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RESOLUTION R-46-04

A RESOLUTION AUTHORIZING THE EXECUTION OF A GRANT OF TEMPORARY CONSTRUCTION LICENSE, HEATING AND COOLING PIPE LINES LICENSE AND COVENANTS AND AGREEMENTS RELATED TO SUCH GRANTS

WHEREAS, the City of Wheaton, an Illinois home rule municipality is the titleholder of the right-of-way and improvements, commonly known as College Avenue in Wheaton, DuPage County, Illinois; and

WHEREAS, Wheaton College has proposed the construction and maintenance of heating and cooling plant lines for the purpose of installing heating and cooling plant lines for a central heating and cooling plant for their campus within in the City right-of-way; and

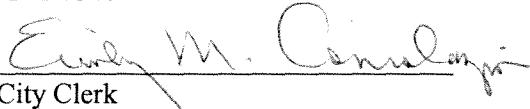
WHEREAS, due to the fact that the heating and cooling plant lines will be for the use of Wheaton College, and not be for the general benefit of the public, the Corporate Authorities of City of Wheaton, are only willing to grant Wheaton College a license, instead of an easement, for purposes of construction and maintenance of heating and cooling plant lines; and

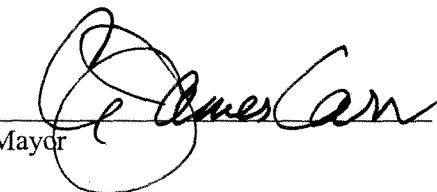
WHEREAS, in order to construct heating and cooling plant lines, Wheaton College has requested a temporary construction license, and in order to maintain heating and cooling plant lines, the College has requested a license from the City.

NOW THEREFORE, be it resolved by the Mayor and City Council of the City of Wheaton, Illinois, that the Mayor is hereby authorized to sign A Grant of Temporary Construction License, Heating and Cooling Plant Lines License and Covenants and Agreements Related To Such Grants between the City of Wheaton and Wheaton College.

ADOPTED this 21st day of June, 2004.

ATTEST:


Emily M. Connelley
City Clerk



Mayor

Ayes:

Roll Call Vote
Councilman Mouhelis
Councilwoman Corry
Councilman Johnson
Mayor Pro Tem Johnson

Nays:

None

Absent:

Mayor Carr
Councilman Bolds
Councilman Mork

Motion Carried Unanimously

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**GRANTS OF:
TEMPORARY CONSTRUCTION LICENSE,
HEATING AND COOLING PLANT PIPE LINES LICENSE
AND COVENANTS AND AGREEMENTS
RELATED TO SUCH GRANTS**

RECITALS

WHEREAS, the City of Wheaton, an Illinois home rule municipality (hereinafter "City") is the titleholder of the right-of-way and improvements, commonly known as College Avenue (hereinafter "Right-of-way") in Wheaton, DuPage County, Illinois; and

WHEREAS, Wheaton College, (hereinafter "College") has proposed the construction and maintenance of heating and cooling plant lines for the purpose of installing heating and cooling pipe lines (hereinafter "Line") within the Right-of-way as depicted upon the engineering plans prepared by Burns & McDonnell, attached hereto and incorporated herein as if fully set forth as Exhibit A; and

WHEREAS, the Right-of-way currently contains a variety of public and private utility easements; and

WHEREAS, due to the fact that the Line will be for the use of College, and not be for the general benefit of the public, the Corporate Authorities of City, are only willing to grant College a license, instead of an easement, for purposes of construction and maintenance of said Line; and

WHEREAS, in order to construct said Line, College has requested a Temporary Construction License and in order to maintain such Line, the College has requested a Heating and Cooling Plant Pipe Lines License from City; and

WHEREAS, in addition to those other considerations described herein, the corporate authorities of City would not approve this Temporary Construction License or Heating and Cooling Plant Pipe Lines License in absence of those considerations and promises related to insurance, hold harmless and indemnification, release and waiver as contained in this Agreement; and

WHEREAS, College recognizes and acknowledges that City's grant of a Temporary Construction License and Heating and Cooling Plant Pipe Lines License for the Line within the Right-of-way is a grant of consideration sufficient to support all those terms, conditions, and covenants set forth herein ; and

WHEREAS, College acknowledges that the citizens of City should have no obligation to contribute by general taxes any monies in furtherance of the construction or maintenance of the Line;

WHEREAS, the City and College represent and covenant the grants provided for in this document are licenses and not easements.

NOW THEREFORE, based upon the foregoing Recitals and other good and valuable consideration as recited herein, City and College hereby grant, covenant and agree as follows:

**GRANT OF
TEMPORARY CONSTRUCTION LICENSE**

1. The Recitals set forth above are incorporated herein by reference and shall constitute evidence of the intent of the parties and substantive terms of this Agreement.
2. City hereby grants and conveys to College and its Contractor and subcontractors a Temporary Construction License to survey, excavate, perform soil or environmental tests and construct the Line with, upon, under, along and across the Right-of-way in strict conformance with the following terms and conditions:
 - A. All work performed pursuant to this temporary grant of construction license shall be in conformance with the construction/engineering plans, prepared by Burns & McDonnell and dated May 5, 2004, titled "Wheaton College Heating and Cooling Plant" which are attached hereto and incorporated herein as if fully set forth as Exhibit A and further subject to all applicable ordinances, codes, regulations, and standards of City; and
 - B. All work on the Line and any and all work arising in conjunction with or proximately caused by the work on the Line shall be at the sole cost and expense of the College, including but not limited to:
 - I. Establishment of safety measures and protection in the areas along, upon or under the areas affected by the work;
 - ii. Locating and making arrangements to deal with all pre-existing utilities;
 - iii. Removal of the street surface and sidewalk surface, if any, and appurtenances;
 - iv. Relocation of any and all utilities where necessary;
 - v. Remediation of any condition or conditions resulting from known and unknown surface and sub-surface conditions affecting construction of the Line, utilities, or reconstruction of the Right-of-way and appurtenances.

- vi. Construction and placement of all structural support requirements for the Line, street and appurtenances or utilities;
- vii. Construction of the Line;
- viii. Backfilling;
- ix. Replacement of any affected street surfaces, sidewalk surfaces and appurtenances;
- x. Restoration of all parkways, landscaping and street lights within the Right-of-way affected by construction of the Line;
- xi. Restoration of any and all other public or private property existing within on or about the Right-of-way prior to the construction that is damaged or otherwise affected by the construction of the Line.

3. If deemed by the Director of Engineering, prior to commencing construction, College at its sole cost and expense, shall provide City with a traffic study and plan analyzing the impact the closing of the construction work area on vehicular and/or pedestrian traffic, as well as a plan for traffic control during construction. College shall further, at its sole cost and expense, and subject to the reasonable approval of Director of Engineering, establish, if necessary, detours during the effective period of the Temporary Construction License.

4. Prior to commencing work on the Line, and at all times during any and all work associated with the construction of the Line, the College and the College's Contractor or Contractors shall obtain and maintain commercial general liability insurance in an amount not less than one million dollars (\$1,000,000) per occurrence (combined single limit) including bodily injury and property damage, and in an amount of not less than one million dollars (\$1,000,000) annual aggregate per each personal injury and products completed operations; and general commercial automobile liability insurance protecting the College and the College's Contractor or Contractors, in an amount not less than one million (\$1,000,000) annual aggregate for personal injury liability and products completed operations. The insurance shall include coverage for explosion, collapse, or underground failure. Additionally, College and College's Contractor or Contractors shall obtain and maintain at all times of the Temporary Construction License an excess liability (umbrella) policy in an amount of two million dollars (\$2,000,000). All insurance policies shall name City as an additional insured as respects all coverages. Coverage shall be on a per occurrence basis and in accordance with the limits and provisions specified herein. Claims made policies are unacceptable. All such insurance shall provide that it will not be canceled or materially altered to reduce the policy limits until City has received at least thirty (30) days written notice of such cancellation or change. If at any time during the Temporary Construction License such coverage is canceled or materially altered, all work on the Line shall cease until such time as the insurance coverages are restored to the satisfaction of City.

5. Prior to commencement of any work authorized by this Temporary Construction License, College shall file with City the required original certificates of insurance with endorsements, which shall clearly state all of the following:
 - A. The policy number; name of insurance company; name and address of the agent or authorized representative; name, address, and telephone number of the insured; project name and address; policy expiration date; and specific coverage amounts; and
 - B. That City shall receive thirty (30) days written notice prior to cancellation or alterations reducing the policy limits; and
 - C. That the College's insurance is primary as respects any other valid or collectible insurance that City may possess, including any self-insured retentions that City may have; and
 - D. Any other insurance City does possess shall be considered excess insurance only and shall not be required to contribute with the College's insurance.
 - E. College and/or its Contractor or Contractors shall obtain and maintain at all times during the term of the temporary license statutory workmans compensation and employer's liability insurance in those amounts not less than that required under Illinois law and shall furnish City with a certificate showing proof of such coverage.
 - F. All insurance carriers providing coverages under this Agreement shall be admitted and authorized to do business in the State of Illinois and shall be rated at least A:X in A.M. Best and Companies Insurance Guide. Insurance policies and certificates issued by non-admitted insurance companies are unacceptable.
 - G. Any deductibles or self-insured retention shall be stated on the certificates of insurance provided to City. To the greatest extent permitted under Illinois law, College hereby agrees and College's Contractor or Contractors shall agree to indemnify, defend, protect and hold harmless City, its corporate authorities, officers, and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and clean-up actions of any kind, and all costs and expenses incurred in connection therewith, including but not limited to attorneys fees, expert witness fees and costs of defense (hereinafter "Losses") proximately resulting from the College's or the College's Contractor and/or Contractors acts or omissions related to work on the Line and in, about, around or under the Right-of-way. College shall be responsible to secure on behalf of City a signed Indemnification Agreement from its Contractor or Contractors providing City with an identical promise to hold City harmless and to indemnify City prior to commencing work of the Line.

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6. College hereby waives any and all claims, demands, causes of action, and rights it may assert against City on account of any loss, damage or injury to its property, or the use of the property except as described in Paragraph 7 below.
7. City shall only be liable to the College for damages arising from the willful and wanton misconduct of City, its corporate authorities, officers or employees. Under no circumstances shall the issuance of a permit or certificate provided for under the City Municipal Code to the College or its Contractor or any other entity associated with work on the Line constitute an act of negligence or willful misconduct. Nothing set forth in this Grant of Temporary License shall be deemed a waiver by City of any statutory or common law privileges or immunities or any defenses that are or would be otherwise available to City or its corporate authorities, officers and employees under provisions of the Illinois Local Government and Government Employees Tort Immunity Act, or that are otherwise available to local governments and their corporate authorities, officers and employees under the common law of the State of Illinois or the United States of America, including events of willful and wanton misconduct. The provisions of this paragraph shall survive the expiration and termination of the temporary construction license or any extension thereof.
8. Prior to commencing any work, pursuant to the Temporary Construction License, College shall furnish or cause to be furnished to City a good and sufficient letter of credit in a form acceptable to City in the amount of FIFTEEN THOUSAND DOLLARS AND NO/100 (\$ 15,000.00), which shall remain in force and affect from the commencement of work until sixty (60) days after a satisfactory final inspection of the Line by the City which letter of credit shall guarantee to the satisfaction of City;
 - A. Timely completion of construction;
 - B. Construction in compliance with applicable plans, permits, codes, regulations and standards;
 - C. Proper location of the Line as specified;
 - D. Restoration of municipal right-of-ways, municipal facilities and municipal property affected by the work.
 - E. Reimbursement for traffic control.
9. This Temporary Construction License shall terminate upon the first to occur of the following:
 - A. Failure to commence construction within twelve (12) months of the approval of this Agreement by the corporate authorities of City;
 - B. Abandonment of the construction of the Line. For purposes of this paragraph, "abandonment" shall mean that substantial progress in the

construction of the Line has ceased for a period of twenty-one (21) calendar days, not including delays caused by weather, war or acts of God, but including strikes and labor disputes. Upon "abandonment" City shall serve a written notice of abandonment on College notifying the College that City has concluded that the College has abandoned the Line as described herein. If the College does not recommence significant construction on the Line within fourteen (14) days of the mailing of the notice of abandonment, City shall be entitled to issue its site draft on the letter of credit described herein, to reconstruct the Right-of-way as it existed prior to the commencement of the construction of the Line and terminate the Temporary Construction License.

10. Should the College fail to complete, maintain, repair, replace or remove the Line during the period of the temporary construction license, and in conformance with the terms of this Agreement, City shall have the right, but not the obligation, to perform said maintenance, repairs, replacement or removal and restoration. Prior to the City undertaking maintenance, repairs, replacement or removal and restoration it shall provide written notice to College of the condition requiring the work and give the College 30 days to commence the work proposed by the City. The College shall pursue any work required by this paragraph with all reasonable diligence. Any and all costs incurred by the City, including reasonable attorney's fees, shall be reimbursed from the College to City within thirty (30) days from invoicing by City to College. If the College fails to reimburse such costs within thirty (30) days of invoicing, any reasonable attorney's fees incurred by City as a result of an action to collect any sums due as provided in this agreement shall be reimbursed by College to City. Nothing in this Agreement shall be interpreted to require City to complete, maintain, replace, repair, remove or restore the Line.

GRANT OF
HEATING AND COOLING PLANT PIPE LINES LICENSE

11. After completion of the construction, City hereby grants a Heating and Cooling Plant Pipe Lines License under, along and across the Right-of-way for the purpose of keeping, using, maintaining, replacing and removing the Line in strict conformance with the following pre-conditions and covenants:
 - A. That no liens have been filed by any entity for the work on the Line or that the College has bonded over such liens with a reputable title company acceptable to City;
 - B. That the College files with City copies of final waivers of lien and Contractors Affidavits from general contractors, sub-contractors, sub-sub-contractors, and materialmen performing work or providing materials for the Line.
12. It shall be a continuing condition and covenant of this grant of Heating and Cooling Plant Pipe Lines License that the College shall use and undertake all care and effort to:

- A. Not permit the Line to adversely affect any adjacent utility easements or City property;
 - B. Notify City in the event if there is any condition or occurrence which may or has adversely affected any adjacent utility easements or City property.
13. If the College hires any Contractor, or otherwise undertakes, to perform any work on the Line, as of or subsequent to the effective date of the Grant of Heating and Cooling Plant Pipe Lines License, the College shall provide or require such Contractor to comply with the requirements of paragraphs 4 and 5A-G of the Temporary Grant of License, or the then current insurance requirements of the City imposed on any contractor applying to the City for a permit to perform work upon, under, along and/or across the rights-of-way of the City.
14. The City, in its sole and absolute discretion, may revoke this Heating and Cooling Plant Pipe Lines License upon written thirty (30) day notice to the College. Upon notice of such revocation, College may remove the Line from the license area and restore the Right-of-way to its pre-removal condition or abandon the Line in place. If the College abandons the Line in place, the City, in its sole discretion, may remove the same and charge the College the reasonable costs of the removal and the disposal of the Line. College shall pay City said sums within thirty (30) days of invoice. If payment is refused and the City undertakes legal action to secure said payment, College shall reimburse the City for any and all reasonable attorney's fees and costs associated with such legal action.
15. The terms of this Heating and Cooling Plant Pipe Lines License shall be for a term of ten (10) years commencing on termination of the Temporary Construction License and barring any other ground which would justify termination as set forth in this Agreement including the Notice of Termination described in Paragraph 14 of this Agreement. This license shall automatically be extended an additional ten (10) years upon termination of the first ten (10) years so long as the College is in compliance with all of the terms, conditions and covenants of this Agreement.

GENERAL PROVISIONS

16. The College shall reimburse the City for the City's reasonable attorney's fees in the preparation, negotiation, and completion of this Agreement.
17. This Agreement may be enforced by injunctive or declaratory action.
18. This Agreement shall be interpreted in accordance with the laws of the State of Illinois.
19. Should any provision of this Agreement be declared invalid by a Court of competent jurisdiction, such invalidity shall render these grants of license invalid and all such licenses shall terminate.

20. Failure by either party to strictly enforce any provision of this grant and Agreement at any time shall not constitute a release or waiver of that provision or any other provision of the Agreement by the non-enforcing party, which shall retain all rights as set forth herein for the duration of the Agreement.
21. All notices, demands, requests or other communications under this Agreement shall be in writing and shall be deemed to have been properly served if: delivered by hand to the party whose attention it is directed; if sent, postage pre-paid by registered or certified mail, return receipt requested; or if sent by private carrier guaranteeing next day delivery, addressed as follows or to such other addresses as either party may designate in writing:

If to College: Wheaton College
501 E. College Avenue
Wheaton, Illinois 60187
Attn: Business Manager

If to City: City of Wheaton
303 Wesley Street
Wheaton, Illinois 60187
Attn: City Manager

22. The covenants, restrictions, and declarations of this Agreement shall inure to the benefit of and be enforceable by College, its representatives, heirs, grantees, executors, administrators, mortgagees, tenants, successors and assigns and by City, or its successors. This Agreement shall not be assigned by the College without the written consent of City. Such consent shall not be unreasonably withheld.

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IN WITNESS WHEREOF, the parties hereunder have set their hands and seals this 2nd day
of June, 2004.

JM Johnson

Wheaton College



Attested by:

Diane L Outcalt

James Carr
City of Wheaton - Mayor

Attested by:

Eric M. Donahue
City Clerk