security, Income Tax laws, Worker's Compensation laws, or other laws with respect to Encroacher's employees engaged in the performance of Encroacher's obligations and operations hereunder.

This Agreement may create a possessory interest in public property which is subject to taxation. In the event such interest is created, Encroacher shall pay any and all taxes levied on such interest.

Encroacher shall pay any and all taxes upon personal property and improvements belonging to said Encroacher and upon its possessory interests, if any, and Encroacher shall pay all sales and other taxes levied against the operation of said business.

17. INSURANCE.

Encroacher shall procure and maintain at Encroacher's own cost and expense for the duration of this Agreement, the following insurance against claims for injuries to persons or damages to property which may arise from or in connection with the condition of the Premises or the possession, occupancy, operation and use of the Premises by Encroacher, Encroacher's agents, representatives, employees, or subcontractors.

A. Extent of Coverage.

Encroacher shall procure limits of insurance coverage in the following minimum amounts:

1. Comprehensive General Liability: Two Million Dollars (\$2,000,000), combined single limit per occurrence for bodily injury and property damage. Such comprehensive liability policy shall expressly include coverage for fire-legal liability.

2. Worker's Compensation and Employer's Liability: Worker's Compensation limits as required by the Labor Code of the State of California and Employer's Liability limits of One Million Dollars, (\$1,000,000) per accident.

3. Builder's Risk or Tenant Improvements Insurance: At City's discretion, either (1) a tenant improvements or betterments insurance or (2) an "all risks" builder's risk insurance. Such insurance shall apply to Façade improvements in place and all material and equipment at the job site furnished under contract. Such insurance shall cover all risks, including but not limited to vandalism and malicious mischief, and shall further cover any damages arising as a result of construction of any improvements, changes or alterations to the Premises, including but not limited to, hook-ups to utilities or upgrading of any utilities; but excluding contractors', subcontractors' and construction managers' tools and equipment and property owned by contractors' or subcontractors' employees, with limits in accordance with project value.

4. Property Insurance: Property insurance shall be provided for the Façade. Encroacher shall obtain and keep in force during the term of this Agreement a policy or policies of insurance covering loss or damage to the Façade, in the amount of at least one hundred percent (100%) of the full replacement value thereof, as the same may exist from time to time, against all perils included

within the classification of fire, extended coverage, vandalism, malicious mischief, and special extended perils. City shall bear no responsibility for any loss, damage or destruction of the Façade even if Encroacher fails to procure and maintain the insurance required hereunder.

B. Duration of Coverage. Encroacher shall procure and maintain the insurance coverage described in subsections A(1), (2) and (4) of this Section prior to commencing occupancy of the Premises and for the entire term of such occupancy. Encroacher shall procure and maintain the insurance coverage described in subsection A(3) of this Section 17, prior to commencing any construction or demolition on the Premises and until completion and acceptance of such work.

C. Deductibles and Self-Insured Retention. Such insurance policies shall have no deductibles or self-insured retentions unless approved in advance by City in writing. At the option of City, either the insurer shall reduce or eliminate such deductibles or self-insured retention as respects City, its officials, and employees; or Encroacher shall procure a bond guaranteeing payment of losses, related investigation, claims administration and defense expenses.

D. Other Insurance Provisions.

1. General Liability:

(i) City, members of its City Council, boards and commissions, officers, agents and employees are to be covered as insureds as respects: liability arising out of activities performed by or on behalf of Encroacher; products and completed operations of Encroacher; premises owned, leased or used by Encroacher, or arising from or in any manner connected to Encroacher's business, activities, operations, services or work conducted in or about the Premises. The coverage shall contain no special limitations on the scope of protection afforded to City, members of City Council, boards and commissions, officers, agents, and employees.

(ii) Encroacher's insurance coverage shall be primary insurance as respects City, members of its City Council, boards and commissions, officers, agents, and employees. Any insurance or self-insurance maintained by City, its officials, and employees shall be in excess of Encroacher's insurance and shall not contribute to it.

(iii) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, members of its City Council, boards and commissions, officers, agents, and employees.

(iv) Coverage shall state that Encroacher's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. Worker's Compensation, Employer's Liability and Property Coverages: The insurer shall agree to waive all rights of subrogation against City, members of its City Council, boards and commissions, officers, agents, and employees for losses arising from the condition, occupancy, possession of the Premises or any activities or operations of Encroacher herein.

3. All Coverages.

(i) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to City as set forth in Section 25 of this Agreement.

(ii) If Encroacher, for any reason, fails to maintain insurance coverage which is required pursuant to this Agreement, the same shall be deemed a material breach of contract. City, at its sole option, may obtain (but has no obligation to do so) such insurance in Encroacher's name or as agent of Encroacher and shall be compensated by Encroacher for the costs of the insurance premiums or may deduct such costs from the security deposit required hereunder. Encroacher shall pay City interest on paid insurance premiums at the maximum rate permitted by law computed from the day written notice is received that the premiums have been paid.

E. Acceptability of Insurance. All insurance policies are to be placed with insurers holding a "General Policy Holders' Rating" of B+VII or better as set forth in the most current issue of "Best's Insurance Guide" and shall be authorized to do business in California.

F. Verification of Coverage. Prior to exercising any right granted under this Agreement, Encroacher shall furnish City with a certificate or certificates of insurance verifying all insurance coverage required by this Section 17. Said certificates shall be signed by a person authorized by that insurer to bind coverage on its behalf. Current copies of said certificates shall be maintain on file with the City Clerk at all times during the term of this Agreement.

G. Increase in Required Insurance Coverages. City may increase the dollar amount of coverage required under any of the policies described above, upon prior written notice to Encroacher.

18. COMPLIANCE WITH LAWS AND ORDINANCES.

Encroacher shall use the Premises and conduct and maintain the Façade in accordance with all federal, State, County and City laws, ordinances, rules and regulations as may from time to time be applicable.

19. PERMITS AND LICENSES.

Encroacher shall be required to obtain any and all permits and licenses as may from time to time be required in connection with the services to be performed under this Agreement and the installation, maintenance or repair of the Façade.

20. WAIVERS.

A waiver by City of any breach of any term, covenant, or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

21. HOLDOVER.

Any holding over by Encroacher after the expiration or any termination of this Agreement or of any extension or renewal thereof shall not constitute a renewal or extension of the term hereof.

22. HOLD HARMLESS.

Encroacher agrees to defend, indemnify and hold harmless City and members of its City Council, boards and commissions, officers, agents, and employees (hereinafter, collectively "City parties") from and against all loss, damage, cost, expense, liability, claims, demands, suits, attorneys' fees and judgments arising from or in any manner connected to Encroacher's possession, occupancy, use,

construction or demolition of the Façade or Premises or arising from or in any manner connected to the condition of the Premises or Façade and Encroacher's business, activities, operations, services or work conducted in, on or about the Premises.

Encroacher further agrees to indemnify, defend and hold harmless all City parties, from and against all loss, damage, costs, expense, liability, claims, demands, suits, attorneys' fees and judgments arising from or in any manner connected to the furnishing or supplying of any work, services, materials, equipment or supplies by any persons, firms, corporations or other entities in connection with this Agreement or Encroacher's operations.

Without limiting the generality of the foregoing, Encroacher agrees that no City party shall be liable for any injury to Encroacher's business or any loss of income therefrom, or for damage to the goods, wares, merchandise, improvements or other property of Encroacher, Encroacher's officers, agents, employees, contractors, invitees, or customers, or any other person in, on or about the Premises, or personal injury or death of Encroacher, its officers, agents, employees, contractors, invitees, and customers.

Encroacher shall further indemnify and hold harmless City from and against any and all claims arising (i) from any breach or default in the performance of any obligations on the part of Encroacher to be performed under the terms of this Agreement and the encroachment permit issued pursuant hereto, or (ii) from any negligence or other wrongful conduct of Encroacher. In the event any action or proceeding is brought against City by reason of such claim, Encroacher, upon notice from City, shall defend such action or proceeding at Encroacher's expense, by legal counsel satisfactory to City.

#### 23. INDEPENDENT CONTRACTOR.

It is understood and agreed that Encroacher, in the performance of this Agreement, will be acting in a wholly independent capacity and not as the agent, employee, partner, or joint venturer of City. This Agreement does not create a tenancy of any nature whatsoever between City and Encroacher.

#### 24. DEFAULT; TERMINATION; REMOVAL OF FAÇADE.

In the event Encroacher fails or refuses to perform any of the provisions hereof at the time and in the manner required hereunder, Encroacher shall be deemed in default in the performance of its obligations under this Agreement. If such default is a monetary default which is not cured within a period of three (3) days after receipt of written notice of default from City to Encroacher, specifying the nature of such default and the steps necessary to cure such default, City may terminate this Agreement forthwith by giving written notice thereof to Encroacher. If such default is a non-monetary default which is not cured within ten (10) days after written notice of default from City to Encroacher, specifying the nature of such default and the steps necessary to cure such default, City may terminate this Agreement forthwith by giving written notice thereof to Encroacher. Upon termination of this Agreement by City due to a default by Encroacher or other termination or expiration of this Agreement, Encroacher shall, at its sole cost and expense, remove the Façade and restore the storefront to its condition prior to the construction and installation of the Façade.

#### 25. NOTICES.

All notices, demands, requests and approvals to be given under this Agreement shall be given in writing and shall be deemed served when delivered personally, or seventy-two (72) hours after the deposit thereof in the United States mail, postage prepaid and addressed as hereinafter provided. All notices, requests and approvals from Encroacher to City shall be addressed to: Office of the City Manager, 455

North Rexford Drive, Fourth Floor, Beverly Hills, California 90210. All notices, demands, requests and approvals from City to Encroacher shall be addressed to the Encroacher at the address set forth in Section 1 of this Agreement. Either party hereto may, from time to time by notice in writing served upon the other party as aforesaid, designate a different mailing address or a different person to whom all such notices or demands are thereafter to be addressed.

26. COSTS OF LITIGATION.

If either party hereto institutes any action or proceeding in court to enforce any provision hereof or for damages by reason of an alleged breach of any provisions of this Agreement, the prevailing party shall be entitled to receive from the losing party all costs and expenses and such amount as the court may adjudge to be reasonable attorneys' fees for the costs incurred by the prevailing party in such action or proceeding.

27. CAPTIONS FOR CONVENIENCE.

The captions herein are for convenience only, are not a part of this Agreement and do not in any way limit, define or amplify the terms and provisions hereof.

28. COUNTERPARTS.

This Agreement may be executed in several counterparts, each of which is an original, and all of which together constitute but one and the same document.

29. MERGER OF NEGOTIATIONS.

This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto with respect to the subject matter hereof and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions hereof. Any amendment to this Agreement shall only be valid if in writing and signed by both parties.

30. GOVERNING LAW.

The validity of this Agreement and any of its terms or provisions, as well as the rights and duties, shall be interpreted and construed pursuant to the law of the State of California.