

2/26/2015 DRAFT

LICENSE AGREEMENT

THIS Agreement ("License"), is made by and between DALLAS AREA RAPID TRANSIT ("Licensor"), a regional transportation authority, created, organized and existing pursuant to Chapter 452, Texas Transportation Code, as amended (the "Act") and CITY OF MCKINNEY ("Licensee"), a Texas Home Rule City acting herein by and through its duly authorized official, whose mailing address is P.O. Box 517, McKinney, Texas 75070.

Pursuant to an agreement between Licensor and Dallas, Garland and Northeastern Railroad Company (hereinafter the "Railroad"), freight railroad operations exist on Licensor's corridor.

1. Purpose. Licensor hereby grants a license (the "License") to Licensee for the purposes of constructing, installing, maintaining and operating a 15-inch PVC sanitary sewer line within a 20-inch steel casing pipe (the "Permitted Improvement") crossing the Sherman Line approximately 590 feet north of McIntyre Road (aka Collin County Road 274) at Mile Post 299.51, in McKinney, Collin County, Texas, more particularly described as shown in Exhibit "A", dated September 9, 2014, attached hereto and incorporated herein for all pertinent purposes, (the "Property").

The Property shall be used by Licensee solely for the purpose of operating and maintaining the Permitted Improvement (the "Permitted Use"). Licensee's right to enter upon and use the Property shall be limited solely to the Permitted Use and the Permitted Improvement.

2. Term. This License shall begin on the 1st day of April, 2015 (the "Term") and continue thereafter until terminated by either party as provided herein.

3. Consideration.

3.01. The consideration for the granting of this License shall be (a) payment by Licensee to Licensor the sum of ONE THOUSAND EIGHT HUNDRED AND NO/100 (\$1,800.00) DOLLARS per annum, payable annually in advance (the "License Fee"), and (b) the performance by Licensee of each of the obligations undertaken by Licensee in this License, PROVIDED, HOWEVER, that the "License Fee" shall be adjusted annually as follows:

- a) The adjustment and change in the License Fee shall be determined according to the cost of living changes in the Consumer Price Index for All Urban Consumers – (CPI-U), Dallas-Fort Worth, TX., "All Items", as published by the Bureau of Labor Statistics, U.S. Department of Labor (the "CPI Index").
- b) The CPI Index figure for the month of May 2015 is hereby fixed and established as the Base Index Figure in the computation of adjustment of rentals herein provided. At the commencement of each annual period as provided herein, the CPI Index for the month of March of such year shall be ascertained and noted and the rent for the next annual period shall be adjusted by increasing or decreasing the License Fee, percentage-wise as the CPI Index for the month of March has increased or decreased as compared with the Base Index Figure as herein fixed, PROVIDED HOWEVER, that under no circumstances shall the License Fee ever be less than \$1,800.00 per year.
- c) If any time during the term hereof the U.S. Bureau of Labor Statistics shall discontinue the issuance of the CPI Index, the parties shall use any other standard nationally recognized cost-

of-living index for the Dallas-Fort Worth area then issued and available, which is published by the U.S. Government.

- d) Acceptance of any License Fee by Licensor after written notice of termination or expiration of this License shall not waive, reinstate, continue or extend the terms of this License.

3.02. Any payment not received by Licensor by the 10th day after it is due, shall bear a late charge of \$25.00 to help offset the administrative cost involved in handling such late payment.

3.03. For any payment not received by Licensor by the 15th day after it is due, such payment shall bear interest at the rate of 18% per annum from the date it was due until it is paid, in addition to the late charge.

3.04. Payments by Licensee. Any payments required of Licensee pursuant to this License shall be made from then available funds budgeted for such purpose.

4. Non Exclusive License. This License is non-exclusive and is subject to (a) any existing utility, drainage or communication facility located in, on, under, or upon the Property owned by Licensor, any Railroad, utility, or communication company, public or private; (b) all vested rights presently owned by any Railroad, utility or communication company, located within the boundaries of the Property; and (c) any existing lease, license or other interest in the Property granted by Licensor to any individual, corporation or other entity, public or private.

5. Design, Construction, Operation and Maintenance. Licensor's use of the Property and adjoining property may include the use of electrically powered equipment. Notwithstanding Licensor's inclusion within its system of measures designed to reduce stray current which may cause corrosion, Licensee is hereby warned that such measures may not prevent electrical current being present in proximity to the Permitted Improvement and that such presence could produce corrosive effects to the Permitted Improvement. Licensee waives any claim and releases Licensor with regard to any claim arising from such corrosion.

5.01. All design, construction, reconstruction, replacement, removal, operation and maintenance of the Permitted Improvement on the Property shall be done in such a manner so as not to interfere in any way with the operations of Licensor or other Railroad operations. In particular, cathodic protection or other stray current corrosion control measures of the Permitted Improvement as required shall be made a part of the design and construction of the Permitted Improvement.

5.02. During the design phase and prior to commencing any construction on the Property, a copy of the construction plans showing the exact location, type and depth of the construction, any cathodic protection measures and any working area, shall be submitted for written approval to Licensor and Railroad. Such approval shall not be unreasonably withheld. No work shall commence until said plans have been approved by Licensor.

5.03. Licensee agrees to design, construct and maintain the Permitted Improvement in such a manner so as not to create a hazard to the use of the Property, and further agrees to pay any damages which may arise by reason of Licensee's use of the Property.

5.04. Licensee covenants and agrees to institute and maintain a reasonable testing program to determine whether or not additional cathodic protection of its Permitted Improvement is necessary and if it is or should become necessary, such protection shall be immediately instituted by Licensee at its sole cost and expense.

5.05. Licensor makes no warranty regarding subsurface installations on the Property. Licensee shall conduct its own inspection of same and will not rely on the absence or presence of markers.

5.06. Licensee shall provide to Licensor final construction drawings (“as-builts”) that are signed and sealed by a Texas Professional Engineer within sixty (“60”) days of completion of the project.

6. Governmental Approvals. Licensee, at its sole cost and expense, shall be responsible for and shall obtain, any and all licenses, permits, or other approvals from any and all governmental agencies, federal, state or local, required to carry on any activity permitted herein.

7. Licensor’s Standard Contract and Insurance. No work on the Property shall be commenced by Licensee or any contractor for Licensee until such Licensee or contractor shall have executed Licensor’s Construction Agreement and Contractor’s Right of Entry covering such work, and has furnished insurance coverage in such amounts and types as shall be satisfactory to Licensor. A company-issued photo identification of Licensee’s employees, contractors or agents shall be required to work on the Property.

8. Duty of Care in Construction. Licensee or its contractor shall use reasonable care during the construction period and thereafter, to avoid damaging any existing buildings, equipment and vegetation on or about the Property and any adjacent property owned by or under the control of Licensor. If the Licensee or its contractor causes damage to the Property or any adjacent property, the Licensee and/or its contractor shall immediately replace or repair the damage at no cost or expense to Licensor. If Licensee or its contractor fails or refuses to make or effect any such repair or replacement, Licensor shall have the right, but not the obligation, to make or effect any such repair or replacement at the sole cost and expense of Licensee, which cost and expense Licensee agrees to pay to Licensor upon demand.

9. Environmental Protection.

9.01. Licensee shall not use or permit the use of the Property for any purpose that may be in violation of any local, state or federal laws pertaining to health or the environment, including but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the Resource Conservation and Recovery Act (“RCRA”), the Clean Water Act (“CWA”) and the Clean Air Act (“CAA”).

9.02. Licensee warrants that the Permitted Use of the Property will not result in the disposal or other release of any hazardous substance or solid waste on or to the Property, and that it will take all steps necessary to ensure that no such hazardous substance or solid waste will ever be discharged onto the Property by Licensee or its Contractors.

9.03. The terms “hazardous substance” and “release” shall have the meanings specified in CERCLA and the terms “solid waste” and “disposal” (or “disposed”) shall have the meanings specified in the RCRA; PROVIDED, HOWEVER, that in the event either CERCLA or RCRA is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment; and PROVIDED FURTHER, that to the extent that the laws of the State of Texas establish a meaning for “hazardous substance”, “release”, “solid waste”, or “disposal”, which is broader than that specified in either CERCLA or RCRA, such broader meaning shall apply.

9.04. Licensee shall, to the extent allowed by Texas law without a special fund therefore, indemnify, defend and hold Licensor and Railroad harmless against all cost of environmental clean up to the Property resulting from Licensee’s use of the Property under this License.

10. Mechanic's Liens Not Permitted. Licensee shall fully pay for all labor and materials used in, on, or about the Property and will not permit or suffer any mechanic's or materialmen's liens of any nature to be affixed against the Property by reason of any work done or materials furnished to the Property at Licensee's instance or request.

11. Maintenance of Completed Improvements. The Permitted Improvement shall be maintained by the Licensee in such a manner as to keep the Property in a good and safe condition with respect to Licensee's use. In the event the Licensee fails to maintain the Property as required, upon discovery, Licensor shall notify Licensee of such occurrence in writing. In the event Licensee shall not have remedied the failure within ten (10) days from the date of such notice, Licensor shall have the right, but not the obligation to remedy such failure at the sole cost and expense of Licensee. In the event Licensor exercises its right to remedy Licensee's failure, Licensee agrees to immediately pay to Licensor all costs incurred by Licensor upon demand.

12. Future Use by Licensor.

12.01. This License is made expressly subject and subordinate to the right of Licensor to use the Property for any purpose whatsoever.

12.02. In the event that Licensor shall, at any time subsequent to the date of this License, at its sole discretion, determine that the relocation of the Permitted Improvement shall be necessary or convenient for Licensor 's use of the Property, Licensee shall, at its sole cost and expense relocate said Permitted Improvement so as not to interfere with Licensor 's or Licensor 's assigns use of the Property. In this regard, Licensor may, but is not obligated to, designate other property for the relocation of the Permitted Improvement. Licensor shall give a minimum of thirty (30) days written notice of any required relocation. Licensee shall promptly commence to make the required changes thereafter and shall diligently complete the relocation as required within a reasonable period.

13. Relocation Benefits. The parties hereto agree that the construction of the Permitted Improvement on the Property shall be subsequent to the acquisition of the Property by Licensor and that Licensee does hereby waive any and all claim that it may have under the Act, or otherwise, regarding the payment of any and all relocation benefits and that all costs associated with any relocation of such Improvements shall be borne by Licensee.

14. Duration of License. This License shall terminate and be of no further force and effect (a) in the event Licensee shall discontinue or abandon the use of the Permitted Improvement; (b) in the event Licensee shall relocate the Permitted Improvement from the Property; (c) upon termination in accordance with paragraph 19 of this License, whichever event first occurs.

15. Compliance With Laws and Regulations. Licensee agrees to abide by and be governed by all laws, ordinances and regulations of any and all governmental entities having jurisdiction over the Licensee and by railroad regulations, policies and operating procedures established by the Railroad, or other applicable railroad regulating bodies, and Licensee agrees to indemnify and hold Licensor harmless from any failure to so abide and all actions resulting therefrom to the extent allowed by Texas law without a special fund therefore.

16. Indemnification. Licensee shall, to the extent allowed by Texas law without a special fund therefore, at all times protect, indemnify, defend and hold Licensor and the Railroad harmless against and from any and all loss, cost, damage or expense, including attorney's fees and including, without limitation, claims of negligence, arising out of this License (including by example and not limitation, Licensee's acts or failure to act hereunder), Licensee's use in any way of the Property, or arising from any accident or other occurrence on or about the Property,

resulting in personal injury, death, or property damage, except to the extent fault is judicially determined against Licensor.

17. Termination of License. At such time as this License may be terminated or canceled for any reason whatsoever, Licensee, upon request by Licensor, shall remove all improvements and appurtenances owned by it, situated in, on, under or attached to the Property, regardless of whether or not such improvements were placed thereon by Licensee, and shall restore the Property to a condition satisfactory to Licensor, at Licensee's sole expense. In the event that Licensor terminates or cancels the License, the unused portion of the annual consideration set forth in Paragraph 3.01, supra, will be refunded to Licensee on a pro rata basis.

18. Assignment. Licensee shall not assign or transfer its rights under this License in whole or in part, or permit any other person or entity to use the License hereby granted without the prior written consent of Licensor which Licensor is under no obligation to grant.

19. Methods of Termination. This License may be terminated in either of the following ways:

19.01. By written agreement of both parties; or

19.02. By either party giving the other party thirty (30) days written notice.

20. Miscellaneous.

20.01. Notice. When notice is permitted or required by this License, it shall be in writing and shall be deemed delivered when delivered in person or when placed, postage prepaid, in the U.S. Mail, Certified, Return Receipt Requested, and addressed to the parties at the following addresses:

LICENSOR:	Dallas Area Rapid Transit 1401 Pacific Avenue Dallas, Texas 75202-7210 ATTN: Railroad Management	Or	P. O. Box 660163 Dallas, Texas 75266-7210
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LICENSEE:	City of McKinney 222 N. Tennessee McKinney, Texas 75070		P.O. Box 517 McKinney, Texas 75070
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Either party may from time to time designate another and different address for receipt of notice by giving written notice of such change of address.

20.02. Governing Law. This License shall be construed under and in accordance with the laws of the State of Texas.

20.03. Entirety and Amendments. This License embodies the entire agreement between the parties and supersedes all prior agreements and understandings, if any, relating to the Property and the matters addressed herein, and may be amended or supplemented only by a written instrument executed by the party against whom enforcement is sought.

20.04. Parties Bound. This License shall be binding upon and inure to the benefit of the executing parties and their respective heirs, personal representatives, successors and assigns.

20.05. Number and Gender. Words of any gender used in this License shall be held and construed to include any other gender; and words in the singular shall include the plural and vice versa, unless the text clearly requires otherwise.

20.06. No Joint Enterprise. The parties do not intend that this License be construed as finding that the parties have formed a joint enterprise. The purposes for which each party has entered into this License are separate and distinct. It is not the intent of any of the parties that a joint enterprise relationship is being entered into and the parties hereto specifically disclaim such relationship. This License does not constitute a joint enterprise, as there are no common pecuniary interests, no common purpose and no equal right of control among the parties hereto.

20.07. Counterparts. The parties may execute this Agreement in multiple originals and when taken together, those originals constitute a whole.

IN WITNESS WHEREOF, the parties have executed this License on the date last signed.

LICENSOR: DALLAS AREA RAPID TRANSIT

BY: _____
MAUREEN MCCOLE
Vice President, Commuter Rail
& Railroad Management

Date: _____

LICENSEE: CITY OF MCKINNEY

BY: _____

Printed Name: _____

Title: _____

Date: _____