

**RIGHT-OF-WAY USE AGREEMENT BETWEEN THE CITY OF OLYMPIA
AND WELL 80 REAL ESTATE, LLC**

This RIGHT OF WAY USE AGREEMENT ("Agreement") is entered into by and between the City of Olympia, a municipality organized under the laws of the State of Washington (hereafter referred to as "Olympia") and Well 80 Real Estate, LLC, a Washington limited liability company, (hereafter referred to as "Well 80"), and jointly referred to as "the Parties." This Agreement sets forth the terms and conditions by which Well 80 is permitted to use certain unopened City right-of-way for specific purposes set forth herein.

Recitals

There exists within the City of Olympia a ten-foot wide platted alley right-of-way running north-south between Lots 6 and 7, Block 53, of Sylvester Town of Olympia, Washington. The alley is located northerly of 4th Avenue and southerly of State Avenue. Said alley right-of-way is more particularly described as set forth below.

Well 80 is a developer of a private building and the owner of the underlying fee title of said alley right-of-way. Well 80 seeks Olympia's permission to use the alley right-of-way for outdoor restaurant seating and other business uses.

Olympia has determined that use of the alley right-of-way for outdoor restaurant seating purposes is consistent with proper permitted use of said alley right-of-way.

The signatories to this Agreement are authorized to execute associated documents, to correct legal descriptions if need be, and to correct scrivener's errors and other errors or omissions that are otherwise in substantial conformance with this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Olympia and Well 80 agree as follows:

Agreement

1. Grant of temporary use. Olympia hereby grants to Well 80 the right to temporarily use the alley right-of-way, as more particularly described below, for outdoor restaurant seating and other related business purposes, on the terms set forth herein:

The north-south alley between Lots 6 and 7, Block 53, Sylvester's Town of Olympia, as recorded in Volume 1 of Plats , Page 14, Thurston County records, and as modified by City of Olympia Ordinance No. 1270. The total right-of-way area authorized for use by this Agreement consists of 1,200 square feet.

2. Term. The term of this Agreement will be four (4) years from the date the last Party executed this Agreement, unless this Agreement is sooner terminated by Olympia. Olympia may terminate this Agreement at its sole discretion by providing written notice of termination to Well 80 as provided in **Section 12** below. The effective date of such a written termination by Olympia, shall not be until 120 days after delivery of the notice of termination to Well 80. Upon receipt of a termination notice from Olympia, Well 80 shall take all necessary actions to ensure that the alley right-of-way is opened upon the date the termination notice becomes effective.

3. Consideration. Well 80 shall pay to Olympia each year the amount of **Three Thousand One Hundred Twenty Dollars and No Cents** (\$3,120.00), plus leasehold excise tax, if applicable. Said amount shall be proportionately pro-rated or reimbursed if this Agreement is terminated within any year prior to October 1. At Well 80's option, the above amount may be paid in two installments, to wit: **One Thousand Five Hundred Sixty Dollars and No Cents** (\$1,560.00) on April 1 and October 1 of each year. The payment to Olympia from Well 80 shall be increased annually by four percent (4%) on October 1 of each successive year of this Agreement.

4. Use of Right-of-Way. Well 80 shall construct and maintain outdoor seating and related facilities on said right-of-way at its own expense and shall maintain said facilities in good repair. Olympia shall not be liable for any of Well 80's costs or expenses of construction, maintenance, or otherwise of its outdoor seating and related facilities by reason of this Agreement. It is agreed between the Parties that Well 80 may impose restrictions on the use of the temporary outdoor seating facilities, including limiting the public use to be made of such outdoor seating and related facilities, subject to **Section 5** below.

5. Nondiscrimination. Well 80 covenants and agrees that it shall not discriminate against any person in use of the right-of-way pursuant to the terms of this agreement as respects any federal, state, or municipal law or ordinance, including but not limited to Washington's Law Against Discrimination or other federal or state civil rights law on the basis of race, color, religion, sex (including pregnancy), national origin, age (40 and older), disability, marital/familial status, veteran, genetic information, sexual orientation, gender identity, use of a guide animal or service animal by a person with a disability, HIV/AIDS or Hepatitis C status, or other status protected by law.

6. Utilities. Olympia retains the right to construct underground utilities through the entire length and breadth of the above-referenced right-of-way, but shall upon completion of any such construction that may occur during the term of this Agreement, restore the site to the condition created by Well 80 without cost to said Party.

7. Assignment. This Agreement may be assigned by Well 80 to any successor in interest taking fee ownership in the surrounding property. To secure a release from liability under this Agreement, Well 80 shall advise Olympia of such change and secure Olympia's consent in writing to the assignment of this Agreement. Such consent shall not be unreasonably withheld if the assignee is a purchaser for value of the surrounding property.

8. Due Authority. Olympia and Well 80 have all requisite power and authority to execute and deliver this Agreement and to carry out its obligations hereunder and the transactions contemplated hereby. This Agreement has been, and the documents contemplated hereby will be duly executed and delivered by Olympia and Well 80 and constitute their legal, valid and binding obligation enforceable against Olympia and Well 80 in accordance with its terms.

9. Hold Harmless, Indemnification and Insurance. Well 80 shall defend, indemnify and hold Olympia, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with activities or operations performed by Well 80 or on Well 80's behalf as a result of this Agreement, except for injuries and damages caused by the sole negligence of Olympia.

Should a court of competent jurisdiction determine that RCW 4.24.115 applies to this Agreement, then Well 80 agrees to defend, indemnify and hold Olympia, its officers, officials, employees and volunteers harmless to the maximum extent permitted thereunder. It is further specifically and expressly understood that the indemnification provided herein constitutes Well 80's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. **This waiver has been mutually negotiated by the parties.** The provisions of this section shall survive the expiration or termination of this Agreement.

A. Insurance Term. Well 80 shall procure and maintain for the duration of this Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with operations or activities performed by or on Well 80's behalf in connection with this Agreement.

B. No Limitation. Well 80's maintenance of insurance as required by this Agreement shall not be construed to limit the liability of Well 80 to the coverage provided by such insurance, or otherwise limit Olympia's recourse to any remedy available at law or in equity.

C. Minimum Scope of Insurance. Well 80 shall obtain insurance of the types and coverage described below:

1. Commercial General Liability insurance shall be at least as broad as Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover liability arising from operations, products-completed operations, and stop-gap liability. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. Olympia shall be named as an additional insured under Well 80's Commercial General Liability insurance policy using ISO Additional Insured-State or Political Subdivisions-Permits CG 20 13 or a substitute endorsement providing at least as broad coverage.

2. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

D. Minimum Amounts of Insurance. Well 80 shall maintain the following insurance limits:

1. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and a \$2,000,000 products-completed operations aggregate limit.
2. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

E. Other Insurance Provision. Well 80's Commercial General Liability insurance policy or policies are to contain, or be endorsed to contain that they shall be primary insurance as respects Olympia. Any insurance, self-insurance, or self-insured pool coverage maintained by Olympia shall be excess of Well 80's insurance and shall not contribute with it.

F. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

G. Verification of Coverage. Well 80 shall furnish Olympia with original certificates and a copy of the amendatory endorsements, including the additional insured endorsement, evidencing the insurance requirements of Well 80 before entering into this Agreement.

H. Notice of Cancellation. Well 80 shall provide Olympia with written notice of any policy cancellation, within two business days of their receipt of such notice.

I. Failure to Maintain Insurance. Failure on the part of Well 80 to maintain the insurance as required shall constitute a material breach of this Agreement, upon which Olympia may, after giving five (5) business days' notice to Well 80 to correct the breach, immediately terminate this Agreement or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to Olympia on demand.

J. Public Entity Full Availability of Permittee Limits. If Well 80 maintains higher insurance limits than the minimums shown above, Olympia shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by Well 80, irrespective of whether such limits maintained by Well 80 are greater than those required by this Agreement or whether any certificate of insurance furnished to Olympia evidences limits of liability lower than those maintained by Well 80.

10. Petition for vacation. Well 80 has the option to file a petition for vacation of the right-of-way described herein, and if said petition be granted, the vacated right-of-way shall be sold to abutting property owners as provided under Olympia's Municipal Code.

11. Public interest. If Olympia determines, in its sole discretion, that the public interest requires the alley be opened for use as a public right-of-way, Well 80 agrees and covenants that it shall improve the right-of-way to Olympia's standards for the length of Well 80's abutting property, if the right-of-way is not vacated.

12. Notices. Unless applicable law requires a different method of giving notice, any and all notices, demands or other communications required or desired to be given hereunder by a party (collectively "Notices") shall be in writing and shall be validly given or made to another party if delivered either personally or by Federal Express (FedEx), UPS, USPS, or other overnight delivery service of recognized standing, or if deposited in the United States mail, certified, registered, or express mail with postage prepaid. If such Notice is personally delivered, it shall be conclusively deemed given at the time of such delivery. If such Notice is delivered by Federal Express (FedEx) or other overnight delivery service of recognized standing, it shall be deemed given twenty-four (24) hours after the deposit thereof with such delivery service. If such Notice is mailed as provided herein, such shall be deemed given forty-eight (48) hours after the deposit thereof in the United States mail. Each such Notice shall be deemed given only if properly addressed to the party to whom such notice is to be given as follows:

To Well 80:

Robert Knudson
Well 80 Real Estate, LLC Manager
716 Plum Street S
Olympia, WA 98501
Email: Rknudson@casamiarestaurants.com

To City of Olympia:

Steven R. Hall
Olympia City Manager
601 4th Avenue East
PO Box 1967
Olympia, WA 98507-1967
Email: shall@ci.olympia.wa.us

With a copy to:

Mark Barber
Olympia City Attorney
601 4th Avenue East
PO Box 1967
Olympia, WA 98507-1967
Email: mbarber@ci.olympia.wa.us

Any party hereto may change its address for the purpose of receiving notices as herein provided by a written notice given in the manner aforesaid to the other party hereto.

13. Event of Default. In the event of a default under this Agreement by Well 80, Olympia shall be entitled, in addition to all other remedies, to seek monetary damages and specific performance of Well 80's obligations hereunder.

14. Applicable Law. This Agreement shall in all respects be governed by the laws of the State of Washington.

15. Further Assurances. Each of the Parties shall execute and deliver any and all additional papers, documents and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of its obligations hereunder to carry out the intent of the parties hereto.

16. Modification or Amendment or Waivers. No amendment, change or modification of this Agreement shall be valid, unless in writing and signed by all of the Parties hereto. No waiver of any breach or covenant or provision in this Agreement shall be deemed a waiver of any preceding or succeeding breach thereof, or of any other covenant or provision in this Agreement. No extension of time for performance of any obligation or act shall be deemed an extension of the time for performance of any other obligation or act.

17. Entire Agreement. This Agreement constitutes the entire understanding and agreement of the Parties with respect to its subject matter and any and all prior agreements, understandings or representations with respect to its subject matter are hereby canceled in their entirety and are of no further force or effect. The Parties do not intend to confer any benefit under this Agreement to any person, firm or corporation other than the Parties executing this Agreement.

18. Construction. Captions are solely for the convenience of the Parties and are not a part of this Agreement. This Agreement shall not be construed as if it had been prepared by one of the Parties, but rather as if both parties had prepared it.

19. Attorneys' Fees and Costs. Should either Party bring suit to enforce this Agreement, the prevailing party in such lawsuit shall be entitled to an award of its reasonable attorneys' fees and costs incurred in connection with such lawsuit.

20. Partial Invalidity. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby; and each such term and provision of this Agreement shall be valid be enforced to the fullest extent permitted by law.

21. Time. Time is of the essence of every provision of this Agreement.

22. Recitals. The Recitals set forth above are incorporated by this reference into this Agreement and are made a part hereof.

City of Olympia, a Washington municipal corporation

By: _____

Name: Steven R. Hall

Its: City Manager

Date: _____

Approved as to form:



Mark Barber, City Attorney

Well 80 Real Estate, LLC

By: _____

Name: Robert Knudson

Its: Managing Member

Date: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

On the ____ day of _____, 201__, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Steven R. Hall, to me known to be the City Manager of the City of Olympia, a municipal corporation, who executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said municipal corporation for the uses and purposes therein mentioned and on oath states that he is authorized to execute the said instrument.

WITNESS my hand and official seal the day and year first above written.

Signature
Print Name: _____
NOTARY PUBLIC in and for the State of
Washington, residing at _____
My commission expires: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

On the ___ day of _____, 201__, before me personally appeared Robert Knudson, to me known to be a Managing Member of Well 80 Real Estate, LLC, a Washington limited liability company, who executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said limited liability company for the uses and purposes therein mentioned and on oath states he/she is authorized to execute the said instrument.

WITNESS my hand and official seal the day and year first above written.

Signature
Print Name: _____
NOTARY PUBLIC in and for the State of
Washington, residing at _____
My commission expires: _____