

STATE OF NORTH CAROLINA
CATAWBA COUNTY

**RIGHT-OF-WAY ENCROACHMENT AGREEMENT
CITY-MAINTAINED STREETS**

THIS RIGHT-OF-WAY ENCROACHMENT AGREEMENT is made and entered into this ____ day of _____, 20 ____ (“Effective Date”), by and between the City of Hickory, a North Carolina municipal corporation, having a mailing address of P.O. Box 398, Hickory, NC 28603 (“Grantor”) and _____, having a mailing address of _____ (“Grantee”).

WITNESSETH

WHEREAS, Grantee desires to encroach on certain public streets and/or right-of-ways (hereinafter collectively, “ROW”) under the Grantor’s jurisdiction for the purpose of constructing, installing and maintaining certain utilities described as follows:

Route(s): _____
Located: _____
Facilities: _____

WHEREAS, it is to the material advantage of the Grantee to effect this encroachment, and Grantor in the exercise of authority conferred upon it by statute, is willing to permit the encroachment within the limits of the right of way as indicated, subject to the conditions of this Agreement.

NOW, THEREFORE, IT IS AGREED that Grantor hereby grants to Grantee the right and privilege to make this encroachment as shown on attached plan sheet(s), specifications and special provisions which are incorporated herein by reference and attached hereto as an exhibit, upon the following conditions, to wit:

Grantor does hereby grant unto Grantee permission to encroach on the ROW at the locations described in the approved plans and specifications, which are attached hereto as Exhibit A, in accordance with the terms of this Agreement for the purpose of constructing, installing, maintaining, operating and, if necessary, removing the encroaching facilities described above (the “Encroachment”). Other than removing the Encroachment, Grantee shall not alter or add to the Encroachment in any way without receiving prior written consent from Grantor. Should Grantee perform any work in the ROW without the prior written consent of Grantor, should it fail to perform the work in a manner consistent with the specifications approved by Grantor, or should the Encroachment threaten any Grantor facility, then Grantee shall be liable to Grantor for any costs Grantor incurs while remedying actual or potential threats to Grantor’s facilities arising from such work.

This Agreement and the rights granted hereto are subordinate and subject to Grantor’s continuing right to use and control the ROW in accordance with North Carolina law. Nothing in this Agreement shall be interpreted to restrict, impair, or affect Grantor’s right to construct, install, operate, maintain, repair, or remove roadways, sewers, water pipes, storm drains, gas pipes, utility poles, overhead and underground electric lines, and any other associated facilities or utility and municipal uses.

Grantee understands and agrees that, notwithstanding any language in this Agreement to the contrary, Grantor grants permission only to the extent authorized by law and only to the extent allowed under the terms of the conveyance of the right of way, fee, easement, or other property interest of Grantor in the ROW. Nothing in this Agreement shall constitute or create an assignment to Grantee by Grantor of any easement or license held by Grantor or of any rights under any easement or license held by Grantor. Nothing herein contained shall be construed to confer on Grantee an exclusive right to encroach on ROW or confer any rights to any third party. This Agreement also does not grant usage of Grantor’s poles or conduits by the Grantee.

The Grantee, its contractors, employees, agents, successors, and assigns shall:

(A) Take all necessary steps, including but not limited to, contacting North Carolina 811 at least three (3) days prior

to any digging or excavation to ensure that any activity or operation by Grantee will not interfere with, damage, disrupt, or interrupt any utility located in the ROW, above or below ground.

- (B) Notify Grantor at least five (5) business days before commencing work in the ROW and at least three (3) days before work begins, take reasonable steps to notify residents of buildings in the area of the affected ROW that work will be performed. Failure to provide the notifications outlined in this Agreement may, in Grantor's discretion, result in suspension or termination of this Agreement. Grantee shall not begin work until approval to proceed has been provided by Grantor. Approval may be provided through electronic mail. Approvals will be provided by a representative designated by the Grantor. Approval or objections will be provided by the Grantor within two (2) business days of receipt of Notice.
- (C) In the event Grantee will be placing the Encroachment in the ROW within the tolerance zone (as defined in Section 87-117 of the North Carolina Underground Utility Safety and Damage Prevention Act) (hereinafter "NC811 Law") of a Grantor water or sewer line or any other Grantor-owned utility line, Grantee shall follow NC811 Law requirements for excavating within that tolerance zone.
- (D) Provide proper traffic control devices in conformance with the latest Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"), including but not limited to signs, signal lights, and flagmen for the protection of traffic and amendments or supplements thereto during any installation or maintenance of the Network Facilities pursuant to this Agreement; Grantee shall provide at least five (5) business days' notice to the Grantor of any work which will require lane closure or traffic control measures lasting more than twenty-four hours; Grantee shall follow all federal, state, and local accessibility regulations, including the MUTCD and the Americans with Disabilities Act.
- (E) Install, operate, repair and maintain the Encroachment at Grantee's sole cost and expense and in accordance with federal, state, and local law, and any other regulations, ordinances and standards imposed by Grantor, as may be amended from time to time. Construction, installation, operation, and maintenance of the Encroachment shall not endanger, inhibit, prevent, or interfere (i) with use of a ROW as a way of passage except in conformance with Section (D) above, (ii) with traffic on any ROW except in conformance with Section (D) above, (iii) with the maintenance of any ROW, (iv) with operation or maintenance of any Grantor-owned infrastructure located within or adjacent to the ROW, including but not limited to electric lines or poles, underground fiber, and water or sewer lines, or (v) with operation or maintenance of any other infrastructure or equipment lawfully located within the ROW.
- (F) In the event Grantee damages any existing gas, electric, communications, water, sewer, or other utility facilities, Grantee shall immediately cease work and notify Grantor and the affected utility company of the damage. Grantee will not resume work where damage has occurred until Grantor determines that the danger to the public and the utility facilities has been eliminated.
- (G) Promptly repair and restore any damage to the ROW, all Grantor-owned infrastructure, and all other areas disturbed during installation, operation, repair and maintenance of the Encroachment, including but not limited to pavement, sidewalk, curb and gutter, drainage systems, signs, pavement markings, underground fiber, utility poles, electric lines, and water or sewer lines, and shall restore same to the condition existing prior to Grantee's disturbance, re-establishing grass cover with seeding and spreading of straw for finishing, all to Grantor's satisfaction which shall be based on the industry standards for such activity.
- (H) Exercise every reasonable precaution during construction and maintenance to prevent eroding of soil; silting or pollution of rivers, streams, lakes, reservoirs, other water impoundments, ground surfaces or other property; or pollution of the air. Grantee shall with applicable rules and regulations of the North Carolina Department of Environmental Quality and with ordinances and regulations of the City of Hickory relating to pollution prevention and control. When any installation or maintenance operation disturbs the ground surface and existing ground cover, Grantee agrees to remove and replace the sod or otherwise reestablish the grass cover to meet the satisfaction of the City of Hickory Engineering Department of Grantor.
- (I) Comply with all Grantor ordinances, rules, and regulations regarding stormwater discharge and soil erosion and sedimentation control as well as Grantor's regulations, ordinances, standards and specifications for roadway and utility construction.
- (J) Assume the actual cost of any inspection of the work considered to be necessary by the City of Hickory Engineering Department of Grantor.

- (K) Reimburse Grantor for any reasonable costs or expenses of Grantor for any repairs or maintenance to the ROW, any Grantor-owned infrastructure, or other Grantor-owned structures resulting from or related to Grantee's negligence or willful misconduct in performing the installation, operation, maintenance, repair, or existence of the Encroachment following receipt of invoices from Grantor detailing those costs and/or expenses, including supporting documentation evidencing them, if requested and available.
- (L) In the event Grantee's Encroachment would interfere with Grantor's use of the ROW for a legitimate governmental purpose, including but not limited to, construction or installation of water, sewer, or electric lines, or construction/relocation of a public road, Grantee will, upon written notice from the Grantor, relocate its Encroachment at Grantee's expense to another location in the public ROW as may be agreed upon by the Parties. Relocation shall occur within a commercially reasonable time period after receiving notice from Grantor, taking into account the urgency of the need for relocation, the difficulty of the relocation, and other relevant facts and circumstances.
- (M) In the event of a public emergency that creates an imminent threat to the health, safety, or property of Grantor or its residents, Grantor may remove or relocate any applicable Encroachment without notice to Grantee; provided, however, that Grantor will make best efforts to provide prior notice to Grantee before making an emergency removal or relocation. Grantor will provide Grantee a detailed description of any emergency removals or relocations of the Encroachment. If Grantee abandons any portion of the Encroachment, Grantee shall notify Grantor and remove said facilities at Grantee's expense; provided, however, that Grantor and Grantee shall discuss whether underground facilities may be abandoned in place or transferred to Grantor at the mutual agreement of Grantee and Grantor.
- (N) Understand and agree that damage or destruction may occur to the Encroachment and other property of Grantee in the course of Grantor's operations and that Grantor has no obligation to take extraordinary measures to protect Grantee, Grantee's property, or the Encroachment or to minimize, mitigate, or avoid any such damage; and release, waive, and discharge any legal rights or claims to seek payment or relief of any kind from Grantor, its elected officials, boards, commissions, and employees, for any damages resulting from Grantor's operations, maintenance, or other use of the ROW under its prior and continuing right to use the ROW.
- (O) Understand and agree that permission provided by this Agreement is non-exclusive, that additional encroachments by others may currently exist and be permitted in the future in the ROW ("Third Party Encroachments"), and that Grantor is not liable for any damage to the Encroachment that arises 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.
- (P) Release, waive, and discharge any legal rights to seek payment or relief of any kind from Grantor, its elected officials, boards, commissions, and employees, for any damages due to or resulting from Third Party Encroachments.
- (Q) Hold Grantor, its officers, employees, and elected officials harmless from any and all liability arising out of the construction, installation, maintenance, repair, or existence of the Encroachment and associated restoration activities in the ROW; that it will defend Grantor, its officers, employees, and elected officials, and pay reasonable attorneys' fees in any and all actions brought as a result of such; and that it will indemnify Grantor, its officers, employees, and elected officials against any and all loss sustained by reason of negligence, recklessness, or intentional wrongful conduct of Grantee arising out of the installation, maintenance, operation, repair, removal, location, or existence of the Encroachment.
- (R) Comply with all applicable Federal, State, and local laws and regulations. Grantee, and all subcontractors, shall comply with Article 2, Chapter 64, of the North Carolina General Statutes.
- (S) Maintain valid general liability insurance in the combined single limit (bodily injury and property damage) amount of \$5,000,000 general aggregate, commercial automobile liability insurance in the minimum amount of \$2,000,000, and provide certificates of such insurance naming the Grantor as an additional insured by endorsement to the policies. Grantee shall maintain an umbrella excess policy in the minimum amount of \$3,000,000 over primary insurance. Additionally, Grantee shall maintain and show proof of workers' compensation within the NC statutory limits and employer's liability insurance in the minimum amount of \$1,000,000. Grantee shall provide notice of cancellation, non-renewal or material change in coverage to Grantor within 10 days of their receipt of notice from the insurance company. All required certificates of insurance, endorsements, and blanket additional insured policy provisions are attached and considered part of this document. Notwithstanding the foregoing, neither the requirement of Grantee to have sufficient insurance nor the

requirement that the Grantor is named as an additional insured, shall constitute waiver of Grantor's governmental immunity in any respect, under North Carolina law.

Grantee agrees to have available at the construction site, at all times during construction, a copy of this Agreement showing evidence of approval by Grantor. Grantor reserves the right to stop all work unless evidence of approval can be shown.

Provided the work contained in this Agreement is being performed on a completed highway open to traffic; Grantee agrees to give written notice to the City of Hickory Engineering Department of Grantor when all work contained herein has been completed. Unless specifically requested by Grantor, written notice of completion of work on highway projects under construction shall be provided.

That in the case of noncompliance with the terms of this agreement by Grantee, Grantor reserves the right to stop all work until the facility has been brought into compliance or removed from the right of way at no cost to Grantor.

Grantee shall not permit or suffer any mechanic's or materialmen's or other liens of any kind or nature to be recorded and/or enforced against Grantor, and Grantee shall indemnify and hold Grantor harmless from and against any and all liens, claims, and expenses related to work done, labor performed, activities undertaken or materials furnished in connection with Grantor's access to the encroachment area described herein in accordance herewith.

In installing and constructing the Encroachment in the ROW Grantee agrees that it will, on its own behalf and on behalf of its contractors and subcontractors, and permitted guests and invitees, release, discharge and covenant not to sue Grantor, its officials, officers, employees, volunteers and agents (collectively, the "Releasees") for any and all liability to Grantee, its contractors, subcontractors, employees, officers, guests, invitees, or assigns (the "Releasors"), for any loss or damage and any claim or demands therefore on account of injury or death to persons or injury or damage to property of the Releasors resulting from and while Releasors are in, upon or about the ROW, unless such loss, damages, claim or demand is determined (by a court's final judgment after all appeals have been concluded or exhausted) to have been caused by the gross negligence or willful misconduct of the Releasees. Grantor accepts the ROW, in its "AS-IS" condition as of the Effective Date of this Agreement and "WITH ALL FAULTS" AND WITHOUT ANY REPRESENTATIONS OR WARRANTIES WHATSOEVER, EXPRESS OR IMPLIED ON THE PART OF GRANTOR, OR ARISING BY OPERATION OF LAW INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE OF THE GRANTOR-OWNED ROW.

At any time during the term of this Agreement, Grantor may terminate this Agreement for Cause (defined below) and revoke Grantee's rights hereunder, with such termination taking effect upon written notice of the termination for Cause being sent to Grantee. "Cause" shall be defined, as determined by the City of Hickory Engineering Department in its reasonable good faith discretion, as termination for: (A) a material breach by Grantee of any provision of this Agreement; or (B) Grantee's gross negligence or willful misconduct in connection with the performance of, or willful refusal to perform or material disregard of, any of Grantee's material duties or material responsibilities under this Agreement. Notwithstanding anything contained herein to the contrary, Grantor shall give Grantee written notice prior to terminating this Agreement based upon a material breach of this Agreement as described in (A) above, setting forth in reasonable detail the nature of any alleged breach and the conduct required to cure such breach. Grantee shall have ten (10) days from the giving of such notice within which to cure such breach, to the extent curable (as reasonably determined in good faith by the City of Hickory Engineering Department). Termination of this Agreement based upon gross negligence or willful misconduct as described in (B) above shall be effective immediately upon written notice to Grantee. Upon termination of this Agreement, the Encroachment granted under this Agreement shall terminate and may only be reestablished if the Grantee applies for and is granted a new encroachment by Grantor under separate Agreement.

Either party may terminate this Agreement without Cause upon thirty (30) days' written notice to the other party.

In the event of termination of this Agreement, whether with or without Cause, this Agreement will continue to govern any construction completed prior to the effective date of termination.

Notwithstanding the foregoing, the encroachment granted under this Agreement shall become void, and this Agreement shall automatically terminate as to any approved construction plans and specification if Grantee fails to complete construction of the Encroachment within one (1) year of the Effective Date, unless Grantee applies for and is granted a written extension by Grantor.

All of Grantee's obligations under this Agreement shall survive termination.

This agreement shall be recorded at Grantee's expense.

This Space was Intentionally Left Blank. Signatures and Acknowledgments Appear on the Following Pages.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed effective as of the day and year written below.

CITY OF HICKORY,
a North Carolina Municipal Corporation

_____ (Seal)

By: Warren Wood

Its: Manager

STATE OF _____
COUNTY OF _____

I, _____ a Notary Public of said county and state, certify that Warren Wood personally came before me this day and acknowledged that he is the City Manager for the City of Hickory, a North Carolina municipal corporation, and being duly authorized to do so, voluntarily executed the foregoing instrument for the purposes stated therein on behalf of said limited liability company.

Witness my hand and notarial stamp or seal, this _____ day of _____, 20__.

Notary Public

[AFFIX NOTARIAL SEAL]

My Commission Expires: _____.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed effective as of the day and year written below.

_____ (Seal)

By:

Its:

STATE OF _____
COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid, certify that _____ [Name] personally appeared before me this day and acknowledged that he or she is the _____ [Title] for _____ [Entity], and being duly authorized to do so, voluntarily executed the foregoing instrument for the purposes stated therein on behalf of said limited liability company.

Witness my hand and official stamp or seal this ____ day of _____, 20__.

[NOTARIAL SEAL]

Notary Public

My commission expires: _____

INSTRUCTIONS

The name and address for the Grantor should be included in the spaces on Page 1 of this Agreement.

This Agreement must have the corporate seal and be attested by the empowered City official. In the space provided in this Agreement for execution by Grantor, the name of the corporation shall be typed above the signature line, and the name and title of the person signing this Agreement on behalf of the corporation should be typed directly below the signature. When the applicant is not a corporation, the name of the person signing this Agreement should be typed below the signature. All signatures must be notarized.

This Agreement must be accompanied, in the form of an attachment, by plans or drawings showing the following applicable information:

1. All roadways and ramps.
2. Right of way lines and where applicable, the control of access lines.
3. Location of the existing and/or proposed encroachment.
4. Length, size and type of encroachment.
5. Method of installation.
6. Dimensions showing the distance from the encroachment to edge of pavement, shoulders, etc.
7. Location by highway survey station number. If station number cannot be obtained, location should be shown by distance from some identifiable point, such as a bridge, road, intersection, etc.
8. Drainage structures or bridges if affected by encroachment (show vertical and horizontal dimensions from encroachment to nearest part of structure).
9. Method of attachment to drainage structures or bridges.
10. Manhole design.
11. On underground utilities, the depth of bury under all traveled lanes, shoulders, ditches, sidewalks, etc.
12. Length, size and type of encasement where required.
13. On underground crossings, notation as to method of crossing - boring and jacking, open cut, etc.
14. Location of vents.

GENERAL REQUIREMENTS

1. Any attachment to a bridge or other drainage structure must be approved by the City of Hickory Engineering Department prior to submission of encroachment agreement for approval by the City of Hickory.
2. All crossings should be as near as possible normal to the centerline of the highway.
3. Minimum vertical clearances of overhead wires and cables above all roadways must conform to clearances set out in the National Electric Safety Code.
4. Encasements shall extend from ditch line to ditch line in cut sections and 5' beyond toe of slopes in fill sections.
5. All vents should be extended to the right of way line or as otherwise required by the City of Hickory Manual of Practice.
6. All pipe encasements as to material and strength shall meet the standards and specifications of the North Carolina Department of Transportation.
7. Any special provisions or specifications as to the performance of the work or the method of construction that may be required by the City of Hickory must be shown on a separate sheet attached to encroachment agreement provided that such information cannot be shown on plans or drawings.
8. The Engineering Department of the City of Hickory shall be given notice by the applicant prior to actual starting of installation included in this agreement.