C: Dir., Department of General Services

City of NORFOLK

**To the Honorable Council**
**City of Norfolk, Virginia**

February 9, 2016

From: David S. Freeman, AICP
Director of General Services

**Subject**: Encroachment agreement with Pimento Island Bistro for outdoor dining at 1902 Colley Avenue

Reviewed: Sabrina Joy-Hogg, Deputy City Manager

**Ward/Superward:** 2/6

Approved: Marcus D. Jones, City Manager

**Item Number:** **R-1**

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** EDR Enterprises, Inc.
d/b/a Pimento Island Bistro

III. **Description:**

This agenda item is an ordinance to permit EDR Enterprises, Inc. d/b/a Pimento Island Bistro ("Bistro") to encroach into the City of Norfolk's ("city's") right-of-way at 1902 Colley Avenue. Bistro will be utilizing this encroachment for an outdoor dining area and for no other purpose. The approved square footage, based on recommended adjustments to the encroachment, is now 84 square feet.

At the request of City Council, this matter was continued at the January 26th Council meeting to February 9th. Further investigation was requested into the size of the encroachment as proposed, as well as its non-contiguous design. The matter has since been resolved as the encroachment size has been reduced, and the design altered, with the removal of a table from the proposed outdoor dining area. The applicant has agreed to these changes.

IV. **Analysis**

Bistro will use this encroachment area to extend their establishment's seating options and offer outdoor dining in addition to their indoor seating.

810 Union Street #1101 ▪ Norfolk, Virginia 23510
Phone: 757-664-4242 ▪ Fax: 757-664-4239

## V. Financial Impact

Liability insurance has been provided naming the city as additional insured in the amount of $1,000,000; therefore there should be no financial risk to the city.

| | |
|---|---|
| Cost for Encroachment (Colley Ave.) | Annual Rent: $504.00 (to be paid quarterly: $126.00 per quarter) |

## VI. Environmental

There are no known environmental issues associated with this property.

## VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the city's agenda notification process.

## VIII. Board/Commission Action

N/A

## IX. Coordination/Outreach

This ordinance has been coordinated with the Department of General Services – Office of Real Estate and the City Attorney's Office.

**Supporting Material from the City Attorney's Office:**

- Ordinance
- Exhibit A – Proposed Encroachment Agreement

2/2/16 lds

Form and Correctness Approved: RAP

By _____
Office of the City Attorney

Contents Approved:

By _____
DEPT.

NORFOLK, VIRGINIA

# ORDINANCE No.

AN ORDINANCE APPROVING AN ENCROACHMENT AGREEMENT WITH EDR ENTERPRISES, INC., DBA PIMENTO ISLAND BISTRO, FOR PROPERTY AT 1902 COLLEY AVENUE.

- - -

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and provisions of the Encroachment Agreement between the City of Norfolk and EDR Enterprises, Inc., dba Pimento Island Bistro, a copy of which is attached hereto as Exhibit A, by which the City of Norfolk authorizes EDR Enterprises, Inc. to encroach into the right of way at 1902 Colley Avenue, with an area measuring 84 square feet on Colley Avenue, upon certain conditions specifically set forth therein, is hereby approved.

Section 2:- That the terms and conditions of the Encroachment Agreement are hereby approved and the City Manager is hereby authorized to execute the Encroachment Agreement and do all things necessary for its implementation.

Section 3:- That this ordinance shall be in effect from and after its adoption.

**EXHIBIT A**

# ENCROACHMENT AGREEMENT

This Encroachment Agreement (hereinafter "Agreement") is made and entered into this day of , 2016, by and between the **City of Norfolk**, a municipal corporation of the Commonwealth of Virginia (hereinafter "City"), and **EDR Enterprises, Inc.,** a Virginia corporation, dba **Pimento Island Bistro** (hereinafter "Bistro").

## WITNESSETH:

1. **ENCROACHMENT AREA.** City hereby grants permission to Bistro to encroach into the right of way of Colley Avenue at 1902 Colley Avenue, with an area measuring approximately 84 square feet, as shown on **Exhibit A** attached hereto ("Patio"), for the purpose of outdoor dining and no other purpose.

2. **USE.** Bistro shall be permitted to occupy the Patio for outdoor dining uses in conjunction with the operation of the restaurant as an eating and drinking establishment.

3. **TERM; TERMINATION.** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on February 1, 2016, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on January 31, 2021. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Bistro, or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Patio.

4. **COMPENSATION.** As compensation for the privilege of encroaching into the right of way, Bistro shall pay City annual rent in the amount of Five Hundred Four Dollars ($504.00) in quarterly installments of $126.00 beginning on the first day of February, 2016 or the day the ordinance is effective whichever is later and every three months thereafter.

The rent shall be paid by check payable to the Norfolk City Treasurer and sent to the Real Estate Office, Department of General Services, 232 E. Main Street, Suite 250, Norfolk, Virginia 23510.

5. **LATE FEES.** For any late payments received 15 days after the date due, Bistro shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES.** City shall not be responsible for utilities of any type used within the Patio. Bistro shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Patio.

7. **REPAIRS.** Bistro shall keep and maintain the Patio in good and complete state of repair and condition. Bistro shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Patio in order to preserve and maintain the condition of the Patio. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Patio.

8. **REQUIREMENTS OF PUBLIC LAWS.** Bistro shall suffer no waste or injury to the Patio and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Patio. In addition, Bistro shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Patio.

9. **CITY'S RIGHT TO ENTER AND CURE.** City shall retain the right to enter upon the Patio at any time for the purpose of inspecting the Patio, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Bistro to meet its obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the

Patio or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Bistro default in making repairs.

10. **NOTICE.** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

| | |
|---|---|
| To City: | Department of General Services – Real Estate Office<br>232 E. Main Street, Suite 250<br>Norfolk, Virginia 23510 |
| To Bistro: | EDR Enterprises, Inc.<br>1902 Colley Avenue<br>Norfolk, Virginia 23517 |
| With copy to: | City Attorney<br>900 City Hall Building<br>810 Union Street<br>Norfolk, Virginia 23510 |

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS.** Bistro agrees that it will not introduce onto the Patio any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Bistro will not allow any air, water or noise pollution to occur in the Patio. Bistro hereby agrees to use and occupy the Patio in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Bistro shall not be responsible or assume liability for environmental conditions existing on or about the Patio prior to occupancy by Bistro.

12. **DESTRUCTION.** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the

permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

13. **NON-LIABILITY OF CITY.** City shall not be liable for any damage or injury which may be sustained by Bistro or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, if any, upon the Patio, or by reason of the elements.

14. **REMOVAL OF SNOW.** Bistro agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Patio.

15. **ALTERATIONS.** Bistro covenants and agrees that it will not make any improvements, changes installations, renovations, additions or alterations in and about the Patio without the prior written consent of the City other than the approval given by Norfolk's Architectural Review Board and Norfolk's Planning Commission. If Bistro installs or makes any improvements, additions, installations, renovations, changes on or to the Patio with the approval of City, Bistro hereby agrees to remove, if requested by City, any improvements, additions, installations, renovations, changes on or to the Patio upon termination of this Agreement. In the event Bistro fails to remove and is requested to do so by City, then City may remove the improvements, additions, installations, renovations, changes and Bistro shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING.** City and Bistro agree that the permission to encroach granted hereby may not be assigned by Bistro without written approval from Norfolk's City Manager.

17. **SURRENDER BY BISTRO.** Bistro will surrender possession of the Patio to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Bistro shall return the Patio to the City in as good

order and condition as it was at the beginning of Bistro use of the Patio. If Bistro has been requested to remove and fails to remove all items from the Patio upon termination hereof, City is authorized to remove and dispose of any such personal property and Bistro shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE.** Bistro shall maintain in full force and effect a Commercial General Liability insurance policy, occurrence form, for the duration of this agreement. The policy will provide combined single limit for bodily injury, death and property damage insurance in the amount of one million dollars ($1,000,000.00) per occurrence and two million dollars ($2,000,000.00) aggregate, insuring City and Bistro against liability claims and suits arising out of the use, occupancy, or maintenance of the Patio and appurtenant areas. The policy shall be endorsed as primary insurance in favor of City naming the City, its officers, employees, agents and representatives as additional named insured, as evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the City Manager if the insurance is cancelled or modified.

19. **INDEMNIFICATION**. Bistro shall indemnify and save harmless City from all fines, penalties, costs, suits, proceedings, liabilities, damages, claims and actions of any kind arising out of the use and occupation of the Patio by reason of any breach or nonperformance of any covenant or condition of this Agreement by Bistro, or by Bistro's act of negligence, and not caused in whole or in part by City.

20. **FIXTURES.** City covenants and agrees that no part of the improvements constructed, erected or placed by Bistro in the Patio shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Bistro to covenant and

agree that all improvements of every kind and nature constructed, erected or placed by Bistro in the Patio shall be and remain the property of Bistro, unless such improvements are not removed upon termination of this Agreement.

21. **LIENS OR ENCUMBRANCES.** If because of any act or omission of Bistro, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Patio, Bistro shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Bistro of the filing thereof, and Bistro shall have the right to contest the validity of such lien if it so chooses.

23. **APPLICABLE LAW.** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the City of Norfolk, Virginia.

24. **WAIVER OF TRIAL BY JURY.** To the extent permitted by law, City and Bistro mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Bistro by this agreement.

25. **OTHER REQUIREMENTS.**

(a) Bistro shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Patio.

(b) The use of the Patio shall be subject to the jurisdiction and review of the City of Norfolk's Architectural Review Board.

(c) Bistro use of the Patio shall not interfere with any water meters or sewer cleanouts.

(d) A trash can compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(e) Tables and chairs will be arranged according to plan approved by Norfolk's Architectural Review Board.

**IN WITNESS WHEREOF,** Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

**THE CITY OF NORFOLK**

By: _____
Marcus, D. Jones, City Manager

ATTEST:

_____
City Clerk

**EDR ENTERPRISES, INC.**
**DBA PIMENTO ISLAND BISTRO**

By: _____

Print Name: _____

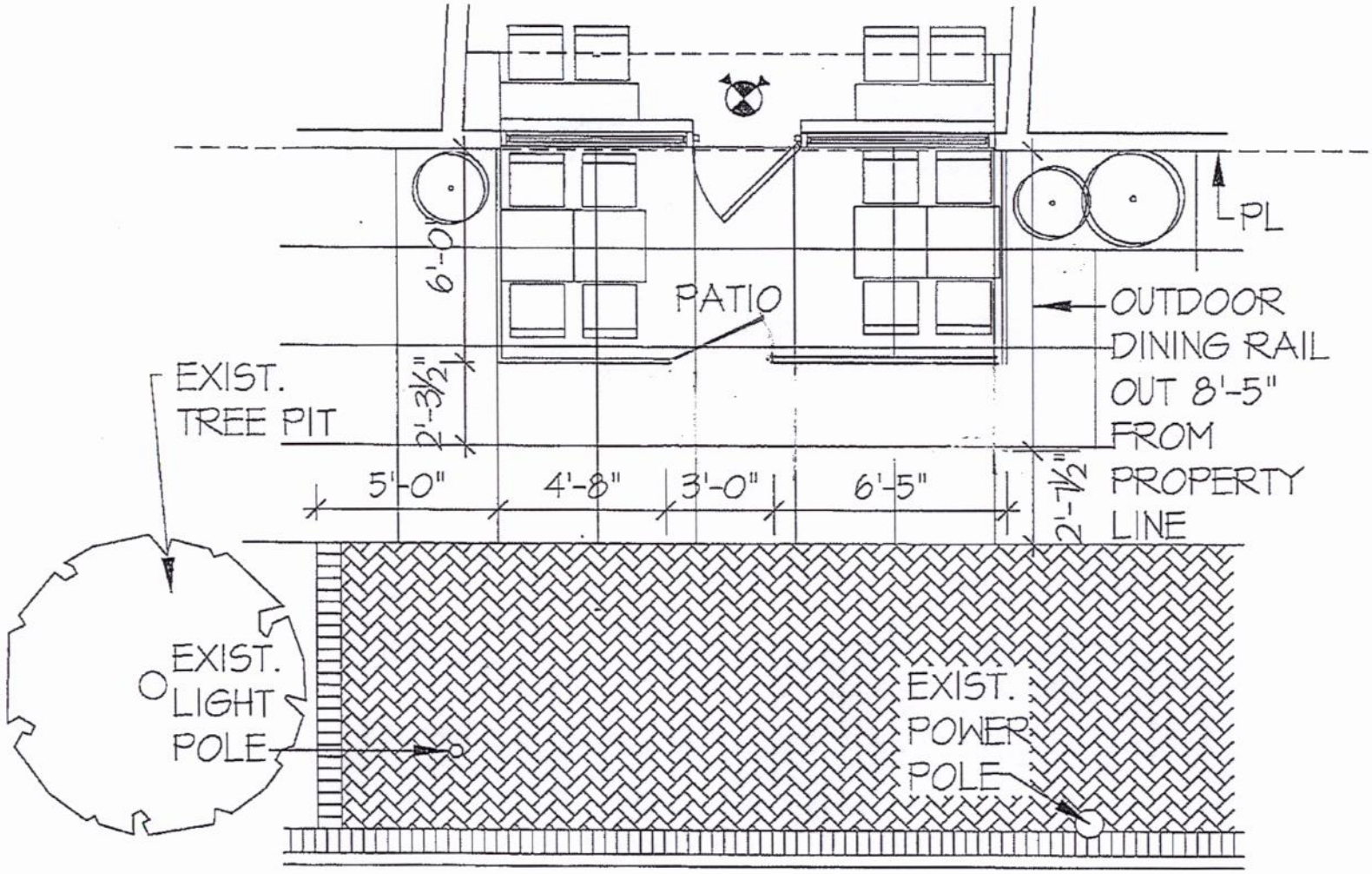
Print Title: _____

APPROVED AS TO CONTENT:

_____
Director, General Services

FORM & CORRECTNESS APPROVED:

_____
Deputy City Attorney




PIMENTO ISLAND BISTRO: 1902 COLLEY AVENUE, NORFOLK, VA 23517

1/4" = 1'-0"

REVISED 9-1-2015

Exhibit A