

## FACILITY USE AGREEMENT

This Facility Use Agreement ("Agreement") is entered into this \_\_\_\_\_ day of September, 2017 (the "Effective Date"), by and between THE CITY OF DAYTONA BEACH, a Florida municipal corporation (the "CITY"), and FOOD TRUCK CRAZY, INC, a Florida corporation ("LICENSEE").

In consideration of the mutual covenants hereinafter set forth, the CITY and LICENSEE hereby agree as follows:

**1. GRANT OF LICENSE; DESCRIPTION OF LICENSE AREA.** Subject to the conditions below, the CITY hereby grants LICENSEE a license to hold "Food Truck Crazy," a competitive judged event where licensed food truck vendors will offer food and non-alcoholic beverages for sale (the "Event"). The Event will take place primarily on Main Street on September 30, 2017. Event hours will be from 12:00 p.m. until no later than 10:00 p.m. Main Street will be closed from 9:00 a.m. through as late as 11:30 to allow for set up and breakdown.

The primary feature of the Event will offering for sale of food and non-alcoholic beverages by licensed food trucks. Licensee will also provide a Children's Play Area and live entertainment, and may offer limited sale of Event-themed/branded merchandise such as "Food Truck Crazy" T-shirts.

The area in which the Event will take place (the "License Area") Area consists of: (i) Main Street, from the eastern right-of-way line of State Road A1A to the western right-of-way line of Peninsula Drive, (ii) Wild Olive Avenue, from the southern right-of-way line of Auditorium Boulevard to Main Street, and (iii) the parking lot located at 601 Main Street. The License Area will be closed to vehicular traffic during the Event. A sketch showing the conceptual layout of the Event is attached hereto as Exhibit A. The exact arrangement of the food truck vendors, information booth(s), the Children's Play Area, entertainment area, portable bathrooms, waste receptacles, and points of sale for alcoholic beverages is subject to the approval of the City's Cultural Services & Community Events Director. The food trucks will be located exclusively along Main Street and will be so arranged as to facilitate pedestrian flow through the License Area, and avoid impeding pedestrian access to and from the entrances of businesses located adjacent to Main Street within the License Area.

During Event hours, the CITY will have the sole right to sell alcoholic beverages within the License Area. In addition, during Event hours the City will waive fees for any adjoining Main Street businesses obtaining temporary promotional activity ("TPA") permits authorized by the CITY Land Development Code.

**2. LICENSEE'S RIGHTS AND OBLIGATIONS.** LICENSEE will be responsible for promoting, planning, and conducting the Event in compliance with the requirements of this Agreement. LICENSEE'S rights and responsibilities consist of the following:

(a) Providing pre-Event marketing and promotion. LICENSEE will undertake such efforts in accordance with reasonably prudent business practices, and in a manner that promotes Event attendance, profitability, and public goodwill. At a minimum, LICENSEE will (i) provide 5,000 "rack cards" to the CITY for distribution at least 14 days prior to the Event; (ii) Actively promote the Event on various "festival association" social media sites of which LICENSEE is a member; and (iii) Actively promote the Event on LICENSEE's Facebook page. All advertisements and promotional material in every form of media will name the CITY as a Co-Sponsor and all written advertisements and promotional material will include the CITY logo. Prior to advertising, LICENSEE will be required to obtain CITY approval of such material. No promotional material will be approved that promotes products or sponsors not suitable for view by minors. No co-sponsorships will be acknowledged on such promotional materials that would be inappropriate for a family-friendly event or that would reflect negatively on the CITY's image. LICENSEE

will be entitled to keep all revenue generated from LICENSEE's sale of Event co-sponsorships to third parties.

(b) Contracting with, and policing on-site behavior of food truck vendors. LICENSEE will bring at least 20 food trucks and anticipates having as many as 40 food trucks at the Event. LICENSEE will be responsible for ensuring that all food truck vendors are state licensed and in compliance with such licensure; and that they have proper liability insurance in place. LICENSEE will be entitled to retain any revenue generated from LICENSEE's contracts with food vendors.

(c) Operating a Children's Play Area on the lot at 601 Main Street as shown on Exhibit A. LICENSEE will have the right to require paid tickets for the rides within this Area in accordance with posted non-discriminatory rates and to retain all revenue therefrom. LICENSEE will employ or contract with the personnel who operate the Children's Play Area and ensure that all operators have passed the Florida Department of Children and Families' Level 2 background screening. LICENSEE will ensure that the vendor supplying the Children's Play Area equipment has commercial general liability insurance coverage in amounts and from an insurance company acceptable to the CITY's Risk Manager; and that such insurance name the CITY as additional insured. LICENSEE must obtain satisfactory proof of such insurance no later than 72 hours before the EVENT.

(d) Providing live entertainment in an area designated for this purpose on the lot at 601 Main Street as shown on Exhibit A. LICENSEE will be responsible for booking the entertainment acts and, except as provided below, securing all necessary equipment, at LICENSEE's cost. All live entertainment acts and performers are subject to CITY's prior approval at least 14 days before the Event. LICENSEE will be responsible for ensuring that all such acts and performers are suitable for view and listening by minors.

(e) Providing a free seating area on the lot at 601 Main Street as shown on Exhibit A, and providing an appropriate number of shaded tables and chairs within this area at LICENSEE's cost.

(f) In case of rain, providing a cover for the temporary platform/stage provided by the CITY (see below) for use by the live entertainment.

(g) Coordinating its Event planning efforts with the City.

(h) In all other respects, operating the Event in conformance with the requirements of this Agreement.

### **3. CITY RIGHTS AND OBLIGATIONS.**

(a) The CITY will have the exclusive right to sell alcoholic beverages for the Event and to retain all proceeds from such sales. The CITY will locate the booths for such sales as shown on Exhibit A.

(b) The CITY has agreed to co-sponsor the Event. As Co-sponsor, the CITY will do all of the following:

(i) Buy advertisements and promotional material at a cost of up to \$2,383.00.

(ii) Provide all police, fire, and public works personnel that the CITY determines are needed for crowd control and public safety for the conduct of the Event, at the CITY's cost and expense.(iii) Provide nine porto-lets at the CITY's cost.

(iv) Provide all traffic personnel and equipment determined by the CITY to be necessary for

the conduct of the Event, at the CITY's cost.

(v) Provide the use of the CITY's temporary platform/stage for use by the entertainment acts booked by LICENSEE.

(vi) Provide trash cans, dumpsters and grounds maintenance personnel determined by the CITY to be needed for the conduct of the Event, at the CITY's cost and expense.

(vii) Policing TPA activities of adjoining Main Street businesses so as to provide for sufficient access to and from the License Area by Event attendees.

#### **4. STAFFING AND SUPERVISION.**

(a) LICENSEE will at all times while occupying the License Area have a responsible supervisor on-site to address compliance problems. LICENSEE will provide the supervisor with a functioning cell phone for use during the Event and will ensure that the CITY has the cell phone number. The supervisor must keep the cell phone on his or her person at all times.

(b) The CITY will provide at least one CITY staff member to represent the CITY during the Event, in addition to police and fire personnel as CITY deems necessary.

#### **5. ADDITIONAL CONDITIONS ON USE.**

(a) *Compliance with legal requirements.* LICENSEE will at its own cost comply with all applicable federal, state, county, municipal, and other governmental statutes, laws, rules, orders, regulations, and ordinances, including those laws prohibiting discrimination on the basis of race, color, religion, sex, national origin, or disability.

(b) *Non-Discrimination.* LICENSEE will not discriminate against any person desiring to participate in the Event because of race, religion, or national origin.

#### **5. INSURANCE.** LICENSEE will procure and maintain the following insurance policies:

(a) *A comprehensive general liability insurance* policy covering its activities under this Agreement with limits of not less than \$1,000,000 per person and \$1,000,000 annual aggregate, for bodily injury, including death and property damage, with respect to LICENSEE's use of the Facility. The policy must name the CITY as an additional insured and must include coverage for sexual molestation/child abuse. The policy must not exclude coverage for participants in LICENSEE's activities.

(b) *Workers compensation insurance* as required by Florida Statutes Chapter 440 and any applicable federal laws, with limits of not less than \$500,000 per occurrence, project specific.

LICENSEE will provide certificates of coverage for the foregoing insurance prior to commencing activity under this Agreement. Unless specifically waived in writing by the CITY's Risk Manager on behalf of the CITY, LICENSEE agrees that the insurer will waive its right of subrogation, if any, against the CITY on each of the foregoing types of required insurance.

**6. INDEMNIFICATION AND NEGLIGENCE.** LICENSEE assumes all risk and liability to itself, its agents, employees, and assigns, and will hold harmless and indemnify the CITY, and the CITY's officers, employees, and agents, for any injury to persons or damage to property resulting from the conduct of LICENSEE (including LICENSEE's agents, participants, employees, contractors, and assigns) in

connection with the Event and for any loss, condition, expense, or other damages resulting from the act or acts, negligence, or failure to exercise proper precautions of and by LICENSEE (including LICENSEE'S agents, participants, employees, contractors, and assigns) in connection with the Event, except where such injury to persons, damage to property, or other damages are due to the negligence of the CITY, or the CITY'S officers, employees, or agents.

The CITY will be responsible for its own negligent acts and omissions, including the actions and omissions of the CITY'S officers, employees, and agents. Nothing in this Agreement will be deemed to be a waiver of sovereign immunity of the CITY, beyond any statutory limited waiver which may have been adopted by the Florida Legislature and nothing in this Agreement will inure to the benefit of any third party for the purpose of allowing any claim which would otherwise be barred under the doctrine of sovereign immunity. In either event the CITY's liability is subject to the provisions and limitations of Florida Statutes § 768.28.

**7. CITY'S CONTROL OF LICENSE AREA AND RIGHT TO ENTER.** In granting LICENSEE'S permission to use and occupy the License Area for the purposes referenced herein, the CITY does not relinquish the CITY's right to control the management of CITY property or to enforce all applicable laws, rules, and regulations within the License Area. LICENSEE acknowledges that this Agreement conveys no leasehold or other property interest in the License Area, and that the CITY has the right to enter upon the License Area at all times without any restrictions whatsoever. The License Area and all other CITY property will at all times be under the control of the CITY.

**8. NO RIGHT TO ASSIGN.** The CITY has entered into this Agreement in reliance on the personal credentials and experience of the principal of LICENSEE who has signed below. LICENSEE is therefore not authorized to assign this Agreement. For purposes herein the term, "assignment," includes the transfer of a controlling interest in LICENSEE, to persons other than the principals signing below.

However, the City's reliance on the credentials and personal experience of the principals of LICENSEE will not bestow personal liability on the principals.

**9. POLICE POWER RETAINED.** This Agreement will not be deemed to limit the City's police power. Among other things, the CITY specifically retains the right to shut down the Event or any portion thereof which the CITY determines poses an undue risk of injury to persons or damage to property.

**10. NOTICES.** Unless otherwise expressly agreed herein, all notices, requests, and demands to or upon the Parties will be delivered by hand, delivered by a courier service, provided to a nationally recognized delivery service for overnight delivery, or by U.S. mail, postage prepaid by registered or certified mail, return receipt requested, to the addresses set forth herein:

To the CITY:  
James V. Chisholm City Manager  
The City of Daytona Beach  
301 S. Ridgewood Avenue  
Daytona Beach, Florida 32114

To LICENSEE:  
Liz Riviera Otts  
Food Truck Crazy, Inc.  
960 Summer Lakes Drive  
Orlando, FL 32835

Either Party may designate a change of address by providing the other Party notice in the manner described above.

**11. INDEPENDENT CONTRACTORS.** LICENSEE agrees that nothing herein contained creates or will be construed as creating a partnership or joint venture between the CITY and LICENSEE, or makes either Party an agent of the other.

**12. FORCE MAJEURE.** In the event that fire, riots, civil commotion, acts of government or government immobility (whether federal, state, or local), war, acts of God, or other contingencies beyond the reasonable control of a Party (hereinafter, "force majeure event") interfere with or prevent the fulfillment by such Party of its obligations hereunder, such obligations will be suspended until such time as such contingency or contingencies have tenanted. Each Party will promptly notify the other upon becoming aware that a force majeure event has occurred or is likely to occur and will use its best efforts to minimize any resulting delay in or interference with the performance of its obligations hereunder.

**13. TERMINATION FOR DEFAULT.** In the event that either Party materially breaches this Agreement, the non-defaulting Party may send the defaulting Party a written letter describing the breach and demanding that the Defaulting Party cure the breach within ten days of the date of the notice. If the defaulting Party fails to remedy the breach within the 10-day period, the non-defaulting Party then may terminate this Agreement without having to provide any additional notice.

**14. DISPUTE RESOLUTION.**

(a) *Mediation Required.* Unresolved controversies, claims and other matters in question between the CITY and LICENSEE arising out of or relating to this Agreement or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(i) The Parties will have 10 days after the date Notice of a Dispute has been delivered to attempt to resolve such Dispute, failing which, LICENSEE and the CITY will submit such dispute to mediation under the following terms. LICENSEE and the CITY will attempt to settle disputes in an amicable manner through mediation conducted pursuant to Florida rules for certified and court-appointed mediators Chapter 44, Florida Statutes, as amended. The mediator must be certified or must have experience in real estate contracts. Injunctive relief may be sought without first complying with this paragraph. The Parties will split equally all mediation fees incurred pursuant to this Paragraph. Each party will pay its own costs, expenses, and fees, including attorneys' fees.

(ii) Disputes not settled pursuant to paragraph (i) may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This paragraph will survive closing or termination of this Agreement. **THE PARTIES FULLY WAIVE THEIR RESPECTIVE RIGHT TO A JURY TRIAL IN ANY JUDICIAL ACTION ARISING UNDER THIS AGREEMENT.**

(b) *Litigation Costs and Fees.* In any litigation instituted under this Agreement, each party will be responsible for its own costs and fees, including attorneys' fees.

**15. ADDITIONAL PROVISIONS.**

(a) The failure of this Agreement to address a particular permit, condition, term, or restriction will not relieve the Parties of the necessity of complying with the law governing said permitting requirements, conditions, term or restriction. Failure by either Party or both Parties to enforce any provision of this Agreement will not be deemed a waiver of such provision or modification of this Agreement. A waiver of any breach of a provision of this Agreement will not be deemed a waiver of any subsequent breach and will not be construed to be a modification of the terms of the Agreement.

(b) This Agreement will be governed by the laws of the state of Florida without regard to any choice of law principles that could result in application of the laws of any other jurisdiction. Jurisdiction for any legal action or proceeding arising out of this Agreement will be exclusively in the courts of the state of Florida in and for Volusia County. The Parties hereby waive any right to stay or dismiss any action or proceeding brought under or in connection with the Agreement that is brought before the above-referenced

courts on the basis of forum *non-conveniens*.

(c) This Agreement will not be deemed to create a partnership, joint venture, or similar relationship between the Parties. Both Parties will act solely as an independent contractor, and neither Party has the power to bind the other.

(d) Both Parties acknowledge and represent that they have read this Agreement in full and, with advice of counsel, understand and voluntarily consent and agree to each and every provision contained herein.

(e) THE PARTIES HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, OR ANY DEALINGS BETWEEN THE PARTIES. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL ENCOMPASSING OF ANY DISPUTES BETWEEN THE PARTIES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER, INCLUDING WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS.

(f) All terms and conditions of this Agreement will be binding upon the Parties, the heirs or representatives, and assigns, and cannot be waived by an oral representation or promise by any agent or other representative of the Parties unless the same is in writing and signed by the duly authorized agent or agents who executed this Agreement. Such written document must be incorporated by specific reference herein as part of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this instrument to be signed in their respective name by their authorized representatives on the dates referenced.

**THE CITY**

**LICENSEE**

By: \_\_\_\_\_  
James V. Chisholm, City Manager

By: \_\_\_\_\_  
Liz Riviera-Otts, President

Attest: \_\_\_\_\_  
Letitia LaMagna, City Clerk

Date: \_\_\_\_\_

Approved as to legal form:

By: \_\_\_\_\_  
Robert Jagger, City Attorney

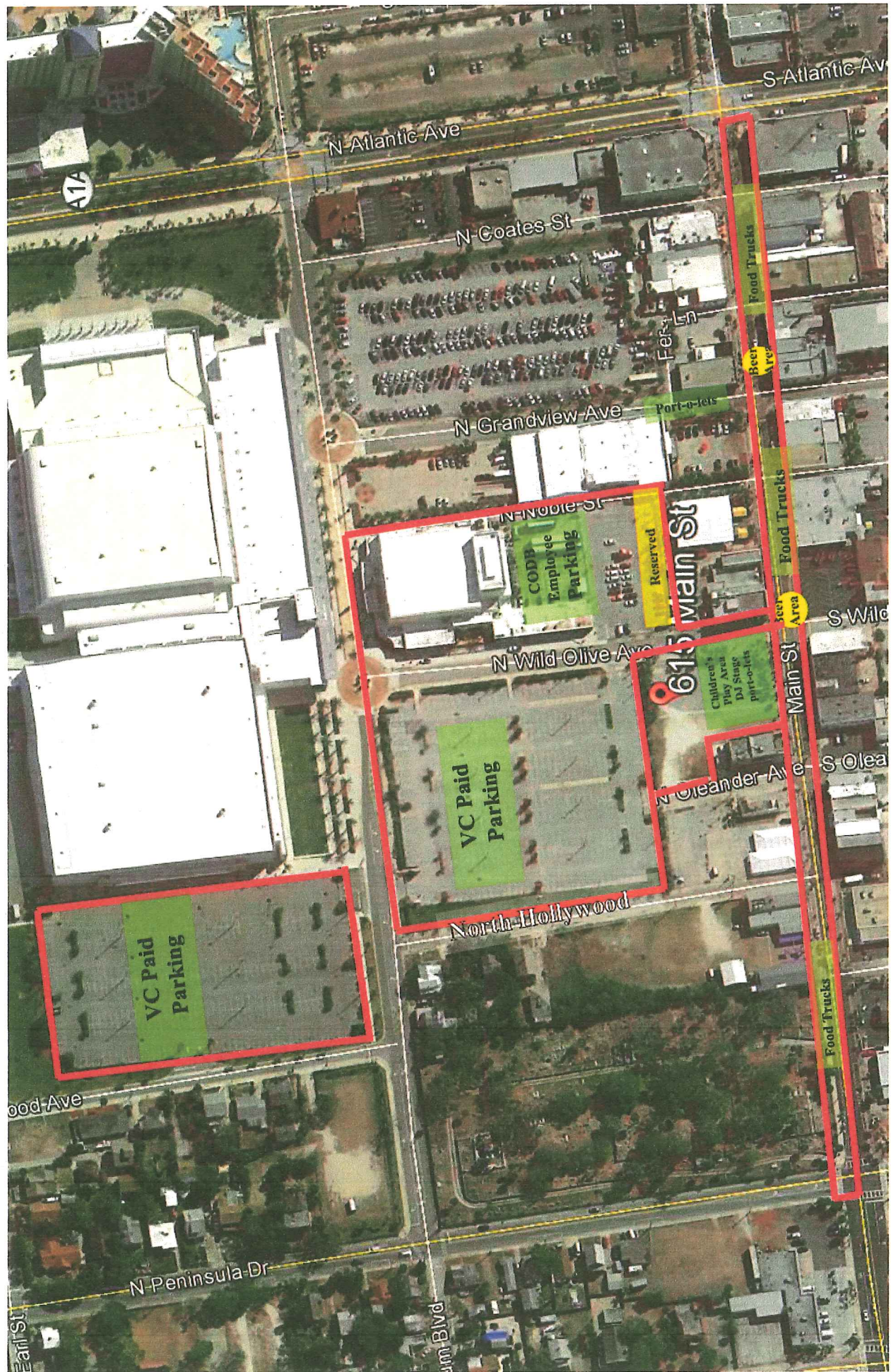


Exhibit A