

STREET NAME: _____

TOWN OF CARY
AND

MINOR ENCROACHMENT AGREEMENT
RIGHT OF WAY OR EASEMENT AREA
FOR IRRIGATION, FENCE, LANDSCAPING and
DRAINAGE IMPROVEMENTS

(Property Owner)

(Property Owner)

This Encroachment Agreement is made this the ____ day of _____, 20____, by and between the Town of Cary (“Town”) and _____ the Property Owner (“Applicant”) of adjacent property located at _____ [insert street address].

WITNESSETH:

WHEREAS, 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 easements of the Town (hereinafter “Town Easement”) for the installation of the following Facilities that will benefit Applicant’s adjacent property [check all that apply]:

- irrigation fixtures
- fencing
- landscape plants and materials
- drainage improvements (including penetrations of the curb, storm drain inlet, or any other Town owned drainage feature within the Public Street); 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 nor will it impair use of Town Easements for their 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 Easement where Applicant owns the underlying fee for the purposes of installing and maintaining Facilities as further described below.

NOW, THEREFORE, subject to the requirements set forth herein, the parties agree as follows:

1. Permission to Encroach. The Town hereby grants the Applicant non-exclusive, revocable permission to encroach over Public Streets or Town Easement located at _____, for the purpose of construction and/or erection and maintenance of Facilities, as more particularly described in the attached plan, 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, easement, or other property interest to Town. 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 Public Streets or confer any rights to any third party not specifically identified herein by name. 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.

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

(a) install, operate and maintain the Facilities at Applicant's sole cost and expense in accordance with all applicable state and local laws, rules and regulations including Code Conditions, 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 or Town Easement, 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 or Town Easement, so long as such infrastructure or equipment is lawfully present, or (vi) with use, operation, or maintenance of any Town Easement;

(b) 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;

(c) exercise reasonable precaution during construction 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. Applicant is responsible for timely contacting NC One Call Center (811);

(d) 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);

(e) promptly remove or alter Facilities at Applicant's sole cost and expense, at Town's request in the event that Town or its contractor need to conduct work in the relevant areas where the Facilities are in conflict with such work (as reasonably determined by the Town); and

(f) 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;

(g) understand and agree that Permission is non-exclusive, that additional encroachments by others may be permitted in the Public Streets or Town Easement ("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;

(h) 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;

(i) 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, 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 Town Easement; and

(j) 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 shorter of the life of Facilities or thirty (30) years. Either party may terminate this Agreement upon seven days written notice to the other party. Upon notice of termination for any reason, Applicant shall, within seven days of the notice, remove all Facilities and restore the Public Street or Town Easement. With Town's written consent, Applicant may abandon Facilities. 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.

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

- A. Applicant shall ensure that the Work does not disrupt, even temporarily, traffic flow on any Public Street, and has no impact to any paved or concrete surface. Drainage improvements may be installed in the curb only by a licensed general contractor or landscape contractor; and must be made in accordance with Town policies and specifications.
- B. Applicant binds itself, its successors, permitted assigns, legal representatives, and successors in title to the terms of this Agreement. This Agreement may not be assigned without the prior written consent of Town. Applicant may subcontract the Work, provided that the Applicant shall be and remain responsible for the Work. Applicant agrees to inform any purchaser of property and Facilities of this Agreement.
- C. In the event of conflict between the requirements of this Encroachment Agreement or the Code Conditions, the more restrictive requirement shall apply.
- D. 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 address shown in the first paragraph hereof. Notices to Town under this Agreement shall be sent to the following address: 316 N. Academy Street, Cary, NC 27513, Attn: Director, Transportation and Facilities Department.

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 Applicant 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 has caused this Agreement to be executed in the day and year first above written.

[Signatures on next page]

PROPERTY OWNER: _____

Signature

Address

City, State, Zip

TOWN OF CARY APPROVAL

By: _____ Date: _____

Title: _____

EXHIBIT A

PLAN