

ENCROACHMENT LICENSE AGREEMENT

Addresses:

120 Water Street
123 Water Street
Naperville, IL 60540

PINs:

07-13-442-024
07-13-440-009

Return to: City Clerk

City of Naperville
400 South Eagle Street
Naperville, IL 60540 Attn: TED

(for Recorder’s Use Only)

ENCROACHMENT LICENSE AGREEMENT

[Water Street Overhead Lights]

THIS ENCROACHMENT LICENSE AGREEMENT (hereinafter referred to as “**Agreement**”) is made this _____ day of _____, 2022 (hereinafter “**Effective Date**”) between the CITY OF NAPERVILLE (“**City**” or “**City of Naperville**”), an Illinois municipal corporation and home rule unit of local government (hereinafter “**Licensor**”) with an office located at 135 Water Street, 4th Floor, Naperville, Illinois 60540, and Water Street Property Owner, LLC, (hereinafter “**Licensee**”) with an address of 401 South Main Street, Suite 300, Naperville, Illinois. The City and Licensee are together hereinafter referred to as “**Parties**” and individually as “**Party**”.

WITNESSETH THAT:

- A. WHEREAS,** Licensee owns the real property legally described on **Exhibit A** and all structures and other improvements thereon (hereinafter “**Licensee’s Property**”).
- B. WHEREAS,** Licensor owns the Water Street right-of-way adjacent to the Licensee’s Property (hereinafter “**Licensor’s Property**”).
- C. WHEREAS,** Licensee is seeking to install LED string lights over portions of the Water

Street right-of-way as described herein (hereinafter “**Licensee’s Encroachments**” or “**Overhead LED Lighting**”).

- D. WHEREAS**, Licensee’s Encroachments will encroach on a portion of Licensor’s Property (hereinafter “**Encroachment Areas**”) as described herein.
- E. WHEREAS**, Licensor and Licensee agree that the License granted hereunder is given at the discretion of Licensor and in no way shall be construed as giving Licensee a real property interest in Licensor’s Property. By execution of this Agreement, Licensee disclaims any possible claim based on adverse possession of any portion of Licensor’s ROW.
- F. WHEREAS**, Licensor has determined that, subject to strict compliance with the terms and conditions set forth and referenced herein, Licensee’s Encroachments will not adversely impact the Encroachment Areas or impair the public health, safety and welfare.
- G. WHEREAS**, Licensee and Licensor consent and agree to Licensee’s Encroachments as described herein subject to strict compliance with the terms and conditions set forth and referenced herein.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and in the exercise of the City’s home rule authority, the Parties hereto agree as follows:

1. **Recitals Incorporated**. The foregoing Recitals are hereby incorporated herein and made part hereof as though fully set forth herein.
2. **License**. To the extent of its authority Licensor does hereby grant to Licensee, and Licensee’s successors and assigns, a nonexclusive and revocable license for the benefit of Licensee’s Property to encroach upon and to occupy and use Licensor’s Property in the manner set forth herein for the License Purpose described below:

2.1 **License Purpose**: Installation, repair, replacement, and maintenance of overhead LED lighting (“**Licensee’s Encroachments**” or “**Overhead LED Lighting**”) comprised of LED string lights crossing back and forth over portions of the Water Street right-of-way in order to create a canopy effect as depicted on **Exhibit B**. Licensee’s Encroachments will be comprised of changeable colored LED string lights enclosed in plastic weatherproof coverings which will remain in place year-round. The Overhead LED Lighting will span a distance of forty (40) feet east of the Water Street pedestrian bridge (“**Pedestrian Bridge**”) and forty (40) feet west of the Pedestrian Bridge as depicted on **Exhibit B**. The Overhead LED

Lighting will not extend below the lowest point of the Pedestrian Bridge and will maintain at least 14'9" of clearance. Subject to permit approval by the City, Overhead LED Lighting will be attached to 20 guide wires (cables) crossing the Water Street right-of-way. The cables will be anchored to the building façade walls of 120 and 120 Water Street which buildings are owned by Licensee in a manner approved by the City. Lighting control boxes in locations approved by the City will be mounted to the walls of said buildings. All electrical service connections will be placed next to the lighting control boxes (no less than 14'9" above the street) to prevent tampering.

The following exhibits are attached hereto and made a part hereof:

- a. **Exhibit A**: A legal description of the Licensee's Property.
- b. **Exhibit B**: A Site Plan depicting the location of Licensee's Encroachments and the Encroachment Areas and specifying the type of LED lighting that will be used.

3. **Limitations.**

3.1 Licensee's Encroachments shall comply with:

- 3.1.1 all applicable provisions of the Naperville Municipal Code as amended from time to time, including but not limited to all provisions set forth or referenced therein pertaining or relating in any way to electric installations; and
- 3.1.2 permits pertaining to Licensee's Encroachments issued by the City of Naperville Transportation, Engineering and Development Department; and
- 3.1.3 All other applicable laws, rules, and regulations, as amended from time to time.

3.2 The License herein granted shall be limited to the License Purpose described in Section 2.1 above.

3.3 The Parties agree that this grant of License to encroach shall not otherwise modify, eliminate, or diminish requirements applicable to use of City right-of-way and further agree that this Grant of License to encroach is also subject to any rights of third parties in the Licensor's Property, and Licensor makes no warranty regarding Licensee's right to use the Encroachment Areas except as regards to the interest of Licensor as provided herein.

3.4 Licensee accepts the Encroachment Areas in their condition **AS-IS** as of the Effective Date of this Agreement.

3.5 Within fifteen (15) calendar days of a written request from Licensor, Licensee shall, at its sole cost, temporarily move or relocate all or a portion of Licensee's Encroachments to permit work or other activity within the Encroachment Areas. Licensee assumes all risk in the placement of Licensee's Encroachments and shall be responsible for removal or relocation of Licensee's Encroachments as requested by Licensor. If Licensee fails to move Licensee's Encroachments as requested, Licensor may remove

Licensee's Encroachments and Licensee shall be responsible to reimburse Licensor for all costs related thereto. Licensor shall make reasonable efforts to avoid disturbance of Licensee's Encroachments; however, in an emergency situation which Licensor determines at its discretion warrants removal of all or a portion of Licensee's Encroachments, Licensor shall not be required to provide Licensee with fifteen (15) calendar days' notice, but may give lesser notice or immediately remove Licensee's Encroachments as appropriate. Licensee assumes all risk and responsibility in such situations.

4. Term.

4.1 This Agreement shall take effect upon the Effective Date and renew annually thereafter unless terminated by either Party as provided herein.

5. Defense, Indemnification, Hold Harmless.

5.1 Licensee assumes all liability and shall defend, indemnify, hold harmless and compensate Licensor, its officers, agents and employees for any injury or damage to person or property occasioned by or arising in connection with the installation or use of Licensee's Encroachments. Licensee further agrees to defend (with legal counsel approved of by Licensor, which approval shall not be unreasonably withheld), indemnify, and save harmless Licensor and its officers, agents and employees from and against: (i) any claim or action against Licensor, its officers, agents, or employees, arising out of or related to this License, Licensee's Encroachments, and the condition of the Encroachment Areas, and any act or omission of Licensee, Licensee's agents or assigns, or any independent contractor acting on Licensee's behalf with respect thereto; and (ii) any claim or expenses incurred by Licensor in enforcing the terms and provisions of this License against Licensee, including but not limited to reasonable attorney's fees (whether in-house or outside counsel) and costs.

6. Insurance.

6.1 The City of Naperville and its officers, agents, and employees shall be named as additional insureds on Licensee's, and Licensee's contractors' and subcontractors' insurance policies for workers compensation, general liability, and automobile liability for any work or activities to be performed within the Encroachment Areas. Licensee shall require any contractor or subcontractor performing work related to the License Purpose set forth herein to waive subrogation which any insurer of said contractor or subcontractor may acquire by virtue of the payment of any loss and to obtain any endorsement that may be necessary to effect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City of Naperville for all work performed hereunder by any contractor or subcontractor and their respective employees, agents, subconsultants and subcontractors. Copies of additional insured certificates and additional insured endorsements showing the policy limits and the coverage afforded the City and its officers, agents, and employees shall be provided by Licensee to the City of Naperville prior to installation Licensee's Encroachments.

7. Assignment and Transfer.

7.1 Lessee shall not assign this Lease Agreement to any entity without the prior written

consent of Lessor, which may be withheld in Lessor's sole discretion. Further, if Licensee transfers, assigns, or conveys an interest in any part of Licensee's Property (other than a mortgage interest), Licensee and any individual or entity which acquires an interest in all or any part of Licensee's Property, shall be jointly and severally bound by the obligations set forth herein. Notwithstanding the foregoing, Licensor shall have the sole right to enforce the terms of this Agreement solely against Licensee and/or against any other individual or entity which has acquired an interest in Licensee's Property.

8 Maintenance and Repair.

8.1 Licensee shall maintain Licensee's Encroachments and the Encroachment Areas in a clean, slightly, and aesthetically appealing manner. Upon demand from Licensor, Licensee shall immediately correct any defect in Licensee's Encroachments which, in the sole determination of Licensor, presents an unsightly or unsafe condition. Such actions shall be accomplished to the satisfaction of Licensor. While nothing contained herein shall impose upon Licensor any duty or obligation to maintain the Encroachment Area or to effect any repair or maintenance of Licensee's Encroachments, Licensor shall have the right to enter upon the Encroachment Areas to remove, repair, maintain and/or clean Licensee's Encroachments and/or the Encroachment Area when, in the sole determination of the Licensor, such action(s) are appropriate to protect the public health, welfare, safety, or aesthetics of Licensee's Encroachments and/or the Encroachment Areas. Within thirty (30) days of receipt of an invoice for such services from the Licensor, Licensee shall remit payment in full to Licensor. If payment is not received in full within forty-five (45) days of issuance of said invoice, Licensee agrees that Licensor shall have the right to record a lien against Licensee's Property for all amounts due, plus interest, and all recording and reasonable attorney's fees.

9 Termination.

9.1 This License may be terminated by either Party as follows:

9.1.1 Licensor may terminate this License upon one thirty (30) days' written notice if it determines that:

(i) Licensee's Encroachments are not properly maintained;

(ii) the existence of this License or Licensee's Encroachments presents a danger or impediment to the public's health, safety or welfare;

(iii) Licensee's Encroachments, or any part thereof, interfere with or will potentially interfere with Licensor's use or proposed use of Licensor's Property;

(iv) Licensee ceases using the Encroachment Areas for all or any portion of Licensee's Encroachments;

(v) or for any other reason determined to be necessary and appropriate by Licensor.

9.1.2 Licensee may terminate this License upon thirty (30) days' written notice provided such termination shall not be effective until Licensee's Encroachments are removed, and the Encroachment Areas restored to the

satisfaction of Licensor.

9.2 If this Agreement is terminated, Licensee shall cause the removal of Licensee's Encroachments and shall return the Encroachment Areas, as well as the structures to which Licensee's Encroachments were attached, to substantially the same, or better, condition as of the Effective Date of this Agreement as determined by the City. In the event Licensee fails to cause such removal and restoration within sixty (60) days of notice of termination by Licensor, Licensor shall have the right to enter upon the Encroachment Areas and remove Licensee's Encroachment. All costs of said removal as provided herein shall be borne by Licensee and shall be paid to Licensor within sixty (60) days of receipt of an invoice therefor. Licensee agrees that Licensor shall have the right to record a lien against Licensee's Property for all amounts due, plus interest and recording costs, if payment in full of such invoice is not timely made.

10. General Provisions.

- 10.1 Binding Effect. Unless otherwise terminated as provided herein, the provisions and conditions of this Agreement shall bind and inure to the benefit of the heirs, transferees, successors and assigns of the respective Parties hereto, and shall run with the title of Licensee's Property.
- 10.2 Attorney's Fees. Licensee shall be responsible for payment of Licensor's reasonable attorneys' fees and costs associated with enforcement of any aspect of this Agreement unless there is a finding in Licensee's favor rendered by a court of competent jurisdiction, or unless Licensor voluntarily dismisses any legal claim.
- 10.3 Choice of Law/Venue. The laws of the State of Illinois shall govern the terms of this Agreement both as to interpretation and performance. Venue for any action arising out of the terms or conditions of this License shall be in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois.
- 10.4 Notice. Any notice required to be given by this Agreement shall be deemed sufficient if made in writing and sent by fax (with verbal confirmation of receipt) or by mail, certified mail, return receipt requested, or by personal service to the persons and addresses indicated below or to such addresses and persons as either party hereto shall notify the other party of in writing pursuant to the provisions of this subsection.

For the Licensor:

City of Naperville
400 S. Eagle Street
Naperville, IL 60540
Attention: Legal Department

For the Licensee:

Water Street Property Owner , LLC
135 Water Street, 4th Floor
Naperville, IL 60540
ATTN: Property Manager

- 10.5 Recordation. A copy of this Agreement shall be recorded with the DuPage County Recorder.
- 10.6 Severability. It is mutually understood and agreed that all agreements and covenants herein are severable and that in the event any of them shall be held to be invalid by any court of competent jurisdiction, this Agreement shall be interpreted as if such invalid agreement or covenant were not contained herein.
- 10.7 Interpretation. This Agreement shall be construed without regard to the identity of the party who drafted the various provisions of this Agreement. Moreover, each and every provision of this Agreement shall be construed as though all parties to this Agreement participated equally in the drafting of this Agreement. As a result of the foregoing, any rule or construction that a document is to be construed against the drafting party shall not be applicable to this Agreement.
- 10.8 Entire Agreement. This Agreement sets forth and constitutes the entire agreement between the Parties with respect to the subject matter described herein and supersedes any and all prior agreements, understandings, promises, warranties, and representations made by each Party to the other concerning the subject matter.
- 10.9 Amendment. This Agreement may be modified only by a written document signed by the Parties.
- 10.10 Effective Date. The effective date (“**Effective Date**”) of this Agreement shall be the date on which it is fully executed by both parties.
- 10.11 Survival. The following provisions and paragraphs of this agreement shall survive any termination of this agreement, novation of this agreement granted herein: 1, 2, 3, 5, 7, 9.2, 10.1-10.4, and 10.6.
- 10.12 Authorizations. Each of the signatories to this Agreement represents and warrants that they are authorized to execute this Agreement on behalf of their respective Party and by such signature to bind that Party to this Agreement.

[Signature pages follow.]

Signatures on following pages.

IN WITNESS WHEREOF, the parties hereto have executed this Encroachment License Agreement as of the day and year first above written.

LICENSOR/CITY OF NAPERVILLE

By: _____
Douglas A. Krieger
City Manager

Attest:

By: _____
Pam Gallahue, Ph.D.
City Clerk

State of Illinois)
)
County of DuPage)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that Douglas A. Krieger, personally known to me to be the City Manager of the City of Naperville, and Pam Gallahue, Ph.D. personally known to me to be the City Clerk for the City of Naperville, appeared before me this day in person and acknowledged that they signed this instrument in their respective capacities as the City Manager and City Clerk of the City of Naperville pursuant to authority granted to them by the City Council of the City of Naperville.

Given under my hand and official seal this _____ day of _____, 2022.

(seal)

Notary Public

LICENSEE/ WATER STREET PROPERTY OWNER, LLC

WATER STREET PROPERTY OWNER, LLC, a Delaware limited liability company

By: Water Street Property Mezz, LLC,
a Delaware limited liability company, its Member

By: Marquette Water Street Venture, LLC
an Illinois limited liability company, its Member

By: MP Water Street District, LLC,
an Illinois limited liability company, its Manager

By: *Nicholas M. Ryan*

Name: Nicholas M. Ryan

Title: Manager

State of Illinois)
) ss
County of DUPAGE)

I, the undersigned, a Notary Public, in and for the County and State aforesaid, DO HEREBY CERTIFY that Nicholas M. Ryan, appeared before me this day in person and acknowledged the signature(s) set forth above.

Given under my hand and official seal this day 23rd of AUGUST, 2022.

Karen M. Rediger
(seal) Notary Public



This instrument prepared by: Legal Department, City of Naperville, 400 South Eagle Street, Naperville, IL 60540.

EXHIBIT A

LEGAL DESCRIPTION

LOT 1 OF THE WATER STREET DISTRICT NORTH PHASE BEING A SUBDIVISION IN THE SOUTHEAST QUARTER OF SECTION 13, TOWNSHIP 38 NORTH, RANGE 9, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED ON APRIL 2, 2015 AS DOCUMENT NO. R2015-033507 IN DUPAGE COUNTY, ILLIONIS ALONG WITH LOT 1 OF THE WATER STREET DISTRICT SOUTH PHASE, BEING A SUBDIVISION IN PART OF THE SOUTHEAST QUARTER OF SECTION 13, TOWNSHIP 38 NORTH, RANGE 9, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT RECRODED ON APRIL 2, 2015 AS DOCUMENT NO. R2015-033508, IN DUPAGE COUNTY, ILLINOIS.

ADDRESSES & PINS

120 WATER STREET, pin: 07-13-442-024

123 WATER STREET, Pin:07-13-440-009

EXHIBIT B SITE PLAN FOR WATER STREET RIGHT OF WAY STRING LIGHTS

 ENCROACHMENT AREAS

