

**RESOLUTION R-2018-18**

**RESOLUTION AUTHORIZING THE EXECUTION  
OF A CERTAIN CONSTRUCTION, USE, AND  
LICENSE AGREEMENT - Alley (517 West Park Avenue)**

**BE IT AND IT IS HEREBY RESOLVED** by the Mayor and City Council of the City of Wheaton, Illinois, that the Mayor is hereby authorized to sign, and the City Clerk is directed to attest to the Construction, Use and License Agreement dated March 14, 2018, between the City of Wheaton and Martin S. and Laura B. Kolinski of 517 West Park Avenue, Wheaton, Illinois, attached hereto as Exhibit 1.

**ADOPTED** this 19<sup>th</sup> day of March 2018.



Michael J. Gresk

Mayor

Attested by:



Sharon Bennett Hagen

City Clerk

**Roll Call Vote:**

Ayes:                    Councilman Rutledge  
                          Councilman Barbier  
                          Councilwoman Fitch  
                          Councilman Prediville  
                          Mayor Gresk

Nays:                    None  
Absent:                Councilman Scalzo  
                          Councilman Suess

**Motion Carried Unanimously**

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**CONSTRUCTION, USE AND LICENSE AGREEMENT**  
**Alley (517 West Park Avenue)**

**THIS CONSTRUCTION, USE AND LICENSE AGREEMENT**, is made and entered into this 19<sup>th</sup> day of March, 2018, by and between the City of Wheaton, Illinois, an Illinois municipal corporation, located in DuPage County, State of Illinois, and Martin S. and Laura B. Kolinski who reside at 517 West Park Avenue, Wheaton, Illinois.

**WITNESSETH**

**WHEREAS**, the City of Wheaton, Illinois (“City”) is in title and control of an unimproved public alley right-of-way (“Alley”), within the City limits, a portion of which is contiguous to the real property located at 517 West Park Avenue, Wheaton, Illinois, which is more fully shown on **Exhibit A**, attached hereto and incorporated by reference herein; ; and

**WHEREAS**, Martin S. and Laura B. Kolinski (“Licensees”), are the legal title holders of the real property located at 517 West Park Avenue, Wheaton, Illinois, which property is legally described herein and is contiguous to a portion of the Alley; and

**WHEREAS**, the Licensees desire to use a portion of the Alley as an extension of their rear yard and to install/construct a fence encroaching on the Alley as shown on Exhibit A (“Encroachment Area”); and

**WHEREAS**, the Licensees acknowledge that this Agreement is not an easement and does not vest them in any manner with any property rights in or claims to any portion of the Alley; and

**WHEREAS**, the Licensees’ successors, heirs, and assigns will benefit from the use of the Alley as described herein; and

**WHEREAS**, the City is willing to permit the Licensees to construct a fence encroaching upon that portion of the Alley contiguous to the property located at 517 West Park Avenue, Wheaton, Illinois, in strict conformance with the terms and conditions herein.

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions herein contained, the parties hereto agree as follows:

1.) **Recitals.** The foregoing recitals are incorporated herein as representing the intent of the undersigned and as substantive representations and covenants.

2.) **Legal Description of Licensee’s Property.** Martin S. and Laura B. Kolinski are the Owners of property located at 517 West Park Avenue, Wheaton, Illinois, legally described as follows:

LOT 2 IN JOE KEIM’S PARK AVENUE SUBDIVISION OF PART OF LOTS 13, 14 AND “A” IN COUNTY CLERK’S ASSESSMENT SUBDIVISION AND OF THE WEST 20.0 FEET OF LOT 8 IN SEEKER’S ADDITION TO WHEATON, ALL IN THE NORTHWEST QUARTER OF SECTION 20, TOWNSHIP 39 NORTH, RANGE 10 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN THE CITY OF WHEATON, DUPAGE COUNTY, ILLINOIS. (HEREINAFTER THE “PROPERTY”)

3.) **License to Use Alley.** The Licensees, for a consideration of Ten Dollars (\$10.00) and other good and valuable consideration as stated herein, are hereby granted a license, subject to the issuance of a fence permit and in strict conformance with the terms of this License Agreement, to construct a fence on and to use as an extension of their rear yard, the 16 feet by 20 feet portion of the unimproved Alley immediately north of the Property as more specifically depicted in Exhibit A.

4.) **No Other Use.** The Licensees shall not otherwise utilize the Encroachment Area in a manner which interferes, impedes, hinders, or otherwise obstructs the lawful use of the Alley by the City or public.

5.) **No Interest in Encroachment Area.** The Licensees shall not acquire any right, title, or interest in or to the City's Alley as depicted in Exhibit A or the portion thereof affected by this Agreement. Licensees understand and agree that the encroachment on the portion of the City's Alley described herein is for a permissive use only and is not an easement. It is only a license. The installation/construction of a fence on the portion of the Alley described herein shall not operate to create or vest any property rights in Licensees. If there is any attempt by the Licensees to maintain that the license granted herein is anything other than a license, the Licensees shall reimburse the City for all attorneys' fees and costs associated with its defense of the claim. If this Agreement is interpreted by a court as an easement, it shall be temporary and terminate within twenty-four (24) hours after entry of the court order interpreting it as an easement.

6.) **Maintenance of Encroachment/Fence.** The Licensees shall construct the fence on that portion of the Alley contiguous to the Property in conformance with all applicable City ordinances. Upon completion, and as long as the fence remains on the Alley, Licensees shall maintain the fence in a good and safe condition, and shall make repairs to the fence when necessary to fully comply with all applicable City ordinances. If the Licensees fail to maintain the fence as required by this paragraph, the City shall have the right but not the obligation to: require the Licensee to repair the fence, make any and all repairs to the fence itself, or to demolish it. The decision whether to do nothing, seek repairs, repair or demolish the fence shall be in the sole discretion of the City Manager. If the City requires the Licensee to make repairs, makes repairs itself or undertakes demolition the Licensees shall reimburse the City for all actual costs of such; including reasonable attorney's fees. If the Licensees fail to reimburse the City for its actual costs within thirty (30) days of the date of the invoice from the City for payment of such costs, the City shall have the right to lien the Property described in paragraph 2 of this Agreement and to foreclose such lien in conformance with State law. Costs, including reasonable attorney's, to lien and/or foreclose, shall also be assessed against the Licensees.

7.) **Access.** The City shall have free and complete access to the Encroachment Area for the purpose of maintaining the existing City utility systems (watermain, storm and sanitary sewers) if any. If the City performs maintenance work on any of the aforesaid utility systems and removes any part of or all of the fence installed on the Encroachment Area the Licensees shall reinstall and/or restore the fence to conform with all applicable City ordinances at the Licensees' sole cost and expense within twenty-one (21) days after the City provides written notice of the completion of its utility maintenance work. The City shall have no obligation to protect or maintain the portions of the fence on the Licensee's Property from damage or destruction caused by the City's destruction, demolition, or removal of those portions of the fence or other items placed in the Encroachment Area and the Licensees hereby waive any and all claims, actions,

causes of action, or damages against the City that may arise in the context of the City's exercise of its authority under this section.

8.) **Termination.** The City may terminate and cancel this Agreement together with all rights and privileges granted hereunder, by notifying the Licensees in writing at least ninety (90) days prior to termination. In the case of a public emergency as determined by the City Manager, this Agreement may be terminated on twenty-four (24) hour notice. Service of the notice of termination in the case of emergency may be by hand or posted notice on the fence.<sup>9</sup>Upon termination of this Agreement, the City may destroy, demolish, and remove any improvements placed upon the Encroachment Area by the Licensee or any occupant of the Property without any liability whatsoever to the Licensees.

10.) **Indemnification.** To the greatest extent permitted under Illinois law, Licensees shall defend, indemnify and hold the City harmless from any and all claims, actions, causes of action, costs, judgments, injuries, property damage, expenses (including reasonable attorneys' fees, and expert witness fees) which arise or may be alleged to have arisen out of or in connection with the negligent acts or omissions or willful and wanton conduct of the Licensees, or Licensees' agents, as a result of the design, construction, maintenance, use or abandonment of the fence described herein or from any activity, work, or act done, permitted, or suffered by Licensees in or about the Encroachment Area, and Licensees shall further indemnify, defend, and hold harmless the City against and from any and all claims or suits arising from any breach or default of any performance of any obligation of Licensees hereunder, and against and from all costs, attorneys' fees, expenses, and liabilities related to any claim or any action or proceeding brought within the scope of this indemnification.

11.) **Modification.** This Agreement may be modified only by a further written Agreement between the parties, and no modification shall be effective unless properly approved and signed by each party.

12.) **Joint and Several Obligations.** The Licensees' obligations under this Agreement shall be joint and several.

13.) **Successors and Assigns.** This Agreement shall be binding upon the Licensees their respective heirs, successors and assigns.

14.) **Recording.** This Agreement shall be recorded in the Office of the Record of Deeds, DuPage County, Illinois, at the expense of the Licensees.

15-6.) **Applicable Law.** This Agreement, and the rights and obligations of the parties hereto, shall be construed and enforced in accordance with the municipal ordinances of the City of Wheaton and the laws of the State of Illinois.

16.) **Waiver.** Any failure of the City to strictly enforce any term, right, or condition of this Agreement, whether implied or express, shall not be construed as a waiver of such term, right, or condition, nor shall it be deemed to or constitute a continuing waiver unless otherwise expressly provided in this Agreement.

17.) **Severability.** If any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

18.) **Notice.** All notices required herein shall be sent via First Class U.S. Mail with postage prepaid thereon to the parties as follows:

To City:

City of Wheaton  
Attn: City Clerk  
303 W. Wesley Street, Box 727  
Wheaton, IL 60187-727

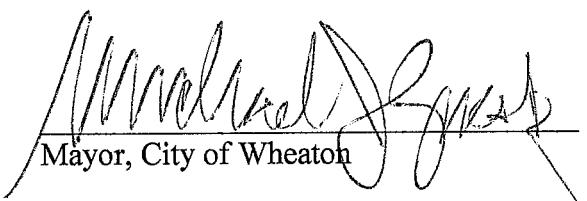
To Owners:

517 West Park Ave  
Wheaton, IL 60189  
Martin & Laura Kolinski

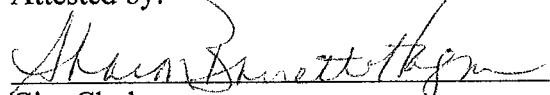
Notices shall be deemed effectively served upon the deposit in the United States Mail.

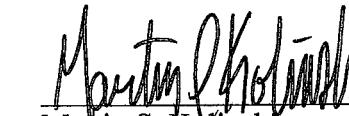
19.) **Entire Agreement.** The provisions set forth in this Agreement and attached exhibit represent the entire Agreement between the parties and shall supersede all prior agreements, contracts, understandings, promises and representations, oral or written, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement.

**IN WITNESS WHEREOF**, the Corporate Authorities of the City of Wheaton and the Owners have hereunto set their hands and seals, and have caused this instrument to be executed by their duly authorized officials with the Corporate Seal attached here all on the date and year first above written.

  
Michael J. Breen  
Mayor, City of Wheaton

Attested by:

  
Sean B. Kolinski  
City Clerk

  
Martin S. Kolinski

  
Laura B. Kolinski

Attested by: