AN ORDINANCE BY COUNCILMEMBER DEBI STARNES **04-O-0312**

AS SUBSTITUTED BY CITY UTILITIES COMMITTEE

AN ORDINANCE AUTHORIZING THE MAYOR OR HER DESIGNEE TO ENTER INTO AN ENCROACHMENT AGREEMENT WITH ATLANTIC STATION, L.L.C. OR ITS DESIGNEE(S) FOR THE MAINTENANCE OF A PRIVATE IRRIGATION SYSTEM AND RELATED FACILITIES WITHIN THE RIGHTS-OF-WAY CONSTRUCTED BY ATLANTIC STATION, L.L.C. WHICH ARE LOCATED WITHIN THE CITY OF ATLANTA AND ARE IN THE PROCESS OF BEING DEDICATED AS PUBLIC STREETS TO THE CITY OF ATLANTA; AND FOR OTHER PURPOSES.

WHEREAS, in December of 1999, Atlantic Station, L.L.C. ("Atlantic Station") purchased approximately 143 acres of land in northwest Atlanta known as the Atlantic Steel Mill site (the "Property"); and

WHEREAS, Atlantic Station is now developing the Property in accordance with a Redevelopment Plan adopted by the City of Atlanta; and

WHEREAS, as a part of the subject Redevelopment Plan, Atlantic Station is in the process of delivering to the City of Atlanta for dedication certain rights-of-way within the Property (the "New Public Streets"); and

WHEREAS, the Master Plan and the zoning conditions for the Atlantic Station project, which call for the creation and approval of a landscape plan, required Atlantic Station to provide certain medians and other green space in the right-of-way and otherwise for the benefit of the public; and

WHEREAS, as part of the construction of the New Public Streets and development of the Property by Atlantic Station, a private irrigation system and related facilities has been installed under and within the Property and portions of the New Public Streets for irrigation of the landscaping located therein (the "Irrigation System"); and

WHEREAS, Atlantic Station has approached the City seeking an Encroachment Agreement for the portions of the Irrigation System which are located within the rights-of-way of the New Public Streets as depicted in that certain Irrigation Plan for Atlantic Station prepared by John Deere Landscapes, dated November 7, 2002 (the "Irrigation Plan"), attached hereto as Exhibit "A" and incorporated herein by this reference, together with the right to use, maintain, repair, and replace the Irrigation System; and

WHEREAS, in view of its obligation to provide greenspace and landscapes and the benefit derived by the City of Atlanta from the installation of the Irrigation System, certain requirements relating to encroachment agreements may not be applicable to the encroachment agreement contemplated herein and may, therefore, be waived and/or modified; and

WHEREAS, the Director of the Bureau of Buildings and the Commissioner of the Department of Watershed Management have reviewed the plans for the development of the Property and the installation of the Irrigation System in the New Public Streets, have determined that the plans meet the appropriate technical requirements and believe it to be desirable and in the best interests of the City to authorize the City to execute an Encroachment Agreement allowing for the existence, use, maintenance, repair, and replacement of the Irrigation System.

NOW, THEREFORE, BE IT RESOLVED BY COUNCIL OF THE CITY OF ATLANTA, GEORGIA AS FOLLOWS:

SECTION 1: The Mayor is authorized to enter into an Encroachment Agreement, as outlined in Section 138, Article II, of the City of Atlanta Code of Ordinances, with Atlantic Station, or its designee(s), for the existence, use, maintenance, repair, and replacement of the Irrigation System in the rights-of-way of the New Public Streets as depicted on the Irrigation Plan attached hereto as Exhibit "A", in a form determined by the Commissioner of the City's Department of Public Works and the City Attorney to be desirable, appropriate and in the best interest of the City for this transaction.

SECTION 2: That the City Attorney is directed to prepare an Encroachment Agreement in accordance with Section 138, Article II, of the City's Code of Ordinances; provided, however, that in consideration of the obligations imposed on Atlantic Station and the benefit derived by the City of Atlanta from installation of the Irrigation System, certain provisions of Section 138, Article II, of the City's Code of Ordinances have been determined not to apply to the Encroachment Agreement contemplated herein, including Sections 138-24(b)(4) and 138-24(b)(8) (the "Inapplicable Provisions"), and certain other provisions of Section 138, Article II, of the City's Code of Ordinances have been modified as applied to the Encroachment Agreement contemplated herein, including Sections 138-24(b)(2), 138-24(b)(7) and 138-24(b)(9) (the "Modified Provisions"). The Inapplicable Provisions are hereby waived and shall not be made a part of the Encroachment Agreement contemplated herein. The Modified Provisions shall only apply to the Encroachment Agreement contemplated herein as specified in said Encroachment Agreement.

SECTION 3: That the Encroachment Agreement will not become binding upon the City and the City will incur no liability under it until it has been executed by the Mayor, attested to by the Municipal Clerk and delivered to the appropriate parties.

After Recording Return To:

_____
_____
_____
_____

RIGHT-OF-WAY ENCROACHMENT AGREEMENT

This AGREEMENT ("Agreement") is entered into as of the _____ day of _____, 2004, between CITY OF ATLANTA, a municipal corporation, chartered pursuant to the laws of the State of Georgia ("CITY"), and Atlantic Station, L.L.C. a Delaware limited liability company ("ENCROACHING PARTY").

BACKGROUND:

Whereas, in December of 1999, Atlantic Station, L.L.C. purchased approximately 143 acres of land in northwest Atlanta known as the Atlantic Steel Mill site; and

Whereas, Atlantic Station is now developing the site in accordance with a Redevelopment Plan adopted by CITY; and

Whereas, as a part of the Redevelopment Plan, Atlantic Station is in the process of delivering to CITY for dedication certain rights-of-way within the site; and

Whereas, a private irrigation system and related facilities has been installed under and within the Property and portions of the rights of way to be dedicated to CITY for irrigation of the landscaping located therein; and

Whereas, CITY's Code of Ordinances (Section 138, Article II) requires a Right-of-Way Encroachment Agreement for the construction and operation of private utilities and facilities within the public right-of-way; and

Whereas, The Council of CITY has authorized the Mayor, by Resolution, to enter into an Encroachment Agreement with ENCROACHING PARTY, allowing it to install and construct certain utility facilities under the public right-of-way;

Accordingly, CITY and ENCROACHING PARTY agree as follows:

1. **Grant Of Rights In Encroachment Area.** CITY grants to ENCROACHING PARTY the right to construct, install, operate, use, repair and maintain private utilities, conduits and facilities (the "Work") within the to be dedicated public rights-of- way (the public right-of-way existing above the Encroachment area is referred to as the "Right-of-Way") crossing under portions of 18th Street, Village Street, 17th Street, State Street, 20th Street, 16th Street, Fowler Street and Market Street (the "Encroachment Area"), as shown on attached engineering drawings. The Commissioner of Public Works has reviewed the plans and has determined that the Work will not adversely impact the ability of the Right-of-Way to handle vehicular or pedestrian traffic or otherwise to perform its intended public function.

2. **Agreement Condition Precedent To Allowing Encroachment.** The execution of this Agreement by ENCROACHING PARTY is, in addition to ENCROACHING PARTY satisfying all other applicable legal, administrative or other requirements, a condition precedent to CITY allowing ENCROACHING PARTY to use, repair and maintain the Work within the Encroachment Area, and that this Agreement will bind ENCROACHING PARTY and its successors in title in perpetuity or until the Agreement is terminated or otherwise expires. Conditions precedent include but are not limited to the acceptance of the dedication of the Rights-of-Way by the CITY.

3. **Plans, Calculations and Technical Specifications.** The Work has been constructed and installed pursuant to plans, calculations, and technical specifications that have been reviewed and approved by a professional engineer licensed to practice in the State of Georgia. All substantial alterations made to the Work by ENCROACHING PARTY must be made pursuant to plans, calculations, and technical specifications approved by a professional engineer licensed to practice in the State of Georgia, and approved by the Commissioner of CITY's Department of Public Works, pursuant to the standards set forth in or promulgated under Chapter 138 of CITY's Code of Ordinances and, when applicable, all other appropriate legal requirements or administrative rules, including, but not limited to, the standards of Georgia Department of Transportation or the Federal Highway Administration, or any other governmental agency having jurisdiction over the Right-of-Way or Encroachment Area.

4. **Public Liability Insurance.** ENCROACHING PARTY agrees to indemnify and hold CITY harmless from all claims arising out of the use of the Encroachment Area and the construction, operation, use, maintenance or removal of the utility facilities in the Encroachment Area by ENCROACHING PARTY or any of its contractors, and to maintain a policy of public liability insurance, at no expense to CITY, satisfactory to CITY and naming CITY as a named insured, in the amount of 1,000,000.00. ENCROACHING PARTY's hold harmless and indemnification agreement will not be limited to the amount of the insurance.

5. **Indemnification Obligations Not Limited.** ENCROACHING PARTY's indemnification obligations under this Agreement shall not be waived or reduced because of the Commissioner of CITY's Department of Public Works having approved any plans, calculations or specifications submitted by or on behalf of ENCROACHING PARTY concerning or relating to the Work to be performed in the Encroachment Area or by the requiring or not requiring of modifications to any plans, calculations or specifications, even if CITY is later adjudicated to have been negligent because of its acts or failure to act concerning its approval of any plans, calculations or specifications.

6. **Removal From And Restoration Of Encroachment Area and Right-of-Way.** ENCROACHING PARTY agrees to remove that portion of the utilities, facilities and other structures constructed or installed by it or on its behalf within the Encroachment Area that has expressly been determined by the Commissioner of CITY's Department of Public Works to be hazardous to the public, and to replace any area beneath and including the Right-of-Way where said portion of utilities facilities and other structures were constructed or installed by it or on its behalf, to a condition satisfactory to CITY with ninety (90) days after being notified to do so by the Commissioner of CITY's Department of Public Works, or as soon as practicable as agreed by the Commissioner of the City's Department of Public Works and ENCROACHING PARTY if it appears that ninety (90) days is not appropriate. The removal shall be without cost to CITY and ENCROACHING PARTY shall provide to CITY security, including a payment bond and/or performance bond, if requested at that time to do so by the City, to ensure that the designated facilities constructed and installed in the Encroachment

Area are removed and backfilled and the Encroachment Area and Right of Way are returned to a condition satisfactory to the Commissioner of CITY's Department of Public Works.

7. **Rental.** ENCROACHING PARTY agrees to pay to CITY a one time rental fee for the Encroachment Area of $10,000.00. The payment of this fee is a condition precedent to the entry of this Agreement.

8. **Non-Exclusivity Of Agreement.** This Agreement is not exclusive and does not negate any past, present, or future agreement that CITY may enter into with any other utility owner or provider for use of the Right-of-Way.

9. **Compliance With Applicable Law; Reparation Of Facilities And Utilities.** ENCROACHING PARTY agrees to conduct all activities within the Encroachment Area and Right-of-Way in accordance with all applicable local, state, and federal rules, regulations, and standards. ENCROACHING PARTY agrees to maintain the private utilities and facilities installed and constructed in the Encroachment Area in good condition, and to repair any damage to any City facilities, and any public or private utilities, and to reimburse the City for any consequential damages that may result from ENCROACHING PARTY's occupation of the Encroachment Area. If CITY determines that the condition of the private utilities and facilities installed and constructed by ENCROACHING PARTY in the Encroachment Area present an imminent danger to life or property of the public, the City may undertake all reasonable measures to protect life or property of the public, and the expense of those measures will be borne by ENCROACHING PARTY.

10. **Reimbursement Of Damages To CITY.** ENCROACHING PARTY agrees to repair any damage to the Right-of-Way or Encroachment Area resulting from the use of the Encroachment Area or the construction, installation, maintenance, repair or use of the utility facilities in the Encroachment Area and to reimburse CITY for any damages to the Right-of-Way or Encroachment Area resulting from the use of the Encroachment Area or the construction, installation, maintenance, repair or use of the utility facilities in the Encroachment Area.

11. **Compliance With CITY's Code Of Ordinances.** ENCROACHING PARTY agrees at all times during the term of this Agreement to comply with all of the terms of CITY's Code of Ordinances applicable to this Agreement, including, but not limited to Chapter 138.

12. Notices.

12.1. **Addresses:** CITY and ENCROACHING PARTY agree that all notices, demands, and requests required under this Agreement must be in writing and sent to CITY or to ENCROACHING PARTY addressed as follows:

TO THE CITY:

Commissioner
City of Atlanta, Department of Public Works
68 Mitchell Street, S.W.
Atlanta, GA. 30335

TO ENCROACHING PARTY: Atlantic Station, L.L.C.
Two Midtown Plaza, Suite 1770
1349 West Peachtree Street, N.E.
Atlanta, Georgia 30309
Attention: President

12.2. **Delivery.** All notices given by either party to the other under this Agreement must be in writing and may be delivered by:

12.2.1. regular mail, first class, postage prepaid;
12.2.2. certified or registered mail;
12.2.3. facsimile, with a hard copy sent within 24 hours of transmission by one of the other permitted delivery means; or
12.2.4. hand-delivery, to the parties at the addresses and facsimile numbers specified in the Clause titled "Addresses".

12.3. **Receipt.** Notices sent by mail will be deemed received 3 Days after deposit in the mail, properly addressed. Notices sent by certified or registered mail will be deemed to be received upon the date of the acknowledgment. Notices sent by facsimile will be deemed to be received upon successful transmission to the proper facsimile number; if the sender can produce a facsimile transmission confirmation report. Notices delivered by hand-delivery will be deemed to be received upon written acceptance by the respective party.

12.4. **Change of Address or Facsimile Number.** Either party may, at any time, change its respective address or facsimile number by sending written notice to the other party of the change.

13. **Entire Agreement.** This Agreement contains the entire agreement of the parties with respect to its subject matter and no representations or agreements, oral or otherwise, which are not set forth in this Agreement, will be of any force or effect.

14. **Covenant Running With Land.** This Agreement is intended as a covenant running with the land and will shall be binding upon and shall inure to the benefit of the successors, the successors in title, and the assigns of the parties to this Agreement.

15. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and all of which together will constitute a single instrument.

16. **Title Certificate.** ENCROACHING PARTY must provide to CITY, contemporaneously with the execution and delivery of this Agreement to CITY, a title certificate of an attorney authorized to practice law in the State of Georgia, setting forth the names and the addresses of all signatories to this Agreement other than CITY. If any of the parties set forth in the title certificate are corporate or other similar entities (i.e. not natural persons), the title certificate must provide the full formal organizational name of the entity, as reflected in any of the entity's organizational papers or filings with any applicable governmental or other authorities in the state in which the entity was formed.

17. **Default and Termination of Agreement.** If ENCROACHING PARTY defaults in its performance of this Agreement, and fails to cure the default within ninety (90) days of CITY's written notice to ENCROACHING PARTY of the default (or if such default is not capable of being cured within ninety (90) days, ENCROACHING PARTY has not commenced curing the default and diligently pursued such cure to completion within a reasonable amount of time), this Agreement may be terminated by CITY upon 5 days prior written notice to ENCROACHING PARTY. Upon termination of this Agreement, the Work shall be abandoned in place by ENCROACHING PARTY unless it is determined by the Commissioner of Public Works that it is in the best interests of the public health and safety that the ENCROACHING PARTY remove some or all of the utility facilities and other structures constructed or installed by it or on its behalf within the Encroachment Area and replace any area beneath and including the Right of Way where said utility facilities and other structures were constructed or installed in accordance with this Agreement.

18. **Parties Bound.** This Agreement will be binding upon and inure to the benefit of CITY and ENCROACHING PARTY and their respective successors, successors in title and assigns.

19. **Governing Law.** This Agreement will be construed under Georgia law. ENCROACHING PARTY and CITY fix jurisdiction and venue for any action brought with respect to this Agreement in Fulton County, Georgia.

20. **Legal Construction.** If any provision contained in this Agreement is held to be invalid, illegal or unenforceable, that invalidity, illegality or unenforceability will not effect any other provision of this Agreement and this Agreement will be construed as if the invalid, illegal or unenforceable provision had never been contained in this Agreement.

21. **Waiver.** The failure of CITY to seek redress for any violation of, or to insist upon the strict performance of, any term of this Agreement will not prevent a subsequent violation of this Agreement from being actionable by CITY. The provision in this Agreement of any particular remedy will not preclude CITY from any other remedy.

22. **Further Acts.** CITY and ENCROACHING PARTY each agrees to perform any additional acts and execute and deliver any additional documents as may reasonably be necessary in order to carry out the provisions and effectuate the intent of this Agreement.

23. **Modifications.** This Agreement may be altered or amended only by written instrument signed by CITY and ENCROACHING PARTY.

24. **Ethics: Gratuities and Kickbacks.**

    24.1. **Gratuities and Kickbacks.** This Agreement may be terminated if ENCROACHING PARTY, or any other representative of ENCROACHING PARTY, gave or agreed to give, any employee or former employee of CITY a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal for a contract or subcontract.

24.2. **Contingent Fees.** ENCROACHING PARTY warrants that it has not employed or retained any company or Person, other than a bona fide employee working for ENCROACHING PARTY, to solicit or secure this Agreement; and that ENCROACHING PARTY has not paid or agreed to pay any company, association, corporation, firm or person, other than a bona fide employee working for ENCROACHING PARTY, any fee, commission, percentage, gift or any other consideration contingent upon or resulting from the award or making of this Agreement. For the breach or violation of this warranty, CITY may terminate this Agreement and, at its discretion, may recover the full amount of any fee, commission, percentage, gift or consideration.

24.3. **Rights and Remedies.** The rights and remedies of CITY and ENCROACHING PARTY provided in this Clause are not exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

CITY:

_____
MAYOR

ATTEST:

_____
MUNICIPAL CLERK (Seal)

WITNESS:

_____
NAME:_____

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:_____
[SEAL]

ENCROACHING PARTY:
ATLANTIC STATION, L.L.C.

By: Jacoby Atlantic Redevelopment, L.L.C., a Georgia limited liability company, a manager

BY:_____
NAME: James F. Jacoby
TITLE: President

ATTEST:

_____
NOTARY PUBLIC
MY COMMISSION EXPIRES:_____
[SEAL]

WITNESS:

_____
NAME:_____

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:_____
[SEAL]

APPROVED:

APPROVED AS TO FORM:

COMMISSIONER, DEPARTMENT OF PUBLIC WORKS

CITY ATTORNEY

RECOMMENDED:

DIRECTOR, BUREAU OF PURCHASING AND REAL ESTATE