

OCCUPANCY AND USE LICENSE AGREEMENT

This Occupancy and Use License Agreement (hereinafter the “Agreement”) is made and entered this 28 day of April, 2022(the “Effective Date”), by and between the City of South Bend, Indiana (the “City”), a municipal corporation, acting by and through its Redevelopment Commission, governing body of the Department of Redevelopment (the “RDC”), and the University of Notre Dame du Lac, an Indiana non-profit corporation, (the “University”), each a party and collectively the parties, upon the following terms and conditions:

Recitals

WHEREAS, the City owns a certain waterway infrastructure located in the City of South Bend, Indiana, about and across the St. Joseph River (“Dam Facility”) located at Seitz Park (the “Park”) and adjacent to the manmade canal commonly known as the East Race Waterway (the “East Race,” and collectively with the Dam Facility and the Park, the “City Property”); and

WHEREAS, title to the Park is held by the RDC; and

WHEREAS, the City and University have worked collaboratively on the development of a hydroelectric facility at the Park near the Dam Facility and East Race (the “Project”), including entering into a Ground Lease (the “Lease”), specifying the obligations of the City and the University; and

WHEREAS, during the course of construction of the Project, the City discovered that the retaining wall along the East Race requires repair immediately adjacent to the Project work, as more specifically detailed and depicted on Exhibit A of this Agreement; and

WHEREAS, in accordance with the terms of the Lease, the City desires to incorporate the repairs (the “Repair Work”) into the scope of the Project and the University and its contractor for the Project (“Contractor”) require access to the City Property to effectuate the repairs; and

WHEREAS the City agrees to grant the University and Contractor, as well as Contractor’s affiliates and sub-contractors, the right to enter upon the City Property to conduct the Repair Work in accordance with and subject to the terms, conditions and limitations of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants, and obligations contained herein, and other good and valuable consideration received by each party, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. *Incorporation of Recitals.* The foregoing recitals are hereby incorporated into this Agreement in their entirety.
2. *Grant of License.* The City hereby grants to University and Contractor a temporary and non-exclusive personal privilege and permission to enter upon City Property for Contractor to perform the Repair Work.

3. *Term.* This Agreement and the license granted to the parties hereunder shall commence as of the Effective Date and shall continue until completion of the Repair Work by the Contractor.
4. *No Interest in Land.* University understands, acknowledges and agrees that this Agreement does not create an interest or estate in University's or Contractor's favor in the City Property. The City retains legal possession of the full boundaries of the City Property and this Agreement merely grants to University and Contractor the personal privilege to occupy and use the City Property as described above throughout the term of this Agreement.
5. *Compliance with Law.* University and Contractor shall adhere to and comply with all ordinances, laws, rules and regulations that may pertain to or apply to the activities contemplated under this Agreement. University agrees and warrants that it, or Contractor, has procured or shall procure any licenses, permits or like permission required by law, if any, to conduct or engage in the Agreement activity, that University, or Contractor, will procure all additional licenses, permits or like permission hereinafter required by law during the term of this Agreement, and that University will keep the same in full force and effect during the term of this Agreement. University shall perform under this Agreement in accordance with all applicable legal requirements.
6. *Indemnification.* The parties agree to indemnify, defend and hold harmless each other, their respective agents, servants, employees, contractors, affiliates and representatives from any and all liability, loss, expense, damage, judgment or settlement which they or any of them may suffer, sustain or incur as a result of any claims, demands, costs, actions, causes of actions, damages or judgments including, without limitation, reasonable attorneys' fees, asserted against or incurred by or on behalf of the other and arising out of or resulting from the breach of their obligations under this Agreement. Notwithstanding the foregoing or anything in this Agreement to the contrary, the City does not waive any governmental immunity or liability limitations available to it under Indiana law. The obligations of this section shall survive any termination of this Agreement.
7. *Breach and Limitation on Damages.* If any party violates or breaches any term of this Agreement, such violation or breach shall be deemed to constitute a default, and the other party shall have the right to seek such administrative, contractual or legal remedies as may be suitable for such violation or breach.
8. *Notices.* Any notice required or permitted under this Agreement shall be in writing and shall be sufficient if personally delivered or mailed by certified mail, return receipt requested, addressed as follows:

To the City:

City Engineer
1300 S. County-City Building,
227 W. Jefferson Blvd., 13th Floor,
South Bend, IN 46601

With a copy to:

Corporation Counsel
1200 S. County-City Building
227 W. Jefferson Blvd.
South Bend, IN 46601

To the University:

Associate Vice President, State and Local
Public Affairs
University of Notre Dame
405 Main Building
Notre Dame, Indiana 46556

With a copy to:

Office of General Counsel
University of Notre Dame
204 Main Building
Notre Dame, Indiana 46556

Notices mailed in accordance with the provisions of this paragraph shall be deemed to have been given on the third business day following mailing. Notices personally delivered shall be deemed to have been given upon delivery.

9. *No Joint Venture or Partnership.* This Agreement shall not be construed so as to create a joint venture, partnership, employment, or other agency relationship between the parties hereto.
10. *No Personal Liability.* No official, director, officer, agent or employee of the City shall be charged personally or held contractually liable under any term or provision of this Agreement, or because of their execution, approval or attempted execution of this Agreement.
11. *Joint and Collective Work Product.* This Agreement is and shall be deemed and construed to be a joint and collective work product of the City and University, and as such, this Agreement shall not be construed against any other party as the otherwise purported drafter of the same by any court of competent jurisdiction in order to resolve any inconsistency, ambiguity, vagueness or conflict, if any, in the terms or provisions contained herein.
12. *Severability.* The terms of this Agreement shall be severable. In the event any of the terms or provisions of this Agreement are deemed to be void or otherwise unenforceable, for any reason, the remainder of this Agreement shall remain in full force and effect.
13. *Governing Law.* This Agreement shall be subject to and governed by the laws of the State of Indiana. Venue for the resolution of any disputes or the enforcement of any rights arising out of or in connection with this Agreement shall be in the courts of applicable jurisdiction within St. Joseph County, Indiana.

14. *References in Agreement.* All references in this Agreement to the singular shall include the plural where applicable, and all reference to the masculine shall include the feminine and vice versa. If either reference shall be declared invalid, such decision shall not affect the validity of any remaining portion that shall remain in full force and effect.
15. *Multiple Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
16. *Paragraph Headings.* Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Agreement.
17. *Binding Agreement on Parties.* This Agreement shall be binding on the parties hereto and their respective successors and permitted assigns.
18. *Assignment.* This Agreement and the obligations herein may not be assigned without the express written consent of each of the parties hereto. The License granted herein is personal to University. Any attempt to assign this License will automatically terminate the license privileges granted to University hereunder.
19. *Entire Agreement.* This Agreement and its exhibits constitute the entire agreement and understanding between the parties and supersedes any prior agreement or understanding relating to the subject matter of this Agreement.
20. *Modification.* This Agreement may be changed, modified or amended only by a duly authorized written instrument executed by the parties hereto. Each party agrees that no representations or warranties shall be binding upon the other party unless expressed in or writing herein or in a duly authorized and executed amendment hereof.

SIGNATURE PAGES FOLLOW

IN WITNESS WHEREOF, each of the parties hereto has caused this Occupancy and Use License Agreement to be executed by its duly authorized representative as of the day and year first above written.

CITY OF SOUTH BEND, INDIANA
REDEVELOPMENT COMMISSION

Marcia I. Jones, President

ATTEST:

Troy Warner, Secretary

UNIVERSITY OF NOTRE DAME DU LAC

By: _____

Name: _____

Its: _____

EXHIBIT A