

TEMPORARY RESOLUTION NO. 78-17

PERMANENT RESOLUTION NO. 80-17

A RESOLUTION AUTHORIZING THE SERVICE-SAFETY DIRECTOR TO ENTER INTO AN OCCUPANCY LICENSE AGREEMENT WITH THE INDIANA & OHIO RAILWAY COMPANY FOR THE CHEROKEE DRIVE DRAINAGE IMPROVEMENTS PROJECT

WHEREAS, an underground storm sewer is being constructed on Lawrence Street that will run underneath the railroad crossing just east of Wyandotte Street as a part of the Cherokee Drive Drainage Improvements Project; and

WHEREAS, in order to conduct this crossing, the operating railroad, The Indiana & Ohio Railway Company, is requiring that the City of Lancaster sign an Occupancy License Agreement, attached as Exhibit 1 hereto;

BE IT RESOLVED BY COUNCIL OF THE CITY OF LANCASTER, STATE OF OHIO

SECTION 1. The Service-Safety Director is hereby authorized to enter into an Occupancy License Agreement for the Cherokee Drive Drainage Improvements Project.

SECTION 2. That this resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed: 8/14/17 after 2nd reading. Vote: Yeas 9 Nays 0

Date Approved: 8/14/17

Clerk: Jessica Lee Sandy

Offered by: [Signature]

Second by: [Signature]

Requested by Water/Water Pollution Control Committee

[Signature]

President of Council

[Signature]

Mayor

OCCUPANCY LICENSE AGREEMENT

This Agreement ("Agreement") made this _____ day of _____, by and between **Indiana & Ohio Railway Company ("LICENSOR")**, whose address is **C/O Genesee & Wyoming Railroad Services, Inc., 13901 Sutton Park Dr. South, Suite 160, Jacksonville, FL 32224**, and **City of Lancaster ("LICENSEE")**, whose address is **104 E. Main Street, Lancaster, OH 43130**.

WHEREAS, LICENSEE has submitted a written request or application to LICENSOR requesting permission to occupy LICENSOR'S property located at or near the location specified in Section 1 below; and

WHEREAS, LICENSOR is willing to grant to LICENSEE the limited right to occupy LICENSOR'S property for the limited purpose described herein.

NOW THEREFORE, in consideration of these promises, the Agreement herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Section 1. LOCATION/DESCRIPTION.

1.1 LICENSOR hereby conveys to LICENSEE a license ("Occupancy") to operate upon, along or across LICENSOR'S property as indicated below:

- A. above ground below ground
- B. water pipeline sewer pipeline stormwater pipeline cable tv wireline fiber optic wireline
 communications wireline power wireline

located at or near Mile Post **58.8011, Lancaster Industrial Subdivision, Latitude: 39.709575, Longitude: -82.586976**, at or near **Lancaster**, County of **Fairfield**, State of **OH**. Nothing herein contained shall be construed as conferring any property right on LICENSEE.

1.2 Said Occupancy to be located and described as follows:

Underground Storm Sewer – 18" Carrier, 30" Casing including necessary appurtenances, structures and other related fixtures, equipment, marker posts or electric power ("**LICENSEE'S Facilities**"), placed as shown on **Exhibit A** attached hereto and made a part hereof. **LICENSEE'S Facilities** are subordinated to all matters of record. **LICENSOR reserves the right to use the area three (3) feet below ground level and to enter LICENSEE'S Facilities for construction and maintenance of LICENSOR'S property.**

1.3 THE UNDERSIGNED AGREES that the continuation of the Occupancy and use herein shall be subject to the conditions specified herein.

Section 2. USE/PURPOSE/OWNERSHIP.

2.1 LICENSEE'S Facilities shall be installed to the satisfaction and approval of LICENSOR'S Engineer and all costs of LICENSOR'S Engineer and other technicians or professional consultants as may be required from time to time shall be borne by LICENSEE.

2.2 LICENSEE hereby agrees to reimburse LICENSOR for any and all expenses LICENSOR may incur or be subjected to, or in consequence of, the planning, negotiation, installation, construction, location, changing, alteration, relocation, operation or renewal of said Facilities, within thirty (30) days after receipt of LICENSOR'S invoice for payment.

Section 3. FEE.

Said Agreement and Occupancy is granted contingent upon payment to LICENSOR of an **annual fee of \$0**. LICENSEE shall also submit a **one-time agreement processing fee of \$0, engineering review fee of \$1500** and a **contractor right of entry fee**

of \$1500, which shall be covered by a separate agreement known as CONTRACTOR RIGHT OF ENTRY LICENSE AGREEMENT.

Section 4. TERM/TERMINATION.

This Agreement shall continue in force indefinitely from and after the date hereof, subject, however, to the right of either party, acting reasonably and with business reason, such as for railroad operational efficiency or improvement, to terminate this Agreement as to the Occupancy or LICENSEE'S Facilities, or any part of LICENSEE'S Facilities, at any time, upon giving the other party thirty (30) days' notice in writing of its desire to terminate this Agreement, and indicating in said notice the extent of said facilities and facilities to which such termination shall apply. Notwithstanding the foregoing, in the event that (i) the use of the Occupancy as set forth above in Sections 1 and 2 is materially changed, (ii) LICENSEE'S Facilities are removed, or (iii) LICENSEE defaults on a material obligation hereunder and such default is not cured within 30 days after receipt of written notice from LICENSOR describing such default (or such longer cure period as determined in LICENSOR'S sole discretion), this Agreement shall automatically terminate. When this Agreement shall be terminated as to LICENSEE'S Facilities, or as to any part thereof, LICENSEE within thirty (30) days' after the expiration of the time stated in said termination notice, agrees at LICENSEE'S own risk and sole expense to remove LICENSEE'S Facilities from the property of LICENSOR, or such portion thereof as LICENSOR shall require removed, and to restore LICENSOR premises and property to a neat and safe condition to the satisfaction of LICENSOR'S designated Engineer or Representative, and if LICENSEE shall fail to do so within said time, LICENSOR shall have the right, but not the duty, to remove and restore the same, at the risk and expense of LICENSEE.

Section 5. INDEMNITY/LIABILITY.

5.1. LICENSOR shall not be responsible for any damage to LICENSEE'S Facilities at any time while this Agreement is in effect.

5.2 (a) LICENSEE HEREBY AGREES TO INDEMNIFY, SAVE, HOLD HARMLESS AND DEFEND LICENSOR AND ITS PARENT, AFFILIATES AND EACH OF THEIR RESPECTIVE DIRECTORS, OFFICERS, AGENTS AND EMPLOYEES FROM AND AGAINST (I) INJURY TO OR DEATH OF ANY PERSON OR PERSONS WHOMSOEVER, INCLUDING BUT NOT LIMITED TO THE AGENTS, EMPLOYEES OR CONTRACTOR(S) OF THE PARTIES HERETO, AND (II) THE LOSS OR DAMAGE TO ANY PROPERTY WHATSOEVER, INCLUDING PROPERTY CLAIMS, DEMANDS, SUITS, JUDGMENTS OR EXPENSES INCURRED IN CONNECTION THEREWITH, RESULTING FROM OR ARISING OUT OF THE ACTS OR OMISSIONS OF LICENSEE, ITS AGENTS, EMPLOYEES OR CONTRACTOR(S), OR RESULTING FROM, ARISING OUT OF, OR OCCURRING IN CONNECTION WITH THE ENTRY OR PRESENCE OF LICENSEE, ITS AGENTS, EMPLOYEES OR CONTRACTOR(S) ON THE PROPERTY, OR RESULTING FROM, ARISING OUT OF, OR OCCURRING IN CONNECTION WITH THE PERFORMANCE OR EXECUTION OF ANY WORK PERFORMED UNDER THIS AGREEMENT OR INCIDENTAL THERETO, INCLUDING BUT NOT LIMITED TO THE USE AND OCCUPANCY OF LICENSEE'S FACILITIES BY LICENSEE, ITS PERMITTEES, INVITEES OR ANY OTHER PERSON OR ENTITY.

(b) THE PARTIES ACKNOWLEDGE THAT THE USE OF LICENSOR'S PREMISES IS FOR THE SOLE CONVENIENCE OF LICENSEE AND THAT LICENSOR SHALL HAVE NO DUTY TO LICENSEE, ITS OFFICERS, EMPLOYEES, AGENTS OR CONTRACTORS TO PROVIDE A REASONABLY SAFE PLACE IN WHICH TO WORK, TO PROVIDE ADEQUATE OR SAFE METHODS AND EQUIPMENT FOR THEIR WORK OR TO INSPECT OR MAINTAIN LICENSEE'S FACILITIES FOR SAID SAFE METHODS AND WORK EQUIPMENT NOR TO GIVE ANY WARNINGS OR OTHER NOTICES TO LICENSEE'S EMPLOYEES OR INVITEES REGARDING SAFETY EITHER OF LICENSEE'S FACILITIES AND RELATED WORKPLACE OR LICENSOR'S PROXIMATE RAILROAD OPERATIONS AND THAT ALL SUCH DUTIES SHALL BE ASSUMED BY LICENSEE WHO FURTHER AGREES TO DEFEND AND HOLD HARMLESS LICENSOR, ITS PARENT AND AFFILIATES FROM ANY AND ALL CLAIMS ALLEGING ANY FAILURE TO PERFORM SAID DUTIES.

(c) IN NO EVENT UNDER THIS AGREEMENT WILL LICENSOR HAVE ANY LIABILITY FOR INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE TERM "LICENSOR" AS USED IN THIS SECTION 5 SHALL INCLUDE THE SUCCESSORS, ASSIGNS, AND AFFILIATED COMPANIES OF LICENSOR AND ANY OTHER RAILROAD COMPANY THAT MAY BE LAWFULLY OPERATING UPON AND OVER THE TRACKS, OR THE TRACKS CROSSING OR ADJACENT TO THE TRACKS, AND THE OFFICERS, AGENTS, INVITEES AND EMPLOYEES THEREOF.

Section 6. RESERVED.

Section 7. RESERVED.

Section 8. ASSIGNMENT.

This Agreement or Occupancy herein granted may not be transferred, assigned or sublet to another party not a signatory hereto without the prior written approval of LICENSOR. Said approval by LICENSOR, subject to LICENSEE'S satisfaction of applicable transfer of rights or assignment fees in effect at that time, shall not be unreasonably withheld.

Section 9. ENVIRONMENTAL/HAZARDOUS MATERIALS.

LICENSOR may, at LICENSOR'S sole discretion, during the removal of LICENSEE'S Facilities in accordance with Section 4, require LICENSEE to conduct an environmental appraisal and report of the property formerly occupied by LICENSEE'S Facilities at LICENSEE'S sole cost and expense. All reports shall be prepared by a LICENSOR approved environmental consultant, to determine if LICENSOR'S property has been environmentally impacted by said Occupancy. All environmental reports, which are prepared subject to this clause, shall be immediately available to LICENSOR by LICENSEE and shall be treated as confidential information by the parties unless disclosure of such environmental reports are required by law. This clause shall survive termination of this Agreement.

Section 10. NOTIFICATION.

In the case of emergency repairs, LICENSEE shall contact LICENSOR by calling LICENSOR'S emergency number at (800) 979-4958 in order to obtain LICENSOR'S consent prior to entering LICENSOR'S property.

Section 11. RESERVED.

Section 12. ALTERATIONS/REPAIRS.

12.1 In the event LICENSEE desires to make changes in the physical or operational characteristics of said Occupancy, LICENSEE shall first obtain in writing the consent and approval of LICENSOR.

12.2 Any entry onto LICENSOR'S property by LICENSEE its employees, agents, representatives or contractors after LICENSEE'S Facilities have initially been constructed shall occur only upon obtaining LICENSOR'S consent pursuant to Section 12 herein, if required, and entering into an additional CONTRACTOR RIGHT OF ENTRY LICENSE AGREEMENT with LICENSOR prior to entry. LICENSEE agrees that any physical or operational changes that LICENSEE desires to make shall be made at LICENSEE'S sole risk, cost and expense and subject to all the terms, covenants conditions and limitation of this Agreement. Any "flagging" services determined at LICENSOR'S sole discretion to be necessary shall be at LICENSEE'S sole cost and expense.

Section 13. RESERVED.

Section 14. INSURANCE.

LICENSEE agrees to comply with the **INSURANCE REQUIREMENTS**, attached hereto as Exhibit C and made a part hereof, and shall provide the required Certificate of Insurance to LICENSOR simultaneous to the execution of this Agreement.

Section 15. RESERVED.

Section 16. RESERVED.

Section 17. RESERVED.

Section 18. GOVERNMENTAL REQUIREMENTS.

18.1 LICENSEE shall comply with any and all laws, statutes, ordinances, rules, regulations, orders, decisions (collectively, the "Laws"), issued by any federal, state or municipal governmental body or agency established thereby ("Authority"), relating to the construction, maintenance, and use of the LICENSEE'S Facilities by LICENSEE and any the use of LICENSOR'S property.

18.2 LICENSEE, in its Occupancy as granted herein, shall not create or permit any condition on LICENSOR'S property that could present a threat to human health or to the environment. LICENSEE shall at all times be in full compliance with all Laws, present or future, set by any Authority, including but not limited to any, environmental laws concerning water quality (surface of underground), hazardous substances and hazardous waste(s).

18.3 Should any discharge, leakage, spillage, emission or pollution of any type occur or arise on LICENSOR'S Property as a result of LICENSEE'S presence, use, operation or exercise of the rights granted herein, LICENSEE shall immediately notify LICENSOR and shall, at LICENSEE'S expense, be obligated to clean all property affected thereby, whether owned or controlled by LICENSOR or any third persons, to the satisfaction of LICENSOR (insofar as the property owned or controlled by LICENSOR is concerned) and any governmental body having jurisdiction in the matter. LICENSOR may, at its option, clean the property; if LICENSOR elects to do so, LICENSEE shall pay LICENSOR the reasonable cost of such cleanup promptly upon the receipt of a bill therefor.

18.4 LICENSEE AGREES TO RELEASE, INDEMNIFY AND DEFEND LICENSOR AND ITS PARENT AND AFFILIATES FROM AND AGAINST ALL LIABILITY, COST AND EXPENSE (INCLUDING, WITHOUT LIMITATION, ANY FINES, PENALTIES, JUDGMENTS, LITIGATION COSTS AND ATTORNEY FEES) INCURRED BY LICENSOR AS A RESULT OF LICENSEE'S BREACH OF THIS SECTION 18 REGARDLESS OF LICENSOR'S NEGLIGENCE, EXCEPT TO THE EXTENT ANY SUCH LIABILITIES, COSTS AND EXPENSES ARE SOLELY CAUSED BY THE GROSS NEGLIGENCE OF LICENSOR, ITS OFFICERS, AGENTS, INVITEES OR EMPLOYEES.

Section 19. RESERVED.

Section 20. RESERVED.

Section 21. RESERVED.

Section 22. LEGAL NOTICES.

Any notice, demand, approval, consents or communication required, permitted or desired to be given hereunder shall be in writing and shall be served on the parties at the following respective addresses:

LICENSEE: City of Lancaster
104 E. Main Street
Lancaster, OH 43130
Attention: Greg Gintz, LDOT Superintendent

LICENSOR: Indiana & Ohio Railway Company
c/o Genesee & Wyoming Railroad Services, Inc.
Real Estate Department
13901 Sutton Park Drive South
Suite 160
Jacksonville, FL 32224

Copy to:
General Counsel
Genesee & Wyoming Inc.
20 West Avenue
Darien, CT 06820

the attention of such other person or officer, as any party may by written notice designate. Any notice, demand or communication required, permitted or desired to be given hereunder shall be sent either (a) by hand delivery, in which case

notice shall be deemed received when actually delivered, (b) by prepaid certified or registered mail, return receipt requested, in which case notice shall be deemed received three calendar days after deposit, postage prepaid in the United States Mail, or (c) by a nationally recognized overnight courier, in which case notice shall be deemed received one business day after deposit with such courier.

Section 23. SPECIAL PROVISIONS.

If required by LICENSOR, LICENSEE at its sole cost and expense, shall furnish LICENSOR with a **survey drawing**, showing the final exact location of said Occupancy and LICENSEE'S Facilities. The survey drawing shall indicate LICENSOR'S survey valuation station which said installation is located, and/or the position of LICENSEE'S Facilities in relation to the center line of the track and/or the centerline of the closest public street crossing said track(s). Said survey drawing to be attached to this Agreement as **Exhibit B** and made a part hereof.

Section 24. PRIOR AGREEMENTS.

Execution of this Agreement shall supersede and/or cancel, as of the date first above written, any and all previous agreements, if any, related to the Occupancy and use herein described, which may exist between the parties or their predecessors.

Section 25. APPLICABLE LAW.

This Agreement shall be governed by and construed under the laws of the State of OH without regard to the choice of law provisions thereof.

Section 26. INTERPRETATION/SEVERABILITY.

To the maximum extent possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Agreement.

Section 26. HEADINGS. The headings of the Sections of this Agreement are inserted for convenience only and are not intended to govern, limit or aid in the construction of any term or provision of this Agreement.

Section 27. CONSTRUCTION OF TERMS. The terms of this Agreement have been arrived at after mutual negotiation and, therefore, it is the intention of the Parties that its terms not be construed against any of the Parties by reason of the fact that it was prepared by one of the Parties.

Section 28. COUNTERPARTS.

This Agreement may be executed in multiple counterparts, each of which shall, for all purposes, be deemed an original but which together shall constitute one and the same instrument, and counterparts of this Agreement may also be exchanged via electronic facsimile machines and any electronic facsimile of any party's signature shall be deemed to be an original signature for all purpose.

(Signature Page Follows)

THIS AGREEMENT IS hereby declared to be binding upon the parties hereto.

IN WITNESS WHEREOF, the undersigned have hereunto set their hand and seals this _____ day of _____.

LICENSOR

Indiana & Ohio Railway Company

By: _____

Name:

Its:

LICENSEE

City of Lancaster

By: _____

Name: Paul Martin

Its: Service Safety Director

EXHIBIT B

SURVEY

This page is not
available until
the construction
is completed,
per Engineering

EXHIBIT C

INSURANCE REQUIREMENTS

(a) The Licensee shall, at its own cost and expense, prior to entry onto Licensor's Property or the commencement of any work pursuant to this Agreement, procure and thereafter maintain throughout the term of this Agreement the following types and minimum amounts of insurance:

(i) The Licensee shall maintain Public Liability or Commercial General Liability Insurance ("CGL"), including Contractual Liability Coverage and CG 24 17 "Contractual Liability – Railroads" endorsement, covering all liabilities assumed by the Licensee under this Agreement, without exception or restriction of any kind, with a combined single limit of not less than Two Million Dollars (\$2,000,000) for Bodily Injury and/or Property Damage Liability per occurrence, and an aggregate limit of not less than Six Million Dollars (\$6,000,000) per annual policy period. Such insurance policy shall be endorsed to provide a **Waiver of Subrogation in favor of the Licensor and its affiliates** and shall name the **Licensor and its affiliates as Additional Insured**. An Umbrella or Excess policy may be utilized to satisfy the required limits of liability under this section, but must "follow form" and afford no less coverage than the primary policy.

(ii) The Licensee shall maintain Commercial Automobile Insurance for all owned, non-owned and hired vehicles with a combined single limit of not less than One Million Dollars (\$1,000,000) for Bodily Injury and/or Property Damage Liability per occurrence. Such insurance policy shall be endorsed to provide a **Waiver of Subrogation in favor of the Licensor and its affiliates** and shall name the **Licensor and its affiliates as Additional Insured**.

(iii) The Licensee shall maintain Statutory Workers' Compensation and Employers' Liability Insurance for its employees (if any) with minimum limits of not less than One Million Dollars (\$1,000,000) for Bodily Injury by Accident, Each Accident; One Million Dollars (\$1,000,000) for Bodily Injury by Disease, Policy Limit; One Million Dollars (\$1,000,000) for Bodily Injury by Disease, Each Employee. Such insurance policy shall be endorsed to provide a **Waiver of Subrogation in favor of the Licensor and its affiliates**, if applicable.

(iv) **Prior to any construction project within 50' of the railroad track**, the Licensee shall purchase Railroad Protective Liability Insurance naming the Railroad as the named insured with limits of Two Million Dollars (\$2,000,000) each occurrence and Six Million Dollars (\$6,000,000) aggregate limit. The policy shall be issued on a standard ISO form CG 00 35 12 03, or, if available, obtain such coverage from the Railroad.

(b) The following general insurance requirements shall apply:

(i) The specified insurance policies must be effected under standard form policies underwritten by insurers licensed in the state where work is to be performed, and carry a minimum Best's rating of "A-" and size "Class VII" or better. The Licensor reserves the right to reject as inadequate any insurance coverage provided by an insurer that is rated less than the ratings specified in this section.

(ii) All coverages shall be **primary and non-contributory to any insurance coverages maintained by the Licensor and its affiliates**.

(iii) All insurance policies shall be endorsed to provide the Licensor with thirty (30) days prior written notice of cancellation, non-renewal or material changes.

(iv) The Licensee shall provide the Licensor with certificates of insurance evidencing the insurance coverages, terms and conditions required prior to commencement of any activities on or about the Property. Said certificates should reference this Occupancy License Agreement by agreement date and description and shall be furnished to the Licensor at the following address, or to such other address as the Licensor may hereafter specify:

Indiana & Ohio Railway Company
C/O Genesee & Wyoming Railroad Services, Inc.
13901 Sutton Park Drive South, Suite 160
Jacksonville, FL 32224

(v) If any policies providing the required coverages are written on a Claims-Made basis, the following shall apply:

- (1) The retroactive date shall be prior to the commencement of the work;
- (2) The Licensee shall maintain such policies on a continuous basis;
- (3) If there is a change in insurer or policies are canceled or not renewed, the Licensee shall purchase an extended reporting period of not less than three (3) years after the contract completion date; and
- (4) Licensee shall arrange for adequate time for reporting of any loss under this Agreement.

(c) The Licensor may require the Licensee to purchase additional insurance if the Licensor reasonably determines that the amount of insurance then being maintained by the Licensee is insufficient in light of all relevant factors. If the Licensee is required to purchase additional insurance, the Licensor will notify the Licensee. Failure of the Licensee to comply within thirty (30) days shall be considered a default subject to termination of the Agreement.

(d) Furnishing of insurance by the Licensee shall not limit the Licensee's liability under this Agreement, but shall be additional security therefore.

(e) The above indicated insurance coverages shall be enforceable by any legitimate claimant after the termination or cancellation of this Agreement, or any amendment hereto, whether by expiration of time, by operation of law or otherwise, so long as the basis of the claim against the insurance company occurred during the period of time when the Agreement was in effect and the insurance was in force.

(f) Failure to provide the required insurance coverages or endorsements (including contractual liability endorsement) or adequate reporting time shall be at Licensee's sole risk.

(g) If contractors are utilized, the Licensee agrees to require all such contractors to comply with the insurance requirements of this Exhibit C and sign a separate right of entry agreement, as required by the Agreement.