

STATE OF TEXAS §
§
COUNTY OF DENTON § **INTERLOCAL COOPERATION AGREEMENT**

This Interlocal Cooperation Agreement (the “Agreement”) is made and entered into by and between Denton County Transportation Authority, a coordinated county transportation authority created under Chapter 460 of the Texas Transportation Code (“DCTA”) and the City of Lewisville, a Texas home rule municipality (“City”)(collectively referred to as the “Parties” or individually as “Party”), acting by and through their authorized representatives.

RECITALS

WHEREAS, pursuant to that certain *Transportation and Access Agreement and Easement* dated and effective May 25, 2010, (“the DART Agreement”) between DCTA and DART, DCTA is operating, and maintaining a public rail transportation system within the former Missouri-Kansas-Texas rail corridor from Mile Post 742.42 in the City of Carrollton, Texas, to Mile Post 721.53 in the City of Denton, Texas, (“the DCTA Corridor”) which is presently owned by DART; and

WHEREAS, pursuant to agreements between and/or among DCTA, DART, and Dallas, Garland & Northeastern Railroad (“Railroad”), both passenger and freight railroad operations are occurring on the DCTA Corridor; and

WHEREAS, DCTA has received a grant from the Texas Department of Transportation (“TxDOT”) for the purpose of designing and constructing a pedestrian and bicycle trail from Mile Post 736.6 to Mile Post 739.8 (“the Trail”), a portion of which is located in the DCTA Corridor; and

WHEREAS, a portion of the Trail will be located within City’s incorporated limits; and

WHEREAS, construction and use of the Trail by City’s residents will benefit City and enhance the lifestyle of those residents; and

WHEREAS, DCTA has advised City that an incentive for DCTA to proceed with the construction of the Trail would be an agreement with City for City to operate and maintain the segment of the Trail located within City’s incorporated limits (the “City’s Trail Segment”) in exchange for granting a license to City for the right to use the Trail within the DCTA Corridor; and

WHEREAS, the Parties are authorized to enter into this Agreement pursuant to the Interlocal Cooperation Act (“Act”), Chapter 791, Texas Government Code;

NOW THEREFORE, for and in consideration of the promises and the mutual covenants set forth in this Agreement, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Article I Purpose

The purpose of this Agreement is to evidence the Parties' agreement regarding establishing cyclical and preventative maintenance on the City's Trail Segment.

Article II Definitions

For purposes of this Agreement, the following terms, phrases and words shall have the meanings given herein unless the context clearly indicates otherwise:

"DART" shall mean Dallas Area Rapid Transit, a regional transportation authority created pursuant to Chapter 452 of the Texas Transportation Code.

"The DART Agreement" shall have that meaning given in the recitals above.

"Effective Date" shall mean the last date of execution hereof.

"Expiration Date" shall mean the 11:59 p.m. of the day immediately prior to the anniversary of the Effective Date.

"Flaggers" shall mean employees or contractors of DCTA employed or engaged (whichever is applicable) to protect DCTA's interest while work is being conducted in the DCTA Corridor and who have been determined by DCTA to be knowledgeable and qualified to perform flagging duties within the DCTA Corridor in accordance with DCTA's operating and safety rules.

"Force Majeure" shall mean any contingency or cause beyond the reasonable control of a Party including, without limitation, acts of God or the public enemy, war, riot, civil commotion, insurrection, government or de facto governmental action (unless caused by acts or omissions of the Party), fires, explosions, rain or other weather delays, floods, strikes, slowdowns or work stoppages.

Article III Term

3.1 The term of this Agreement shall begin on the Effective Date, and shall continue until the Expiration Date, unless sooner terminated as provided herein; provided, however, this Agreement shall be automatically renewed for periods of twelve (12) months each unless terminated by either Party by providing six (6) months' notice to the other Party.

3.2 This Agreement may be terminated by either Party in the event the other Party breaches any of the terms or conditions of this Agreement and such breach is not cured within thirty (30) days after written notice thereof.

3.3 Notwithstanding Section 3.1, above, this Agreement shall terminate upon the termination of the DART Agreement unless DART accepts an assignment and assumption of this Agreement and all of DCTA's duties and responsibilities set forth herein.

Article IV Responsibilities

4.1 The City's Trail Segment will be fenced, at no cost to City, in order to separate the City's Trail Segment from DCTA's transportation facilities located within the DCTA Corridor. With respect to the repair and maintenance of the fencing and structures separating the City's Trail Segment from DCTA's transportation facilities, DCTA and City agree as follows:

- a. Subject to Section 4.2, below, DCTA will provide fence maintenance to the primary fence that separates the rail corridor from the City's Trail Segment.
- b. City's employees, agents, and contractors shall not enter into any portion of the DCTA Corridor behind this primary fencing due to proximity to the active DCTA rail.
- c. DCTA shall maintain the area of the DCTA Corridor on the rail side of the primary fence, which shall include mowing, trash and debris removal, herbicide and pesticide applications, tree trimming, signage installation and maintenance, drainage and erosion maintenance, bridge and railing maintenance, from the primary fence to the western property edge of the DCTA Corridor.
- d. DCTA shall conduct maintenance and graffiti removal relating to any sound walls.
- e. DCTA agrees to notify and coordinate with City's Parks and Recreation Department when any maintenance of DCTA's rail facilities will require the use of the City's Trail Segment for access.
- f. DCTA shall conduct structural maintenance of any control device, buildings, signage, or other physical structure that exists for the express purpose of the DCTA rail service along the DCTA Corridor.
- g. City shall be responsible for operating and maintaining the City's Trail Segment which shall include mowing, trash and debris removal, herbicide and pesticide applications, tree trimming, signage installation and maintenance, drainage and erosion maintenance, bridge and railing maintenance, maintenance to fences that are adjacent to pedestrian hazards such as areas preceding a significant change in topography or near the transition of the trail to a pedestrian bridge, and repair, maintenance, and replacement of any amenities including, but not limited to, tables, chair, benches, trash receptacles, water dispensers or fountains, and other equipment typically installed within a recreational trail area.

- h. Subject to Section 4.3, below, City shall be responsible for conducting structural maintenance on trail base and surfaces and bridge repair related to the City's Trail Segment.
- i. City shall perform all special event administration and support services for activities on the City's Trail Segment and shall notify DCTA not less than ten (10) days prior to the date of such events that the events will be occurring.
- j. City shall, through its various departments, coordinate with DCTA when performing maintenance and operation of traffic control, signage, paint striping and similar activities related to the City's Trail Segment.

4.2 City, its employees and its contractor shall use reasonable care to avoid damaging any existing buildings, equipment and vegetation on or about the DCTA Corridor and any adjacent property owned by or under the control of DCTA and/or DART. If the failure to use reasonable care by City, its employees or contractor results in damage to the DCTA Corridor or such adjacent property (other than personal property owned by City), City and/or its contractor shall immediately make an appropriate replacement or repair the damage at no cost or expense to DCTA or DART. If City or its contractor fails or refuses to make such replacement, DCTA shall have the right, but not the obligation, to make or affect any such repair or replacement at the sole cost and expense of City, which cost and expense City agrees to pay to DCTA upon written demand. City shall require that the work and activities associated within the DCTA Corridor shall be conducted in such a manner and at such times to not endanger or interfere with the operation of DCTA or any railroad, and in accordance with the regulations and instructions of DCTA and the Railroad.

4.3 DCTA, its employees and its contractor shall use reasonable care to avoid damaging any existing buildings, equipment and vegetation owned by City on or about the DCTA Corridor and any adjacent property owned by or under the control of City. If the failure to use reasonable care by DCTA, its employees or contractors results in damage to the City's Trail Segment or other personal property owned by City, DCTA and/or its contractor shall immediately make an appropriate replacement or repair the damage at no cost or expense to City. If DCTA or its contractor fails or refuses to make such replacement, City shall have the right, but not the obligation, to make or affect any such repair or replacement at the sole cost and expense of DCTA, which cost and expense DCTA agrees to pay to City upon written demand.

4.4 If, in spite of the express provisions of this Agreement, the Parties' area of responsibility for maintenance and repair at a particular area in the DCTA Corridor is unclear or ambiguous when applying such provisions to the actual physical situation in the field, the Parties shall refer to the Rail R/W Delineation set forth in Exhibit "A" to determine which portion of said area within the DCTA Corridor for which the Parties are responsible for maintaining and repairing.

4.5 City shall reimburse DCTA for all costs and expense incurred by DCTA in connection with the provision of any services or work in relation to City work in the DCTA Corridor including, without limitation, the expense of furnishing such inspectors, watchmen and Flaggers as DCTA deems reasonably necessary or which are otherwise requested by City in order for City to construct its work within the DCTA Corridor.

4.6 City understands and acknowledges that flagging and safety rules will be administered by First Transit through the Roadway Worker Safety Training. DCTA may from time to time designate another party to provide flagging and safety rule administration, which party shall be used by City following notice to City by DCTA.

Article V Grant of License

5.1 In consideration of City's performance of the obligations set forth in this Agreement, DCTA hereby grants to City a non-exclusive license to enter the DCTA Corridor to use, and authorize others to use, the portions of the City's Trail Segment located within the DCTA Corridor for purposes generally consistent with a public "hike and bike" trail. The license granted herein shall at all times be subject to applicable federal and state laws and regulations regarding the use of the DCTA Corridor, including all rail safety regulations.

5.2 In addition to any other remedy available to DCTA pursuant to this Agreement or applicable laws, DCTA may suspend and/or terminate the license and the right to enter the portions of the City's Trail Segment located within the DCTA Corridor if City fails to perform its obligations pursuant to this Agreement and such failure continues for a period of thirty (30) days after DCTA provides written notice to City regarding the nature of the failure to perform.

5.3 Nothing in this Agreement shall authorize City to prevent parties who neither reside in nor own property within City's incorporated limits from using the City's Trail Segment in any lawful manner. City shall have the right to establish rules and regulations relating to the use of the City's Trail Segment by those who City authorizes to use the City's Trail Segment, which rules and regulations, to the extent they apply to those portions of the City's Trail Segment within the DCTA Corridor, shall be subject to approval by DCTA, which approval shall not be unreasonably withheld or denied.

5.4 The Parties acknowledge that City shall at all times have the right to enforce state laws and local ordinances within the DCTA Corridor to the same extent that the City can enforce such laws and ordinances on property located anywhere else within City's incorporated limits.

Article VI Party Responsibility; Insurance

6.1 City and DCTA further agree as follows:

- a. Without waiving any governmental immunity available to the Parties under Texas and other applicable laws, and without waiving any available defenses under Texas and other applicable laws, the Parties acknowledge that neither Party is an agent, servant, or employee of the other Party, and each Party agrees it is responsible for its own individual negligent acts or omissions or other tortious conduct as well as such acts and deeds of its contractors, agents, representatives, and employees during performance of this Agreement to the extent such liability can be imputed

to said Party under applicable law. Nothing in this Article VI shall be construed to create or grant any rights, contractual or otherwise, in or to any third persons or entities.

- b. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN SECTION 6.1.a., ABOVE, PRIOR TO THE PARTY’S CONTRACTOR ENTERING INTO THE DCTA CORRIDOR PURSUANT TO THIS AGREEMENT TO PERFORM WORK ON BEHALF OF SAID PARTY, SAID PARTY SHALL REQUIRE ITS CONTRACTOR OR OTHER THIRD PARTY WHO ENTERS AND/OR PERFORMS WORK IN THE CORRIDOR ON BEHALF OF SAID PARTY TO AGREE AT ALL TIMES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS CITY, DCTA, AND DART AND THEIR RESPECTIVE OFFICERS, AGENTS, AND EMPLOYEES AGAINST AND FROM:**

 - i. ANY AND ALL LOSS, COST, DAMAGE, OR EXPENSE, INCLUDING REASONABLE ATTORNEY’S FEES, ARISING OUT OF OR FROM ANY ACCIDENT OR OTHER OCCURRENCE CAUSING PERSONAL INJURY, DEATH OR PROPERTY DAMAGE RESULTING FROM OR RELATED TO USE OF THE DCTA CORRIDOR BY THE CONTRACTOR, ITS AGENTS, EMPLOYEES, PARTNERS, SHAREHOLDERS, AGENTS, SUBCONTRACTORS, INVITEES, OR GUESTS, WHETHER OCCASIONED BY THE INTENTIONAL OR NEGLIGENT ACTS OR OMISSIONS OF THE CONTRACTOR, ITS EMPLOYEES, OFFICERS, PARTNERS, SHAREHOLDERS, AGENTS, SUBCONTRACTORS, INVITEES, OR GUESTS, EXCEPT WHEN CAUSED BY THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF CITY, DCTA, OR DART OR THEIR OFFICERS, EMPLOYEES AND/OR AGENTS, AND ONLY THEN TO THE EXTENT OF THE PROPORTION OF ANY FAULT DETERMINED AGAINST DCTA, DART, OR RAILROAD FOR THEIR WILLFUL MISCONDUCT OR GROSS NEGLIGENCE; AND**
 - ii. ANY PENALTY, OR ANY DAMAGE, OR CHARGE, IMPOSED FOR ANY VIOLATION OF ANY LAW, ORDINANCE, RULE OR REGULATION ARISING OUT OF THE USE OF THE LICENSED PREMISES BY THE CONTRACTOR, ITS AGENTS, EMPLOYEES, PARTNERS, SHAREHOLDERS, AGENTS, SUBCONTRACTORS, INVITEES, OR GUESTS, WHETHER OCCASIONED BY THE INTENTIONAL OR NEGLIGENT ACTS OR OMISSIONS OF CITY, DCTA, OR DART OR THEIR EMPLOYEES, OFFICERS, PARTNERS, SHAREHOLDERS, AGENTS, CONTRACTORS, INVITEES, OR GUESTS.**

- c. City and DCTA are each a “governmental unit” as that term is defined in Tex. Civ. Prac. & Rem. Code §101.001 and do not by agreement to and acceptance of this Agreement waive their respective rights to claim immunity to liability or suit or to invoke the limits of liability set forth in Chapter 101 of the Texas Civil Practices & Remedies Code, as amended, to the extent sovereign immunity has been waived by said statutes. DCTA and City further acknowledge and agree that nothing in this Agreement is intended to be for the benefit of any third parties except to the extent expressly provided in this License.
- d. The provisions of this Section 6.1 shall survive the termination of this Agreement regardless of the means of termination.

6.2 Prior to occupancy of the DCTA Corridor under this Agreement, the Parties agree to require all contractors and subcontractors engaged by said Party to perform work in the DCTA Corridor to comply with the provisions of this Section 6.2 by procuring and maintaining the following types and amounts of insurance with an insurer or insurers and in form satisfactory to DCTA and City, such insurance shall be primary and non-contributory.

- a. Commercial General Liability with Contractual Liability Endorsement.
 - i. \$1,00,000 per occurrence/\$2,000,000 per aggregate for bodily injury, personal injury and property damage
 - ii. City, DCTA, and DART and all affiliated companies and organizations named as additional insureds without any qualification or restriction.
 - iii. DCTA or City, respectively, must be provided 30 days’ notice of cancellation or modification to the extent authorized by law.
- b. Commercial Automobile Liability Policy
 - i. Combined single limit of not less than \$2,000,000.
 - ii. City, DCTA and DART named as additional insureds without any qualification or restriction.
 - iii. DCTA or City, respectively, must be provided 30 days’ notice of cancellation or modification to the extent authorized by law.
- c. Workers' Compensation Insurance
 - i. Providing Statutory Benefits under the Workers' Compensation Act of the State of Texas and/or any other State or Federal Law or Laws applicable to the Contractor's employees performing the work under this License.

- ii. Employer's Liability Insurance with limits of liability of not less than \$500,000 each accident, \$500,000 each employee for disease and \$500,000 policy limit for disease.
 - iii. Endorsed with a Waiver of Subrogation Endorsement, waiving the carrier's right of recovery under subrogation or otherwise from City, DCTA and DART.
- d. The Parties shall require all contractors and subcontractors engaged by them to perform work on the DCTA Corridor to furnish City and DCTA Certificates of Insurance and copies of Endorsements for Additional Insured, Waiver of Subrogation and Contractual Liability (or, as and when DCTA or City, respectively, may direct, copies of the actual insurance policies) as evidence of the coverages outlined in Paragraphs a, b, and c, above, and this Paragraph d. Approval will be expedited if all required coverages and the following endorsements are included on the Certificates:
 - i. Endorsement showing City, DCTA and DART named as additional insureds in as required by Paragraphs a. and b., above and requiring that City and DCTA be given 30 days' notice of cancellation or modification. The endorsement and certificate must specify that the endorsement is applicable to the General Liability and Auto Liability Policies.
 - ii. Contractual liability endorsement.
 - iii. Endorsement removing exclusions from contractual liability coverage for operations within 50 feet of a railroad or the purchase of a Railroad Protective Liability Policy with limits of liability of no less than \$2,000,000 per occurrence and \$6,000,000 aggregate.
 - iv. Endorsement removing exclusions for XCU hazards.
 - v. Waiver of subrogation endorsement specific to Workers' Compensation.

6.3 Any contract between City or DCTA and a third party contractor or agent to perform work on behalf of said Party within the DCTA Corridor entered after the Effective Date shall be made expressly subject to the provisions of this Agreement to the extent the work is performed by said third party within the DCTA Corridor, which agreement shall be either (i) incorporated into the text of said contract in full or by reference or (ii) by separate instrument signed by an authorized representative of said third party.

Article VII Miscellaneous

7.1 **Entire Agreement.** This Agreement constitutes the sole and only agreement between the Parties and supersedes any prior understandings written or oral agreements between the Parties with respect to this subject matter.

7.2 **Assignment.** This Agreement may not be assigned by either Party without the prior written consent of the other Party; provided, however, this Agreement may be assigned by DCTA to DART upon termination of the DART Agreement without the consent of City if DART agrees to assume all of DCTA's duties and responsibilities set forth in this Agreement.

7.3 **Successors and Assigns.** Subject to the provisions regarding assignment, this Agreement shall be binding on and inure to the benefit of the Parties to it and their respective heirs, executors, administrators, legal representatives, successors and permitted assigns.

7.4 **Governing Law.** The laws of the State of Texas shall govern this Agreement; and venue for any action concerning this Agreement shall exclusively be in the State District Court of Denton County, Texas. The Parties agree to submit to the personal and subject matter jurisdiction of said court.

7.5 **Amendments.** This Agreement may be amended by the mutual written agreement of the Parties.

7.6 **Severability.** In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it.

7.7 **Notice.** Any notice required or permitted to be delivered hereunder may be sent by first class mail, overnight courier or by confirmed telefax or facsimile to the address specified below, or to such other party or address as either Party may designate in writing, and shall be deemed received three (3) days after delivery set forth herein:

To DCTA:

Denton County Transportation Authority
Attn: Deputy Chief Executive Officer
1955 Lakeway Drive, Suite 260
Lewisville, Texas 75067

To City:

City of Lewisville
Attn: City Manager
P.O. Box 299002
151 Church Street
Lewisville, Texas 75201

With Copy to:

Joseph G. Gorfida, Jr.
Nichols, Jackson, Dillard, Hager & Smith, LLP
500 N. Akard, Suite 1800
Dallas, Texas 75201

With Copy to:

City of Lewisville
Attn: City Attorney
P.O. Box 299002
151 Church Street
Lewisville, Texas 75201

7.8 **Counterparts.** This Agreement may be executed by the Parties in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument. Each counterpart may consist of any number of copies hereof each signed by less than all, but together signed by all of the Parties.

7.9 **Recitals.** The recitals to this Agreement are incorporated herein.

7.10 **Authorization.** Each Party represents that it has full capacity and authority to grant all rights and assume all obligations that are granted and assumed under this Agreement.

7.11 **Survival of Covenants.** Any of the representations, warranties, covenants, and obligations of the Parties, as well as any rights and benefits of the Parties, pertaining to a period of time following the termination of this Agreement shall survive termination hereof.

7.12 **Approval of Parties.** Whenever this Agreement requires or permits the approval or consent to be given by a Party, the Parties agree that such approval or consent shall not be unreasonably withheld, conditioned or delayed.

7.13 **No Third-Party Beneficiary.** Nothing in this Agreement shall be construed as creating or giving rise to any rights of third-parties or any persons other than the Parties hereto.

7.14 **Current Funds; Fair Compensation.** Each Party paying for the performance of governmental functions or services pursuant to this Agreement shall make those payments from current revenues available to the paying Party. The Parties represent and agree that the payments required by this Agreement by the paying Party, if any, will fairly compensate the performing Party for the services or functions performed under this Agreement.

signatures on following page

SIGNED AND AGREED this _____ day of _____, 2020.

DENTON COUNTY TRANSPORTATION AUTHORITY

By: _____
Kristina Holcomb, Deputy Chief Executive
Officer

SIGNED AND AGREED this _____ day of _____, 2020.

CITY OF LEWISVILLE, TEXAS

By: _____
Donna Barron, City Manager

ATTEST:

Julie Worster, City Secretary

APPROVED AS TO FORM:

Lizbeth Plaster, City Attorney

EXHIBIT "A"

