C: Dir., Department of General Services

City of NORFOLK

To the Honorable Council
City of Norfolk, Virginia

July 19, 2016

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

Subject: Encroachment Agreement with 131 Granby, LLC for Outdoor Dining at 131 Granby Street, Norfolk, VA

Reviewed: Sabrina Joy-Hogg, Deputy City Manager

Ward/Superward: 2/6

Approved: Marcus D. Jones, City Manager

Item Number: **R-5**

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** 131 Granby, LLC
Attn: R. Craig Burns
207 Granby Street, Suite 203
Norfolk, VA

III. **Description:**
This agenda item is an ordinance to permit 131 Granby, LLC ("131 Granby") to encroach into the City of Norfolk's (the "city's") right-of-way at 131 Granby Street with an area measuring approximately 27 square feet for use as an outdoor dining area and for no other purpose.

IV. **Analysis:**
This encroachment will permit 131 Granby, and its tenant, to utilize this area for outdoor dining in addition to the establishment's indoor seating options. The term of the encroachment is no longer than five (5) years, commencing on August 1, 2016, or the date of any authorizing ordinance, and terminating on July 31, 2021. The permission granted for this encroachment is subject to the right of revocation by the Norfolk City Council.

V. **Financial Impact:**

Encroachment Fee (131 Granby, LLC)	Annual Rent: $162.00 (to be paid annually)
Liability insurance (131 Granby, LLC)	The City has been named as an additional insured in the amount of $1,000,000 per occurrence; therefore, there should be no financial risk to the city

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

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 letter and ordinance have 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
- Proposed Encroachment Agreement

6/2/2016 - wld

Form and Correctness Approved:

By _____
Office of the City Attorney

Contents Approved:

By _____
DEPT. General Services

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE GRANTING 131 GRANBY LLC PERMISSION TO ENCROACH INTO THE RIGHT-OF-WAY AT 131 GRANBY STREET APPROXIMATELY 27 SQUARE FEET FOR THE PURPOSE OF OUTDOOR DINING AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

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

Section 1:- That the terms and conditions of the Encroachment Agreement between the City of Norfolk and 131 Granby LLC ("131"), a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to 131 to encroach into the right-of-way at 131 Granby Street approximately 27 square feet for the purpose of outdoor dining and for no other purpose.

Section 2:- That the City Manager and other proper officers of the City are hereby authorized to execute the Encroachment Agreement and do all things necessary for its implementation.

Section 3:- That the City Manager is further authorized to correct, amend or revise the Encroachment Agreement as he may deem advisable consistent with the intent of the Council as expressed therein.

Section 4:- That this ordinance shall be in effect from and after its adoption.

EXHIBIT A TO ORDINANCE

ENCROACHMENT AGREEMENT

This **ENCROACHMENT AGREEMENT** ("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 ("City"), and **131 GRANBY LLC,** a Virginia limited liability company, ("131"), whose address is 207 Granby Street, Suite 203, Norfolk, Virginia 23510.

WITNESSETH:

1. **ENCROACHMENT AREA:** City hereby grants permission to 131 to encroach into the right-of-way at 131 Granby Street approximately 27 +/- square feet, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor dining and for no other purpose.

2. **USE:** 131, and its tenant(s), shall be permitted to occupy the Encroachment Area for outdoor dining purposes in conjunction with the operation of a dining 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 August 1, 2016, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on July 31, 2021. However, it is expressly understood that the permission granted hereby is subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation 131, and its tenant(s), shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION:** As compensation for the privilege of encroaching into the right of way, 131 shall pay City an annual encroachment fee in the amount of **One Hundred and Sixty-Two Dollars and 0/100 ($162.00)**, beginning on the first day of August, 2016 and annually thereafter. The encroachment fee shall be paid by check payable to the "Norfolk City Treasurer"

and sent to the Department of General Services, 232 E. Main Street, Suite 250, Norfolk, VA 23510, Attn: Mr. Jim Resolute.

5. **LATE FEES:** For any late payments received 15 days after the first of each month, 131 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 Encroachment Area. 131 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 utilities necessary to serve the Encroachment Area.

7. **REPAIRS:** 131, and its tenant(s), shall keep and maintain the Encroachment Area in good and complete state of repair and condition. 131, and its tenant(s), shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and competent manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS:** 131, and its tenant(s), shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state, and municipal laws, ordinances and regulations applicable to the structure, use, and occupancy of the Encroachment Area. In addition, 131, and its tenant(s), shall be responsible for the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **RIGHT TO ENTER AND CURE:** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs, which City deems necessary because of

any failure of 131, and/or its tenant(s), to meet their 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 Encroachment Area for 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 131's, and/or its tenant(s)', 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:

City: Department of General Services
Attn: Mr. James Resolute, Jr.
232 E. Main Street, Suite 250
Norfolk, Virginia 23510

131: 131 Granby LLC
Attn: Mr. R. Craig Burns
207 Granby Street, Suite 203
Norfolk, Virginia 23510

With copies to: City Attorney
900 City Hall Building
810 Union Street
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. **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.

12. **NON-LIABILITY OF CITY:** City shall not be liable for any damage or injury which may be sustained by 131, its tenant(s), 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, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, hearing or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements, or resulting from acts, conduct or omissions on the part of 131, its tenant(s), or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

13. **REMOVAL OF SNOW:** 131, and its tenant(s), agree to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

14. **ALTERATIONS:** 131, and its tenant(s), covenant and agree that they will not make any improvements, changes installations, renovations, additions, or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee and Norfolk's Planning Commission. If 131, and/or its tenant(s), install or make any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, 131, and its tenant(s), hereby agree to remove, if requested by City, any improvements, additions, installations, and renovations, changes on or to the Encroachment Area upon termination of this Agreement. In the event 131, and/or its tenant(s), fail to remove the improvements, additions, installations, renovations, and changes on or to the Encroachment Area when requested to do so by City, then the City may remove the improvements, additions, installations, renovations, and changes. 131, and its tenant(s), shall be jointly and severally liable for paying for the cost of such removal.

15. **ASSIGNMENT AND SUBLETTING:** City and 131 agree that the permission to encroach granted hereby is for the benefit of 131 and its tenant(s), and may not be assigned by 131 without express authorization by the City. Further, upon 131's lease of the premises (adjoining the

Encroachment Area) to a tenant, 131 shall have any such tenant execute a copy of this Agreement, acknowledging acceptance of the terms and conditions set forth herein.

16. **SURRENDER:** 131, and its tenant(s), will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. 131, and its tenant(s), shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of 131's use of the Encroachment Area. If 131, and its tenant(s), have been requested to remove and fail to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and 131, and its tenant(s), shall be jointly and severally liable to City for the cost of any removal and disposal.

17. **INSURANCE:** 131, and/or its tenant(s), shall maintain in full force and effect Commercial General Liability ("CGL") insurance with a combined single limit policy of bodily injury, death and property damage insurance of One Million and 0/100 Dollars ($1,000,000) per occurrence and Two Million and 0/100 Dollars ($2,000,000) general aggregate insuring against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas. CGL insurance shall be written on an approved ISO form for coverage in the Commonwealth of Virginia, and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury, and liability assumed under insured contract. The City, its officers, employees, agents and representatives shall be named as additional insured on any such policy. Coverage shall be 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 City if the insurance is cancelled or modified. 131, and its tenant(s), shall inform the City Attorney and the Department

of General Services within 15 days of receiving such notice or cancellation, and immediately obtain coverage compliant with this agreement.

Further, 131, and its tenant(s), shall maintain the applicable statutory Workers' Compensation Insurance, and Employer's Liability Insurance with a limit of at least $500,000 per accident/disease, and policy limit of $500,000 covering any of 131's employees, as well as its tenant's employees, whose work occurs within the premises which are subject to this agreement.

18. **INDEMNIFICATION**: 131, and its tenant(s), 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 Premises by reason of any breach or nonperformance of any covenant or condition of this Agreement by 131, or its tenant(s), or by 131's, or its tenant(s)', intentional act or negligence, and not caused in whole or in part by City. This indemnification shall extend to all claims of any person or party for death or injury to persons and damage to any property, and to legal expenses, including reasonable attorney's fees, incurred by City in the defense of such claims or incurred by City as a result of a breach of any provision of this Agreement by 131, and/or its tenant(s), but does not extend to circumstances caused in whole or in part by City.

19. **FIXTURES:** City covenants and agrees that no part of the improvements constructed, erected or placed by 131, or its tenant(s), in the Encroachment Area 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 131, and its tenant(s), to covenant and agree that all improvements of every kind and nature constructed, erected or placed by 131, and/or its tenant(s), in the Encroachment Area shall be and remain the property of 131, and/or its tenant(s), unless such improvements are not removed upon termination of this Agreement.

20. **ENVIRONMENTAL:**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. § 6901 et seq.) (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing, or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of 131, and/or its tenant(s), including but not limited to the 131's, or its tenant(s)', interest in the Encroachment Area or any of 131's, and/or its tenant(s), property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that 131, and its tenant(s), may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, 131, and its tenant(s), shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. 131, and its tenant(s), shall not cause or permit, because of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, 131, and its tenant(s), shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) 131, and its tenant(s), shall comply with all applicable federal, state, and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with all permits required thereunder, as well as under any successor or new environmental laws. Upon the receipt of any Notice, 131, and its tenant(s), shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this section shall apply to any successor in interest to 131, and/or its tenant(s), whether due to merger, sale of assets or other business combination or change of control.

(e) 131, and its tenant(s), hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from

131's, and/or its tenant(s), failure to comply strictly with the provisions of this section. The provisions of this section shall survive the termination of this permission granted by this Agreement.

21. **LIENS OR ENCUMBRANCES :** If because of any act or omission of 131, and/or its tenant(s), any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, 131, and its tenant(s), 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 131, and/or its tenant(s), of the filing thereof, and 131, and/or its tenant(s), shall have the right to contest the validity of such lien if they so choose.

22. **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 Norfolk, Virginia.

23. **WAIVER OF TRIAL BY JURY:** To the extent permitted by law, City and 131, and its tenant(s), 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 131, and its tenant(s), by this agreement.

24. **OTHER REQUIREMENTS:**

(a) 131, and its tenant(s), shall comply with the City of Norfolk's Downtown Outdoor Dining Policy, as amended from time to time.

(b) 131, and its tenant(s), shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(d) 131's, and its tenant(s)', use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

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

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee.

25. **TITLES AND HEADINGS**: Titles and headings are inserted in this Agreement for reference purposes only, and shall not be used to interpret the Agreement.

26. **SEVERABILITY**: Each provision of this Agreement must be interpreted in a way that is valid under applicable law. In the event that any provision or portion of this Agreement is determined by a court of competent jurisdiction to be void, invalid, or otherwise unenforceable, such provision or portion shall be deemed reformed, insofar as is possible, to cure the defect and give maximum effect to the intent of the City and 131, and its tenant(s), entering into this Agreement, and in any event the remainder of the Agreement shall continue in full force and effect.

27. **ENTIRE UNDERSTANDING**: This Agreement constitutes the entire understanding between or on behalf of the City and 131, and its tenant(s), and supersedes any prior understandings and/or written or oral agreements between them or on their behalf respecting the subject matter herein. There are no representations, agreements, arrangements, or understandings, oral or written, between and among the parties hereto relating to the subject matter of this Agreement, which are not fully expressed herein.

This Agreement may be modified or amended only by a writing signed and dated by both parties. All amendments shall be incorporated and made a part of this Agreement, and attached hereto.

28. **SUCCESSORS AND ASSIGNS**: In the event 131 assigns, conveys, sells, or otherwise disposes of its interest in the property located at 9659 First View Street to a party other than an affiliated entity, the permission granted by this Agreement shall immediately terminate. Any such successor in interest to 131 that desires to encroach into the right-of-way must submit a new application for approval by the City.

29. **COMPLIANCE WITH FEDERAL IMMIGRATION LAW:** At all times during which any term of this Agreement is in effect, 131, and its tenant(s), do not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United states Code or the U.S. Attorney General.

30. **AUTHORITY TO EXECUTE:** The terms of this Agreement are contractual and not mere recital, and the individuals executing this Agreement hereby represent and warrant that they have full and complete authority to covenant and agree as herein provided and to execute this Agreement on behalf of the Parties hereto.

31. **AUTHORIZATION TO TRANSACT BUSINESS IN THE COMMONWEALTH:** 131, and its tenant(s), hereby represent that they are organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership and is authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

32. **COUNTERPARTS**: The Agreement may be signed in counterparts. The Parties hereto agree that facsimile or email signatures shall have the full force and effect of original signatures.

IN WITNESS WHEREOF, the parties hereto 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.

CITY OF NORFOLK

By: _____
City Manager

Attest:

_____
City Clerk

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK, to-wit:

I, _____, a Notary Public in and for the City of Norfolk, in the Commonwealth of Virginia, do hereby certify that Marcus D. Jones, City Manager, and R. Breckenridge Daughtrey, City Clerk, respectively, of the City of Norfolk, whose names as such are signed to the foregoing Encroachment Agreement, have acknowledged the same before me in my City and State aforesaid.

Given under my hand this ___ day of _____, 2016.

_____
Notary Public
Registration: _____

Approved as to Contents:

_____
Director of General Services

Approved as to Form and Correctness

_____
Deputy City Attorney

131 GRANBY LLC

By:_____
Name (Printed): _____
Title:_____

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK, to-wit:

I, _____, a Notary Public in and for the City of _____, in the Commonwealth of Virginia, do hereby certify that _____, _____ (Title) of 131 Granby LLC whose name is signed to the foregoing Encroachment Agreement, has acknowledged the same before me in my City and State aforesaid. He/She is personally known to me or has produced a driver's license as identification.

Given under my hand this ____day of _____, 2016.

_____
Notary Public
Registration: _____

Tenant Endorsement and Acceptance:

Tenant: _____

By:_____
Name (Printed): _____
Title:_____

COMMONWEALTH OF VIRGINIA
CITY OF _____, to-wit:

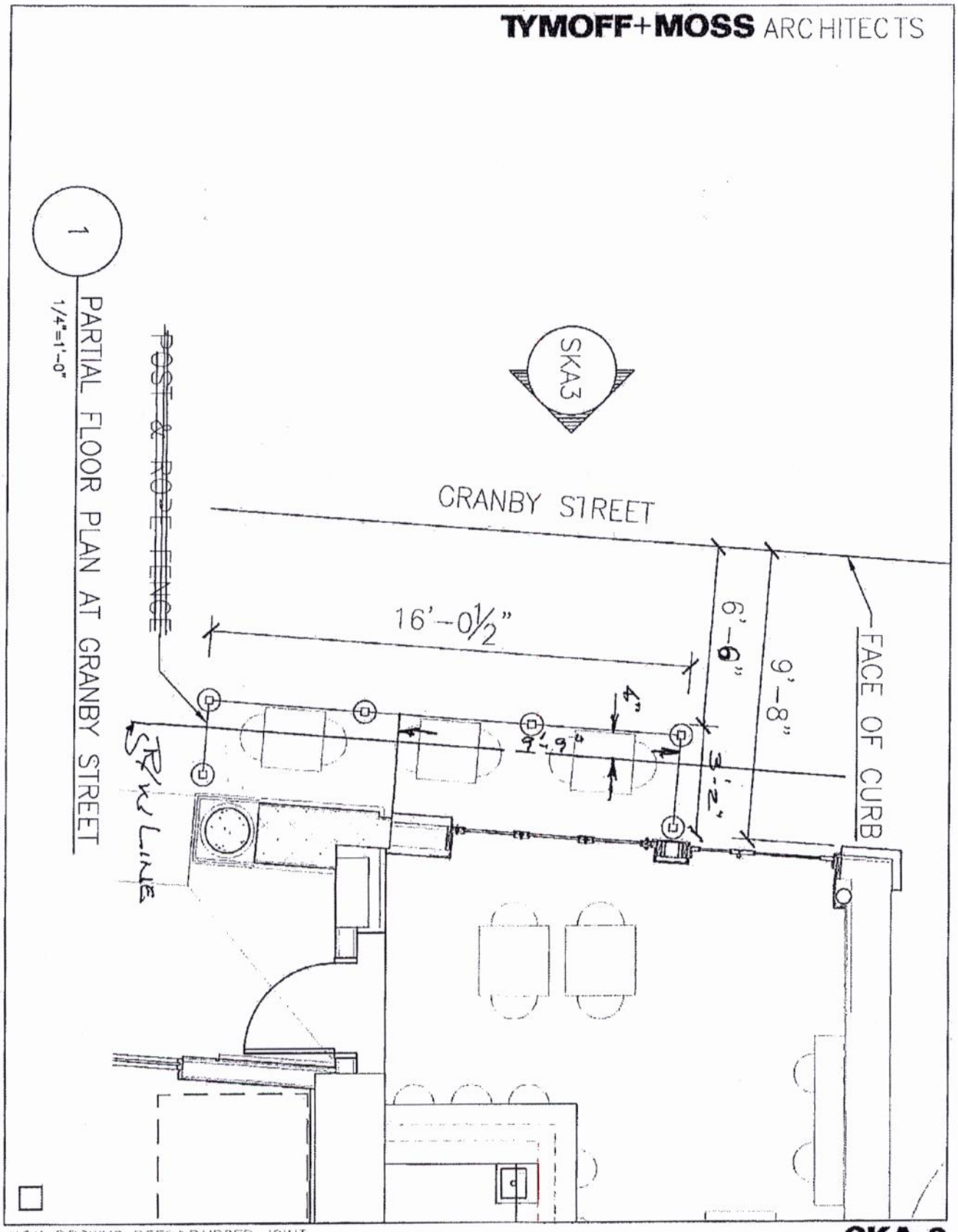
I, _____, a Notary Public in and for the City of _____, in the Commonwealth of Virginia, do hereby certify that _____, _____ (Title) of _____, whose name is signed to the foregoing Encroachment Agreement, has acknowledged the same before me in my City and State aforesaid. He/She is personally known to me or has produced a driver's license as identification.

Given under my hand this ____day of _____, 2016.

_____
Notary Public
Registration: _____

EXHIBIT A

TYMOFF+MOSS ARCHITECTS



JACK BROWNS BEER&BURGER JOINT
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