

CITY OF ASHLAND



Application For:

ROW Encroachment Permit - Sidewalk Cafe

Chapter 13.03 Sidewalk Café, Special Event and Publication Box Regulation (Effective 11/1/09), protects and promotes a safe environment within the public sidewalks in the C-1-D, C-1 and E-1 Districts. The applicant must submit this application along with a scaled diagram of the sidewalk permit area, with dimensions and the location and description of all structures, materials and activities shown (see example). In addition, a certificate of insurance and endorsement form must be provided and the attached "Terms and Conditions" agreement signed. All permits expire December 31st of the year obtained. Acceptance of permit fee does not deem the application approved.

For more information call 488-5347 or visit <http://www.ashland.or.us/Permits>.

Business Owner Information

Name _____
Business Name _____
Mailing Address _____
Business Phone Number _____
Emergency Contact Number _____

Property Owner Information

Name _____
Mailing Address _____
Office / Cell Phone Number _____
*As property owner I hereby consent to the placement of a
sidewalk café adjacent to my property:*
X _____

Will alcohol be served? (If yes, provide a copy of liquor license) _____

Will there be a change in the table/chair configuration? _____ (If yes, provide a new site plan.)

***I, the permit holder, have read and consent to the Terms and Conditions
including the attached RELEASE / HOLD HARMLESS Agreement:***

Applicant Signature _____ Name _____ Date _____

Site Information

Site Address _____
Assessor's Map & Tax Lot _____ Zoning _____
Block (between X & Y Streets) _____
Estimated Number of Square Feet _____ (Fee is equal to \$4.50 per square foot with 50 foot minimum)

Based on demonstrated compliance with the applicable criteria in AMC Chapter 13.03, as reflected in the application materials and supporting documentation provided by the applicant and contained in the record maintained in the offices of the City of Ashland Public Works Dept, the application for occupancy/use of the right-of-way is hereby approved, subject to compliance with all applicable terms, conditions and limitations specified herein, attached standard terms and conditions as well as all applicable requirements of the Ashland Municipal Code.

_____ Date _____
Public Works Director or designee

Measured square footage: _____ Calculated Fee: _____

Additional Approvals:

Fire Marshall Approval Date: _____ Bldg Official Approval Date: _____
Planning Dept Approval Date: _____ City Recorder Approval Date: _____

Disclaimer: This Sidewalk Dining/ROW Encroachment Permit granted by the City shall not in any way be interpreted as a waiver, modification, or grant of any other city, state, county or federal agency permits or authorizations, including specifically applicable land use laws and regulations or permission or authorization to violate any city, state, county or federal law or regulation.

DEPARTMENT OF PUBLIC WORKS

www.ashland.or.us

20 East Main St

Fax: 541-488-6006

Ashland, Oregon 97520

TTY: 800-735-2900

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CITY OF ASHLAND ROW ENCROACHMENT STANDARD PERMIT/CONCESSION TERMS AND CONDITIONS AND RELEASE/INDEMNITY AND HOLD HARMLESS AGREEMENT

Proposals of Applicant. The permit holder/concessionaire agrees that occupancy/use shall be as proposed in the application and as finally approved, including supporting documentation as entered into the record. All proposals of the permit holder / concessionaire are conditions of approval for purposes of enforcement.

AMC Chapter 13.03. All the terms, conditions, standards and limitations of the Ashland Municipal Code, including AMC Chapter 13.03 are incorporated herein by this reference and shall be in full force and effect and shall control the use/occupancy granted by this permit/concession.

Grant of Revocable License/ Permit. City hereby grants and delivers and permit holder / concessionaire hereby accepts this revocable license / permit for use of the permit area identified herein, subject to the conditions, covenants, terms and provisions of this Agreement and the Ashland Municipal Code. Permit holder / concessionaire shall be permitted to take occupancy of the permit area on the date specified in the permit and the occupancy shall end on the date specified not to secede one year unless otherwise specified. Permit holder / concessionaire shall have the right to operate and maintain occupancy and use of the permit area, subject to all the terms, covenants, conditions regulations and restrictions as applicable to the property and as otherwise recorded in the official records.

Scope of Grant. The use / occupancy of the permit area is for the sole purpose of the license and permit granted herein and for no other purpose or occupancy.

Term. The term of this Permit shall commence upon approval by City and shall terminate as provided on the face of the permit, unless terminated or revoked earlier as provided for herein. The City shall have no obligation to hereafter grant any future permit or license. Regardless of the end of the term or early termination, the obligations of the permit holder/concessionaire continue in full force and effect until full payment of all financial obligations to the City, removal of items from the permit area and the complete resolution and satisfaction of any claims.

Compliance with Law. Permit holder/concessionaire shall comply with all applicable federal, state and city and county [local] laws, rules, and regulations, including specifically but not limited to, as applicable, City business license laws, food and beverage license laws, County applicable public health regulations, OLCC regulations, and all such laws and regulations concerning non-discrimination in employment and provision of services, public health and safety regulations and the policies, ordinances, rules and regulations of the City of Ashland and /or Ashland Parks and Recreation Commission in effect on date of occupancy and use. Compliance with the Americans with Disabilities Act all applicable regulations and administrative rules established pursuant to those laws, in the construction, remodeling, maintenance and operation of any structures and facilities, as applicable, and in the conduct of all programs, services, training, educational or otherwise, shall be required.

Responsibility for Compliance. Permit holder/concessionaire shall obtain all federal, state and local permits, licenses and authorizations as necessary for the occupancy and use contemplated; Applicant shall be solely responsible for obtaining all such approvals, permits, licenses, insurance, and authorizations from the responsible Federal, State, County, and local authorities, or other entities, necessary to use the property in the manner contemplated, including all authorizations necessary to perform placement of personal property in the location and manner contemplated. All costs of compliance and permitting are to be borne by permit holder / concessionaire and not the City. Further, it is expressly agreed and understood that the City has no duty, responsibility or liability for requesting, obtaining, ensuring, or verifying permit holder/concessionaire's compliance with the applicable state, county and federal agency permit or approval requirements. Any permit or authorization granted by the City, shall not in any way be interpreted as a waiver, modification, or grant of any other city, state, county or federal agency permits or authorizations or permission to violate any city, state, county or federal law or regulation. Permit holder / concessionaire shall be held strictly liable and responsible, and shall hold the City, its officers, employees, and agents harmless for administrative, civil and criminal penalties for any violation of federal state, county and city statutes or regulations. Nothing herein shall be interpreted as restricting or limiting the City from bringing any criminal, civil or administrative enforcement action under the Ashland Municipal Code or Oregon State Statute.

Maintenance and Safety. Permit holder/concessionaire is strictly responsible to maintain the permit area including but not limited to the grounds, improvements, facilities, assets, personal property, equipment and fixtures contained within the permit area in good repair and in safe, sanitary, clean, and attractive condition that is acceptable to, and approved by the City. This obligation includes provision of adequate security measures to prevent the unauthorized use of the permit area, facilities, grounds and protect the resources and property of the permit holder / concessionaire and the City. City shall be under no obligation to make or perform any repairs, maintenance, replacements, alterations, or improvements of the permit area or immediately surrounding area for, or on behalf of Permit holder / concessionaire or to provide security measures. City reserves the right to make repairs, replacements, alterations, and to perform other work on or around the subject permit area, and to exercise police power and regulatory functions in the permit area and will strive not to cause unreasonable interference with use of the property by permit holder / concessionaire. Permit holder / concessionaire shall have no right to any abatement of charges / fees nor any claim against City, its officers, employees and agents for any inconvenience or disturbance resulting from City's activities in conducting the above-referenced activities.



Damage/Repair. Permit holder/concessionaire shall not injure, damage or deface or allow its employees, contractors or patrons to injure, damage or deface City rights-of-way, including but not limited to the grounds, improvements, sidewalks, facilities, assets and fixtures owned or controlled by City or others authorized to use such property. Upon demand, permit holder/concessionaire shall completely repair any such damage to the City's satisfaction or reimburse the City for the cost of repair or replacement of any items, at the sole discretion of the City. Failure to make such repair or reimburse the City within 15 calendar days of such written demand shall be considered a default and may result in a termination of the permit/license and /or concession. Claims may be submitted to permit holder / concessionaire's insurance carrier but such submission does not excuse the prompt and timely reimbursement or payment as called for herein. Permit holder/concessionaire shall further indemnify and hold the City, its officers, employees, and agents harmless from all damages to the permit area, including the grounds, improvements, facilities, assets and fixtures and other personal property of third parties caused or permitted by the permit holder / concessionaire.

Improvements and Placement of Equipment. Except as expressly authorized by the terms and conditions of this approval, this Permit does not authorize or permit physical improvements or alterations to City property or installation of structures or fixtures thereon. Improvements or alterations may only be made in accordance with applicable City approvals, including land use authorizations if necessary. Any and all improvements must meet local and state code and all work must be performed by appropriately licensed contractors; physical improvements, structures, or installation of fixtures shall, upon termination of the permit or concession, become the property of the City and shall be treated as donations to the City, free of any and all encumbrances. Similarly, equipment and other personal property abandoned by permit holder / concessionaire and left on city property after the term of the concession shall be forfeited and shall be treated as donations to the City, free of any and all encumbrances.

Fire and Life Safety. Permit holder / concessionaire shall strictly comply with any and all fire and life safety guidelines, recommendations and requirements as dictated by the City of Ashland Fire Marshal; further, any violation of the fire and structure safety requirements as established by the Fire Marshal may result in default and immediate revocation of the license/permit to use the permit area.

Land Use Approvals and Permits. Permit holder / concessionaire shall strictly abide by existing land use laws, authorizations approvals and conditions as applicable. Permit holder / concessionaire is not authorized by this permit to make application for any new land use approvals, including signage permits. Similarly, applications for building department permits or other applications concerning city property are not authorized by this Agreement. No banners, flags, signage and/or marking of any kind shall be placed on City property. This Permit grants no permit or authorization for signage or banners. Applications for signs on City Park property can only be submitted by the City Parks Director and shall only be for governmental purposes. Banners on City right-of-way must be applied for at City Administration.

Summary Abatement. When the City Public Works Director, or designee, believes upon inspection, that the maintenance provisions of this Permit or the Code re violated, or that some other unsanitary or public health and / or public safety condition exists which was caused by, permitted by or allowed to occur by Permit Holder / Concessionaire, Director may immediately cause the violations and conditions to be summarily abated using City employees or City contractors. Permit holder/concessionaire shall be responsible to reimburse the City for the actual cost [including overtime costs] to remedy the violation or condition. Director or Director's designee will attempt to contact permit holder / concessionaire to demand permit holder/concessionaire remedy the violation but Director is not required to wait to perform summary abatement. Reimbursement shall be made to the City within five (5) working days after the performance of the abatement and delivery of the charges to Concessionaire.

Non-Interference with Retail Businesses, Residences, and other authorized Permits/ Concessions. Permit holder / concessionaire shall use and occupy the right-of-way in a manner that does not damage, conflict with, or interfere with adjacent or abutting businesses or residences, and other approved concessions / permits, including permitted vehicular and pedestrian access ways and normal business / domestic functions.

Payment of Fees. Permit holder / concessionaire shall pay a fee as established by City Council by Resolution for the use and occupancy of the City right-of-way based either upon the square footage of the concession / permit area awarded or upon gross sales. The permit / concession fee will not change once the permit is executed; however, the fee will likely change every year, (only upward) at least by CPI, and Permit holder/Concessionaire has no right to challenge the amount or type of fee. All required payments must be made and verified by the City before any new permit / concession will be authorized with the Concessionaire. Failure to remit the amounts owed the City under this Agreement, or submission of falsified returns or other falsification of records, *shall* be submitted to the Jackson County District Attorney for consideration of criminal prosecution, in addition to other remedies available to the City identified in this Agreement.

Food and Beverage Taxes. If the use / occupancy of the right-of-way concerns food service, the concession shall be operated in accordance with applicable law, including payment of all local taxes, fees and charges. Permit holder / concessionaire shall pay all food and beverage taxes associated with the business furthered by this concession / permit. The records inspection provisions above apply fully to City verification of compliance with this requirement. No concession shall be granted to an individual or entity, if the person, entity, its owner or operator is in arrears, in collection, or in administrative or litigation concerning amounts owed to the City of Ashland under the Food and Beverage Tax provisions of AMC 4.34, regardless of whether the obligation concerns a business using a different name. Similarly, no individual or entity shall be awarded a permit or concession if the individual / entity, its owners or operators have pending criminal prosecutions for theft of city food and beverage taxes or are otherwise involved in violation proceedings under AMC



1.08 for violation of provisions of the food and beverage tax ordinance. Failure to maintain current food and beverage payments, the existence of arrearages, collections, administrative, civil or criminal actions arising out of failure to strictly comply with the City food and beverage tax shall result in default and revocation of the license /permit to use the permit area and termination/ revocation of the permit/concession

Business License Taxes, Utilities and fees. Permit holder / concessionaire shall pay all business license taxes associated with the business utilizing the right-of-way furthered by this permit / concession. A Permit holder / Concessionaire shall obtain a City business license in accordance with AMC 6.04 and maintain as valid said license during the concession period. No application for a permit / concession shall be accepted from a business entity or individual owner or operator without a current business licenses and without full payment for any arrearages owed by said business entity or individual owner or operator regardless of whether the obligation concerns a business using a different name. In addition, violation of Chapter 6.04 is punishable by daily fines in accordance with AMC Chapter 1.08. Failure to maintain a valid a business license by payment of the business license tax, failure to pay all utilities fees and charges, shall result in default and revocation of the license to use the right-of-way and termination of the permit/concession.

Insurance: Permit holder / concessionaire shall procure and maintain insurance in accordance with the requirements of the application in full force and effect throughout the term of this permit / concession. Permit Holder / concessionaire shall provide the City with copies of said insurance certificates and shall name the City of Ashland as an additional insured. Any request to modify or waive the insurance requirements stated herein must be approved in writing by the City Administrator.

RELEASE / INDEMNITY AND HOLD HARMLESS: Permit Holder / Concessionaire, for itself, its officers, members, employees, and agents, does hereby release and forever discharge the City of Ashland, its Commissions, Boards and Committees, officers, employees, agents, contractors, successors and assigns, from any and all claims or causes of action which Permit Holder / Concessionaire, its officers, members, employees, and agents, now have or which may hereinafter accrue against the City, Commissions, Boards and Committees, officers, employees, agents, contractors, successors and assigns, in connection with or arising out of the this permit / license / concession, including without limitation, personal injury or death, damages to property, by any cause, including trespass, conversion or other property loss, and including specifically damage or theft of personal property placed or located on city right-of-way.

Permit Holder / Concessionaire, for itself, its officers, members, employees, and agents, shall hold harmless, indemnify, and defend the City of Ashland, its Commissions, Boards and Committees, officers, employees, agents, contractors, successors and assigns, from any and all liability, actions, claims, costs, losses, damages or other costs including attorney's fees and witness costs (at both trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity, including permit holder, concessionaire, patrons, other permit holders / concessionaires or adjacent businesses, as well as other participants, arising from, during or in connection with the Permit holder / Concessionaire's entry onto, occupancy and use of City property, and the operation of the permit area, except liability arising out of the sole negligence of the City, its officers or employees. The Permit holder/ Concessionaire specifically agrees to indemnify the City of Ashland, its Commissions, Boards and Committees, City officers, employees, contractors and agents against all loss injury or damage to concessionaire or permit holder/concessionaire's property sustained by reason of occupancy of the premises or any portion hereof. Such indemnification shall also cover claims brought against the City under state or federal workers compensation laws. If any aspect of this indemnity shall be found to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this indemnification.

In the event any action or claim is brought against the City of Ashland, its Commissions, Boards and Committees, officers, employees, agents, contractors, successors and assigns, the Permit holder / Concessionaire shall, if the City so elects, and upon tender by the City, defend the same at the Permit holder / Concessionaire's sole cost and expense, and Permit Holder/ Concessionaire shall promptly satisfy any judgment adverse to the City, and the Permit Holder / Concessionaire, jointly, and reimburse the City of Ashland, its Commissions, Boards and Committees, officers, employees, agents, contractors, successors and assigns for any loss, cost damage or expense, including attorney fees, suffered or incurred. The Permit holder / Concessionaire is not required to indemnify for damages caused solely by the negligence of the City.

The obligation to indemnify is expressly understood to survive termination of the permit / license / concession for any reason, and includes reasonable attorneys' fees, including attorneys' fees on appeal, and investigation costs and all other reasonable costs, expenses and liabilities incurred by City or its attorney from the first notice that any claim or demand is to be made or may be made.

Termination: Notwithstanding any other provision hereof to the contrary, this permit / license / concession may be terminated as follows:

- a. This permit / concession may be terminated by mutual consent by both parties at any time, or by either party upon fifteen (15) days notice personally delivered or upon deposit in the United States mail, postage fully prepaid, certified, return receipt requested, addressed to the Party.
- b. The City shall have the right in its sole discretion, to immediately terminate this Permit / Concession at any time, with cause, by giving written notice to Permit holder / Concessionaire. "Cause" means any failure to perform any of the



obligations or requirements of this permit / concession, including but not limited to compliance with the Code, any specified default provision or any other violation of the terms of this Permit by Permit holder / concessionaire.

- c. Notwithstanding any other provision in this agreement, City may terminate this agreement immediately upon Permit holder / Concessionaire's failure to have in full force and effect any insurance required by this Agreement. The City may provide the Concessionaire with an opportunity to secure replacement insurance, (not to exceed 48 hours) but the permit area shall not be used, occupied, operated or maintained for any reason whatsoever while Permit holder/ concessionaire's required insurance protection is not in full force and effect.
- d. Notwithstanding any other provision in this agreement, in the event of termination, City may at its option and sole discretion, direct Concessionaire to remove any or all improvements, equipment, and furnishings installed pursuant to this Agreement.

Default:

The Permit Holder / Concessionaire may be declared in default by the City if:

- Permit holder / concessionaire vacates, deserts or abandons the permit area for two or more consecutive weeks; or
- Permit holder / concessionaire violates any material provision of this permit/concession, including but not limited to, those provisions specifically identified as triggering default, violation, revocation, termination or breach;
- Permit holder / concessionaire fails to keep the premises in a safe and sanitary condition or operates the concession in a manner which is hazardous or offensive to the public; or
- Permit holder / concessionaire fails to comply with any of the statutes, ordinances, rules, orders, regulations or requirements of the federal, state, county, city government, including specifically city regulations, health department regulations, fire and building codes and planning laws and conditions; or
- Permit holder/ concessionaire becomes insolvent; or
- A voluntary or involuntary petition in bankruptcy is filed by or against the Permit holder / concessionaire; or
- A receiver is appointed to take charge of the Permit holder / concessionaire affairs, or
- Permit holder / concessionaire fails to maintain compliance with requirements concerning payment of taxes, fees and charges, or Permit holder / concessionaire fails to provide access to adequate financial records. City will protect the confidentiality of the concessionaire's financial records to the extent allowed by law except where access to such records is material to pending litigation.

In such event of a default(s) as set forth above, if permit holder / concessionaire has failed to remove its property from the permit / concession area, whether or not the permit / concession is terminated or not, the Permit holder / concessionaire agrees to surrender to the City the entire permit area immediately upon the completion of a 15 day notice of default /cure period and the City may order vacation of the premises or immediately thereafter remove the permit holder/ concessionaire or any other person who may be occupying the premises without resort to courts for an Order sanctioning such action. Removal includes complete removal of personal property using City forces, or pursuant to this Permit and permit holder / concessionaire expressly consents to such removal. City is expressly authorized to remove all Permit holder / Concessionaire property from the premises at the permit holder / concessionaire's expense. The City is relieved and discharged from any and all loss, damage or claim occasioned by such removal, and shall not be responsible for safe-keeping of property so removed.

SURRENDER:

Upon the expiration of the original term, permit holder / Concessionaire shall surrender to the City the premises in as good or better condition and order as was originally received, except as allowed for within the typical wear and tear. Surrender is considered complete only upon approval of site conditions as determined by the City. City will inspect site within 48 hours written notice by Permit holder / Concessionaire of readiness for inspection. The 48-hour period does not apply to Saturday, Sunday, or any recognized City holiday.

Upon expiration, abandonment, termination, or cancellation of this Agreement for any cause, permit holder / concessionaire shall immediately quit the premises and shall remove its personal property not affixed to the land and leave the site in a clean and tidy condition acceptable to the City. Any personal property not removed within that time shall be deemed abandoned and shall become at once the property of the City. Any buildings, alterations, or other improvements affixed to the land, except for movable furniture and trade fixtures, shall become a part of the land and shall belong to the City upon the expiration or termination of this agreement for any cause. In the event of termination of this contract prior to its expiration for reasons other than breach, or default on the part of Permit holder / Concessionaire or other than abandonment by Permit holder / concessionaire or other than for cause, or other than wrongful termination or repudiation, City shall pay Permit holder / concessionaire such sums as the parties agree represent the reasonable value of improvements made by Permit holder/ concessionaire on the property and existing at the time of termination of the agreement, provided such improvements were made with authorization. Permit holder / concessionaire shall in such event accept said sum in complete and full satisfaction of any claim. If the parties cannot agree on the value, the matter shall be resolved by reference to a mediator.



Status of Concessionaire. Permit holder / concessionaire is not to be considered an agent or employee of the City and is not entitled to participate in any pension plan, insurance, bonus, or similar benefits City provides its employees. Permit holder/ concessionaire will not be eligible for any federal social security, state worker's compensation, unemployment insurance, or Public Employees Retirement System benefits from this permit. Nothing in this Agreement shall be construed to render the City in any way or for any purpose a partner, joint venturer, or associate in any relationship with Permit holder / Concessionaire other than that of Licensor and Licensee / Concessionaire, nor shall this Agreement be construed to authorize either party to act as agent for the other

Entry for Inspection. Permit holder / concessionaire consents to and provides an irrevocable right of entry to permit inspection by City personnel, City contractors, City authorized representatives and other governmental authorities for purposes of regulatory compliance inspection and determination of compliance with this permit, federal, state and local laws as well as the general condition of premises, equipment and facilities. Entry by City personnel, City contractors, representatives and other governmental authorities on official business shall not be deemed a trespass. City also reserves to itself the unqualified and irrevocable right-of-entry for the inspection of the premises to determine compliance with this Agreement and for emergency purposes.

Notice. Except as otherwise expressly provided by law, any and all notices or other communications required or permitted by this Permit or by law to be served on or given to a party of this Agreement shall be in writing and shall be deemed duly served and given when personally delivered to the party, any managing employee of the party, or, in lieu of personal service, when deposited in the United States mail, first class postage prepaid, addressed to the appropriate party as follows:

City: City of Ashland
Kelly Madding, City Administrator
20 East Main Street
Ashland, Oregon 97520
(Telephone 541-488-2100, Fax: 541-488-5311)

Copy to: Paula Brown, Public Works Director
20 East Main Street
Ashland, Oregon 97520
(Telephone: 541-488-5587, Fax: 541-488-6006)

Permit holder: See address on face of permit

And when so addressed, shall be deemed given upon deposit in the United States Mail, postage prepaid. In all other instances, notices, bills, and payments shall be deemed given at the time of actual delivery. Changes may be made in the names and addresses of the person to whom notices, bills, and payments are to be given by giving notice pursuant to this paragraph.

Assignment/Delegation. Neither party shall assign, sublet, transfer any interest in, or delegate any duty under this Permit/concession without the written consent of the other, and no assignment or delegation shall be of any force or effect whatsoever unless and until the other party has so consented. Any attempt to assign, sublet, transfer any interest in, or delegate any duty under this Permit / concession without the written consent of the other, shall result in default and the license and concession authorized pursuant to this Agreement may then be immediately be revoked and terminated

Emergency. Nothing in this Agreement prohibits or restricts the power of the City of Ashland governing body, the Mayor, the City Administrator or other City Official from exercising regulatory power or other authority over City property pursuant to the City emergency operations ordinance, AMC Chapter 2.62.

No Waiver. Failure or delay of the City to require performance of any provision of this permit and contract shall not limit, waive or prejudice the right of the City to later enforce that or any other provision of this Agreement. The enforcement provisions of this permit are non-exclusive, and enforcement by the City may be by any means provided by law, including but not limited to criminal prosecution for violation of city ordinance pursuant to City or state law.

Governing Law. This Agreement, and all matters relating to this Agreement, shall be governed by the laws of the State of Oregon in force at the time any need for interpretation of this Agreement or any decision or holding concerning this Agreement arises. The parties to this Agreement do not intend to confer on any third party any rights under this Agreement.

Severability. If any provision of this Permit/ concession is held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect unimpaired by the holding.

