

ENCROACHMENT AGREEMENT

THIS ENCROACHMENT AGREEMENT (“Agreement”) dated effective the ____ day of _____, 2016 (“Effective Date”), by and between Miller Building Partners, LLP, an Indiana limited liability partnership (together with its successors and assigns, the “Owner”), and City of West Lafayette (“City”).

RECITALS

WHEREAS, Owner is the owner of certain real estate located in West Lafayette, Tippecanoe County, Indiana, commonly known as 100 Northwestern Avenue and 220 South Street (key no. 164-02600-0171; state identification no. 79-07-19-278-001.000-026) (“Owner Real Estate”);

WHEREAS, there is an existing building located on the Owner Real Estate (“Building”);

WHEREAS, according to an ALTA/ACSM Land Title Survey for the Property prepared by Vester and Associates Inc., dated August 10, 2016 (“Survey”), the Building encroaches upon City-owned public right-of-way as follows: the Building is located approximately 2.2 feet over the west property line of the Owner Real Estate at the south end of said line and 0.9 feet over the west property line of the Owner Real Estate at the north end of said line;

WHEREAS, according to the Survey, awnings and a metal fire escape ladder attached to the Building also extend over the west property line of the Owner Real Estate and encroach upon City-owned public right-of-way; and

WHEREAS, the City agrees that the encroachments described in this Agreement shall be permitted to exist upon the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the premises hereof and the mutual covenants and conditions hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows.

1. Recitals. The foregoing recitals are true, accurate, and complete statements of fact and are hereby incorporated into and made a part of this Agreement as set forth verbatim.

2. Encroachment. The City hereby agrees that the following encroachments onto City-owned property (individually an “Encroachment” and collectively, the “Encroachments”) shall be permitted to continue perpetually:

- a. the Building extends and/or is located approximately 2.2 feet over the west property line of the Owner Real Estate at the south end of said line;
- b. the Building extends and/or is located approximately 0.9 feet over the west property line of the Owner Real Estate at the north end of said line;
- c. the awnings on the west and south sides of the Building extend over the west and south property line of the Owner Real Estate; and

d. a metal fire escape ladder attached to the Building extends over the west property line of the Owner Real Estate.

3. Easement for Ingress and Egress. To the extent required, the City hereby grants to Owner an easement of ingress and egress over such portion of City-owned property as is reasonably necessary for the Owner to use, maintain, repair, replace, and/or monitor the Encroachments.

4. Right to Replace, Maintain, and Repair Encroachments; Indemnification. Owner shall have the right to replace, maintain, and repair any Encroachment permitted by this Agreement provided that Owner does not expand, relocate, or increase the Encroachment as a result of such replacement, maintenance, or repair. Any repair, replacement, maintenance, or monitoring by Owner of the Encroachments shall be at the sole cost and expense of Owner and shall not unreasonably interfere with the public's use of the public right-of-way impacted by the Encroachment without the City's prior consent.

To the extent any of public-right-of-way is damaged during any activities with respect to the replacement, maintenance, repair, or monitoring of the Encroachments, Owner shall restore the portion of the public right-of-way so damaged to the condition existing immediately prior to the commencement of such activities and shall pay all costs and expenses incurred in connection with such restoration.

5. Disclaimer of Interest. Owner expressly disclaims any right, title or interest in any portion of the City-owned public right-of-way by reason of the Encroachments, except for the rights specifically granted herein, and Owner agrees that Owner will not claim in the future any portion of said City-owned public right-of-way by reason of the Encroachments.

6. Remedies. In the event either party shall fail to observe or comply with any provision or covenant in this Agreement where such default is not cured to the reasonable satisfaction of the non-defaulting party within thirty (30) days of the date written notice of such default is given, which such notice shall specify with reasonable particularity the basis for the default claimed, then the non-defaulting party may seek all legal and equitable remedies available and reasonable attorney fees, expenses and costs incurred in connection with pursuing such remedies. The failure to enforce a breach of this Agreement shall not be construed as a waiver of the right to enforce such breach at a later time or to enforce any other breach.

7. Sale of Owner Real Estate. The Owner has informed the City that the Owner may sell the Owner Real Estate to a third party. Upon the sale of the Owner Real Estate to a third party, the third party and the third party's successors and assigns shall have all rights, interests, duties, and obligations of the Owner hereunder.

8. Extinguishment. Any alteration or addition beyond the current dimensions of the above-described encroachments shall result in the extinguishment of any rights conferred by City to Owner in this Encroachment Agreement. Extinguishment shall also occur in the event any area of encroachment shall not be used or occupied for a continuous period of One (1) year.

9. Notice. Any notices under or pursuant to this Agreement shall be deemed duly sent when delivered in hand or when mailed by registered or certified mail, return receipt requested, addressed as follows:

If to Owner: Miller Building Partners, LLP
 Attn: W.R. Miller
 P.O. Box 2233

West Lafayette, IN 47906

If to City: City Engineer
West Lafayette City Hall
West Lafayette, Indiana

With a copy to: Eric H. Burns
Withered Burns, LLP
8 N. 3rd Street, Suite 401
P.O. Box 499
Lafayette, IN 47901

Any party hereto may change such address by sending written notice of the change to the other party.

10. Entire Agreement; Modifications. This Agreement constitutes the entire agreement between Owner and the City respecting the matters herein. This Agreement shall not be modified or amended except in a writing signed by the Owner and the City and/or their respective successors-in-interest and assigns.

11. Binding Effect. This Agreement is made to bind each of the parties hereto in any capacity in which they have rights or authority and their respective successors and assigns.

12. Interpretation. This Agreement shall be construed according to its fair meaning and without application of the rule of construction that ambiguities are to be resolved against the party with primary drafting responsibility therefor. The captions used herein, if any, are for convenience of reference only and shall not be deemed to modify or construe this Agreement.

13. Invalidity and Severability. If any provision of this Agreement or the application thereof to any person or circumstance, for any reason and to any extent, shall be held to be invalid or unenforceable, then neither the remainder of this Agreement nor the application of such provision to any other person or circumstance shall be affected thereby, but rather the same shall be enforced to the greatest extent permitted by law. The invalid or unenforceable provision shall be deemed modified to the minimum extent necessary to make the provision valid or enforceable; and, in its modified form, that provision shall then be enforceable and enforced.

14. Governing Law; Venue. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Indiana, without regard to its conflicts of law principles. Each party consents to the jurisdiction of any federal or state court within Tippecanoe County, Indiana and also consent to service of process by any means authorized by Indiana or federal law or any other law.

15. Counterparts. This Agreement may be executed in multiple counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts, taken together, shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the Effective Date.

OWNER

Miller Building Partners, LLP

By:

W. R. Miller
W. R. Miller

Its: General Partner

STATE OF INDIANA)

) SS:

TIPPECANOE COUNTY)

Before me, a Notary Public in and for said County and State, personally appeared **Miller Building Partners, LLP**, by W.R. Miller, its general partner, who acknowledged the execution of the foregoing instrument.

WITNESS my hand and Notarial Seal this 14th day of October, 2016.

Justin A. Crowell
(written)
Justin A. Crowell
(printed) NOTARY PUBLIC
Resident of Tippacano County

My Commission Expires:
4/3/24

CITY

City of West Lafayette, Indiana

By: _____

(written)

(printed)

Its: _____

(title)

STATE OF _____)

) SS:

_____ COUNTY)

Before me, a Notary Public in and for said County and State, personally appeared **City of West Lafayette**, by _____, its _____, who acknowledged the execution of the foregoing instrument.

WITNESS my hand and Notarial Seal this ____ day of _____, 2016.

(written)

My Commission Expires:

(printed) NOTARY PUBLIC

Resident of _____ County

