

RESOLUTION NO. 23

SERIES 1997

A RESOLUTION APPROVING AN ENCROACHMENT LICENSE AGREEMENT WITH FOUR SEASONS PLAZA, LLC (Tables, Chairs and Planters)

WHEREAS, the Town of Breckenridge is willing to enter into an Encroachment License Agreement Four Seasons Plaza, LLC, a Colorado limited liability company, a copy of which is marked Exhibit "A", attached hereto and incorporated herein by reference ("Agreement"); and

WHEREAS, the Town Council of the Town of Breckenridge has reviewed the proposed Agreement, and finds and determines that it would be in the best interests of the Town and its residents for the Town to enter into the proposed Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF BRECKENRIDGE, COLORADO, as follows:

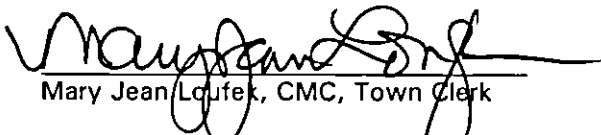
Section 1. The proposed Agreement with Revocable License Agreement between the Town and Four Seasons Plaza, LLC, a Colorado limited liability company (Exhibit "A" hereto) is approved; and the Town Manager and Town Clerk are hereby authorized, empowered and directed to execute such Agreement for and on behalf of the Town of Breckenridge.

Section 2. This Resolution shall become effective upon its adoption.

RESOLUTION APPROVED AND ADOPTED THIS 8TH DAY OF JULY, 1997.

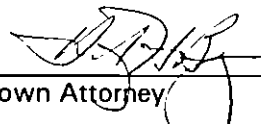
TOWN OF BRECKENRIDGE

ATTEST:


Mary Jean Loufek, CMC, Town Clerk

By 
Stephen C. West, Mayor

APPROVED IN FORM


Town Attorney

7/8/97
date

EXHIBIT "A"
TO
RESOLUTION NO. 23, SERIES 1997

ENCROACHMENT LICENSE AGREEMENT

THIS ENCROACHMENT LICENSE AGREEMENT ("Agreement") is made and entered into at Breckenridge, Colorado this ____ day of July, 1997, by and between the TOWN OF BRECKENRIDGE, a Colorado municipal corporation ("Town") and FOUR SEASONS PLAZA LLC, a Colorado limited liability company ("Owner").

RECITALS

A. Owner is the owner of the following real property located within the Town of Breckenridge, County of Summit, and State of Colorado, to wit:

Lots 4-11, Block 5, Stiles Addition to the Town of Breckenridge
("Owner's Property").

B. Town is the owner of real property located immediately adjacent to and westerly of Owner's Property commonly known as the Town of Breckenridge "Riverwalk", including an easement over the westerly fifteen (15) feet of Owner's Property ("Town's Property").

C. Portions of the improvements located or to be located upon Owner's Property encroach, or will encroach, into and on the Town's Property (collectively, the "encroachment"), as shown on the attached Exhibit "A", which is incorporated herein by reference

D. The Town has agreed to grant to Owner a personal privilege to maintain the encroachment described above into and on the Town's Property, all in accordance with, and subject to the terms, conditions and limitations of, this Agreement.

1. **Grant Of License.** The Town hereby grants to the Owner the personal privilege and permission to enter upon the Town's Property and to maintain the encroachment described above on the Town's Property, subject, however, to the terms, conditions and limitations of this Agreement. The license herein granted shall be subject to all existing utility easements, if any, located within the Town's Property.

2. **Term.** This Agreement and the license granted to Owner hereunder shall commence as of the date of this Agreement and shall continue until terminated pursuant to Paragraph 9 of this Agreement.

3. **Consideration.** The consideration to be paid by the Owner to the Town for the privilege granted by this Agreement shall be \$100.00, receipt of which is hereby acknowledged by the Town, and other good and valuable consideration as herein provided.

4. **No Interest In Land.** Owner understands, acknowledges and agrees that this Agreement does not create an interest or estate in Owner's favor in the Town's Property. The Town retains legal possession of the full boundaries of its Town's Property and this Agreement merely grants to the Owner the personal privilege to maintain the encroachment described above throughout the term of this Agreement.

Notwithstanding the expenditure of time, money or labor by the Owner on the improvements which constitute the encroachment, this Agreement shall in no event be construed to create an assignment coupled with an interest in favor of the Owner. Owner shall expend any time, money or labor at Owner's own risk and peril.

5. **Limited Scope Of License.** The license granted to the Owner is limited in scope to the following permitted use or uses: (i) placement of tables and chairs in connection with operation of restaurant and/or bar by Owner or Owner's tenant, and the provision of restaurant and/or bar service within the area of the encroachment, and (ii) placement of Owner's landscape planters, all as depicted on Exhibit "A".

Owner shall not have the right to expand the encroachment or Owner's use of the Town's Property or to alter or change the Owner's use of the Town's Property.

6. **Use Of Licensed Premises By Others.** Owner may permit Owner's employees, tenants, business invitees, contractors, subcontractors, lessees, agents, guests, family members and others to use the portion of the Town's Property for which this Agreement has been executed.

7. **Transferability Of License.** The license granted to the Owner by this Agreement may be transferred to subsequent owner(s) of Owner's Property; provided, however, that such subsequent owner(s) shall be required to assume in writing all of Owner's obligations hereunder (in a form acceptable to Town) and such subsequent owner(s) shall acquire nothing more than the personal privilege herein granted to Owner. Further, the rights of any subsequent owner(s) shall be subject to termination in accordance with the provisions of Paragraph 9 of this Agreement.

8. **Default.** In the event either party materially defaults in the performance of any of the material covenants or agreements to be kept, done or performed by it under the terms of this Agreement, the non-defaulting party shall notify the defaulting party in writing of the nature of such default. Within five (5) days following receipt of such notice the defaulting party shall correct such default; or, in the event of a default not capable of being corrected within five (5) days, the defaulting party shall commence correcting the default within five (5) days of receipt of notification thereof and thereafter correct the default with due diligence. If the defaulting party fails to correct the default as provided above, the non-defaulting party, without further notice, shall have the right to declare that this Agreement is terminated pursuant to Paragraph 9 hereof effective upon such date as the non-defaulting party shall designate. The rights and remedies provided for herein may be exercised singly or in combination.

9. **Termination.** This Agreement and the license herein granted to Owner is fully terminable in accordance with the following terms and conditions:

- a. **Termination Upon Notice To Owner.** This Agreement and the license herein granted to Owner shall terminate 120 days after written notification of termination is provided by the Town to Owner at Owner's address as set forth in this Agreement. Such notice may be given by Town at any time. The 120 day notice provision established by this Paragraph 9(a) shall conclusively be deemed to be reasonable.
- b. **Destruction Or Removal Of Improvements.** In the event that Owner's improvements which encroach into the Town's Property are destroyed or are permanently removed, this Agreement, and the license herein granted to Owner, may be terminated by Town upon not less than thirty (30) days' advance written notice to owner.
- c. **Termination Upon Default.** This Agreement and the license herein granted to Owner may be terminated by either party upon the material default of the other party in the performance of the material covenants or agreements of this Agreement in accordance with the provisions of Paragraph 8 of this Agreement.
- d. **Recording Of Notice Of Termination.** Upon termination of this Agreement the Town may cause to be recorded with the Clerk and Recorder of Summit County, Colorado a written Notice of Termination.
- e. **No Compensation To Owner.** In the event of termination of this Agreement for any reason, Owner shall not be entitled to receive a refund of any portion of the consideration paid for this Agreement, nor shall Owner be compensated for any improvements which must be removed from the Town's Property.

10. **Permanent Removal Of Encroachment Upon Termination.** At such time as this Agreement and the license herein granted to Owner is terminated the Owner shall, at the option of the Town, remove, at Owner's expense, any and all encroachments owned or maintained by Owner in the Town's Property.

11. **Insurance.** Owner shall obtain and maintain at all times during the term hereof, at Owner's sole cost, a policy or policies of comprehensive general liability insurance with limits of coverage of not less than \$150,000 for injuries, damages or losses sustained by any one person in any single occurrence, and not less than \$600,000 for injuries, damages or losses incurred by two or more persons in any single occurrence. The Town shall be named as an additional insured on all such policies and Owner shall furnish the Town with a copy of such policy or policies prior to the effective date hereof. Notwithstanding anything contained herein to the contrary, Town may terminate this Agreement, and the license herein granted to Owner, in accordance with the provisions of Paragraphs 8 and 9 of this Agreement, if Owner fails to procure and maintain the insurance required by this Paragraph 11. If at anytime while this Agreement is in effect, the limits of liability for local governments under the Colorado Governmental Immunity Act, Section 24-10-101, et seq., C.R.S. ("Act"), are raised above the limits of liability provided above, Owner's insurance requirement provided in this Paragraph 11 shall be amended accordingly.

12. **Maintenance.** During the term of this Agreement the Owner shall, at Owner's expense, maintain the improvements which encroach into the Town's Property in good condition.

13. **Owner's Waiver Of Claims Against Town.** As a part of the consideration paid by Owner to Town for this Agreement, Owner hereby waives any and all claims which Owner may or might hereafter have or acquire against Town for loss or damage to the Owner's improvements which encroach into the Town's Property arising from the use by the Town, or the public, of the Town's Property for any purpose including, but not limited to, the construction, maintenance or repair of any Town improvements within the Town's Property.

14. **Indemnification.** Owner agrees to indemnify and hold harmless the Town, its officers, employees, insurers, and self-insurance pool, from and against all liability, claims, and demands, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with the use of the Town's Property pursuant to this Agreement, if such injury, loss, or damage is caused in whole or in part by, or is claimed to be caused in whole or in part by, the negligence of Owner, any contractor or subcontractor of the Owner, or any officer, employee, agent, tenant, guest, family member, or representative of the Owner, or of any person permitted or allowed to use the Town's Property by Owner, or which arise out of any worker's compensation claim of any employee of the Owner or of any employee of any subcontractor of the Owner; except to the extent such liability, claim or demand arises through the negligence of Town, its officers, employees or agents. Owner agrees to investigate, handle, respond to, and to provide defense for and defend against any such liability, claims or demands at the sole expense of the Owner. Owner also agrees to bear all other costs and expenses related thereto, including court costs and attorney fees.

15. **Mechanics' Liens.** Owner shall not allow any mechanics' or similar liens to be filed against the Town's Property arising from any work done by Owner in the Town's Property, and Owner shall indemnify and hold Town harmless with respect thereto, including any attorney's fees incurred by Town in connection with any such lien or claim. If any mechanics' or other liens shall be created or filed against the Town's Property by reason of labor performed or materials furnished for the Owner, the Owner shall, within ten (10) days thereafter, at the Owner's own cost and expense, cause such lien or liens to be satisfied and discharged of record. Failure to do so shall entitle Town to terminate this Agreement in accordance with the provisions of Paragraphs 8 and 9 of this Agreement.

16. **Notices.** Any notice required or permitted under this Agreement shall be in writing and shall be sufficient if personally delivered or mailed by certified mail, return receipt requested, addressed to the following:

If To The Town: Gary Martinez
Town Manager
Town of Breckenridge
P. O. Box 168
Breckenridge, CO 80424

If To The Owner: Four Seasons Plaza LLC
1625 Broadway, Suite 990
Denver, CO 80202

Notices mailed in accordance with the provisions of this Paragraph shall be deemed to have been given on the third day following mailing. Notices personally delivered shall have been deemed to have been given upon delivery. Either party may change their address by giving notice thereof to the other party in the manner provided in this Paragraph 16.

17. **Attorney's Fees.** If any action is brought in a court of law by either party to this Agreement concerning the enforcement, interpretation or construction of this Agreement, the prevailing party, either at trial or upon appeal, shall be entitled to reasonable attorney's fees as well as costs, including expert witness's fees, incurred in the prosecution or defense of such action.

18. **Waiver.** The failure of either party to exercise any of its rights under this Agreement shall not be a waiver of those rights. A party waives only those rights specified in writing and signed by the party waiving its rights.

19. **Governmental Immunity.** The parties hereto understand and agree that Town is relying on, and does not waive or intend to waive by any provision of this Agreement, the monetary limitations (presently \$150,00 per person and \$600,000 per occurrence) or any other rights, immunities, and

protections provided by the Act, as from time to time amended, or any other law or limitation otherwise available to Town, its officers, or its employees.

20. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between the parties and supersedes any prior agreement or understanding relating to the subject matter of this Agreement.

21. **Modification.** This Agreement may be modified or amended only by a duly authorized written instrument executed by the parties hereto.

22. **Paragraph Headings.** Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Agreement.

23. **Terminology.** Wherever applicable, the pronouns in this Agreement designating the masculine or neuter shall equally apply to the feminine, neuter and masculine genders. Furthermore, wherever applicable within this Agreement, the singular shall include the plural, and the plural shall include the singular.

24. **Authority Of Town.** This Agreement is entered into pursuant to a Resolution of the Town Council of the Town of Breckenridge adopted _____, 1997.

24. **Confirmation of Termination of Prior Agreement.** Town hereby confirms that the previous Encroachment License Agreement granted to the former owner of Owner's Property, dated _____, 1989, and recorded _____, 1989 under Reception No. _____ of the records of the Clerk and Recorder of Summit County, Colorado was terminated upon the conveyance of Owner's Property to Owner. The provisions of this Paragraph 24 shall constitute a written notice of termination as described in Paragraph 9(D) of the abovedescribed Encroachment License Agreement.

TOWN OF BRECKENRIDGE, COLORADO:

(AFFIX TOWN SEAL HERE)

By _____
Gary Martinez, Town Manager

ATTEST:

Mary Jean Loufek, CMC, Town Clerk

OWNER:

FOUR SEASONS PLAZA LLC, a Colorado limited liability company

By: _____

Title: _____

STATE OF COLORADO)
) ss.
COUNTY OF SUMMIT)

The foregoing instrument was acknowledged before me this ___ day of _____, 1997, by Gary Martinez, Town Manager, and Mary Jean Loufek, CMC, Town Clerk, of the Town of Breckenridge, a Colorado municipal corporation.

WITNESS my hand and official seal.

My commission expires: _____.

Notary Public

STATE OF COLORADO)
) ss.
COUNTY OF SUMMIT)

The foregoing instrument was acknowledged before me this ___ day of _____, 1997, by _____ as _____ of Four Seasons Plaza LLC, a Colorado limited liability company.

WITNESS my hand and official seal.

My commission expires: _____.

Notary Public