

MEMORANDUM

To: Mayor and City Council

From: Michael Smith, Director of Public Works

Date: June 24, 2014

Subject: **Discussion of Temporary Right of Way Easement for KDC**

ITEM DESCRIPTION

Discussion of a Right of Way Easement for KDC to allow for the installation of temporary tiebacks that will anchor the shoring system necessary to excavate the parking deck for the State Farm development.

BACKGROUND

Construction plans for the State Farm development at Perimeter Center Parkway and Hammond Drive require an excavation approximately 40 feet deep. The excavation will require a shoring system to restrain the walls of the excavation and protect adjacent roadway and structures. The shoring system is supported by anchors drilled into the ground adjacent to the excavation. It will be necessary for some of these anchors to extend beneath city right of way as shown on the attached exhibits.

The developer for the project has requested a temporary right of way easement to allow for installation of these anchors beneath the right of way. As outlined in the proposed temporary easement, the developer will be required to cut or de-tension the anchors upon completion of the construction and the easement will terminate at that time.

RECOMMENDED ACTION

Staff recommends approval of the right of way easement.

**STATE OF GEORGIA
CITY OF DUNWOODY**

ORDINANCE 2014-07-XX

AN ORDINANCE AUTHORIZING THE GRANTING OF AN EASEMENT TO ATLANTA OFFICE INVESTMENT PHASE I, LLC FOR THE PURPOSE OF INSTALLING AND MAINTAINING UNDERGROUND FOUNDATION ANCHOR TIEBACK FACILITIES LOCATED ALONG CERTAIN RIGHTS-OF-WAY ON HAMMOND DRIVE, PERIMETER CENTER PARKWAY AND GOLDKIST ROAD

WHEREAS, Atlanta Office Investment Phase I, LLC ("Indemnitor") owns that piece of property located along Hammond Drive, Perimeter Center Parkway and Goldkist Road, described specifically in the Encroachment and Indemnification Agreement attached hereto and incorporated herein by reference; and

WHEREAS, as part of its development of its Property, Indemnitor, for the purpose of stabilization of its site during development, is in need of anchoring its foundation via an anchor tieback facility that needs to extend into the rights-of-way of Hammond Drive, Perimeter Center Parkway and Goldkist Road; and

WHEREAS, Indemnitor agrees to maintain said anchor tieback facilities as described in the Encroachment and Indemnification Agreement and agrees to restore the surface and abandon the facilities upon termination of the easement and the Encroachment and Indemnification Agreement; and

WHEREAS, in order to secure the development site and provide for the proper safety and welfare of the residents of the City as well as travelers in and around said development, the City is willing to grant said Anchor Tieback easement to Indemnitor through the execution of the Encroachment and Indemnification Agreement attached hereto.

NOW, THEREFORE BE IT RESOLVED, by the Mayor and Council for the City of Dunwoody, that the Mayor, City Manager, and City Attorney are hereby authorized to execute all necessary documents, including the Encroachment and Indemnification Agreement attached hereto and incorporated herein, to affect the granting of the Anchor Tieback Easement as described herein.

SO RESOLVED AND EFFECTIVE, this ____ day of July, 2014.

Approved:

Michael G. Davis, Mayor

Attest:

Sharon Lowery, City Clerk

(Seal)

Please return to:
Leonid Felgin, Esq.
Riley McLendon, LLC
315 Washington Avenue
Marietta, Georgia 30060

**ENCROACHMENT AND INDEMNIFICATION AGREEMENT
(TIEBACKS - Hammond Drive, Perimeter Center Parkway and Goldkist Road)**

THIS AGREEMENT, made this _____ day of July, 2014, between ATLANTA OFFICE INVESTMENT PHASE I, L.L.C., a Delaware limited liability company (the "Indemnitor"), and the CITY OF DUNWOODY, GEORGIA, a municipality of the State of Georgia (the "City").

For good and valuable consideration, receipt of which is hereby acknowledged, it is hereby agreed as follows:

1

The City hereby grants to Indemnitor the right to enter into a portion of certain City rights-of-way located along Hammond Drive, Perimeter Center Parkway and Goldkist Road for the purpose of installing and maintaining certain underground foundation anchor tieback facilities (the "Facilities") located within said right-of-way areas as shown on the attached Exhibit "A" and as further described on the attached Exhibit "B" (the "Encroachment Areas") and further grants Indemnitor such additional rights as may be described herein. The foregoing rights benefit certain property owned by Indemnitor as referenced in and recorded at Deed Book _____, Page _____, Land Lots 329 and 348, District 18 of DeKalb County, Georgia records and as is more fully described in the attached Exhibit "C" ("Indemnitor's Property").

2

With respect to this Agreement, the Indemnitor shall maintain the Facilities within the Encroachment Areas in a manner which complies with all applicable federal, state, and local laws and regulations.

3

This Agreement shall commence on the date of execution hereof and shall continue in full force

and effect until the earlier of: (i) the completion of the portion of the work on the Indemnitor's Property necessitating the Facilities, and (ii) December 31, 2016.

4

Upon the termination of this Agreement: (i) the Indemnitor shall restore the surface of the Encroachment Area to its currently improved condition (which is paved and contains sidewalks) and Indemnitor will provide a letter to the City from Indemnitor's contractor confirming that all anchors within the right of way have been unloaded or detensioned, and (ii) the Facilities shall be deemed abandoned and the Indemnitor shall not be required to remove the Facilities.

5

The Indemnitor agrees that its maintenance activities will not adversely impact the rights-of-way. In the event that any activities of Indemnitor do impact the rights-of-way on a temporary basis, the Indemnitor shall promptly return the disturbed area to its prior condition. The Indemnitor or its employees, agents or assigns shall perform all work on the rights-of-way in a good and workmanlike manner and in compliance with all applicable governmental laws, ordinance and regulations.

6

Subject to the limitations in Section 8 below, the City personnel and/or agents shall have free access to and across the rights-of-way to perform routine maintenance and any emergency repairs when needed to protect the health, safety and general welfare of the public.

7

The Indemnitor shall be solely responsible for the Facilities within the Encroachment Areas and the City grants the Indemnitor a right of access in order to carry out these obligations.

8

The City acknowledges and agrees that the disturbance of the Encroachment Areas could result in material and permanent structural damage to the improvements located on Indemnitor's Property. Accordingly, the City acknowledges and agrees that it will not disturb the Encroachment Areas without prior, written notice to the Indemnitor so that the parties may coordinate, plan and schedule any such disturbance so as to avoid any damage to the Facilities.

2

9

The Indemnitor hereby agrees to indemnify the City and hold the City harmless from any and all actual damages which the City may suffer and from any and all direct and actual liability, costs, and expenses arising out of the exercise of the easements and rights granted in this Agreement (including cost of defense, settlement, and reasonable attorneys' fees) which the City may hereafter incur, become responsible for, or pay out as a result of the death or bodily injuries to any person, destruction or damage to any property, or any violations of governmental laws, regulations or orders caused solely by the negligent act, negligent omissions or willful misconduct of the Indemnitor, its employees or subcontractors in the performance of this Agreement.

10

The Indemnitor agrees to repair or replace in a manner acceptable to the City and/or the owner thereof any public utilities damaged by its employees or subcontractors during performance of this Agreement. At its election, the City may repair or replace the damaged utility and assess all costs against the Indemnitor. Time is of the essence in all repairs or replacements. If any public utility is damaged by Indemnitor's employees or subcontractors, Indemnitor shall promptly notify the City.

11

The Indemnitor shall obtain and furnish applicable insurance certificates to the City for the following amounts of insurance and the insurance shall be maintained in full force and effect during life of the Agreement:

- (a) Commercial General Liability Insurance providing coverage for injuries to persons as well as damage to property in an amount not less than One Million and 00/100 dollars (\$1,000,000.00).

12

The rights, easements and obligations established in this Agreement will run with the land and shall be binding upon and inure to the benefit of the Indemnitor, its assigns and successors and to the extent allowable by law, upon the City. This Agreement shall be governed by and construed in accordance with the laws of the State of Georgia.

3

This Agreement shall be recorded in the real property records of DeKalb County, Georgia, and inure to all subsequent purchasers, transferors and assigns of Indemnitor's Property, until otherwise terminated according to the provisions set forth herein.. This Agreement may be executed in multiple counterparts, each of which will constitute an original, but all of which taken together will constitute one and the same agreement.

All notices, consents, requests, demands or other communications to or upon the respective party shall be in writing and shall be effective for all purposes upon receipt, including, but not limited to (1) personal delivery; (ii) delivery by messenger, express or air courier or similar courier, or (iii) delivery by United States first class certified or registered mail, postage prepaid and addressed as follows:

CITY: City of Dunwoody
c/o City Manager
41 Perimeter Center East, Suite 250
Dunwoody, GA 30346

WITH A COPY TO: Leonid Felgin, Esq.
Riley McLendon, LLC
315 Washington Avenue
Marietta, Georgia 30060

INDEMNITOR: Atlanta Office Investment Phase I, L.L.C.
c/o KDC AH Investments One LP
1040 Crown Pointe Parkway
Suite 1070
Atlanta, Georgia 30338
Attention: Alexander A. Chambers

WITH A COPY TO: Atlanta Office Ph I, L.L.C.
c/o State Farm Mutual Automobile Insurance Company
1 State Farm Plaza E-7
Bloomington, Illinois 61710
Attention: John Higgins, Senior Investment Officer

AND: Atlanta Office Ph I, L.L.C.
c/o State Farm Mutual Automobile Insurance Company
1 State Farm Plaza A-3
Bloomington, Illinois 61710
Attention: Christiane M. Stoffer, Associate General Counsel

AND:

Maureen Theresa Callahan, Esq.
Troutman Sanders LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, Georgia 30308-2216

[Signatures begin on next page]

This Agreement has been executed by the parties as of the date first written above.

INDEMNITOR:

Signed, sealed and delivered in
the presence of:

ATLANTA OFFICE INVESTMENT PHASE I, L.L.C.,
a Delaware limited liability company

By: KDC AH Investments One LP,
its managing member

Witness

By: KDC AH Investments One GP LLC,
its general partner

Notary Public

By: _____(SEAL)

My Commission Expires: _____

Name: _____

Title: _____

(NOTARY SEAL)

[Signatures continue on next page]

CITY:

Signed, sealed and delivered in
the presence of:

CITY OF DUNWOODY, GEORGIA

Witness

By: _____
Name: _____
Title: _____

(CORPORATE SEAL)

Notary Public

My Commission Expires: _____

(NOTARY SEAL)

[End of signatures]

EXHIBIT "B"**LEGAL DESCRIPTION OF ENCROACHMENT AREAS**

All that tract or parcel of land lying and being in Land Lots 329 & 348 of the 18th District, City of Dunwoody, Dekalb County, Georgia and being more particularly described as follows:

BEGINNING at the intersection of the easterly right-of-way of Perimeter Center Parkway (having an apparent variable width right-of-way and the northerly right-of-way of Goldkist Drive (having an apparent variable width right-of-way); thence, leaving the aforesaid point and continuing with the said right-of-way of Goldkist Drive

1. 2.44 feet along the arc of a curve deflecting to the left, having a radius of 50.00 feet and a chord bearing and distance of South 88° 04' 08" East, 2.44 feet; thence,
2. South 89° 28' 04" East, 237.51 feet; thence, leaving the aforesaid right-of-way of Goldkist Drive
3. South 04° 40' 02" East, 13.78 feet; thence,
4. South 82° 53' 30" West, 311.09 feet; thence,
5. North 07° 06' 30" West, 319.50 feet; thence,
6. North 26° 06' 30" West, 272.00 feet; thence,
7. North 63° 53' 30" East, 272.00 feet; thence,
8. South 26° 06' 30" East, 67.79 feet to a point on the southerly right-of-way of Hammond Drive (having an apparent variable width right-of-way); thence, continuing with the aforesaid right-of-way
9. South 89° 26' 56" West, 153.85 feet to a concrete monument found; thence, leaving the said right-of-way of Hammond Drive and running with the aforesaid right-of-way of Perimeter Center Parkway
10. South 55° 26' 52" West, 59.50 feet; thence,
11. South 09° 50' 52" West, 34.13 feet; thence,
12. 54.47 feet along the arc of a curve deflecting to the left, having a radius of 385.00 feet and a chord bearing and distance of South 22° 34' 53" East, 54.42 feet; thence,
13. South 26° 38' 04" East, 123.04 feet; thence,
14. 309.05 feet along the arc of a curve deflecting to the right, having a radius of 495.00 feet and a chord bearing and distance of South 08° 44' 54" East, 304.05 feet; thence,
15. South 47° 25' 22" East, 53.20 feet to the point of beginning, containing 45,511 square feet or 1.0448 acres of land, more or less.

EXHIBIT "C"

LEGAL DESCRIPTION OF INDEMNITOR'S PROPERTY

All that tract or parcel of land lying and being in Land Lots 329 & 348 of the 18th District, City of Dunwoody, Dekalb County, Georgia and being more particularly described as follows:

COMMENCING at the intersection of the southerly right-of-way of Hammond Drive (having an apparent variable width right-of-way and the westerly right-of-way of Perimeter Center Parkway (having an apparent variable width right-of-way) if the right-ways were extended to intersect; thence, leaving the aforesaid point North 89° 26' 56" East, 104.86 feet to the TRUE POINT OF BEGINNING.

Thence, from the aforesaid TRUE POINT OF BEGINNING as thus established and running with the aforesaid right-of-way line of Hammond Drive

16. North 89° 26' 56" East, 217.32 feet; thence, leaving the aforesaid right-of-way of Hammond Drive and running with property now or formerly owned by Metropolitan Atlanta Rapid Transit Authority recorded at DB. 8898, Page 631, among the records of Dekalb County, Georgia
17. South 07° 06' 30" East, 36.88 feet; thence,
18. North 82° 53' 30" East, 17.75 feet; thence,
19. South 07° 06' 30" East, 43.00 feet; thence,
20. North 82° 53' 30" East, 61.50 feet; thence, leaving the aforesaid property of Metropolitan Atlanta Rapid Transit Authority and running with property now or formerly owned by Perimeter Atlanta SC LLC recorded at DB. 19774, Page 736, aforesaid records
21. South 04° 40' 02" East, 211.27 feet; thence, continuing with the aforesaid property of Perimeter Atlanta SC LLC
22. South 04° 40' 02" East, 279.34 feet; thence
23. South 89° 28' 20" East, 45.45 feet to a capped rebar found stamped RLS 2301; thence,
24. South 06° 41' 15" West, 10.10 feet to a point on the north side of Goldkist Drive (being an apparent private drive); thence, leaving the aforesaid property of Perimeter Atlanta SC LLC and run along the north side of Goldkist Drive
25. North 89° 28' 04" West, 280.96 feet; thence,
26. 2.44 feet along the arc of a curve deflecting to the right, having a radius of 50.00 feet and a chord bearing and distance of North 88° 04' 08" West, 2.44 feet; thence, leaving the aforesaid Goldkist Drive
27. North 47° 25' 22" West, 53.20 feet; thence,
28. 230.55 feet along the arc of a curve deflecting to the left, having a radius of 495.00 feet and a chord bearing and distance of North 04° 12' 18" West, 228.47 feet; thence,
29. 78.50 feet along the arc of a curve deflecting to the left, having a radius of 495.00 feet and a chord bearing and distance of North 22° 05' 28" West, 78.42 feet; thence,
30. North 26° 38' 04" West, 123.04 feet; thence,
31. 54.47 feet along the arc of a curve deflecting to the right, having a radius of 385.00 feet and a chord bearing and distance of North 22° 34' 53" West, 54.42 feet; thence,
32. North 09° 50' 52" East, 34.13 feet; thence,
33. North 55° 26' 52" East, 59.50 feet to the point of beginning, containing 162,468 square feet or 3.7293 acres of land, more or less.