

ORDINANCE NO. _____
0-06-108

An ordinance of the City of Gainesville, Florida, to vacate, abandon and close that portion of Southwest 5th Terrace located in the vicinity between Southwest 2nd Avenue and Southwest 3rd Avenue, as more specifically described in this Ordinance; reserving public and private utilities easements; providing conditions and a reversionary interest; providing a severability clause; providing a repealing clause; and providing an immediate effective date.

WHEREAS, pursuant to Section 30-192 of the Code of Ordinances of the City of Gainesville, an application was initiated to vacate, abandon and close that portion of Southwest 5th Terrace located between Southwest 2nd Avenue and Southwest 3rd Avenue, as more specifically described herein, to make possible the community redevelopment project commonly and hereinafter known as Jefferson 2nd Avenue; and

WHEREAS, notice was given and publication made as required by law and a public hearing was held by the City Plan Board on August 17, 2006; and

WHEREAS, at least ten (10) days notice has been given of the public hearing once by publication in a newspaper of general circulation notifying the public of this proposed ordinance and of the public hearings in the City Commission meeting room, First Floor, City Hall, in the City of Gainesville; and

WHEREAS, notice has also been given by mail to all owners of property abutting the portion to be vacated prior to the adoption of this ordinance; and

WHEREAS, prior to the public hearings the application was presented to and approved by the appropriate Departments of the City; and

1 **WHEREAS**, the City Commission finds that it is in the public interest to vacate, abandon
2 and close the right-of-way as set forth herein to make possible the development of a mixed use
3 community redevelopment project commonly referred to as Jefferson 2nd Avenue, but that the
4 right-of-way is otherwise required for public use and benefit if the project is not constructed and
5 completed; and

6 **WHEREAS**, the City Commission is willing to vacate, abandon and close the right-of-
7 way subject to specific terms and conditions in an enforceable agreement between the City and the
8 developer, its successors and assigns.

9 **NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE**
10 **CITY OF GAINESVILLE, FLORIDA:**

11 **Section 1.** Except as provided in Sections 2 and 3 below, the following described right-
12 of-way in the City of Gainesville no longer serves a public purpose and is hereby vacated,
13 abandoned and closed for use by the public generally in order to make possible the community
14 redevelopment project, commonly known as "Jefferson 2nd Avenue":

15 See legal description attached hereto as Exhibit "A", and made a part hereof
16 as if set forth in full.

17 **Section 2.** The City reserves unto itself, its successors and assigns a public and private
18 utilities easement over, under, across and through the right-of-way described in Exhibit "A",
19 attached hereto and made a part hereof, for the purpose of operating, maintaining, removing and
20 relocating the public and private utilities located therein.

21 **Section 3.** The vacation, abandonment and closure of the right-of-way described in § 1
22 of this Ordinance is subject to the terms and conditions of a certain Vacation of Right-of-Way
23 Agreement between the City and the applicant of the petition to vacate the right-of-way, Jefferson

1 2nd Avenue, L.P., a Delaware Limited Partnership, dated November _____, 2006, which
2 Agreement provides, among other things, that this ordinance may be repealed and the vacation,
3 abandonment and closure of the right-of-way shall be of no further force and effect.

4 **Section 4.** The Clerk of the Commission or designee is authorized to record a true copy
5 of this Ordinance in the Public Records of Alachua County, Florida.

6 **Section 5.** If any section, sentence, clause or phrase of this ordinance is held to be invalid
7 or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect
8 the validity of the remaining portions of this ordinance.

9 **Section 6.** All ordinances, or parts of ordinances, in conflict herewith are to the extent of
10 such conflict hereby repealed.

11 **Section 7.** This ordinance shall become effective immediately upon final adoption.

12 **PASSED AND ADOPTED** this _____ day of _____, 2006.

13
14 _____
15 Pegeen Hanrahan, Mayor

16 ATTEST: Approved as to form and legality:

17
18
19
20
21 _____ By: _____
22 KURT LANNON, MARION J. RADSON, CITY ATTORNEY
23 CLERK OF THE COMMISSION

24
25 This ordinance passed on first reading this _____ day of _____, 2006.

26
27 This ordinance passed on second reading this _____ day of _____, 2006.

28
29 H:\Marion Radson\Planning\96SVA 06 pet.doc

EXHIBIT "A"

George F. Young, Inc.
1905 South Main Street
Gainesville, FL 32601
(352) 378-1444 Fax (352) 372-2502



George F. Young, Inc.

Turning Vision Into Reality

Since 1919

ARCHITECTURE ■ ENGINEERING ■ ENVIRONMENTAL ■ LANDSCAPE ARCHITECTURE ■ PLANNING ■ SURVEYING ■ UTILITIES

October 16, 2006

Mr. Ben Montgomery
JPI Development Services
600 E. Las Colinas Boulevard #1800
Irving, Texas 75039

RE: Southwest 5th Terrace Right of Way to be vacated, Gainesville, Florida.

Dear Mr. Montgomery;

To assist you in this vacation, you can use the following description for the application:

All the Southwest 5th Terrace right of way as described in Deed Book 130, page 426, Public Records of Alachua County, Florida lying south of the south right of way line of Southwest 2nd Avenue and north of the north right of way line of Southwest 3rd Avenue, lying and being in Section 5, Township 10 South, Range 20 East, Alachua County, Florida.

Sincerely,
George F. Young, Inc.

Michael L. Harbert, PSM
Florida Certificate Number 4995
Vice President – Gainesville Office



VACATION OF RIGHT-OF-WAY AGREEMENT

This Vacation of Right-of-Way Agreement (the "Agreement") is made by and between the **City of Gainesville, a municipal corporation** (the "City") and **Jefferson 2nd Avenue, L.P., a Delaware limited partnership** (the "Developer").

WHEREAS, the City is aware that municipalities in Florida have the authority under Article VIII, section 2(b) of the Florida Constitution and Section 166.021(4) of Florida Statutes to impose conditions on vacation of a public street or right-of-way. See City of Temple Terrace v. Tozier, 903 So.2d 970 (2nd DCA 2005);

WHEREAS, the Developer has requested the City vacate, abandon and close a portion of Southwest 5th Terrace located between Southwest 2nd Avenue and Southwest 3rd Avenue, as more particularly described in **Exhibit "A"** attached hereto (the "Right-of-Way") and depicted on **Exhibit "B"** attached hereto, to make possible the development of a mixed-use community redevelopment project commonly referred to as Jefferson 2nd Avenue (the "Project");

WHEREAS, the City finds that the vacation of the Right-of-Way is necessary to make possible the development of the Project, but that the Right-of-Way is required for the public use and benefit if the Project is not constructed and completed; and

WHEREAS, the Developer agrees with the City's findings and agrees that the imposition of the conditions described below is a proper exercise of the City's powers;

NOW THEREFORE, in consideration of \$10.00 and other valuable consideration, the parties agree as follows:

1. Recitals. The recitals above comprise a material part of this Agreement are hereby incorporated by reference.
2. General Conditions. The Developer agrees to the following conditions:
 - a. The second reading of the ordinance vacating, abandoning and closing the Right-of-Way (the "Ordinance") shall not occur until the City Manager or designee confirms that the City Community Development Department is ready to issue a final development order for the Project.
 - b. Upon adoption of the Ordinance, Developer agrees to proceed with the Project in substantial conformity with the final development order (the "Development"). The Developer agrees that the nature, character and extent of the Development as presented in connection with the petition for the vacation is a material inducement to enter into this Agreement.
 - c. Developer shall not remove or cause to be removed all or any portion of the Right-of-Way or any infrastructure within the Right-of-Way prior to

commencement of construction pursuant to a building permit for the Development issued by the City Building Department.

- d. Developer must commence construction within two (2) years of the date of adoption of the Ordinance and must complete construction and obtain all of the certificates of occupancy for the Development within five (5) years of the date of adoption of the Ordinance.
3. Specific Conditions. Upon the Developer's or the Utilities,' as appropriate, removal, relocation or abandonment of the public and/or private utilities within the Right-of-Way, at the expense of the Developer, and upon proper petition by the Developer, the City shall release the utilities easement reserved in the Ordinance and the Developer shall grant to the City, at no cost or expense to the City, any additional utility easements required as a result of such release.
 4. Default: Possibility of Reverter. There shall be a default by the Developer if the Developer fails to comply with any condition described in Section 2(b), (c) or (d), Section 3 or any other provision in this Agreement. If a default occurs, then upon the City giving written notice of such default to the Developer, if the Developer has not cured the default within thirty (30) days after the receipt of the notice of default, the City may repeal the Ordinance, upon which title to the Right-of-Way, shall revert to the City for use as a public right-of-way. Provided however, if the nature of the default is such that it cannot reasonably be cured within such thirty (30) day period, then the Developer shall have up to an additional ninety (90) days to cure the default, provided the Developer diligently undertakes and pursues such cure. Developer shall not have more than one hundred twenty (120) days from receipt of the notice of default to cure the default. Failure to cure within that period shall, at the election of the City, result in repeal of the Ordinance and reversion of title to the Right-of-Way to the City. In the event of repeal and reversion of title, the Developer shall be responsible for any and all costs incurred in restoring the Right-of-Way to the condition in which it existed on the date of adoption of the Ordinance. Notwithstanding the foregoing, upon completion of pouring the foundations for Building 1, Building 2 and the parking garage, as generally depicted on the site plan attached hereto as **Exhibit "C"**, the City's right of repeal and reverter shall automatically terminate and, on Developer's request, the City shall quit-claim the right of reverter to the Developer. If the default occurs after completion of pouring the foundations for Building 1, Building 2 and the parking garage, the City shall have such legal rights and remedies as are allowed at law or in equity.
 5. Enforcement of Remedy. The City Manager, through the City Attorney, may seek an injunction, declaratory judgment or any other remedy available at law or in equity in a court of competent jurisdiction to enforce its rights, including without limitation the right to repeal the Ordinance and take title to the Right-of-Way only as specified above. In any litigation or other proceeding, including appeals, arising out of this Agreement, including breach, enforcement or interpretation, the prevailing party in such proceeding, shall be entitled to recover from the non-prevailing party reasonable attorney's fees, costs and expenses.

6. Term; Expiration. This Agreement shall expire when (a) no uncured default exists under this Agreement and all of the certificates of occupancy have been issued for the Development, or (b) the Ordinance is repealed and title to the Right-of-Way reverts to the City; whichever first occurs.
7. Termination. Prior to commencement of construction, Developer may terminate this Agreement upon thirty (30) days prior written notice to the City. Upon expiration of the thirty (30) day notice period, this Agreement shall terminate and all obligations of the parties shall cease and be released and no longer of any force and effect, except as otherwise provided herein. Upon which the City may repeal the Ordinance and title to the Right-of-Way shall revert to the City for use as a public right-of-way.
8. No Contractual Zoning; No Contracting of Police Powers. Nothing contained in this Agreement shall be interpreted or construed as an approval, waiver or agreement to approve or waive any development order, development permit, rezoning, comprehensive plan amendment or any other governmental requirement for the Development. Nothing contained in this Agreement shall be interpreted or construed as contracting away the exercise of the police powers of the City.
9. Release. No recourse shall be had for any damages or claims based upon any representation, obligations, covenant or agreement in this Agreement against any past, present or future officer, member, legal counsel, employee, director or agent, of the City, either directly or through the City, under any rule of law or equity, statute or constitution or by the enforcement of any assessment or penalty or otherwise, and all such liability of any such officers, members, legal counsels, employees, directors or agents is hereby expressly waived and released as a condition of and consideration for the execution of the Agreement. This section shall survive the termination or expiration of this Agreement.
10. Representations and Warranties of Developer. The Developer represents and warrants to the City that the following statements are true:
 - a. The Developer is a valid existing entity under the laws of the State of Delaware, is qualified to do business in Florida, has all requisite power and authority to carry on its business as now conducted, to own or hold property and to enter into and perform the obligations of this Agreement and each instrument to which it is or will be a party, and has consented to service of process in the State of Florida.
 - b. The General Partner of the Developer is a valid existing entity under the laws of the State of Delaware, has all requisite power and authority to carry on business as now conducted on behalf of the Developer, to own or hold property and to enter into and perform the obligations of this Agreement and each instrument to which it is or will be a party, and has consented to service of process in the State of Florida.

- c. Each document to which the Developer is or will be a party has been duly authorized by all necessary action on the part of, and has been or will be duly executed and delivered by, the Developer, and neither the execution and delivery, nor compliance with the terms and provisions: (i) requires the approval of any other party, including any limited partners, except as have been obtained or as are noted herein, (ii) contravenes any law, judgment, governmental rule, regulation or order binding on the Developer, or (iii) results in any default under or creates any lien upon any property of the Developer.
 - d. Each document to which the Developer is or will be a party constitutes a legal, valid, and binding obligation of the Developer, enforceable against the Developer, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws which affect creditor's rights generally and subject to usual equitable principles if equitable remedies are invoked.
 - e. There are no pending or threatened actions before any court or administrative body by the City against the Developer, or against any officer of the Developer that question the validity of any document contemplated herein, or that are likely to materially adversely affect this Agreement or the financial condition of the Developer.
 - f. The Developer is financially capable of carrying out all obligations in connection with the Development contemplated by this Agreement.
11. Covenants of Developer. The Developer covenants with the City that the Developer shall use due diligence to construct and complete the Development, to timely fulfill all the conditions herein that are within the control of Developer and are the responsibility of Developer.
12. Waiver. The failure of the City to promptly insist upon strict performance for any provision shall not be deemed a waiver of any right or remedy that they may have, and shall not be deemed a waiver of a subsequent default or nonperformance of such provision.
13. Force Majeure. Delays in any performance due to: fire, flood, earthquake, windstorm, or sinkhole; war, declaration of hostilities, revolt, civil strife, altercation or commotion; strike or labor dispute; epidemic; archaeological excavation; or because of act of God shall be deemed to be events of Force Majeure and such delays shall be excused in the manner herein provided. If such party is delayed for any of the events of Force Majeure, the date required for actions required shall be extended by the number of calendar days equal to the total number of calendar days, if any, that such party is actually delayed. The party seeking excuse for nonperformance on the basis of Force Majeure shall give written notice to the other parties specifying the cause of the anticipated delay, giving its actual or anticipated duration, and weekly thereafter, if such delay shall be continuing, written notice stating whether the condition continues and giving its actual or then anticipated duration. Each party seeking excuse from nonperformance on the basis of Force Majeure

shall use due diligence to rectify conditions causing a delay and will cooperate with the other party, except for the occurrence of unreasonable additional costs and expenses, to overcome any loss of time that has resulted.

14. Sovereign Immunity. The Developer and City agree that nothing in this Agreement shall be interpreted as a waiver of the City's sovereign immunity under section 768.28, Florida Statutes.

15. Assignment; Mortgages.

- a. Prior to the issuance of the certificate(s) of occupancy for the Development, the Developer may not sell, convey, assign, or otherwise transfer or dispose of any of its rights, title, and interest in the Development, or any duty or obligation of the Developer pertaining to the Development, or any part thereof without prior written consent of the City. Such consent not to be unreasonably withheld. The Developer shall provide the City with written notice of such proposed assignment along with the name, address and such financial information relating to the proposed assignee as the City may reasonably require (the "Assignment Information"). The City shall notify the Developer of its approval or disapproval of the proposed assignment within forty five (45) days from its receipt of the notice and Assignment Information. The City's failure to notify the Developer within the forty five (45) day period shall constitute its approval of the assignment. In determining whether or not to consent to the proposed assignment, the City shall consider, among other factors, the reputation, experience and financial condition of the proposed assignee, and whether the assignee is "in good standing" with the City. Upon approval of the assignment, the assignment instrument shall be sent to the City and must include the street address, phone number and facsimile number of the assignee. Such contact information shall be used by the parties under the notices provision herein. In connection with the Developer's assignment of this Agreement, either the Developer shall remain responsible for, or the assignee must assume in writing, the responsibilities, obligations and duties associated with the interests being assigned by the Developer.
- b. Notwithstanding the foregoing, the Developer may do the following without obtaining consent of the City:
 - i. Assign its interest in the Development, or any part thereof, to another entity owned, directly or indirectly, by JPI Multifamily Holding, L.P. and any equity investor in such entity.
 - ii. Mortgage its interest in the Development, or any part thereof, to any institutional mortgagee in order to fund the construction of the Development. In addition, any transfer of title by virtue of foreclosure or deed in lieu of foreclosure by any such Mortgagee shall not be deemed a transfer or assignment.

iii. Sell or lease units to bona fide third party purchasers or lessees in the ordinary course of business.

16. Third Party Beneficiaries. The Agreement has been entered into for the benefit of the parties and there are no third party beneficiaries. Unless expressly granted in a written instrument executed by Developer and approved by the City, third parties acquiring any indicia of ownership in the Property or any portion of the Development shall not, by virtue of such acquisition or otherwise, acquire or receive any right, title or interest whatsoever in any of the benefits under this Agreement.

17. Notices. All notices, demands, requests for approvals, or other communications shall be deemed given and delivered on the date delivered in person or on the date mailed by registered or certified mail, postage prepaid, return receipt requested, and addressed:

To the Developer: Jefferson 2nd Ave, L.P.
 Attn: Frank B. Schubert, Jr.
 600 East Las Colinas Blvd., Suite 1800
 Irving, TX 75039

To the City: Office of the City Manager
 City of Gainesville
 P.O. Box 490
 Gainesville, FL 32602

With copy to: Office of the City Attorney
 City of Gainesville
 P.O. Box 490, Station 46
 Gainesville, FL 32602

These addresses may be changed from time to time in writing delivered to the other party. Until written notice is received, a party may rely upon the last address given. Notice shall be deemed given, if notice is by mail, on the date mailed to the address set forth above or as changed pursuant to this Section.

18. Severability. If any provision of this Agreement is held invalid, the remainder shall not be affected if such remainder would then continue to conform to the requirements of applicable laws and if the remainder can be reasonably performed without material hardship, so as to accomplish the intent and the goals of the parties.

19. Governing Law; Construction. The laws of the State of Florida shall govern the validity, performance and enforcement of this Agreement. This Agreement has been negotiated by each party. It shall not be deemed to have been prepared by the City or Developer, and each of them shall be deemed to have participated equally in the preparation hereof.

20. Venue; Jurisdiction. Each party submits to the jurisdiction of the State of Florida, Alachua County and the courts thereof and to the jurisdiction of the United States District Court for the Northern District of Florida, for the purposes of any suit, action or other proceeding relating to this Agreement and agrees not to assert by way of a motion or a defense or otherwise that such action is brought in an inconvenient forum or that the venue of such action is improper or that the subject matter thereof may not be enforced in or by such courts. If at any time, the Developer has no agent available for service of process in the State of Florida, or if any permitted assignee shall have no agent available for service of process in the State of Florida, the Developer consents to service on its designated agent for such purpose and designates the Secretary of State, State of Florida, its agent for service in any court action between it and the City relating to this Agreement and such service shall be made as provided by the laws of the State of Florida for service upon a non-resident; provided, however, that at the time of service on the Secretary of State, a copy of such service shall be mailed by prepaid, registered mail, return receipt requested, to the Developer at the address for notices.
21. Entire Agreement; Conflicts; Not a Development Agreement. This Agreement, together with the Exhibits attached and the Ordinance, constitutes the full and complete agreement between the parties, and supersedes and controls any prior agreements, representations and statements, whether written or oral. The Ordinance and each Exhibit are an essential part of this Agreement. This Agreement, in whole or part, is not intended to be nor shall be construed or interpreted to be a Development Agreement under the terms of the "Florida Local Government Development Agreement Act" in Section 163.3220 et seq., Florida Statutes, or as defined in the Land Development Code, Chapter 30 of the City of Gainesville Code of Ordinances.
22. Captions. The section headings and captions of this Agreement are for convenience only and in no way define, limit, or describe the scope or intent of this Agreement.
23. Successors and Assigns. The terms City and Developer shall include their successors and assigns and all benefits and obligations shall inure to and bind such successors and assigns.
24. Time. Whenever a notice or performance is to be done on a Saturday or Sunday or on a legal holiday observed in the City of Gainesville, Florida, it shall be postponed to the next business day.
25. Relationship. The Developer is not an agent or contractor of the City and is not subject to nor shall it be required to comply with any laws, ordinances, regulations, orders, or policies applicable to contractors or agents of the City.
26. Amendment. This Agreement may be amended or modified only by written agreement executed by both parties.

27. Recording. The Developer shall, at its expense, record this Agreement, and any amendment to this Agreement, in the Public Records of Alachua County, Florida, within five business days of execution.

IN WITNESS WHEREOF, the last of the parties have signed this Agreement on _____, 2006 (the "Effective Date".)

WITNESSES:

CITY OF GAINESVILLE

Approved as to form and legality:

Marion J. Radson, City Attorney

WITNESSES:

**Jefferson 2nd Avenue, L.P., a Delaware
limited partnership**

By:
Its: General Partner

By: _____
Its: _____

EXHIBIT "A"

George F. Young, Inc.
1905 South Main Street
Gainesville, FL 32601
(352) 378-1444 Fax (352) 372-2502



George F. Young, Inc.

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October 16, 2006

Mr. Ben Montgomery
JPI Development Services
600 E. Las Colinas Boulevard #1800
Irving, Texas 75039

RE: Southwest 5th Terrace Right of Way to be vacated, Gainesville, Florida.

Dear Mr. Montgomery;

To assist you in this vacation, you can use the following description for the application:

All the Southwest 5th Terrace right of way as described in Deed Book 130, page 426, Public Records of Alachua County, Florida lying south of the south right of way line of Southwest 2nd Avenue and north of the north right of way line of Southwest 3rd Avenue, lying and being in Section 5, Township 10 South, Range 20 East, Alachua County, Florida.

Sincerely,
George F. Young, Inc.

Michael L. Harbert, PSM
Florida Certificate Number 4995
Vice President – Gainesville Office



