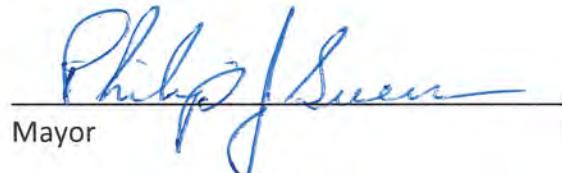


RESOLUTION R-2022-90  
A RESOLUTION AUTHORIZING THE EXECUTION  
OF A CERTAIN CONSTRUCTION, USE, AND  
INDEMNIFICATION AGREEMENT  
(704 N. GARY AVE.)

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 Indemnification Agreement dated October 12<sup>th</sup>, 2022 between the City of Wheaton and Dina M. Kapernekas, Trustee under the Declaration of Trust of Dina M. Kapernekas dated November 5, 2008 for 704 N. Gary Ave., Wheaton, Illinois, attached hereto as Exhibit "1".

ADOPTED this 7<sup>th</sup> day of November 2022.

  
Philip J. Suess  
\_\_\_\_\_  
Mayor

ATTEST:

  
Andrea Rosedale

City Clerk

Roll Call Vote:

Ayes: Councilwoman Robbins  
Councilman Weller  
Councilman Barbier  
Councilwoman Bray-Parker  
Councilman Brown  
Mayor Suess  
Councilwoman Fitch

Nays: None

Absent: None

Motion Carried Unanimously



**CONSTRUCTION, USE, AND INDEMNIFICATION AGREEMENT  
RIGHT OF WAY, 704 GARY AVENUE**

THIS CONSTRUCTION, USE, AND INDEMNIFICATION AGREEMENT, is made and entered into this 18 day of October, 2022, between the City of Wheaton, Illinois, an Illinois corporation, located in DuPage County, State of Illinois, and Dina M. Kapernekas, Trustee under the Declaration of Trust of Dina M. Kapernekas dated November 5, 2008.

**RECITALS**

**WHEREAS**, the City of Wheaton ("City") is the owner and in possession of an alley Right-of-Way ("Right-of-Way"), a portion of which is contiguous to the real property located at 704 N. Gary Avenue, Wheaton, Illinois, which is more fully shown on **Exhibit B**, a copy of which is attached hereto and incorporated by reference herein; and

**WHEREAS**, Dina M. Kapernekas, Trustee under the Declaration of Trust of Dina M. Kapernekas dated November 5, 2008 ("Owner"), is the legal and equitable titleholder of the real property located at 704 N. Gary Ave., Wheaton, Illinois (the "Premises"), which property is legally described herein and is contiguous to a portion of the City's alley Right-of-Way; and

**WHEREAS**, the Owner has planted eleven (11) trees (the "Trees") and landscaped (the "Landscaping") a portion of the City's alley Right-of-Way adjacent to the west property line of the real property located at 704 N. Gary Avenue without the City's permission and would like to continue to use that portion of the City's alley Right-of-Way for the purpose of maintaining those Trees and the Landscaping; and

**WHEREAS**, the City has determined that the estimated cost for the City to maintain and repair the paved portion of the alley Right-of-Way adjacent to the Licensed Area in future years due to the impact of the Licensed Activities stated herein amounts to six hundred dollars (\$600.00); and

**WHEREAS**, the Owner acknowledges that this Agreement is not an easement or lease and does not vest Owner with any property rights or claims to any portion of said Right-of-Way.

**NOW, THEREFORE, BE IT AND HEREBY AGREED** by the City Council of the City of Wheaton, an Illinois municipal corporation, and the Owner as follows:

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

2) Dina M. Kapernekas, Trustee under the Declaration of Trust of Dina M. Kapernekas dated November 5, 2008, is the Owner of the Premises, legally described in **Exhibit A** attached hereto and made a part hereof.

3) The Owner, for a consideration of Ten Dollars (\$10.00) and other good and valuable consideration as stated herein, is hereby granted a license authorizing the use of only the 110 foot by 10 foot portion of the alley Right-of-Way adjacent to the west property line of the real property located at 704 N. Gary Avenue, Wheaton, Illinois (the "**Licensed Area**") as specifically depicted and identified on **Exhibit B** for continued use, maintenance, and possible removal of the eleven (11) Trees planted by Owner and related Landscaping use (collectively, the "**Licensed Activities**") conforming to all applicable ordinances ("**Ordinances**") of the City and this Agreement. The Ordinances are material terms and conditions of this Agreement.

4) Owner shall be responsible for maintaining the Trees and related Landscaping located in the Licensed Area. Owner agrees to exercise reasonable efforts to maintain such Trees in a healthy condition and such efforts shall include, but not be limited to, the following:

- a. Pruning Tree branches so that branches that overhang the paved portion of the alley Right-of-Way are at least eleven (11) feet above the Right-of-Way; and
- b. Trimming the Trees so that sight lines to traffic are not obscured; and
- c. Pruning broken or dead branches of Trees correctly to promote proper healing of the wound; and
- d. Removing hazardous or dead Trees after obtaining prior written approval from the City in accordance with this Agreement; and
- e. Remediating any damage caused by a failure to maintain the trees in conformance with this section.

5) Owner shall not remove any Tree located in the Licensed Area without prior written approval from the City Manager. Replacement of dead, diseased, or healthy Trees shall require prior written approval from the City Manager, and such approval is not guaranteed. The City retains the right to deny Owner the right to replace any Tree.

6) The City retains the right to enter said Licensed Area for any purpose to perform any work including, but not limited to, constructing and maintaining the City utility systems (watermain, storm and sanitary sewers) and other infrastructure, paving, resurfacing, and clearing snow from the Licensed Area. If the City performs any work within said Licensed Area or the adjacent City Right-of-Way which causes damage to the Trees or Landscaping, the Owner shall be responsible for promptly correcting any such damage at Owner's sole cost and expense. Such corrective measures shall include but not be limited to uprighting and staking any fallen or leaning trees; removing dead or damaged material, including stump removal and grinding; and mulching, minor grading, and/or reseeding and replacement of sod. The Owner shall have the option to replace at Owner's sole cost and expense any damaged or dead Trees. Any pits left from tree removal shall be filled with good soil, mulched, reseeded or laid with sod to match existing grade. The Owner hereby acknowledges and agrees that the City, its employees, and agents shall have no liability to the Owner for any damage, removal, or other casualty to the Trees and Landscaping caused by the City, its employees or agents regardless of the cause.

7) In the event growing tree roots or fallen Trees: (1) cause any asphalt laid in the Licensed Area or adjacent City Right-of-Way to upheave and crack; (2) cause damage to any utilities located upon, over, or under the Licensed Area or the adjacent Right-of-Way; or (3) interfere with vehicular use of the Licensed Area or Right-of-Way, Owner shall be responsible for paying up to Six Hundred Dollars (\$600.00) of the cost(s) incurred by the City to mitigate, repair and/or resurface the Licensed Area or Right-of-Way, or make the Licensed Area or adjacent Right-of-Way travelable for vehicular traffic (hereinafter, "Owner's Cost Contribution"). Owner's Cost Contribution obligation shall expire at 11:59 p.m. on October 31, 2039, or upon payment of \$600.00 to the City, whichever shall occur first. The City shall invoice the Owner for any amounts due and owing arising from the Owner's Cost Contribution obligation and such amount(s) owed to the City shall be paid to the City within thirty (30) days of the date of invoice.

8) The City may terminate and cancel this Agreement together with all rights and privileges granted hereunder, by notifying the Owner in writing at least fourteen (14) days prior to termination.

9) Upon termination of this Agreement, the City may destroy, demolish, or remove any Trees and Landscaping placed upon the Licensed Area by the Owner without liability.

10) To the greatest extent permitted under Illinois law, Owners shall defend, indemnify and hold harmless the City, its present and future elected and appointed officials, attorneys, administrators, consultants, agents, contractors, and employees ("City Indemnitees") from and against any and all claims, actions, causes of action, costs, judgments, expenses, (direct, indirect, or consequential, and including reasonable attorney's and expert's fees), loss or damage, including without limitation, injuries, death, property loss or damage proximately caused by the continued presence of the Trees and Landscaping in the Licensed Area, Owner's or Owner's agent's, contractor's or subcontractor's maintenance of such Trees and Landscaping, and/or Owner's or Owner's agent's, contractor's or subcontractor's removal of such Trees and Landscaping. City and Owner expressly agree that this provision shall be construed broadly. This indemnification and hold harmless provision shall survive termination of this Agreement.

11) Owner acknowledges and agrees that Owner shall conduct the Licensed Activities entirely at the Owner's own risk. Owner acknowledges that the City shall not provide any supervision, security, or protection in connection with the Licensed Activities. The City shall not be liable or responsible for damage caused by fire, vandalism or other casualty to, or for the destruction, loss, or theft of, any Trees, Landscaping, or other personal property located on the Licensed Area at any time during the Agreement, including, but not limited to, when such damage, destruction or loss occurs in relation to any garbage/refuse collection activity(ies) by the City and/or its contractor(s). To the fullest extent permitted by the laws of the State of Illinois, Owner hereby forever waives, relinquishes and discharges and holds harmless and agrees to indemnify the City, and its elected and appointed officials, officers, employees and agents ("City Indemnitees") from any and all claims of every nature whatsoever, which Owner may have at any time against the City Indemnitees, including without limitation claims for personal injury or property damage sustained or incurred by Owner or any person claiming by, through or under

Owner, relating directly or indirectly to the Licensed Activities, the condition of the Licensed Area, or use by the Owner of the Licensed Area. Nothing in this agreement shall be deemed or interpreted to waive, release, or in any manner compromise the City's privileges or immunities which are fully reserved by the City to the maximum extent allowed by law. There are no intended third person beneficiaries of this Agreement.

12) This Agreement is not an easement or lease. It only provides a license. Should a court of competent jurisdiction construe it as an easement or lease it shall automatically abrogate or expire 14 days after such construction.

13) The provisions set forth in this Agreement and its exhibits 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. 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.

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

15) This Agreement shall be binding on the Owner, and on Owner's successors, heirs, and assigns.

16) The Parties agree that the laws of the State of Illinois shall govern the terms of this Agreement. In the event of any claim or loss regarding this Agreement, DuPage County, Illinois shall be the appropriate venue for any such claim or suit.

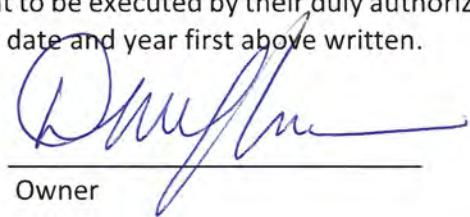
17) If all or any portion of this Agreement is challenged or modified in any manner, except by mutual consent of the Parties, this entire Agreement shall become null, void and without legal effect and shall not in manner compromise or diminish the City's control of the right of way.

18) All notices required under this Agreement shall be in writing and shall be deemed to have been given at the time they are mailed to the respective Party via certified mail, return receipt requested with an additional copy sent via U.S. first class mail at the addresses set forth below, or at such other place or address as the Parties shall provide to each other in writing,

City of Wheaton  
303 W. Wesley  
P.O. Box 727  
Wheaton, IL 60187

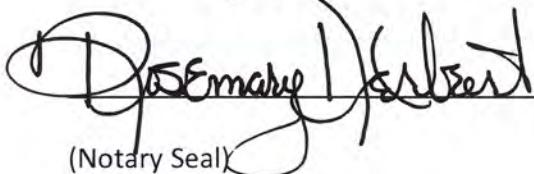
Owner  
Dina M. Kapernekas, Trustee under the Declaration of Trust  
of Dina M. Kapernekas dated November 5, 2008  
704 N. Gary Ave.  
Wheaton, IL 60187

IN WITNESS WHEREOF, the Corporate authorities and the Owner have hereunto set their hands and seals and have caused this instrument to be executed by their duly authorized officials and the Corporate seal attached here all on the date and year first above written.

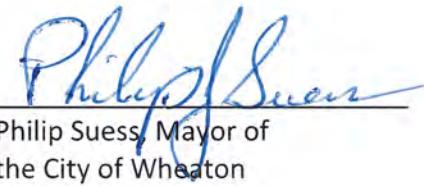


\_\_\_\_\_  
Owner

Subscribed and sworn to before me this 12 day of October, 2022.



\_\_\_\_\_  
Rosemary Herbert Notary Public  
(Notary Seal)



\_\_\_\_\_  
Philip Suess  
Philip Suess, Mayor of  
the City of Wheaton

Attended by:



\_\_\_\_\_  
Andrea Rosedale  
City Clerk

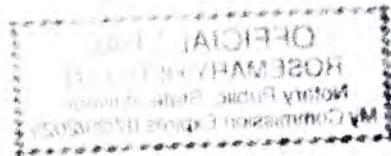
**Exhibit A**

LEGAL DESCRIPTION

LOT 1 IN POSTMA'S CONSOLIDATION OF LOTS 1 AND 2 IN BLOCK 7 OF NOAH GARY'S FIRST ADDITION TO THE CITY OF WHEATON, IN THE NORTHEAST  $\frac{1}{4}$  OF SECTION 17, TOWNSHIP 39 NORTH, RANGE 10, EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT OF CONSOLIDATION RECORDED SEPTEMBER 23, 2014, AS DOCUMENT R2014-087228, IN DUPAGE COUNTY, ILLINOIS.

COMMON ADDRESS: 704 N. GARY AVENUE, WHEATON, IL

PIN: 05-17-207-013



**Exhibit B**

