

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVERS' LICENSE NUMBER.

After Recording Return to:

City of Frisco
Attention: Right of Way Manager
6101 Frisco Square Boulevard
Frisco, Texas 75034

ENCROACHMENT AND LICENSE AGREEMENT

THIS ENCROACHMENT AND LICENSE AGREEMENT ("Agreement") is made and entered into by and between the CITY OF FRISCO, TEXAS, a home-rule municipality ("City"), and _____, a _____ ("Licensee"). City and Licensee are sometimes referred to collectively as the "parties" or individually as a "party."

WHEREAS, City has existing property rights in certain real property by virtue of that certain _____ ("Plat"), recorded on _____, under Instrument No. _____, in the Real Property Records, _____ County, Texas, as more particularly described and depicted in the Plat ("Property"). The Plat, which more particularly describes depicts the Property, is incorporated herein by reference for all purposes; and

WHEREAS, Licensee desires to install, construct, operate, reconstruct, repair and maintain _____ ("Encroaching Facility"), as more particularly described and depicted in Exhibit A, attached hereto and incorporated herein by reference for all purposes, within the boundaries of the Property; and

WHEREAS, in exchange for the consideration set forth below, City has agreed to grant a license to permit the encroachment of the Encroaching Facility on the Property subject to the terms and conditions of this Agreement and provided that Licensee first complies with the City's ordinances relating to the construction and use of the Encroaching Facility.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and Licensee do hereby agree as follows:

1. Incorporation of Recitals. The representations, covenants and recitations set forth in the foregoing recitals of this Agreement are true and correct and are incorporated into the body of this Agreement.
2. Location of Encroaching Facility. City hereby grants a nonexclusive license to Licensee, authorizing Licensee to, at its own cost and expense, locate, construct,

operate, reconstruct, maintain and repair the Encroaching Facility within that portion of the Property as generally depicted and described in Exhibit A, subject to the terms and conditions of this Agreement. Any modification, alteration, expansion or addition to the Encroaching Facility, or any portion thereof, is prohibited without the prior written consent of City. In particular, Licensee shall not modify the Encroaching Facility in any manner that results in the Encroaching Facility: (a) occupying more space within the Property than as approved by this Agreement; (b) extending further into the Property than as approved by this Agreement; or (c) changing the Encroaching Facility's location within the Property to be outside the area approved by this Agreement. Licensee shall ensure that Licensee and any third party and/or contractor of Licensee engaged in locating, constructing, reconstructing, maintaining and/or repairing the Encroaching Facility abide by the terms and conditions set forth herein and any permit governing the Encroaching Facility. Licensee shall, at its own cost and expense, provide a copy of this Agreement to any third party and/or contractor of Licensee engaged in locating, constructing, operating, reconstructing, maintaining and/or repairing the Encroaching Facility. Notwithstanding anything to the contrary herein, nothing in this Agreement shall be deemed to waive any applicable requirement of the City's ordinances or regulations applicable to the Encroaching Facility, and Licensee shall be responsible for obtaining a permit, if required under the City's ordinance, prior to the installation or construction of the Encroaching Facility.

3. Restrictions on Use of Property. In using the Property for the purposes described herein, Licensee shall, at its own cost and expense, comply with all applicable laws, rules, regulations and requirements, as they exist, may be amended or in the future arising, including but not limited to, City's ordinances, and shall promptly execute and fulfill all orders and requirements imposed by City or other governmental authorities for the correction, prevention and abatement of nuisances or Code violations in, on or connected with the Encroaching Facility. At the conclusion of any work in connection with the Encroaching Facility, Licensee shall ensure that any third party and/or contractor of Licensee engaged in such work shall remove all debris and other materials from the Property and restore the same to substantially the same condition it was in prior to the commencement of the work thereon or in proximity thereto, with the exception of the encroachment permitted herein. Licensee shall ensure that any third party and/or contractor of Licensee engaged in locating, constructing, operating, reconstructing, maintaining and/or repairing the Encroaching Facility does not, and shall not itself, place trash dumpsters, toxic or hazardous substances or flammable material in or on the Property. Additionally, Licensee shall not place in or on the Property any other improvements unless approved in advance in writing by City. Any modification, alteration, expansion or other addition to the Encroaching Facility, or any portion thereof, is prohibited without the prior written consent of City
4. Maintenance of Encroaching Facility. Licensee shall, at Licensee's sole cost and expense, maintain the Encroaching Facility in good condition and repair. City will

not, under any circumstance, be responsible for any costs, whatsoever, of construction, reconstruction, operation, maintenance, repair or removal of the Encroaching Facility. If City notifies Licensee of any deficiencies in any such construction, reconstruction, operation, maintenance, repair or removal of the Encroaching Facility, Licensee shall make the necessary repairs within the earlier of (a) thirty (30) days after the date of such notice or the (b) another date as determined by City and Licensee in writing. If City notifies Licensee of any deficiencies in any such construction, reconstruction, operation, maintenance, repair or removal of the Encroaching Facility, and Licensee shall thereafter fail to complete such construction, reconstruction, operation, maintenance, repair or removal within the required time period, then City may require Licensee to promptly remove the Encroaching Facility or contract, at Licensee's sole cost and expense, for the construction, reconstruction, operation, maintenance, repair or removal of the Encroaching Facility.

5. Removal of Encroaching Facility. City is entitled to remove all or a portion of the Encroaching Facility as reasonably necessary to construct, reconstruct, maintain or repair public improvements within the affected Property. City will notify Licensee of any intent to remove all, or a portion, of the Encroaching Facility, and upon receiving such notice, Licensee shall ensure that the requested removal is made within the earlier of (a) thirty (30) days after the date of such notice or (b) another date as determined by City and Licensee in writing. If City notifies Licensee of its intent to remove all, or a portion, of the Encroaching Facility, and Licensee shall thereafter fail to complete the removal within the required time period, then City may require Licensee to promptly remove the Encroaching Facility. Notwithstanding anything to the contrary herein, if the removal is necessitated by an emergency, no notice is required. If so removed, City has no obligation to replace the affected portions of the Encroaching Facility upon completion of such work.
6. Risk and Liability. Licensee assumes all risks and liability resulting or arising from or relating to Licensee's use of the Property, the Encroaching Facility, the existing condition or location of the Property or the existing state of maintenance, repair or operation of the Property. Licensee agrees and acknowledges that City shall not be liable, whatsoever, for any damage to the Encroaching Facility as a result of City's use or enjoyment of the rights provided it in the Property. Any City property and/or infrastructure damaged or destroyed by Licensee or its agents, employees, representatives, invitees, contractors, subcontractors and/or any other third parties for whom Licensee is legally responsible, shall be repaired or replaced by City at Licensee's sole cost and expense and payment is due immediately upon Licensee's receipt of an invoice from City.
7. **INDEMNIFICATION. LICENSEE AGREES TO RELEASE, DEFEND, INDEMNIFY AND HOLD HARMLESS CITY, ITS COUNCIL MEMBERS, OFFICERS, AGENTS, REPRESENTATIVES, EMPLOYEES AND ANY**

OTHER THIRD PARTIES FOR WHOM CITY IS LEGALLY RESPONSIBLE FROM AND AGAINST ANY AND ALL CLAIMS, LAWSUITS, JUDGMENTS, COSTS, AND EXPENSES FOR PERSONAL INJURY (INCLUDING DEATH), PROPERTY DAMAGE (INCLUDING LOSS OF USE), LOSSES, DEMANDS, EXPENSES AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES (INCLUDING ATTORNEYS' FEES AND EXPENSES INCURRED IN ENFORCING THIS INDEMNITY), OR OTHER HARM ARISING OUT OF, OR OCCASIONED BY, ANY NEGLIGENCE, GROSS NEGLIGENCE AND/OR WILLFUL MISCONDUCT, WHETHER BY ACT OR OMISSION, OF ANY LICENSEE OR ITS AGENTS, REPRESENTATIVES, EMPLOYEES, SEPARATE CONTRACTORS AND/OR SUBCONTRACTORS AND/OR THIRD PARTIES FOR WHOM EACH SUCH LICENSEE IS LEGALLY RESPONSIBLE, REGARDLESS OF ANY JOINT OR CONCURRENT NEGLIGENCE OF CITY.

IN ITS SOLE DISCRETION, CITY SHALL HAVE THE RIGHT TO APPROVE OR SELECT DEFENSE COUNSEL TO BE RETAINED BY LICENSEE IN FULFILLING ITS OBLIGATION HEREUNDER TO DEFEND AND INDEMNIFY CITY, UNLESS SUCH RIGHT IS EXPRESSLY WAIVED BY CITY IN WRITING. CITY RESERVES THE RIGHT TO PROVIDE A PORTION OR ALL OF ITS OWN DEFENSE; HOWEVER, CITY IS UNDER NO OBLIGATION TO DO SO. ANY SUCH ACTION BY CITY IS NOT TO BE CONSTRUED AS A WAIVER OF LICENSEE'S OBLIGATION TO DEFEND CITY OR AS A WAIVER OF LICENSEE'S OBLIGATION TO INDEMNIFY CITY PURSUANT TO THIS AGREEMENT. LICENSEE SHALL RETAIN CITY-APPROVED DEFENSE COUNSEL WITHIN SEVEN (7) BUSINESS DAYS OF CITY'S WRITTEN NOTICE THAT CITY IS INVOKING ITS RIGHT TO INDEMNIFICATION UNDER THIS AGREEMENT. IF ANY LICENSEE FAILS TO RETAIN COUNSEL WITHIN SUCH TIME PERIOD, CITY SHALL HAVE THE RIGHT TO RETAIN DEFENSE COUNSEL ON ITS OWN BEHALF, AND LICENSEE SHALL BE LIABLE FOR ALL COSTS INCURRED BY CITY.

THE PROVISIONS OF THIS SECTION 7 ARE SOLELY FOR THE BENEFIT OF THE PARTIES HERETO AND NOT INTENDED TO CREATE OR GRANT ANY RIGHTS, CONTRACTUAL OR OTHERWISE, TO ANY OTHER PERSON, ENTITY OR THIRD PARTY. THE RIGHTS AND OBLIGATIONS CREATED BY THIS SECTION 7 SHALL SURVIVE TERMINATION OF THIS AGREEMENT.

- 8. No "Permit." NOTHING CONTAINED IN THIS AGREEMENT SHALL CONSTITUTE A "PERMIT" AS DEFINED IN CHAPTER 245, TEX. LOC. GOV'T CODE, AND NOTHING IN THIS AGREEMENT SHALL BE CONSIDERED TO PROVIDE THE CITY WITH FAIR NOTICE OF A**

PROJECT. LICENSEE WAIVES ANY STATUTORY CLAIM UNDER CHAPTER 245 OF THE TEX. LOC. GOV'T CODE BASED ON THIS AGREEMENT. THIS SECTION SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

9. Default/Remedies. If Licensee, its employees, agents, representatives, contractors, subcontractors and/or any other third parties for whom Licensee is legally responsible, defaults under any of the terms and conditions of this Agreement and such default continues for a period of five (5) days after City notifies Licensee of such default in writing, City may, at its sole election and in addition to any other remedies it may exercise, terminate this Agreement, and upon such termination, all of Licensee's rights hereunder shall cease and terminate. This Agreement shall also terminate upon Licensee's abandonment of the Encroaching Facility.
10. Miscellaneous Provisions.
- a. Notices. Any notice provided or permitted to be given under this Agreement must be in writing and may be served by depositing same in the United States Mail, addressed to the party to be notified, postage pre-paid and registered or certified with return receipt requested; by electronic mail, with documentation evidencing the addressee's receipt thereof; or by delivering the same in person to such party via hand-delivery service, or any courier service that provides a return receipt showing the date of actual delivery of same to the addressee thereof. Notice given in accordance herewith shall be effective upon receipt at the address of the addressee. For purposes of notification, the addresses of the Parties shall be as follows:

If to City, addressed to it at:

City of Frisco
Attention: Wesley S. Pierson, City Manager
6101 Frisco Square Boulevard, 5th Floor
Frisco, Texas 75034
Telephone: (972) 292-5105
Email: wpierson@friscotexas.gov

with a copy to:

Abernathy, Roeder, Boyd & Hullett, P.C.
Attention: Ryan D. Pittman
1700 Redbud Blvd., Suite 300
McKinney, Texas 75069
Telephone: (214) 544-4000
Email: rpittman@abernathy-law.com

If to Licensee, addressed to it at:

- b. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to the matters contained herein and may not be modified or terminated except upon the provisions hereof or by the mutual written agreement of the parties.
- c. Governing Law; Venue. The laws of the State of Texas shall govern the interpretation, validity, performance and enforcement of this Agreement, without regard to conflict of law principles. This Agreement is performable in Collin County, Texas, and the exclusive venue for any action arising out of this Agreement shall be a court of appropriate jurisdiction in Collin County, Texas.
- d. Counterparts. This Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes. An electronic mail signature will also be deemed to constitute an original if properly executed and delivered to the other party.
- e. Authority to Execute. Each party represents and warrants to the other that it has the full power and authority to enter into and fulfill the obligations of this Agreement. The respective signatories to this Agreement, by affixing its signatories hereto, warrant and represent that they have the authority to bind its respective parties as duly authorized representatives thereof.
- f. Savings/Severability. In the event that a term, condition or provision of this Agreement is determined to be invalid, illegal, void, unenforceable or unlawful by a court of competent jurisdiction, then that term, condition or provision shall be deleted and the remainder of the Agreement shall remain in full force and effect as if such invalid, illegal, void, unenforceable or unlawful provision had never been contained in this Agreement.
- g. Representations. Each party represents that it has carefully read this Agreement, knows the contents hereof, has consulted with an attorney of its choice regarding the meaning and effect hereof and is signing the same solely of its own judgment.
- h. No Third Party Beneficiaries. The parties do not intend that this Agreement be construed as creating any right in any third party not a signatory to this Agreement, and the parties do not intend to create any third party beneficiaries by entering into this Agreement.
- i. Indemnification. The parties agree that the indemnity provisions set forth in Section 7 herein are conspicuous, and the parties have read and understood the same.

- j. Waiver. Waiver by either party of any breach of this Agreement, or the failure of either party to enforce any of the provisions of this Agreement, at any time, shall not in any way affect, limit, or waive such party's right thereafter to enforce and compel strict compliance.
- k. Immunity. The parties acknowledge and agree that, in executing and performing this Agreement, City has not waived, nor shall be deemed to have waived, any defense or immunity, including governmental, sovereign and official immunity, that would otherwise be available to it against claims arising in the exercise of governmental powers and functions. By entering into this Agreement, the parties do not create any obligations, express or implied, other than those set forth herein.
- l. Miscellaneous Drafting Provisions. This Agreement shall be deemed drafted equally by the parties. The language of all parts of this Agreement shall be construed as a whole according to its fair meaning, and any presumption or principle that the language herein is to be construed against either party shall not apply. Headings in this Agreement are for the convenience of the parties and are not intended to be used in construing this document.

[Signature page follows.]

IN WITNESS WHEREOF, the parties have executed this Agreement and caused this Agreement to be effective when all the parties have signed it. The date this Agreement is signed by the last party to system it (as indicated by the date associated with that party's signature below) will be deemed the effective date of this Agreement.

CITY:

CITY OF FRISCO, TEXAS,
a home-rule municipality

By: _____
Wesley S. Pierson, City Manager
Date: _____

LICENSEE:

_____,
a _____

By: _____
Printed Name: _____
Its: _____
Date: _____

THE STATE OF TEXAS §
 §
COUNTY OF COLLIN §

BEFORE ME, the undersigned authority, on this day personally appeared Wesley S. Pierson, known to me to be the person whose name is subscribed to the foregoing instrument; he acknowledged to me that he is the city manager and duly authorized representative of the CITY OF FRISCO, TEXAS, a Texas home-rule municipality, and that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of the CITY OF FRISCO, TEXAS.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 20__.

Notary Public in and for the State of Texas
My Commission Expires: _____

STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____ known to me to be the person whose name is subscribed to the foregoing instrument; he acknowledged to me that he is the _____ and duly authorized representative of _____, a _____, and that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of _____.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 20__.

Notary Public in and for the State of Texas
My Commission Expires: _____

EXHIBIT A