

## **RIGHT-OF-WAY USE AGREEMENT**

This Agreement is made this the \_\_\_\_\_ day of \_\_\_\_\_, 2020, by and between the **City of Plano, Texas** ("City"), a Texas home rule municipal corporation, and **TB Plano 1 LLC, limited liability company** duly organized and existing under the laws of the State of Delaware ("Company").

### **RECITALS:**

**WHEREAS**, Company desires to locate, place, attach, install, operate, maintain, repair and replace, subject to the terms of this Right-of-Way Use Agreement, a sky bridge system located in the City of Plano right-of-way; and

**WHEREAS**, the sky bridge system (the "Structure") shall be located in a portion of 11<sup>th</sup> between K Avenue and Iron Avenue in Plano, Collin County, Texas, (the "Right-of-Way") between two buildings located on Block A, Lot 1 and Block B, Lot 1 (the "Buildings") all as depicted on the attached Exhibit "A"; and

**WHEREAS**, the City is authorized by Texas Transportation Code Section 316.021 to authorize use of its right-of-way for private uses that do not interfere with the public use of the right-of-way and that do not create a dangerous condition; and

**WHEREAS**, the City will allow Company to use the Right-of-Way for the Structure under the terms of this Agreement.

**NOW, THEREFORE**, the City and Company agree as follows:

#### **1. Definitions.**

Capitalized terms used in this Agreement and not otherwise defined within this Agreement shall have the following meanings:

- (a) *Affiliate* shall mean any individual, partnership, association, joint stock company, limited liability company, trust, corporation, or other person or entity who owns or controls, or is owned or controlled by, or is under common ownership or control with, the entity in question.
- (b) *Effective Date* shall mean \_\_\_\_\_.
- (c) *Execution Date* shall mean the date of execution of this Agreement by the City.
- (d) *Person* shall mean an individual, corporation, a limited liability company, a general or limited partnership, a sole proprietorship, a joint venture, a business trust or any other form or business entity or association.

## 2. **Grant of Rights.**

### 2.1 **General Use of Right-of-Way.**

Subject to the terms and conditions set forth in this Agreement, the City Charter, and the ordinances of the City, the City hereby grants Company (and any successor in interest to the Buildings) an exclusive license as to the area in which the Structure is situated and a non-exclusive license as to all other areas for the purpose of locating, placing, attaching, installing, operating, repairing, maintaining and replacing its Structure in the Right-of-Way. Company hereby acknowledges and agrees that the location, attachment, installation, operation, maintenance, removal, reattachment, reinstallation, relocation and/or replacement of the Structure constitutes an actual use of the Right-of-Way, that the City has the right to manage and regulate the use of such Right-of-Way, and that the City is entitled to recover reasonable compensation from Company because of such use of the Right-of-Way.

Both the City and Company ("Parties") hereby acknowledge and agree that this Agreement addresses only the use of the Right-of-Way by Company to locate, place, attach, install, operate, maintain, repair and replace its Structure. This Agreement does

not grant Company or any Affiliate or contractor of the Company the use of the Right-of-Way for any other reason, including but not limited to :1) the posting of signs on the outside of the Structure other than those permitted by the City; 2) the attachment of telecommunication facilities to the outside of the Structure; or 3) the attachment of other items to the outside of the Structure except those items essential to the function of the Structure. If Company, an Affiliate of Company, or any assignee, successor in interest or contractor of Company contends that Company, an Affiliate of Company, or any assignee, successor in interest/title to the Buildings or contractor of Company wishes to construct or install additional facilities in any of the City's right-of-way, Company shall first notify the City in writing and shall obtain a written permit or agreement for that additional use of the right-of-way. The Structure itself is the property of Company.

2.2 Scope. Any and all rights granted to Company under this Agreement, which shall be exercised at Company's sole cost and expense, shall be subject and subordinate to the prior and continuing right of City, its successors and assigns, to use any and all part of the Right-of-Way below or above the Structure exclusively or concurrently with any other Person or Persons having the legal right to use such Right-of-Way. In addition, any and all rights granted to Company under this Agreement shall be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the Right-of-Way. Nothing in this Agreement shall be deemed to grant, convey, create, or vest in Company a real property interest in land, including, but not limited to, any fee, leasehold interest, or easement. Any work performed by or on behalf of Company shall be subject to the prior and customary review and regulation by the City. Company shall not allow any liens, including, but not limited to,

mechanic's or materialman's liens, to be enforced against City's premises by reason of any such work.

2.3 Non-exclusive. This Agreement and all rights granted to Company herein are strictly non-exclusive as to the area below and above the Structure. Solely as it relates to areas above and below the Structure, the City reserves the right to grant other and future agreements, consents and franchises for the use of right-of-way in the City, including the Right-of-Way used by Company pursuant to this Agreement, to other Persons as the City deems appropriate. This Agreement does not establish any priority for the use of the Right-of-Way by Company or by any present or future franchisees, users or other permit holders. In the event of any dispute as to the priority of use of the Right-of-Way, the first priority shall be to the public generally, the second priority to the City in the performance of its various functions, and thereafter, as between franchisees, users and other permit holders, as determined by the City in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Texas.

2.4 Other Permits. This Agreement does not relieve Company of any obligation to obtain permits, licenses, and other approvals from the City necessary for the construction, repair, or maintenance of the Structure.

### 3. Term.

This License shall continue in force for a period of seventy-five (75) years from the Effective Date and may thereafter be renewed for such time and upon such terms as the parties may then agree. If any law or agency rule or regulation is adopted that affects the City's ability or right to manage the Right-of-Way, Company agrees to meet with the City and to negotiate with diligence and in good faith an agreement or amendment to this

Agreement that reasonably resolves the City's and Company's concerns regarding such law or agency rule or regulation.

4. **Fees and Payments.**

4.1 Right-of-Way Use Fee. On the Execution Date, Company shall pay the City as compensation for its use of the Right-of-Way the sum total of **\$1,075.00 (ONE THOUSAND AND SEVENTY-FIVE DOLLARS)** per year with each annual payment payable in advance of each year and with the first payment due within thirty (30) days after the Effective Date. The annual use fee thereafter will be determined by the amount set in the City's Right of Way Management Ordinance as it may be amended from time to time. City will notify Company of increases at least thirty (30) days before the due date for any particular yearly payment. Company hereby acknowledges and agrees that the amount of this Right-of-Way Use Fee constitutes just and reasonable compensation to the City for Company's use of the Right-of-Way as provided by this Agreement.

4.2 Other Payments. In addition to the Right-of-Way Use Fee, Company shall pay the City all sums that may be due the City for property taxes, license fees, permit fees, or other taxes, charges or fees that the City may from time to time impose.

4.3 Interest. All sums due the City under this Agreement that are not paid when due shall bear interest at the rate of ten percent (10%) per annum, computed monthly.

4.4 Compensation for Other Uses of the Right-of-Way. Company acknowledges that it understands that this Agreement and the fee charged in Section 4.1 above relate only to the Right-of-Way specifically identified in Exhibit "A." Additional portions of the right-of-way and/or street crossings shall require a new license and an additional fee.

5. **Use of Right-of-Way.**

5.1 **Construction and Maintenance.** In all matters relating to this Agreement, Company shall comply with the City of Plano Right-of-Way Management Ordinance, as amended from time to time, and all other pertinent laws, rules, and regulations of the City and the State of Texas. Approval by City of this Agreement shall not constitute a warranty by City that Company's plans conform with federal, state and/or local codes and regulations applicable thereto. Company shall comply with all laws or ordinances of the City of Plano, including, but not limited to, those relating to building and excavation permits.

5.2 **Work by Others; Alterations Required if Needed to Conform with Public Improvements.** The City reserves the right, subject to further conditions described in this paragraph, to lay and permit to be laid sanitary sewer, gas, water, electric, telephone and television cable and other pipelines or cables and conduits and to do and permit to be done any underground and overhead installation that may be deemed necessary or proper by the governing body of the City in, across, along, over or under any of the Right-of-Way and to change any curb or sidewalk or the grade of any street. The City shall provide notice to the Company if such work may disturb, impede or affect the Structure in any way. In permitting such work to be done, the City shall not be liable to Company, except to the extent provided under the Texas Tort Claims Act. Nothing herein shall relieve any other person or corporation from any liability for damage to the facilities or the Structure.

5.3 **Testing.** Company shall cooperate with City in making any test or tests it requires of any installation or condition that, in its reasonable judgment, may have

adverse effects on any of the facilities of the City. All costs incurred by the test(s), or any corrections thereof, shall be borne by Company.

5.4 Location, Use or Purpose Changes. No change in the location, use or purpose of the Right-of-Way shall be made by Company without City's written approval.

6. **Miscellaneous Obligations of Company.**

6.1 Removal of Structure. Upon the termination or expiration of this Agreement, Company's right to use Right-of-Way under this Agreement shall cease and Company shall immediately discontinue use of the Structure. Within six (6) months following such termination or expiration and in accordance with directions from the City, Company shall remove the Structure, including, but not limited to, all supporting structures, poles, transmission and distribution Structures and other appurtenances, fixtures or property from the Right-of-Way. If Company has not removed all Structure facilities and equipment from the Right-of-Way within six (6) months following termination or expiration of this Agreement, the City may deem all of the Company's Structure facilities and equipment remaining in the Right-of-Way abandoned and, at the City's sole but reasonable discretion, (i) take possession of and title to such property; and/or (ii) take any and all legal action necessary to compel Company to remove such property.

Within six (6) months following termination or expiration of this Agreement, Company shall also restore any property, public or private, that is disturbed or damaged by removal of the Structure. If Company has not restored all such property within this time, the City, at the City's sole but reasonable discretion, may perform or have performed any necessary restoration work, in which case Company shall, within 10 days following

receipt of an itemized invoice, reimburse the City for any and all costs incurred in performing or having performed such restoration work.

**7. Indemnification and Insurance.**

**7.1 Disclaimer of Liability. EXCEPT TO THE EXTENT PROVIDED BY THE TEXAS TORT CLAIMS ACT, THE CITY SHALL NOT AT ANY TIME BE LIABLE FOR ANY INJURY OR DAMAGE OCCURRING TO ANY PERSON OR PROPERTY FROM ANY CAUSE WHATSOEVER THAT ARISES OUT OF THE ATTACHEMENT, INSTALLATION, OPERATION, MAINTENANCE, REMOVAL, REATTACHMENT, REINSTALLATION, RELOCATION AND/OR REPLACEMENT OF THE STRUCTURE OR THE CONSTRUCTION, MAINTENANCE, REPAIR, USE, OPERATION, CONDITION OR DISMANTLING OF THE STRUCTURE.**

**7.2 Indemnification. COMPANY SHALL PROVIDE TO THE CITY THE INDEMNIFICATION SET OUT IN THE CITY'S RIGHT-OF-WAY MANAGEMENT ORDINANCE, AS AMENDED. COMPANY FURTHER RELEASES AND INDEMNIFIES THE CITY FROM AND AGAINST ANY AND ALL LIABILITY, COST AND EXPENSE, INCLUDING ATTORNEY'S FEES FOR LOSS OF OR DAMAGE TO THE CITY'S PROPERTY AND FOR INJURY TO OR DEATH OF PERSONS (INCLUDING, BUT NOT LIMITED TO, THE PROPERTY AND EMPLOYEES OF EACH OF THE PARTIES HERETO) ARISING OR RESULTING FROM A BREACH OF THIS AGREEMENT BY COMPANY, WHETHER OR NOT CAUSED OR CONTRIBUTED TO BY ANY ACT OR OMISSION, NEGLIGENCE OR OTHERWISE, OF ANY EMPLOYEE OR AGENT OF CITY.**



7.3 **Assumption of Risk.** COMPANY HEREBY UNDERTAKES AND ASSUMES, FOR AND ON BEHALF OF COMPANY, ITS SUCCESSORS, ASSIGNS, AFFILIATES, SUBSIDIARIES, OFFICERS, AGENTS, CONTRACTORS, SUBCONTRACTORS, AGENTS AND EMPLOYEES, ALL RISK OF DANGEROUS CONDITIONS, IF ANY, ON OR ABOUT ANY CITY-OWNED OR CITY-CONTROLLED PROPERTY OR FACILITIES, INCLUDING, BUT NOT LIMITED TO, THE RIGHT-OF-WAY. IN ADDITION, COMPANY HEREBY AGREES TO AND SHALL INDEMNIFY AND HOLD HARMLESS THE CITY AGAINST AND FROM ANY CLAIM ASSERTED OR LIABILITY IMPOSED UPON THE CITY FOR ANY PERSONAL INJURY OR PROPERTY DAMAGES INCURRED OR ASSERTED BY COMPANY OR ANY OF ITS EMPLOYEES, AGENTS, CONTRACTORS OR SUBCONTRACTORS, AND ARISING FROM THE ATTACHMENT, INSTALLATION, OPERATION, MAINTENANCE, CONDITION, REMOVAL, REATTACHMENT, REINSTALLATION, RELOCATION AND/OR REPLACEMENT OF THE STRUCTURE.

7.4 **Insurance.** Company shall comply with the insurance requirements set out in the City's Right-of-Way Management Ordinance, as amended.

8. **Termination.** This Agreement shall terminate:

- A. at the end of the term provided for in Section 3 above;
- B. upon abandonment of the Right-of-Way or discontinuance of use thereof;
- C. upon failure of Company to correct any default under this Agreement after expiration of the applicable cure period as set out in Section 9 and 10 below.
- D. upon (A) ninety (90) days prior written notice to City;

E. if the Structure is not built within 5 years of execution of this Agreement, upon ninety (90) days prior written notice any time after the 5<sup>th</sup> year.

If Company (or the successor in interest to the Buildings) elects to terminate this Agreement pursuant to Section D or E above, there shall be no penalty or any additional payments due from Company as a result of such termination.

9. **Defaults.**

The occurrence at any time during the term of this Agreement of one or more of the following events shall constitute an “Event of Default” under this Agreement:

9.1 Failure to Pay Right-of-Way Use Fee. An Event of Default shall occur if Company fails to pay any Right-of-Way Use Fee on or before the respective due date.

9.2 Breach. An Event of Default shall occur if Company materially breaches or violates any of the terms, covenants, representations, or warranties set forth in this Agreement or fails to perform any duty or obligation required by this Agreement.

9.3 Violations of the Law. An Event of Default shall occur if Company violates any existing or future federal, state or local laws or any existing or future ordinances, rules and regulations of the City; provided, however, that no Event of Default shall be deemed to occur or exist during the pendency of any legal action which the City or Company may initiate against the other under or in connection with such law, ordinance, rule or regulation.

10. **Uncured Defaults and Remedies.**

10.1 Notice of Default and Opportunity to Cure. If an Event of Default occurs, the City shall provide Company with written notice and shall give Company the opportunity to cure such Event of Default. For an Event of Default which can be cured by

the immediate payment of money to the City, Company shall have thirty (30) calendar days from the date it receives written notice from the City to cure the Event of Default. For any other Event of Default, Company shall have sixty (60) calendar days from the date it receives written notice from the City to cure the Event of Default. If any Event of Default is not cured within the time period specified herein, such Event of Default shall, without further notice from the City, become an "Uncured Default" and the City immediately may exercise the remedies provided in Section 10.2.

10.2 Remedies for Uncured Defaults. Upon the occurrence of an Uncured Default, the City shall be entitled to exercise, at the same time or at different times, any of the following remedies, all of which shall be cumulative and without limitation to any other rights or remedies the City may have:

10.2.1 Termination of Agreement. Upon the occurrence of an Uncured Default, the City may terminate this Agreement immediately upon written notice to Company. Upon such termination, Company shall forfeit all rights granted to it under this Agreement, and, except as to Company's unperformed obligations and existing liabilities as of the date of termination, this Agreement shall automatically be deemed null and void and shall have not further force or effect. Company shall remain obligated to pay, and the City shall retain any, Right-of-Way Use Fee and any other payments due up to the date of termination. In this event, Company shall comply with the provisions of Section 6.1 of this Agreement. The City's right to terminate this Agreement under this Section does not and shall not be construed to constitute any limitation on the City's right to terminate this Agreement for other reasons as provided by and in accordance with this Agreement.

10.2.2. Legal Action Against Company. Upon the occurrence of an Uncured Default, the City may commence against Company an action at law for monetary damages or in equity for injunctive relief or specific performance of any of the provisions of this Agreement that, as a matter of equity, are specifically enforceable.

10.2.3. Lender Cure Rights. Notwithstanding anything contained herein to the contrary, the City shall provide the Lender (pursuant to the address set forth in the notice clause below) with copies of all notices of Events of Default by Company under this Agreement simultaneous with delivery of notice to Company. Before an Event of Default shall become an Uncured Default and before City may take any actions or exercise any right and/or remedies under Sections 8 or 10.2 (including without limitation, the termination right set forth in Section 8B, Lender shall have the right to cure such Event of Default within any cure period allowed to Company plus an additional 30 days. Nothing set forth herein shall be deemed to obligate Lender to cure any Event of Default. It is expressly agreed that the curing by Lender of any Event of Default under this Agreement or the taking of any action by Lender in connection therewith shall not be deemed an assumption by Lender of any of the Company's obligations under this Agreement. The City shall accept performance by Lender of any cure of an Event of Default as though performed by Company.

11. **Assignment of Agreement.**

The rights granted by this Agreement run with the land and inure to the benefit of Company and any successor in interest to the Structure and Buildings. In the event

Company transfers a controlling interest in the Company to a third party or conveys the Buildings, Company shall provide City with written notice thereof.

12. **Notices.**

12.1 All notices that shall or may be given pursuant to this Agreement shall be in writing and delivered or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight delivery service as just described, addressed as follows:

*If to the City:*

**City of Plano**

Attn: Intergovernmental Relations  
P.O. Box 860358  
1520 Avenue K, Suite 320  
Plano, TX 75086-0358  
Fax Number (972) 423-9587

With a copy to:

**City of Plano**

Attn: City Attorney  
P.O. Box 860358  
1520 Avenue K, Suite 340  
Plano, TX 75086-0358  
Fax Number (972) 424-0099

*If to Company:*

**TB PLANO 1 LLC**

Care of Toll Bros., Inc.  
Attn: Charles Elliot  
1140 Virginia Drive  
Ft. Washington, PA 19034  
Phone: 215-938-8180  
Fax: 215-293-5695

*If to Lender:*  
**Santander Bank, N.A.**  
Two Aldwyn Center  
Lancaster Avenue and Route 320  
Villanova, PA 19085  
Attn: James Dunleavy, Commercial Real Estate

With a copy to:  
Blank Rome LLP  
One Logan Square  
Philadelphia, PA 19103-6998  
Attn: Steven A. Shoumer, Esquire

12.2 Date of Notices; Changing Notice Address. Notices shall be deemed given three (3) days after deposit in the mail; or the next day in the case of facsimile, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

13. **No Waiver.**

The failure of the City to insist upon the performance of any term or provision of this Agreement or to exercise any rights that the City may have, either under this Agreement or the law, shall not constitute a waiver of the City's right to insist upon appropriate performance or to assert any such right on any future occasion.

14. **Miscellaneous Provisions.**

14.1 Run with the Land. The use of the Right-of-Way granted by this Agreement and the rights and obligations of each party hereto shall be appurtenant to and run with the land.

14.2 Amendment of Agreement. This Agreement may not be amended except pursuant to a written instrument signed by both parties.

14.3 Severability of Provisions. If any one or more of the Provisions of this Agreement shall be held by court of competent jurisdiction in a final judicial action to be

void, voidable, or unenforceable, such Provision(s) shall be deemed severable from the remaining Provision(s) of this Use Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Agreement.

14.4 Governing Law; Jurisdiction. This Agreement shall be governed and construed by and in accordance with the laws of the State of Texas, without reference to its conflicts of law principles. If suit is brought by a party to this Agreement, the parties agree that venue for the trial of such action shall be vested exclusively in the state courts of Texas, County of Collin, or in the United States District Court for the Eastern District of Texas.

14.5 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably delay or withhold consent.

14.6 Waiver of Breach. The waiver by either party of any breach or violation of any Provision of this Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other Provision of this Agreement.

14.7 Representations and Warranties. Each of the parties to this Agreement represent and warrant that at the time of signing of this Agreement it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith.

14.8 Entire Agreement. This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein.

14.9 No Third Party Beneficiaries. This Agreement is for the benefit of Company, the owner of the land upon which the Buildings are to be constructed, any transferee or assignee in accordance with the provisions contained herein, and the City, and not for the benefit of any third party. No Provision of this Agreement shall be construed as creating any third party beneficiaries.

14.10 Force Majeure. Neither party is required to perform any term or covenant in this Agreement for as long as performance is delayed or prevented by force majeure, which includes acts of God, strikes, lockouts, material or labor restrictions by any governmental authority, civil riots, floods, and any other cause not reasonably within the party's control and that the party, by exercising due diligence and by paying money, cannot prevent or overcome, in whole or in part.

*[Signatures on following page]*



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed  
in duplicate the day and year first above written.


**LICENSOR:**  
**CITY OF PLANO, TEXAS,**  
A Home Rule Municipal Corporation

By: \_\_\_\_\_  
Mark D. Israelson  
City Manager

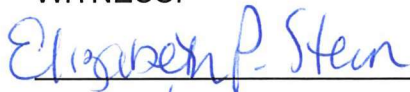
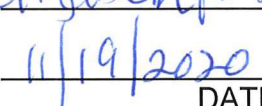
APPROVED AS TO FORM:

\_\_\_\_\_  
Paige Mims, CITY ATTORNEY

**LICENSEE:**  
**TB PLANO 1 LLC**

  
\_\_\_\_\_  
By: Ken Greenspan  
Title: Vice President

WITNESS:

  
\_\_\_\_\_  
  
\_\_\_\_\_  
DATE

## ACKNOWLEDGMENTS

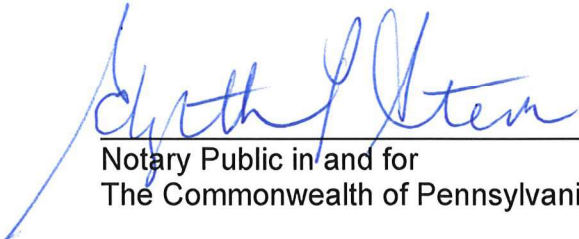
STATE OF TEXAS       §  
                                  §  
COUNTY OF COLLIN   §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2020 by Mark D. Israelson, City Manager of the **CITY OF PLANO, TEXAS**, a home-rule municipal corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public in and for the State of Texas

COMMONWEALTH OF PENNSYLVANIA   §  
  §  
COUNTY OF MONTGOMERY           §

This instrument was acknowledged before me on the 19<sup>th</sup> day of November, 2020, by Ken Greenspan, Vice President of **TB PLANO 1 LLC**, on behalf of said company.

  
\_\_\_\_\_  
Notary Public in and for  
The Commonwealth of Pennsylvania

Commonwealth of Pennsylvania - Notary Seal  
ELIZABETH P. STEIN, Notary Public  
Montgomery County  
My Commission Expires September 8, 2023  
Commission Number 1159840

**Exhibit "A"**

(See attachments)

