



**TOWN OF MILLIKEN
TOWN BOARD OF TRUSTEES
AGENDA MEMORANDUM**

To: Mayor Woodcock and Town Board of Trustees		Meeting Date: Wednesday, June 8, 2016	
From: Martha Perkins, Community Development Director			
Via: Kent Brown, Town Administrator			
Agenda Item #	Action:	Discussion: X	Information:
Agenda Title: Policy Direction on the Use of Encroachment Licenses			
Attachments: Proposed Agreement for Encroachment Licenses Resolution 15-15			

PURPOSE

To obtain policy direction from the Town Board on whether or not to use encroachment licenses.

BACKGROUND

On June 24, 2015, the Board discussed encroachments upon the Town's property and other easements or right-of-way, which are currently occurring. These encroachments are becoming more apparent with code enforcement and an active real estate market. Thus, the Board adopted Resolution 15-15.

Resolution 15-15 provides notice to various individuals and entities who have made and are making use of real property owned by the Town of Milliken without either the written or verbal permission of the Town's Board of Trustees. The Town continues to assert its right to all real property which it owns in fee simple or through which it has easements or right-of-way. The Town may at some point in the future move, destroy, and/or demand removal of structures, pipelines, or other facilities located on the Town's real property along with an assessment for the cost of doing so.

A Realtor came to the Board meeting on June 24, 2015 as she was representing a buyer for a house located on Josephine Avenue with a pre-existing garage encroaching into the Town's right-of-way. She and the new owner acknowledged at some point the right-of-way may be used and that the property owner will have to pay for the garage to be demolished. However, they wanted to record in the County Clerk's office this pre-existing encroachment before the property owner purchased the property. This did not occur, unless it was recorded with the property survey.

In other municipalities, staff has used an agreement that the property owner signs acknowledging that the private structure, pipeline, use, or facility that exists or will be constructed in an easement or a right-of-way may need to be removed at a later date at the property owner's expense or a lien will be put on the property. This allows the municipality to document that property owner knows that they are making use of real property or an easement that is not theirs and

must bear the expense of removing the structure or use no matter how long it has been in existence. Usually, this acknowledgement has been recorded in the County Clerk's office too.

Thus, upon staff's request, Linda Michow drafted an Encroachment License Agreement for the Board's consideration. She believes that the decision to use this license agreement is the Board's decision and not staff's. It is a policy decision.

BUDGET IMPLICATIONS

This license agreement should protect the Town from bearing the cost of private improvements on public right-of-way or easements.

RECOMMENDATION

Staff does see a use for such an agreement, particularly for commercial activities or uses. Right now, Town staff uses Resolution 15-15 to remind property owners that if they build on an easement or encroach on a public right-of-way that they will bear the cost of replacing those improvements should a need arise for the use of the easement or right-of-way.

RESOLUTION 15-15

A RESOLUTION OF THE TOWN OF MILLIKEN, WELD COUNTY, COLORADO CONFIRMING THE LEGAL POSITION OF THE TOWN OF MILLIKEN WITH RESPECT TO THE USE OF THE TOWN'S REAL PROPERTY BY UNAUTHORIZED PERSONS OR ENTITIES

Recitals

The Board of Trustees of the Town of Milliken is aware that various individuals and entities have made and are making use of real property owned by the Town of Milliken without either the written or verbal permission of the Town's Board of Trustees.

Many of these parties are using either the Town's real property which it owns in fee simple, or they are using its easements and rights-of-ways. Some have been doing so for significant periods of time with or without knowledge that they have no prior or subsequent written authorization by the Town of Milliken's Board of Trustees.

NOW THEREFORE BE IT RESOLVED THAT, THE TOWN OF MILLIKEN CONTINUES TO ASSERT ALL OF ITS LEGAL RIGHTS TO ALL REAL PROPERTY WHICH IT OWNS IN FEE SIMPLE OR THROUGH WHICH IT HAS EASEMENTS OR RIGHTS OF WAY, AND HEREBY PLACES ALL PERSONS OR ENTITIES WHO ARE MAKING USE OF THE TOWN'S REAL PROPERTY ON NOTICE THAT AT SOME POINT IN THE FUTURE THE TOWN OF MILLIKEN MAY DETERMINE THAT IT IS IN ITS BEST INTERESTS TO REMOVE, DESTROY, REQUIRE THE REMOVAL OR DAMAGE ANY STRUCTURES, FENCES, PIPELINES OR OTHER FACILITIES LOCATED ON THE TOWN'S REAL PROPERTY. THE PERSONS AND ENTITIES WHO HAVE USED OR ARE USING THE TOWN'S REAL PROEPRTY WILL NOT BE COMPENSATED BY THE TOWN AND, IN FACT, MAY BE ASSESSED WITH THE COSTS INCURRED BY THE TOWN IN REMOVING OR DAMAGING THESE STRUCTURES OR FACILITIES LOCATED IN OR ON THE TOWN'S REAL PROPERTY.

WHEN EXIGENT CIRCUMSTANCES ARE NOT PRESENT THE TOWN MAY ELECT TO GIVE THE PERSONS OR ENTITIES WHO ARE USING THE TOWN'S REAL PROPERTY PRIOR WRITTEN NOTICE OF THE TOWN'S INTENTIONS TO REMOVE, DESTROY, REQUIRE THE REMOVAL OR DAMAGE THE IMPROVEMENTS THAT HAVE BEEN MADE ON THE TOWN'S REAL PROPERTY.

IN ANY EVENT, THE TOWN TAKES NO RESPONSIBILITY AND DOES NOT GIVE ANY PERSON OR ENTITY THE RIGHT TO USE THE TOWN'S REAL PROPERTY, WHETHER IT IS OWNED BY THE TOWN IN FEE SIMPLE, OR IT IS AN EASEMENT OR RIGHT-OF-WAY WITHOUT RECORDED CONVEYANCES OR VACATION OF THE REAL PROPERTY BY THE BOARD OF TRUSTEES.

At the regular meeting of the Board of Trustees on June 24, 2015, this resolution was passed by the Board of Trustees with a vote of 7 in favor and 0 opposed.

TOWN OF MILLIKEN


Milt Tokunaga, Mayor

ATTEST:


Cheryl Powell, Town Clerk

Published:

Approved as to form:


R. B. Fickel II, Attorney

**AN AGREEMENT BY AND BETWEEN THE TOWN OF MILLIKEN, COLORADO AND
FOR THE GRANT OF A REVOCABLE
ENCROACHMENT LICENSE TO INSTALL, CONSTRUCT, AND/OR MAINTAIN
ON TOWN-OWNED RIGHT-OF-WAY**

1.0 PARTIES. The parties to this Agreement are the TOWN OF MILLIKEN, COLORADO, a Colorado municipal corporation (the "Town") and _____ (the "Licensee"). This Agreement is effective upon execution by the Licensee and following execution by the Town Administrator on the date indicated below.

2.0 RECITALS AND PURPOSE.

2.1. The Town is the owner of certain property located in the Town of Milliken, Weld County, Colorado, commonly known as the _____ right-of-way ("Town Property").

2.2. The Licensee desires to encroach upon and occupy the Town Property for the purpose of installing, constructing, and maintaining certain private improvements as more fully described herein.

2.3. The Town is willing to grant a revocable license to the Licensee under the terms and conditions as hereinafter specified in this Agreement provided that nothing in this Agreement shall waive or modify any obligation to seek building permits, variances, or other approval necessary to meet any obligation imposed by law. The Licensee remains obligated to apply for and obtain all necessary permits and approvals, pay all required fees, and comply with all applicable local laws.

3.0 TERMS AND CONDITIONS.

3.1. The Town hereby grants to the Licensee a revocable license for the encroachment and occupation described as follows:

_____, as more specifically described in the attached **Exhibit A** ("Private Improvements"). Nothing in this Agreement is intended to waive, alter, modify, or permit any violation of any state or local law applicable within the Town of Milliken. To the extent that the location or other specifications of this License or any exhibit conflicts with state or local laws, the more restrictive of the state or local law shall govern.

Except for the encroachment and occupation of the Private Improvements identified in this paragraph 3.1, no other encroachment, structure, improvement, vehicle, fence, wall, landscaping, or any other real or personal property shall be erected, installed, constructed, parked, stored, kept, or maintained in any way or fashion on the Town Property.

3.2. The encroachment and occupation as specified in paragraph 3.1 above shall continue from the date of this Agreement to the time that this Agreement is terminated.

- 3.2.1. Town Termination: The Town may terminate this Agreement at any time if the Town Administrator makes a written determination that removal of the Private Improvements is necessary to protect the public health, safety, or welfare. At such time as the Town Administrator makes a determination that removal of the Private Improvements is necessary, the Administrator shall also determine the reasonable period of time within which the Private Improvements must be removed by the Licensee. Except in the case of a public safety emergency or where a shorter period of time is justified due to the nature of the Private Improvements, the Licensee shall not be required to remove the Private Improvements within less than thirty (30) days of notice to the Licensee. The Town may also terminate this Agreement at any time in the case of a declaration by the Town Board of Trustees that a public safety emergency exists by giving written notice to the Licensee five (5) days in advance of the effective date of termination.
- 3.2.2. Licensee Termination: The Licensee may terminate this Agreement at any time by delivery of written notice of termination to the Town which notice shall state an appropriate date of termination consistent with the requirements of this paragraph. Prior to delivery of such notice, the Licensee shall consult with the Town to determine whether the Town directs that the Private Improvements be removed as a condition of termination. Should the Town direct removal of one or more of the Private Improvements, the Licensee shall cause such Private Improvements to be removed at Licensee's cost and expense prior to the effective date of termination stated in the notice of termination. Should the Town consent to or permit one or more of the Private Improvements to remain within the Town Property, the Licensee shall have the option of: (1) removing the Private Improvements at the Licensee's cost and expense prior to the date of termination stated in the Licensee's notice of termination; or (2) conveying the Private Improvements to the Town by affirmatively declaring in the Licensee's notice of termination that the Private Improvements remaining within the Town Property following the date of termination are owned by the Licensee and are deemed conveyed upon the date of termination by the Licensee to the Town and that the Licensee neither requests nor desires any additional compensation for the conveyance of such Private Improvements. The Parties agree that, by the Town's consent to permit Private Improvements to remain within the Town Property, the Licensee is relieved of the cost and expense of removal of such Private Improvements which is sufficient and adequate consideration for conveyance of the Private Improvements to the Town.
- 3.3. The Licensee expressly agrees to, and shall, indemnify and hold harmless the Town and any of its officers, agents, or employees from any and all claims, damages, liability, or court awards, including costs and attorney's fee that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by anyone, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of any omission or act of commission by the Licensee or any of its employees, agents, partners, or lessees, in encroaching upon the Town Property. In particular and without limiting the scope of the foregoing agreement to indemnify and hold harmless, the Licensee shall indemnify the Town for all claims, damages, liability, or court

awards, including costs and attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by anyone, including but not limited to, any person, firm, partnership, or corporation, in connection with or arising out of any claim in whole or in part that all or any portion of the Private Improvements and encroachment permitted by this Agreement constitutes a dangerous and/or unsafe condition within a public right-of-way.

- 3.4. The Licensee agrees that it will never institute any action or suit at law or in equity against the Town or any of its officers or employees, nor institute, prosecute, or in any way aid in the institution or prosecution of any claim, demand, or compensation for or on account of any damages, loss, or injury either to person or property, or both, known or unknown, past, present or future, arising as a result of or from the revocable license granted to the Licensee by this Agreement. This provision includes but is not limited to claims relating to road maintenance, snow removal or other public works activities performed by or on behalf of the Town.
 - 3.5. The Licensee agrees to construct, maintain, and repair the Private Improvements placed or located on the Town Property by the Licensee or its lessees, agents, employees, or other persons under the control or direction of the Licensee pursuant to this Agreement at the cost and expense of the Licensee and at no cost or expense to the Town. The Licensee agrees to remove or cover graffiti or other damage caused to the improvement(s) within a reasonable time following notice or knowledge of such damage or within forty-eight (48) hours of delivery to the Licensee of a written demand by the Town, whichever is earlier. The Licensee shall not erect, cause to be erected or permit the erection of any sign, advertising object, or illustration upon any improvement, structure, fence, or wall placed or located by the Town Property pursuant to this Agreement and shall promptly remove any such sign or advertising.
 - 3.6. Private Improvements shall be installed and maintained such that proper sight distances for vehicle drivers are provided, as determined by the Town Traffic Engineer. Mature landscaping shall not interfere with sight distance or street sign visibility, encroach on the sidewalk pedestrian space or extend over utility boxes, manholes or other public facilities. If applicable, landscaping installed by the Licensee shall be maintained in living and healthy condition at the sole expense of the Licensee. **[Insert Any Special Maintenance Obligations Related to Specific Improvements or Location; e.g., inlets to be cleared regularly, etc.]**
 - 3.7. The Licensee agrees to repair and reconstruct any damage to the Town Property upon termination of this Agreement or removal of the Private Improvements described in paragraph 3.1 and any other improvements erected by the Licensee on the Town Property and the Licensee shall return the Town Property to its original condition at Licensee's sole cost and expense.
- 4.0 **ASSIGNMENT.** This Agreement shall not be assigned by the Licensee without the prior written consent of the Town which may withhold its consent for any reason; provided that the Town encourages the Licensee to inform any purchaser of the Licensee's property or interests of the existence of this Agreement and the Town will promptly consider any request by the Licensee for assignment of this Agreement to such purchaser.

- 5.0 **NOTICES.** Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if personally served or if sent by certified mail or registered mail, postage and fees prepaid, addressed to the party to whom such notice is to be given at the address set forth on the signature page below, or at such other address as has been previously furnished in writing, to the other party or parties. Such notice shall be deemed to have been given when deposited in the United States Mail.
- 6.0 **INTEGRATION AND AMENDMENT.** This Agreement represents the entire agreement between the parties and there are no oral or collateral agreements or understandings. This Agreement may be amended only by an instrument in writing signed by the parties. If any other provision of this Agreement is held invalid or unenforceable, no other provision shall be affected by such holding, and all of the remaining provisions of this Agreement shall continue in full force and effect. Invalidation of the Agreement in its entirety shall revoke any authorization, whether explicit or implied to the continuing use and occupancy of the Town Property for the Private Improvements.
- 7.0 **GOVERNING LAW AND VENUE.** This Agreement shall be governed by the laws of the State of Colorado and venue for any action arising under this agreement shall be in the appropriate court for Weld County, Colorado.
- 8.0 **WAIVER OF BREACH.** A waiver by any party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either party.
- 9.0 **BINDING EFFECT.** This Agreement shall inure to the benefit of, and be binding upon, the parties, their respective legal representatives, successors, heirs, and assigns; provided, however, that nothing in this paragraph shall be construed to permit the assignment of this Agreement except as otherwise expressly authorized herein.
- 10.0 **UNDERLYING INTENT AND SCOPE.** It is the intent of this Agreement that the Town shall incur no cost or expense attributable to or arising from the construction, maintenance, or operation of the Private Improvements and encroachment permitted by this Agreement and that, in all instances, the risk of loss, liability, obligation, damages, and claims associated with the encroachment shall be borne by the Licensee. This Agreement does not confer upon the Licensee any other right, permit, license, approval, or consent other than that expressly provided for herein and this Agreement shall not be construed to waive, modify, amend, or alter the application of any other federal, state, or local laws, including laws governing zoning, land use, property maintenance, or nuisance.
- 11.0 **AUTHORITY TO BIND PARTY.** The undersigned persons represent that they are expressly authorized to execute this Agreement on behalf of the Parties and to bind their respective Parties and that the Parties may rely upon such representation of authority.

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SIGNATURE PAGE TO FOLLOW

DATED THIS _____ DAY OF _____, 20__.

TOWN OF MILLIKEN:

Kent Brown, Town Administrator
1101 Broad Street, Milliken, CO 80543

ATTEST:

APPROVED AS TO FORM (excluding exhibits):

Town Clerk

Town Attorney

LICENSEE:

By: _____

Print Name: _____

Address: _____

STATE OF COLORADO)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 20____, personally by _____.

Notary Public

(SEAL) Commission expires: _____

EXHIBIT A
DESCRIPTION/LOCATION PRIVATE IMPROVEMENTS