

RESOLUTION R-30-09

**A RESOLUTION APPROVING A TEMPORARY ACCESS
AND CONSTRUCTION EASEMENT GRANT
(703 W. Wesley Street – FE Wheaton/ProBuild)**

WHEREAS, the owner of the property located at 703 W. Wesley Street has presented a temporary access and construction easement grant to the City of Wheaton for approval by the Mayor and City Council (the property is legally described in Exhibit A, attached to this resolution); and the Wheaton City staff has recommended that the easement grant be accepted.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton, Illinois, that the Temporary Access and Construction Easement Grant for 703 w. Wesley Street is hereby approved.

IT IS FURTHER RESOLVED that the Mayor is authorized to sign the approval form and the City Clerk is authorized and directed to attest to the signature of the Mayor and attach a certified copy of this resolution of acceptance to the Temporary Access and Construction Easement Grant for 703 W. Wesley Street.

ADOPTED this 18th day of May, 2009.

Mayor

ATTEST:

Emily M. Censl w/ s
City Clerk

ROLL CALL VOTE

Ayes: Councilman Prendiville
Councilman Scalzo
Councilman Suess
Councilwoman Corry
Councilman Levine
Councilman Mouhelis
Mayor Gresk

Nays: None
Absent: None

Motion Carried Unanimously

Prepared by and after recording
return to:

Henry S. Stillwell III
Rathje & Woodward, LLC
300 E. Roosevelt Road
P.O. Box 786
Wheaton, IL 60187

TEMPORARY ACCESS AND CONSTRUCTION EASEMENT

THIS GRANT OF EASEMENT ("Grant"), made this 18th day of May 2009, by Wheaton Property Corp., an Illinois corporation ("Owner") and ProBuild North, LLC, a Washington limited liability company ("Lessee") (Owner and Lessee collectively "Grantors"), to the City of Wheaton, DuPage County, Illinois, a municipal corporation, having its principal offices at 303 W. Wesley Street, Wheaton, Illinois ("City" or "Grantee"):

RECITALS:

- A. Owner is the owner of fee title to the real estate legally described and depicted on Exhibit "A" ("Owner Parcel").
- B. Lessee holds the exclusive right to possession of the Owner Parcel pursuant to that certain Lease Agreement dated January 1, 2006 ("Lease").
- C. City desires to access and utilize a portion of the Owner Parcel, as depicted on Exhibit "B" ("Easement Premises"), for the purpose of modifying the existing grades and elevations therein so as to facilitate the construction by the City of a new bridge across the railroad right-of-way located south of the Owner Parcel ("Bridge Project") in compliance with those certain plans and specifications therefore as identified and incorporated herein by reference in Exhibit "C" ("Plans and Specifications").
- D. Grantors are agreeable to granting to the City a temporary construction easement over and across the Easement Premises subject to the covenants and conditions hereinafter set forth.

KNOW ALL MEN BY THESE PRESENTS, in consideration of the payment by the City to Lessee of the sum of Forty-Two Thousand Five Hundred and no/100 Dollars (\$42,500.00) and other valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the undersigned Grantors, hereby grant to the City a temporary access and construction easement ("Temporary Easement") for the purpose of surveying, clearing, excavating, regrading, repaving and restoring existing improvements (collectively the "Work"), over, under, upon and

across the Easement Premises, as a part and in furtherance of the City's execution and completion of the Bridge Project.

The terms and conditions of the Temporary Easement are as follows:

1. The Work shall be performed by the City and/or its agents, contractors, employees, successors and assigns, at the City's sole expense, in full compliance with the Plans and Specifications and shall be carried out in a prompt, professional, first class and workmanlike manner. No changes or modifications to the Plans and Specifications affecting the Easement Premises, the Work to be performed therein, and/or modifying the grade transition and/or location for the existing access drive for the Owner Parcel on Western Ave., shall be implemented by the City without the prior written consent of Grantors, which approvals shall be in Grantors' reasonable discretion.

2. Upon the commencement of any portion of the Work which disturbs, damages or removes any of the improvements currently located within the Easement Premises, including without limitation, the parking lot pavement ("Work Commencement Date"), the City shall cause the Work to be completed within one hundred twenty (120) days following the Work Commencement Date ("Completion Deadline"), except the 120 days may be extended by a reasonable period of time in cases of delays caused by unforeseen subsurface conditions, strike, war, civil unrest, acts of God, adverse weather, force majeure or other circumstances beyond the City's control.

3. All existing improvements located within the Easement Premises or elsewhere on the Owner Parcel which are disturbed, damaged or removed shall be repaired or replaced by the City, at its sole expense, in compliance with the Plans and Specifications prior to the Completion Deadline. The reconstruction and repaving of the parking lot shall be performed in compliance with the structural design and construction standards identified in the Plans and Specifications, including, without limitation, minimum soil compaction, sub-base, base and pavement standards.

4. The City, its successors and assigns, shall indemnify, defend and hold harmless Grantors, their respective successors and assigns, board members, officers and employees (collectively "Indemnitees"), of and from all liability, claims, and expenses, including reasonable attorney's fees, for injury to person or property occasioned directly or indirectly as a result of any act or omission by the City, or any person or entity acting by, through, or under the City on the Easement Premises. Where allegations of a claim for injury to person or property are directed solely at the Grantors as a result of the Grantors direct or indirect acts or omissions, or where there is joint and several liability occasioned directly or indirectly as a result of any act or omission of the City, the Grantors, or any persons or entities acting on their behalf, such claims, expenses, including reasonable attorney's fees, shall be apportioned among the parties in conformance with the law. All of the contractors of the City performing work within the Easement Premises shall at all times during the term of this Temporary Easement carry broad

form general liability insurance with combined single limit coverage of not less than \$2,000,00000, naming Grantors as insureds thereunder. The City shall deliver certificates of insurance to Grantors verifying such insurance to be in place prior to commencement of the Work. The City shall not cause or permit any claim or notice of lien to be filed of record against the Easement Premises or any other portion of the Owner Parcel as a result of the activities of the City's, or those acting on behalf of the City, under the Temporary Easement.

5. The Temporary Easement shall automatically, and without further action by any party, expire and be of no further force or effect on the first to occur of (i) completion of the Work, (ii) the Completion Deadline, or (iii) two (2) years following the date of this document (each a "Termination Event"). Upon the occurrence of a Termination Event either of Grantors shall have the right, but not the obligation, to request that the City execute a confirmation of termination in recordable form ("Termination Confirmation") in which event the City shall execute and deliver the same to the applicable Grantor within thirty (30) days following the Grantor's delivery of the Termination Confirmation to the City Engineer.

6. The Owner Parcel shall have and be entitled to the continuous and uninterrupted access for ingress and egress of vehicular and pedestrian traffic onto and off of Western Avenue ("Western Avenue Access") throughout the term of the Temporary Easement and the City's construction of the Bridge Project. The City shall, at its expense and in a prompt and workmanlike manner, from time to time construct such temporary or permanent improvements to the Western Avenue Access servicing the Owner Parcel so as to protect and maintain said access in a continuous and uninterrupted manner.

7. Any notice required or desired to be given under this Grant shall be in writing and shall be deemed to have been given when delivered personally, on the date of confirmed telefacsimile transmission, or on the date deposited in a United States Post Office, registered or certified mail, postage prepaid, return receipt requested, and addressed as follows:

If to Owner: Wheaton Property Corp.
1039 Garner
Wheaton, IL 60187
Attn: Jeff Brown
Fax: (303) 262-8386

If to Lessee: ProBuild North, LLC
7595 Technology Way
Suite 500
Denver, CO 80237
Attn: Real Estate Manger
Fax: (303) 262-8386

If to City: City of Wheaton
 303 W. Wesley Street
 Wheaton, IL 60187
 Attn: City Engineer
 Fax: (630) 260-2017

or to such other address as either Party may from time to time specify in writing to the other in accordance with the terms hereof.

8. All references to section and paragraph numbers contained in this Grant shall mean the section or paragraph of such number contained in this Grant, unless otherwise expressly provided therein. All references herein to an Exhibit shall mean such exhibit attached to this Grant, unless otherwise expressly provided herein.

9. Except as otherwise provided herein, this Grant may be amended or modified by, and only by, a written instrument duly authorized and executed by the Parties hereto.

10. This Grant shall be governed by the laws of the State of Illinois.

IN WITNESS WHEREOF, Grantors have executed this indenture this _____ day of
2009.

OWNER:

WHEATON PROPERTY CORP., an
Illinois corporation

By: Andrew Berg
Title: President
Attest: PJ
Title: Secretary

LESSEE:

PROBUILD NORTH, LLC, a Washington
limited liability company

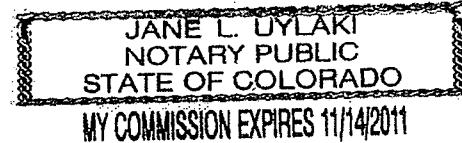
By: Mark B. Felt
Title: Vice President
Attest: MC
Title: Assistant Secretary

COLORADO
STATE OF ILLINOIS)
DENVER) SS
COUNTY OF DURAGE)

I, the undersigned, a Notary Public in and for the County and State aforesaid, DO HEREBY CERTIFY, that Mark B. Butterman and Jeff Smith, personally known to me to be the Managers of PROBUILD NORTH, LLC, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, ~~Managers~~ ^{Officers} appeared before me this day in person and acknowledged that as such ~~Managers~~, they signed and delivered the said instrument pursuant to authority given by the Members of said limited liability company, as their free and voluntary act, and as the free and voluntary act and deed of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 24th day of April 2009.

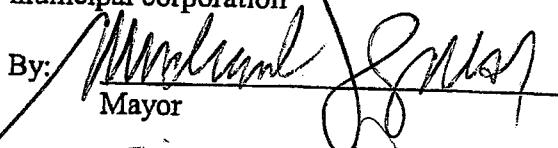

Jane L. Uylaki
Notary Public

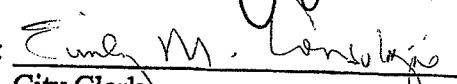


CITY ACCEPTANCE

The above and foregoing Grant of Temporary Access and Construction Easement and the terms and conditions set forth therein are hereby approved and accepted by the City. Following execution by the City this instrument may be recorded against the Easement Premises at the City's expense. In the event the City records this instrument, upon the occurrence of a Termination Event the City shall, within thirty (30) days following the written request of Owner or Lessee execute a recordable notice of termination verifying the termination of the Temporary Easement, which Owner or Lessee may record at its expense. The recordation of a termination notice shall not be required for the termination of the Temporary Easement to be effective.

CITY OF WHEATON, an Illinois
municipal corporation

By: 
Mayor

Attest: 
City Clerk

STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO
HEREBY CERTIFY that _____, Mayor, and _____, City
Clerk, of the CITY OF WHEATON, an Illinois municipal corporation, who are personally
known to me to be the same persons whose names are subscribed to the foregoing instruments as
such Mayor and City Clerk, respectively, appeared before me this day in person and
acknowledged that they signed and delivered the said instrument as their own free and voluntary
act and as the free and voluntary act of said corporation, for the uses and purposes therein set
forth; and the said City Clerk then and there acknowledged that he, as custodian of the records
of the corporation, did affix the corporate seal of said corporation to said instrument as h own
free and voluntary act and as the free and voluntary act of said corporation, for the uses and
purposes therein set forth.

GIVEN under my hand and Notarial Seal this _____ day of _____ 2009.

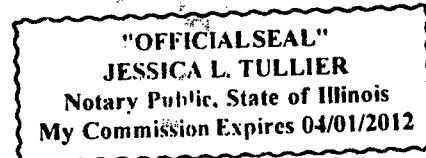
Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF DUPAGE)

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that Anne Wanzenberg, President, and Jeffrey B. Brown, Secretary, of WHEATON PROPERTY CORP., an Illinois corporation, who are personally known to me to be the same persons whose names are subscribed to the foregoing instruments as such President and Secretary, respectively, appeared before me this day in person and acknowledged that they signed and delivered the said instrument as their own free and voluntary act and as the free and voluntary act of said corporation, for the uses and purposes therein set forth; and the said Secretary then and there acknowledged that he, as custodian of the records of the corporation, did affix the corporate seal of said corporation to said instrument as his own free and voluntary act and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

GIVEN under my hand and Notarial Seal this 26th day of April 2009.

Jessica L. Miller
Notary Public



LIST OF EXHIBITS

EXHIBIT "A": Legal Description of Owner Parcel

EXHIBIT "B": Depiction of Easement Premises

EXHIBIT "C": Plans and Specifications

EXHIBIT "A"

LEGAL DESCRIPTION OF OWNER PARCEL

PIN: 05-17-227-019
05-17-227-025

Owner:	Wheaton Property Corp.
Route:	Wesley Street /
Section:	Manchester Road
County:	97-0084-00BR
Job No.:	Du Page
Parcel:	D-91-531-97
Station:	0007TE
	40+91.16 LT to
	63+55.00 LT

That part of Lot 29 in Henry W. Wheaton's and Ralph L. Wheaton's Subdivision of part of W.W. Steven's Addition to Wheaton and part of the Northeast Quarter of Section 17, Township 39 North, Range 10 East of the Third Principal Meridian, according to the plat of said subdivision recorded November 12, 1924 as document 184813, and that part of Lot 23 in said W.W. Steven's Addition to Wheaton, being a subdivision in the Northeast Quarter of Section 17, Township 39 North, Range 10 East of the Third Principal Meridian, according to the plat thereof recorded August 10, 1909 as document 97865 in Du Page County, Illinois, described as follows:

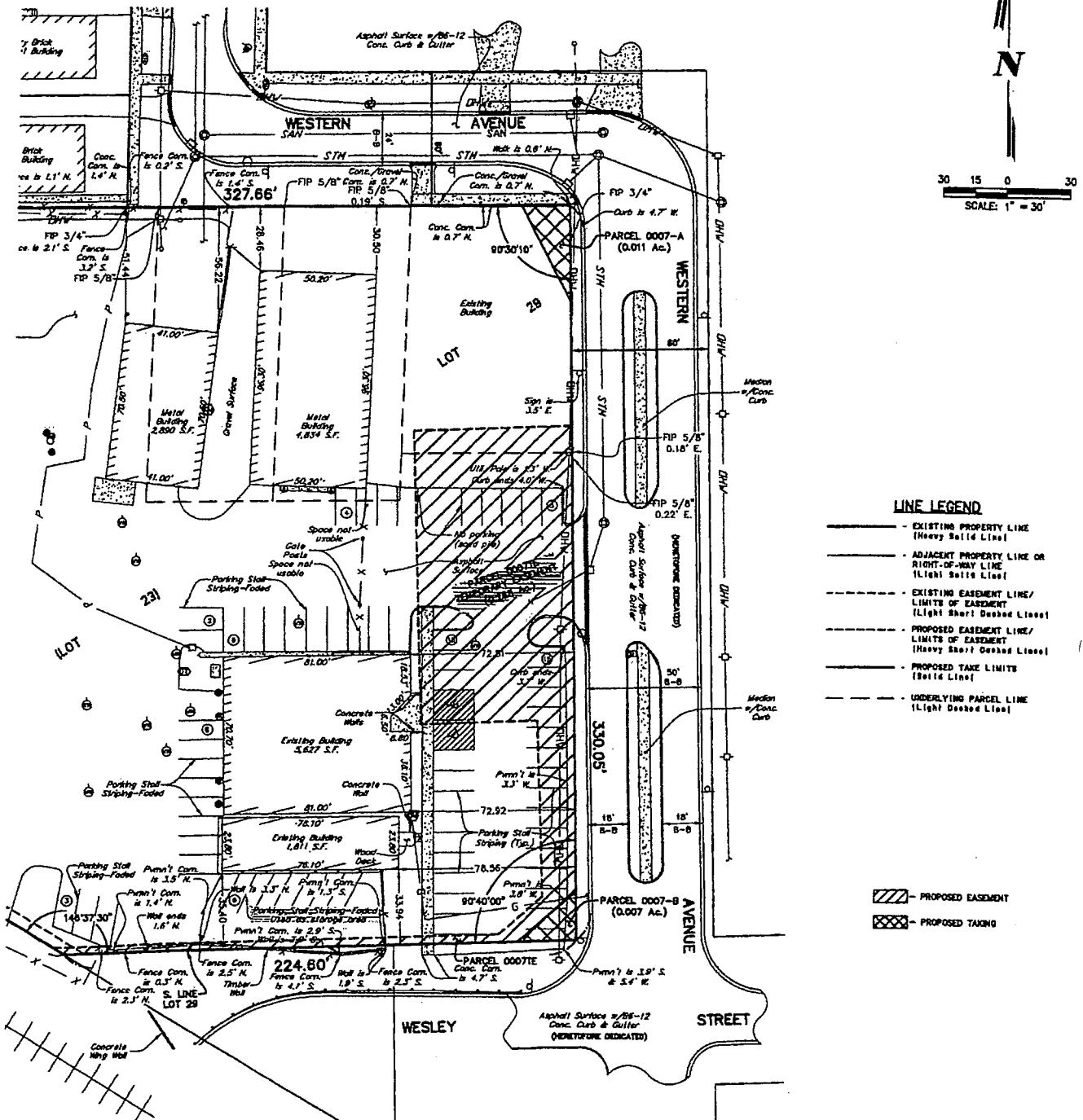
Commencing at the southeast corner of said Lot 29; thence on an assumed bearing South 88 degrees 23 minutes 10 seconds West, on the south line of said Lot 29, a distance of 26.26 feet to the Point of Beginning; thence continuing South 88 degrees 23 minutes 10 seconds West, on said south line, 209.62 feet to the southwesterly line of said Lot 29; thence North 59 degrees 04 minutes 55 seconds West, on said southwesterly line, 4.73 feet; thence North 88 degrees 06 minutes 42 seconds East, 201.70 feet; thence North 48 degrees 49 minutes 59 seconds East, 25.86 feet; thence North 2 degrees 06 minutes 03 seconds West, 79.00 feet; thence South 87 degrees 53 minutes 57 seconds West, 52.00 feet; thence North 2 degrees 06 minutes 03 seconds West, 132.00 feet; thence North 87 degrees 53 minutes 57 seconds East, 70.64 feet to the east line of said Lot 23; thence South 1 degree 57 minutes 21 seconds East, on the east line of said Lots 23 and 29, a distance of 209.34 feet; thence South 48 degrees 33 minutes 09 seconds West, 34.02 feet to the Point of Beginning.

Parcel 0007TE herein described contains 0.268 acre, more or less.

It is not the intent of this instrument to encumber any building or structure lying within this easement area.

PROPOSED EASEMENT AND TAKE EXHIBIT

EXHIBIT B



NOTES
ACREAGE SHOWN HEREON BASED
UPON LEGAL DESCRIPTIONS
PROVIDED TO CEMCON, LTD.

PREPARED BY:
CEMCON, Ltd.
Consulting Engineers, Land Surveyors & Planners
2280 White Oak Circle, Suite 100
Aurora, Illinois 60502-8875
PH: 830.862.2100 FAX: 830.862.2199
E-Mail: codd@emcon.com Website: www.emcon.com
DISC NO.: R\900399 **FILE NAME:** EASE_TAKE EXHIBIT
DRAWN BY: KJA **FLD. BK / PG. NO.:** -
COMPLETION DATE: 04-28-09 **JOB NO.:** 900.399
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EXHIBIT "C"

PLANS AND SPECIFICATIONS

SEE ATTACHED FOR PLANS AND SPECIFICATIONS

