

STREET NAME: Westhigh Street

TOWN OF CARY  
AND  
Town of Apex

ENCROACHMENT AGREEMENT  
RIGHT OF WAY OR OTHER TOWN PROPERTY  
STANDARD FORM

This Encroachment Agreement is made as of the \_\_\_ day of \_\_\_\_\_, 2017, by and between the Town of Cary (“Town”) and Town of Apex (the “Applicant”).

WITNESSETH:

WHEREAS, on \_\_\_\_\_, 20\_\_\_, the Applicant submitted an application for permission to encroach on certain public street and/or street right(s) of way (hereinafter, “Public Streets”) under Town’s jurisdiction or on other Town-owned property (hereinafter, “Town Property”), along with a site plan; and

WHEREAS, based on Applicant’s submittals, such proposed encroachment will not substantially impair or hinder the use of the Public Streets as a way of passage or the use of Town Property for its intended purpose; and

WHEREAS, Town is willing to exercise its authority in accordance with N.C.G.S. 160A-265, 160A-296 and the Town of Cary Code of Ordinances to permit the Applicant to encroach on the Public Streets or Town Property in the locations, and for the purposes described below.

NOW, THEREFORE, the parties agree as follows:

1. Permission to Encroach. The Town hereby grants the Applicant non-exclusive, revocable permission (subject to applicable law) to encroach over Public Streets located at Bishops Gate Subdivision or on Town Property located at Westhigh Street, for the purpose of construction and/or erection and maintenance of 1/0 UG Primary Distribution cables, as more particularly described in the attached plan (“Facilities”) attached hereto as *Exhibit A* and incorporated herein by reference, subject to the lawfully imposed terms and conditions set forth in Town of Cary Code of Ordinances Chapter 28, Article VI (the “Code Conditions”) and those stated below (the “Permission”). The installation, operation, and maintenance of the Facilities are sometimes referred to herein as “the Work.” Applicant understands and agrees that, notwithstanding any language in this Agreement to the contrary, Town grants Permission only to the extent authorized by law and the terms of the conveyance of the right-of-way, fee, easement, or other property interest to Town in the Public Streets or Town Property. Applicant shall be solely responsible for obtaining for itself all easements, licenses and property rights, and in complying with any state or federal regulatory requirements as may be necessary for the Work. Nothing in this Agreement shall constitute or create an assignment to Applicant by Town of any easement or license held by Town or of any rights under any easement or license held by Town. Nothing herein contained shall be construed to confer on Applicant an exclusive right to encroach on Town Easement or confer any rights to any third party not specifically identified herein by name.

2. The Applicant’s Obligations. In addition to the requirements set forth in the Code Conditions, the Applicant, its successors and permitted assigns shall:

(a) provide proper signs, signal lights, flagman and other warning devices for the protection of traffic in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways (“MUTCD”) and amendments or supplements thereto (which can be obtained from the Right of Way Coordinator) during any

installation and maintenance of the Facilities Applicant places in the Public Streets or on Town Property pursuant to this Agreement; provide at least three (3) business days notice to Town of any work which will require lane closure or traffic control measures lasting more than twenty-four hours; and ensure that temporary pedestrian accessibility is provided in accordance with Americans with Disabilities Act Accessibility Guidelines and the MUTCD;

(b) install, operate and maintain the Facilities at Applicant's sole cost and expense in accordance with Town's Standard Specifications and Details, as such may be amended from time to time, and other Town policies and otherwise in such a safe and proper condition that installation, operation and maintenance of Facilities will not endanger or otherwise interfere (i) with use of a Public Street as a way of passage, (ii) with traffic on any Public Street, (iii) with the maintenance of any Public Street, (iv) with operation or maintenance of any other Town-owned infrastructure located within or adjacent to the Public Street, including but not limited to underground fiber and water, sewer, or reclaimed water lines, (v) with operation or maintenance of any other infrastructure or equipment located within the Public Street, so long as such infrastructure or equipment is lawfully present within the Public Street, or (vi) with use, operation, or maintenance of any Town Property;

(c) promptly repair any damage to the Public Streets, all Town-owned infrastructure, facilities, or structures, and all other areas disturbed during installation and maintenance of the Facilities, including but not limited to pavement, sidewalk, curb and gutter, drainage systems, signs, pavement markings, underground fiber, and water, sewer, or reclaimed water lines, and shall restore to the condition existing prior to Applicant's disturbance, re-establishing grass cover with seeding and spreading of straw for finishing, all to the satisfaction of Town, which shall not be unreasonably withheld or delayed;

(d) exercise reasonable precaution during construction, operation, and maintenance of the Facilities to prevent soil erosion, silting or other pollution of any surface water or groundwater, and otherwise comply with all applicable rules and regulations, including Town's Erosion Control and Public Street Right(s)-of-Way Ordinances;

(e) give written notice to Town when any work on or near a highway open to traffic is completed pursuant to this Agreement (unless specifically requested by Town, written notice of completion of work on street projects under construction will not be required);

(f) reimburse Town for any costs or expenses of Town, reasonably incurred, for any repairs or maintenance to the Public Streets, any Town-owned infrastructure, facilities, structures, or other areas resulting from or related to the installation, operation, maintenance or existence of the Facilities, following receipt of invoices from the Town detailing those costs (and including supporting documentation evidencing them if available and requested by Applicant);

(g) within a commercially reasonable time, remove or alter the Facilities at its cost, at Town's request in the event that Town or its contractors need to conduct work in the relevant areas, where the Facilities are in conflict with such work (as reasonably determined by the Town) and unless applicable law provides otherwise; provided however, that if in connection with a specific Town project the Town compensates any similarly situated person for relocating or moving its facilities, Town will, at Applicant's request, compensate Applicant for relocation or moving its facilities in connection with the same Town project using Town's standard processes and practices applicable to all third parties;

(h) understand and agree that damage or destruction may occur to Facilities and other property of Applicant in the course of Town's operations and that Town has no obligation to protect Applicant, Applicant's property or Facilities or to minimize, mitigate or avoid any such damage; and release, waive, and discharge any legal rights to seek payment or relief of any kind from the Town, its officers, boards, commissions and employees, for any damages resulting from Town's operations, maintenance, or other use of the Public Streets or Town Property;

(i) understand and agree that Permission is non-exclusive, that additional encroachments by others may be permitted in the Public Streets or Town Property (“Third Party Encroachments”), and that Town is not liable for any damage to Facilities that arise from the installation, operation, maintenance, or existence of Third Party Encroachments; and that any recourse for such damage must be from the Third Party Encroacher;

(j) release, waive, and discharge any legal rights to seek payment or relief of any kind from the Town, its officers, boards, commissions and employees, for any damages resulting from Third Party Encroachments;

(k) indemnify, defend and hold harmless the Town, its officers, boards, commissions, employees, and contractors from and against any and all damages, loss, costs, expense and claims and liabilities, including reasonable attorneys’ fees and costs, that arise from the installation, operation, maintenance or existence of the Facilities, the restoration of the area disturbed by the installation, maintenance or existence of the Facilities, and Applicant’s activities or items in the Public Streets or on Town Property; and

(l) comply with all applicable Federal, State, and local laws. Applicant, and all subcontractors, shall comply with Article 2, Chapter 64, of the North Carolina General Statutes.

3. Term. The term of this Agreement is the earlier of twenty (20) years (the “First Term”) or the cessation of use and maintenance of the Facilities. At the end of the First Term, if Facilities are still being used and operated, the Agreement shall automatically renew for successive one-year terms unless terminated by either party as provided herein or unless superseded by a new or amended agreement. Either party may terminate this Agreement upon thirty days written notice to the other party. Notwithstanding the foregoing, the grant of Permission to encroach shall become void, and this Agreement terminated, if the Applicant does not begin installation of the Facilities within one (1) year of the date of this Agreement (unless mutually agreed upon in writing by the parties) and thereafter diligently pursue installation to completion. If the Town Manager or designee determines that suspension of this Agreement is warranted to protect the public health or safety, Town may suspend this Agreement, in whole or in part, immediately upon notice to Applicant and for such length of time as deemed necessary by the Town to protect the public health or safety. Upon the termination of this Agreement, Applicant shall remove Facilities and restore any disturbed area to the condition existing prior to Applicant’s encroachment, re-establishing grass cover with seeding and spreading of straw for finishing, all to the satisfaction of Town, which shall not be unreasonably withheld or delayed.

4. Other Requirements. This Agreement is further subject to the following conditions or requirements:

---

A. Applicant binds itself, its successors, permitted assigns and legal representatives to the terms of this Encroachment Agreement. This Encroachment Agreement may not be assigned without the prior written consent of the Town. Applicant may subcontract the Work, provided that the Applicant shall be and remain responsible for the Work and all required insurance and financial security. All entities performing the work must be North Carolina licensed and bonded contractors.

B. The Applicant shall procure and maintain liability and worker's compensation and other insurance at all times during performance of any work under this Agreement and any approved permit applications, in the amounts and under the terms stipulated on the *Schedule of Insurance* attached as *Exhibit B*. The Applicant shall deliver to Town a certificate of insurance evidencing such coverage, and that Town is an additional insured. Should any of the described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.

C. At the time of execution of this Agreement, the Applicant shall furnish a Performance Bond in an amount not less than the sum of \$10,000 or the estimated cost of construction or erection of Facilities, whichever is the higher amount, as security for the faithful performance of this Agreement for the term of this

Agreement. The Performance Bond shall be with a Surety acceptable to Town and shall be in the form and amount as stipulated on the attached *Exhibit C Performance Bond Form*, incorporated herein by reference.

D. In the event of conflict between the requirements of this Encroachment Agreement or the Code Conditions, the more restrictive requirement shall apply.

E. Applicant must comply with all relevant provisions of the Town of Cary Code of Ordinances, including but not limited to Sections 22-102 – 22-112 (“Noise”) and Section 36-1 (“Tampering with water or sewer systems--Protection of systems on certain days”), as they may be amended from time to time. Section 36-1 prohibits performing “any excavation or other work adjacent to or near” the Town’s water or sewer system (including reclaimed water system) or the making “of any street or other repairs which might endanger said water or sewer system on any legal holidays of the town or on Saturdays or Sundays without prior written permission of the town manager.”

5. Notice. Notices to Applicant under this Agreement shall be sent to the following address:

---

Notices to Town under this Agreement shall be sent to the following address: 316 N. Academy Street, Cary, NC 27513, Attn: Right of Way Coordinator.

6. Recitals. The Recitals are incorporated herein.

7. Miscellaneous. (a) Neither party waives any rights it may have under applicable law with respect to the subject matter in this Agreement. (b) There are no third party beneficiaries to this Agreement. (c) Town may convert the signed original of this Agreement to an electronic record pursuant to an approved North Carolina Department of Cultural Resources procedure and process for converting paper records to electronic records for record retention purposes. Such electronic record of this Agreement shall be deemed for all purposes to be the original signed Agreement. (d) The individual signing Agreement has the right and power to do so and bind Grantee to the obligations set forth herein and such individual does so warrant that he/she has such authority. (e) Applicant acknowledges that records in the custody of Town are public records and subject to public records requests. Town may provide copies of such records, including copyrighted records, in response to public record requests. (f) Nothing contained in this Agreement shall be deemed or construed so as to restrict or inhibit the Town’s police powers or regulatory authority. (g) Nothing in this Agreement shall be construed to mandate purchase of insurance by Town pursuant to N.C.G.S. 160A-485 or to in any way waive Town's defense of sovereign or governmental immunity from any cause of action alleged or brought against any Party for any reason if otherwise available as a matter of law. No officer, agent or employee of Town shall be subject to any personal liability by reason of the execution of this Agreement. Such officers, agents, or employees shall be deemed to execute this Agreement in their official capacities only, and not in their individual capacities. This section shall not relieve any such officer, agent or employee from the performance of any official duty provided by law. (h) This Agreement represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations, or agreements, either written or oral, and may only be amended only by written amendment in a writing signed by the both parties. (i) This Agreement shall be governed by the laws of the State of North Carolina. All suits or actions related to Agreement shall be brought exclusively in Wake County, North Carolina.

---

IN WITNESS WHEREOF, each of the parties to this agreement has caused the same to be executed in the day and year first above written.

NAME OF APPLICANT: \_\_\_\_\_

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name and Title, if Applicable (Please Print)*

\_\_\_\_\_  
*Address*

\_\_\_\_\_  
*City, State, Zip*

NOTARY OR CORPORATE SEAL

ATTEST OR WITNESS:

NORTH CAROLINA

COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, a notary public, do certify that  
\_\_\_\_\_ personally appeared  
before me this day and acknowledged the due execution of the  
foregoing agreement. Witness my hand and notarial seal this \_\_\_\_\_  
day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
*Notary Public*

My commission expires: \_\_\_\_\_

---

---

TOWN OF CARY APPROVAL

So Agreed By: \_\_\_\_\_ DATE \_\_\_\_\_

EXHIBIT A

**PLAN**

EXHIBIT B

**SCHEDULE OF INSURANCE**

The insurance required by the Encroachment Agreement shall be as provided herein and written for not less than the following amounts, or greater if required by law:

1. Workers' Compensation

- a. Statutory Coverage for North Carolina
- b. Employers' Liability
  - \$500,000 Per Accident
  - \$500,000 Disease Policy Limit
  - \$500,000 Disease Each Employee

2. Commercial General Liability (including Premises-Operations; Personal and Advertising injury; Products and Completed Operations; Bodily Injury; Property Damage and Contractual Liability). The Applicant shall include Cary and its employees, agents and consultants as additional insureds on the Commercial General Liability Policy.

- a. Combined single limit (bodily injury and property damage):
  - \$3,000,000 General Aggregate
  - \$1,000,000 Products & Completed Operations Aggregate
  - \$1,000,000 Personal and Advertising Injury
  - \$1,000,000 Per Occurrence
  - \$ 50,000 Fire Damage (Any One Fire)
- b. Property Damage Liability Insurance shall provide X, C, and U coverage.
- c. Products and Completed Operations insurance shall be maintained for a minimum period of two (2) years after completion of Work.
- d. Commercial General Liability Policy shall be endorsed to have the general aggregate apply on a "per project" basis.

3. Commercial Automobile Liability covering all owned, hired, and non-owned vehicles:

Combined Single Limit; \$1,000,000 Each Accident

4. Umbrella Policy

\$5,000,000 Over Primary Insurance & Self Insured Retention not to exceed \$5,000  
Grantee may use any combination of primary and excess insurance to meet required total limits.

Certificates of Insurance acceptable to Town shall be filed with Town prior to commencement of any work. Coverage afforded under the policies will not be canceled, if not renewed, until at least thirty (30) days prior written notice has been given to the Town. Insurance carrier(s) shall be licensed, authorized, or permitted, and admitted to do business in the state of North Carolina.