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City of Atlanta Law Department
55 Trinity Ave., S.W., Suite 5000
Atlanta, Georgia 30303

Space above this line for recording information

ENCROACHMENT AGREEMENT FOR NON-CONFORMING USE

THIS ENCROACHMENT AGREEMENT FOR NON-CONFORMING USE (“**Agreement**”) is entered into on the ____ day of _____, 2019, by and between the **CITY OF ATLANTA**, a municipality organized under the laws of the State of Georgia (the “**City**”), and **KIRKWOOD NEIGHBORS ORGANIZATION, INC.**, a domestic non-profit corporation (“**Encroaching Party**”).

WITNESSETH:

WHEREAS, Encroaching Party wishes to install wayfinding signs (collectively, the “**Encroachment**”) in the City’s public right-of-way throughout the City’s Kirkwood neighborhood as shown on **Exhibit “A”** attached hereto and incorporated herein by this reference (the “**Encroachment Area**”); and

WHEREAS, the plans or specifications for the Encroachment are attached hereto as **Exhibit “B”** attached hereto and incorporated herein by this reference; and

WHEREAS, City’s Code of Ordinances, at Section 138, Article II, requires a Right-of-Way Encroachment Agreement for Non-Conforming Uses for the continued existence and maintenance of, or the alteration of, private structures or properties that encroach into and within the public right-of-way for which there is not an applicable agreement; and

WHEREAS, the City Code of Ordinances, Sections 138-20, 138-22 and 138-24, require an Encroachment Agreement for authorization to allow the installation and continued maintenance of the above-described Encroachment in the public right-of-way; and

WHEREAS, the Commissioner (“**Commissioner**”) of the City’s Department of Public Works (“**DPW**”) has reviewed the plans for the Encroachment and has determined that the Encroachment will not adversely impact the ability of the affected right-of-way to handle vehicular or pedestrian traffic or otherwise to perform its intended public function; and

WHEREAS, Encroaching Party has agreed to conform to the conditions set out in the City's Code of Ordinances at Sections 138-20, 138-22 and 138-24, and all applicable zoning requirements in connection with the Encroachment; and

WHEREAS, the City Council of the City has, by Ordinance Number 19-O-____, adopted on _____ and approved by operation of law on _____, authorized the City to enter this Agreement with Encroaching Party, allowing Encroaching Party to install and maintain the Encroachment that encroaches into and within the public right-of-way.

NOW, THEREFORE, for and in consideration of Ten Dollars and No/100ths (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City and Encroaching Party hereby covenant and agree as follows:

- 1. Public Benefit of Encroachment.** In the opinion of the Commissioner, the construction, installation, operation, use and maintenance of the Encroachment extending into the Encroachment Area will constitute a benefit to the public.
- 2. Grant of Rights in Encroachment Area.** The City hereby grants to Encroaching Party a revocable right to construct, install, use, repair, replace, and maintain the Encroachment within the Encroachment Area, at no cost to the City. The Commissioner has reviewed the plans and has determined that the Encroachment will not adversely impact the ability of the affected right-of-way to handle vehicular or pedestrian traffic or otherwise to perform its intended public function. Accordingly, Encroaching Party shall not construct, install, use, repair, replace, or maintain within the Encroachment Area any facility or structure not listed or described in this Agreement or on the attached **Exhibit "B"**. For avoidance of doubt, this Agreement grants to Encroaching Party a revocable license, rather than an easement or other interest in land. Ownership of the right-of-way, including the Encroachment Area, remains in the City for all purposes, and the City retains the right to enter into and access the right-of-way, including the Encroachment Area, at any time.
- 3. Agreement Is Condition Precedent to Permitting Process; Term of Agreement.** In addition to Encroaching Party satisfying all other applicable legal, administrative or other requirements, the execution of this Agreement by Encroaching Party is a condition precedent to the City issuing any permit for Encroaching Party to construct, install, use, repair, replace, and maintain any structure or facility within the Encroachment Area. This Agreement will bind Encroaching Party, its successors and assigns from and after the date of this Agreement unless sooner terminated as provided herein.
- 4. Plans, Calculations and Technical Specifications.** All alterations, excavations or encroachments permitted on, in, over, under or within the Encroachment Area must be pursuant to plans, calculations, and technical specifications prepared by a professional engineer licensed to practice in the State of Georgia, and approved by the Commissioner, pursuant to the standards set forth in or promulgated under Chapter 138 of the City's Code of Ordinances and, when applicable, all other appropriate legal requirements or administrative rules, including, but not limited to, the standards of the Georgia Department of Transportation or the

Federal Highway Administration, or any other governmental agency having jurisdiction over the right-of-way or Encroachment Area.

5. Indemnification; Public Liability Insurance. Encroaching Party shall indemnify and hold harmless the City, its elected or appointed officials, officers, agents, employees, representatives, successors, and assigns from any and all suits, actions, legal or administrative proceedings, claims, debts, demands, damages, obligations, losses, judgments, charges, interest, attorneys' fees, costs, causes of action of every kind and character, whether in law or equity, and expenses of every kind, arising out of the use of the Encroachment Area by Encroaching Party and the construction, maintenance, or removal of any facility or structure installed by Encroaching Party in the Encroachment Area. This indemnification and hold harmless provision shall survive any termination of this Agreement. Encroaching Party and any contractors who perform any work in the Encroachment Area on its behalf shall maintain a policy of public liability insurance, at no expense to the City, satisfactory to the City and naming the City as an additional insured, in an amount of at least \$1,000,000.00 per occurrence, subject to a \$2,000,000.00 general aggregate amount as required by the City's Risk Manager. Encroaching Party's obligation to comply with the insurance requirements set forth in this Agreement will not be construed to conflict with or limit Encroaching Party's indemnification obligations under this Agreement.

6. Removal From and Restoration of Encroachment Area and Right-of-Way. Encroaching Party agrees to replace or remove the Encroachment from the Encroachment Area, and to replace any area in the right-of-way where the Encroachment is located, to the same as or better condition than existed prior to the installation thereof within ninety (90) days after being notified to do so by the Commissioner, without cost to the City, under the following circumstances:

- a. When DPW determines that such removal is required because of repairs that must be made to the right-of-way or because of infrastructure changes that must be made to the right-of-way; or
- b. When DPW determines that removal is absolutely required for the safe and efficient use of the right-of-way by the public; or
- c. When DPW determines that removal is absolutely required to maintain the health, safety, or welfare of the public.

Any notice issued by DPW to remove, alter, or replace the Encroachment for the reasons set out in subsections 6(a) through 6(c) above will not be issued except when no other reasonable option is available to the City. In accordance with City Code Section 138-24(b)(7), if requested to do so by the City, Encroaching Party shall provide security to ensure that the Encroachment will be removed and the area backfilled, if applicable, and returned to a condition satisfactory to the Commissioner of DPW without cost to the City. In the event that the Encroachment must be completely removed, this Agreement will terminate as of the date specified in the notice from the Commissioner of DPW.

7. **Compliance with the City’s Code of Ordinances.** Encroaching Party agrees at all times during the term of this Agreement to comply with all of the terms of the City’s Code of Ordinances applicable to this Agreement, including, but not limited to Chapter 138.
8. **Compliance with Applicable Law; Reparation of Facilities and Utilities.** Encroaching Party agrees to conduct all activities within the Encroachment Area and right-of-way in accordance with all applicable local, state, and federal rules, regulations, and standards. Encroaching Party agrees to maintain the Encroachment in good condition and will require its contractors to repair any damage to any City-owned property or facilities caused by such contractor, and any public or private utilities. If the City determines that the condition of any work installed and constructed by Encroaching Party in the Encroachment Area presents an imminent danger to life or property of the public, the City may undertake all reasonable measures to protect life or property of the public, and the expense of those measures will be borne by Encroaching Party.
9. **Reimbursement of Damages to the City.** Encroaching Party agrees to repair, or require its contractors to repair, any damage to the right-of-way or Encroachment Area resulting from Encroaching Party’s or its contractors’ use of the Encroachment Area or the construction, installation, maintenance, repair or use of the utility facilities in the Encroachment Area, and will reimburse or require such contractors to reimburse the City for any damages to the right-of-way or Encroachment Area resulting from the same.
10. **Annual Inspection Fee.** Encroaching Party agrees to pay to the City such annual inspection fee of \$100.00 each year on the anniversary of this Agreement during the term hereof. The payment of the one-time application fee by Encroaching Party is a condition precedent to the execution of this Agreement by the City.
11. **Non-Exclusivity of Use of Right-of-Way.** This Agreement is not exclusive as to the use of the right-of-way and does not negate any past, present, or future agreement that the City may enter into with any other person, utility company or provider for use of the right-of-way.

12. Notices.

- a. **Addresses:** The City and Encroaching Party agree that all notices, demands, and requests required or permitted under this Agreement must be in writing and sent to the City or to Encroaching Party, addressed as follows:

TO THE CITY:

City of Atlanta Department of Public Works
 Attn: James Jackson, Commissioner
 55 Trinity Avenue, S.W.
 Atlanta, Georgia 30303
 E-mail: jamesjackson@atlantaga.gov

WITH A COPY TO:

City of Atlanta Department of Public Works
 Attn: Nurudeen Olayiwola
 Senior Public Works Manager

55 Trinity Avenue, S.W.
Atlanta, Georgia 30303
E-mail: noolayiwola@atlantaga.gov

TO ENCROACHING PARTY:

Kirkwood Neighbors Organization, Inc.

Attn: _____

Email: _____

- b. Delivery.** All notices required or permitted to be given by either party to the other under this Agreement must be in writing and may be delivered by:
- (1) Certified or registered U.S. mail, return receipt requested; or
 - (2) E-mail, with a hard copy sent within 24 hours of transmission by one of the other permitted delivery means; or
 - (3) Personal delivery.
- c. Receipt.** Notices sent by certified or registered mail will be deemed received three (3) business days after deposit in the mail, properly addressed. Notices sent by e-mail will be deemed received upon the date of transmission to the proper e-mail address. Notices delivered by hand will be deemed given when actually received or when refused by their intended recipient or returned as non-deliverable.
- d. Change of Contact, Address or E-mail.** Either party may, at any time, change its respective point of contact, address or e-mail address by sending written notice to the other party of the change in accordance with the notice provisions herein.

13. Default and Termination of Agreement. If Encroaching Party defaults in its performance of this Agreement, and fails to cure the default within thirty (30) days of the City's written notice to Encroaching Party of the default or if such default is not capable of being cured within thirty (30) days, provided that Encroaching Party has not commenced curing the default and diligently pursued such cure to completion, this Agreement may be terminated by the City upon ten (10) days' prior written notice to Encroaching Party. Encroaching Party may terminate this Agreement at any time for convenience upon thirty (30) days' written notice. Upon termination of this Agreement under this Paragraph 13, Encroaching Party must remove all facilities and other structures installed by it or on its behalf within the Encroachment Area and replace any area beneath, and including, the right-of-way where the facilities and other structures were installed by it or on its behalf within the Encroachment Area in accordance with this Agreement.

14. Parties Bound. This Agreement will be binding upon and inure to the benefit of the Parties and their respective permitted successors, successors and assigns.

15. Governing Law. This Agreement will be construed under the laws of the state of Georgia. Encroaching Party and the City fix and consent to jurisdiction and venue for any action brought

with respect to this Agreement in Fulton County, Georgia.

- 16. Entire Agreement.** This Agreement contains the entire agreement of the parties with respect to its subject matter and no representations or agreements, oral or otherwise, which are not set forth in the Agreement, will be of any force or effect.
- 17. Recitals and Exhibits.** The Recitals set forth above and the Exhibits attached to this Agreement are incorporated herein by reference and made a part hereof.
- 18. Authority.** Each individual executing this Agreement represents and warrants that he or she is duly authorized to execute this Agreement on behalf of Encroaching Party, and that Encroaching Party has full right and authority to execute and deliver this Agreement.
- 19. Relationship of Parties.** THE PARTIES ACKNOWLEDGE AND AGREE THAT IN NO EVENT WILL THE CITY BE CONSTRUED OR HELD BY VIRTUE OF THIS AGREEMENT OR OTHERWISE TO BE AN EMPLOYER, AGENT, PARTNER, ASSOCIATE OR JOINT VENTURER OF ENCROACHING PARTY IN THE CONDUCT OF ENCROACHING PARTY'S BUSINESS, NOR SHALL THE CITY BE LIABLE FOR ANY DEBTS OR LIABILITIES INCURRED BY ENCROACHING PARTY IN THE CONDUCT OF ENCROACHING PARTY'S BUSINESS. ENCROACHING PARTY IS NOT AN EMPLOYEE, INDEPENDENT CONTRACTOR, AGENT, PARTNER, ASSOCIATE OR JOINT VENTURER OF THE CITY.
- 20. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

CITY OF ATLANTA, a municipality
organized under the laws of the State of
Georgia

By: _____
Name: KEISHA LANCE BOTTOMS
Title: MAYOR

ATTEST:

RECOMMENDED:

MUNICIPAL CLERK (Seal)

COMMISSIONER
DEPARTMENT OF PUBLIC WORKS

APPROVED AS TO FORM:

ASSISTANT CITY ATTORNEY

[Signatures continue on following page]

Signed and sealed in the presence of:

KIRKWOOD NEIGHBORS ORGANIZATION, INC.

Unofficial Witness

By: _____
Name:
Title:

Notary Public (SEAL)

**Exhibit “A”
Encroachment Area**

**Exhibit “B”
Plans/Specifications**

[Attached]