

GRADE CROSSING MAINTENANCE AGREEMENT

THIS GRADE CROSSING MAINTENANCE AGREEMENT (this “Agreement”), effective as of _____ (the “Effective Date”), is between CSX TRANSPORTATION, INC., a Virginia corporation with its principal place of business located at 500 Water St., Jacksonville, FL 32202, hereinafter called “CSXT,” and TOWN OF APEX, a body corporate and political subdivision of the State of North Carolina, hereinafter called “AGENCY”.

WITNESSETH:

WHEREAS, by that certain Construction Agreement entered into between the AGENCY and CSXT, dated _____, hereinafter referred to as the “Construction Agreement”, AGENCY will construct or cause to be constructed the Project (as defined in the Construction Agreement) which includes an at-grade public roadway known as Hunter Street across and over the tracks, right-of-way and property of CSXT, at CSXT’s Milepost SDS 20.58, DOT No. 845902P, hereinafter referred to as the “CROSSING”; and

WHEREAS, upon completion of the Project, the AGENCY will use, maintain, repair, renew, replace and ultimately remove the CROSSING under the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, it is agreed between AGENCY and CSXT as follows:

- 1) The CROSSING includes but is not limited to, the track structure, grade crossing surface, any railroad crossing warning signs, and automatic grade crossing warning devices which are, or might be, located within or adjacent to the above-described location. Upon completion of the Project, the CROSSING shall be thereafter maintained as provided herein at the sole cost and expense of the AGENCY.

- a) AGENCY shall maintain and repair, at its sole cost and expense, all parts comprising the permanent aspects of the Project, as shown by the Plans, consisting of roadway pavement up to the outer ends of the railroad cross ties, sidewalks, guardrails, and curbs, in good and safe condition to CSXT's satisfaction. In the event AGENCY fails to do so after reasonable notice from CSXT (unless an emergency condition exists or is imminent in the opinion of CSXT that requires immediate action), CSXT may perform such maintenance and repair, at AGENCY's sole cost and expense.
 - b) CSXT shall maintain and repair the crossing surface between the ends of its cross ties and its signal facilities at the CROSSING, at AGENCY's sole cost and expense.
 - c) AGENCY shall not undertake any alteration, modification or expansion of the CROSSING, without the prior written approval of CSXT, which may be withheld for any reason, and the execution of such agreements as CSXT may require. CSXT may undertake alterations and/or maintenance of its property, track or facilities and shall be reimbursed by AGENCY for the expenses incurred by CSXT with respect to the removal and restoration of the crossing in connections with such alteration and/or maintenance.
- 2) Upon completion of the Project, notwithstanding any rights granted to the AGENCY herein, CSXT reserves the right to perform all work required on CSXT's property and right-of-way at the CROSSING including construction, drainage, lighting and vegetation management, in which event AGENCY shall pay CSXT the entire cost and expense of labor, materials and equipment furnished by CSXT in performing such work.
- 3) The CROSSING shall be used for public at-grade road and walkway crossing purposes only and no utility (including but not limited to telecommunications facilities,

pipes, wires, cables) or other line or structure, materials, vegetation or other improvements shall be placed in, on or over the CROSSING without the previous consent in writing of CSXT and the execution of such additional agreements as CSXT deems necessary.

4) This Agreement shall terminate immediately on the date of termination of the easements rights granted and conveyed by CSXT to the AGENCY pursuant to that certain Deed of Easement granted by CSXT to Agency and recorded in the records of Wake County, North Carolina.

5) RESERVED.

6) Unless otherwise specified in this Agreement, the cost of and liability for installation, construction, maintenance, replacement and removal of all facilities at the CROSSING, including but not limited to the track structure, any railroad crossing warning signs, and crossing surfaces, whether performed by the AGENCY or CSXT, shall be the sole responsibility of the AGENCY.

7) RESERVED.

8) Pursuant to the Construction Agreement, the crossing surface will measure approximately seventy-two feet (72') wide at the CROSSING (the "SURFACE"), including the walkways. On each anniversary of the Effective Date until termination of this Agreement, AGENCY shall pay an annual fee to CSXT in the amount of **FOUR THOUSAND FOUR HUNDRED SEVENTY-EIGHT AND 00/100 DOLLARS** (\$4,478.00), towards the ongoing maintenance of the SURFACE (the "Annual Surface Fee"). The Annual Surface Fee shall be increased each year in accordance with Section 9.

9) The Annual Surface Fee shall be adjusted as follows:

(a) The Annual Surface Fee shall be subject to periodic review and adjustment by

CSXT. Agency shall have no right of refund for any cause whatsoever with respect to the Annual Surface Fees paid to CSXT, which shall commence on the dates provided in Section 8. CSXT will provide notice of any increase as a result of such review and adjustment in advance of the due date.

- (b) In addition to the periodic review and adjustment referred to in the Section 9 a) above, the Annual Fees shall be adjusted on an annual basis by three percent (3%) per annum.

10) When CSXT determines that the replacement of the SURFACE is more economical than its continued maintenance, CSXT shall have the exclusive option to replace the SURFACE with its standard timber and asphalt surface. In the event AGENCY requests that CSXT install a different type of grade crossing surface and CSXT agrees to do so, the difference in cost between the then current estimated replacement cost of CSXT's standard timber and asphalt surface and the AGENCY's requested surface type shall be the sole responsibility of the AGENCY.

11) The AGENCY shall, at its sole expense, maintain and replace the remainder of the road on either side of the SURFACE within CSXT's right-of-way at the CROSSING, plus any paving which may be located between the ends of the ties. AGENCY shall perform such work in accordance with the time and operational requirements of CSXT. The AGENCY will give prior notice to CSXT of all work to be performed by it at or near the CROSSING and no such work shall be performed by AGENCY without the prior approval of CSXT and the execution of such additional agreements as CSXT deems necessary. All work performed by the AGENCY shall be conducted at such times and in such manner as to not interfere or impede the operations of CSXT. CSXT shall provide a construction watchman or other protective services at the CROSSING while work is being performed

by the AGENCY under the provisions of this Agreement, at the sole expense of the AGENCY.

12) The AGENCY agrees, acknowledges and understands that CSXT reserves the right to make any changes at any future time in its existing tracks or other facilities, including the installation, maintenance and operation of any additional track or tracks or other facilities on its right-of-way at the CROSSING. CSXT shall be reimbursed by AGENCY for the expenses incurred by CSXT with respect to the removal and restoration of the CROSSING in connection with such changes or alterations. The AGENCY agrees to promptly relocate any AGENCY facilities to accommodate any CSXT changes within thirty (30) days of a request by CSXT to do so, at AGENCY's sole cost and expense.

13) The AGENCY agrees that it will install, maintain and replace all necessary drainage facilities to prevent the accumulation of surface water due to the existence of the CROSSING. Such facilities must first be approved by the CSXT and any governing bodies having jurisdiction thereof and operation of the facilities shall also be subject at all time to their approval. An additional license agreement may be required by the CSXT, depending upon the location of such drainage facilities and type, size, depth and other specifications of the proposed facilities.

14) Lighting facilities adequate to comply with the requirements of the laws of the State of North Carolina covering illumination of the road crossing shall be installed, maintained and replaced at or near this CROSSING by and at the sole cost of AGENCY.

15) Facilities at or near the CROSSING that are not specifically covered by this Agreement may not be constructed by AGENCY at or near the CROSSING without the prior written approval of CSXT, which approval is in CSXT's sole discretion. The cost and liability for such facilities, including but not limited to claims for personal injury or death

or damage to property of any person or persons whomsoever, shall be the sole responsibility of AGENCY to the extent permitted by law.

16) If at any time CSXT, at AGENCY's request, performs work required to be performed by AGENCY hereunder, the cost and liability for such work, including but not limited to claims for personal injury or death or damage to property of any person or persons whomsoever, shall be the sole responsibility of AGENCY to the extent permitted by law.

17) The AGENCY further covenants to pay CSXT, within thirty (30) days after presentation of the same, all invoices submitted by CSXT under this Agreement. Failure to promptly pay to CSXT amounts billed as due under this Agreement shall constitute default by the AGENCY. In the event the AGENCY fails to pay CSXT any sums due to CSXT under this Agreement, AGENCY shall pay CSXT an interest rate at the lesser of 1.0% per each month of delinquency or the maximum rate of interest permitted by applicable law on the delinquent amount until paid in full. In the event AGENCY fails to comply with any of the other terms and conditions of this Agreement, then, at the option of CSXT, CSXT may elect, by delivery of notice to AGENCY, not to perform CSXT's obligations under this Agreement, up to and including closing the CROSSING, until the AGENCY cures any such default to CSXT's satisfaction.

18) At the termination of this Agreement as provided above, all rights of the AGENCY shall terminate and the AGENCY shall remove, under CSXT's supervision and direction, at AGENCY's entire cost and expense, said road and all non-CSXT-owned improvements placed upon the CSXT's right-of-way and restore the ground to its original condition.

19) To the fullest extent permitted by state law, the AGENCY shall indemnify,

defend and hold harmless CSXT for assessments or other charges of any kind whatsoever against the CSXT at any time for any portion of public improvements arising out of the existence of the CROSSING.

20) The AGENCY shall not in any way, or at any time, interfere with or obstruct CSXT's right-of-way, the movement of CSXT's trains and other railroad operations, or interfere with the CSXT's use thereof, or the use thereof by CSXT's assigns, invitees, lessees or licensees.

21) To the fullest extent permitted by state law, the AGENCY shall, and shall require its contractor to, indemnify, defend and hold harmless CSXT, its affiliates, officers, directors and employees from any and all suits, claims, liability, losses, damages, expenses and costs (including reasonable attorney's fees) incurred by or asserted against CSXT whether for personal injury or death or damage to property of any person or persons whomsoever, relating to, resulting from or arising out of any future maintenance or replacement of the CROSSING by CSXT, the performance of work by CSXT required to be performed by AGENCY hereunder, or the use of the CROSSING or AGENCY facilities, including but not limited to pedestrian walkways, at or near the CROSSING. Notwithstanding the foregoing, the AGENCY shall have no indemnification obligation for the intentional, wrongful acts of CSXT.

22) At least thirty (30) days prior to AGENCY's performance of any work in connection with the CROSSING, AGENCY's performance of any work in connection with the CROSSING, AGENCY or its contractor shall notify CSXT or its authorized representative. CSXT shall review AGENCY's request for approval and/or authorization to proceed. Such approval and/or authorization to proceed shall include (if applicable) the execution of such additional agreement(s) as CSXT deems necessary and CSXT's

requirement to furnish protective services including but not limited to flagmen, construction watchmen, field construction inspectors, etc. ("Protective Services") for the protection of CSXT's employees, property and train operations with respect to AGENCY's work activity. Any such Protective Services shall be furnished at AGENCY's sole cost and expense. AGENCY shall abide by all instructions of CSXT's Regional Engineer, or his or her authorized representative, in the performance of any work at the CROSSING.

In addition to, but not in limitation of any of the foregoing provisions, if at any time CSXT should deem it necessary to place Protective Services for the protection of any person or property, during the construction, maintenance, repair, alteration, renewal, or removal at the CROSSING, CSXT shall have the right to place such Protective Services, or other persons, at the sole cost and expense of the AGENCY. The furnishing or failure to furnish Protective Services, or other persons, by the CSXT under this paragraph, however, shall not release AGENCY from any and all other liabilities assumed by AGENCY under the terms of this Agreement, including its obligations under Paragraph 20 hereof.

23) Installation, maintenance and replacement of any and all railroad advance warning signs and pavement markings on any road approaching the CROSSING shall be the sole responsibility and cost of the AGENCY, and at its sole expense.

24) The AGENCY hereby acknowledges that it has been notified that its personnel will or may be working in an area containing active fiber-optic transmission cable as well as other cables and other facilities.

25) If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

26) This Agreement will be governed by the laws of the State of North Carolina. It constitutes the complete and exclusive statement of the Agreement between the parties which supersedes all proposals, oral or written, and all other communications between the parties related to the subject matter of this Agreement. Any future change or modification of this Agreement must be in writing and signed by both parties.

27) Upon completion of the Project and except as otherwise provided in this Agreement, if any provision contained in this Agreement is in conflict with, or inconsistent with, any provision in any of the Construction Agreement, the provision contained in this Agreement shall govern and control.

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IN WITNESS WHEREOF, the CSXT and the AGENCY have caused this instrument to be executed in their corporate names in duplicate the day first hereinafter written by their undersigned officials thereunto lawfully authorized.

TOWN OF APEX

CSX TRANSPORTATION, INC.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

By: _____

Name: _____

Title: _____