

REQUEST FOR BOARD ACTION

HENDERSON COUNTY BOARD OF COMMISSIONERS

MEETING DATE: February 16, 2022

SUBJECT: **Rail Trail Encroachment Policy**

PRESENTER: Marcus Jones, PE
County Engineer

ATTACHMENTS: Yes
1. Proposed License Agreement / Application

SUMMARY OF REQUEST:

Engineering has developed the following policy to review, approve and manage encroachments by others onto the right of way of the Rail Trail. The policy and attached license agreement has been reviewed by the County Attorney and Risk Manager.

Encroachment Policy for the Rail Trail within Henderson County

All publicly owned or publicly regulated utilities and agriculture operations with the need to encroach on the Trail right of way shall submit an executed Rail Trail License Agreement for review by the County Engineer. Upon satisfactory review by the County Engineer, he / she is authorized to approve the agreement and sign on behalf of the County. All other encroachments will be reviewed by the County Engineer and individually presented to the Board of Commissioners for approval. Engineering will maintain a master list of all encroachments within the right of way and inspect them annually.

Staff is not recommending a fee for the process currently due to the public nature of the applicant's operations. Engineering anticipates having adequate resources to manage the encroachment process. Also, staff is not recommending applicants submit surety for the encroachments; the license agreement details compensation and reimbursement processes if necessary.

BOARD ACTION REQUESTED:

Approve the encroachment policy for the Rail Trail and authorize the County Engineer manage the encroachments process.

Suggested Motion:

I move the Board approve the encroachment policy for the Rail Trail and authorize the County Engineer to manage the encroachments process.

Henderson County Rail Trail

LICENSE AGREEMENT FOR WIRE, PIPE AND CABLE TRANSVERSE CROSSINGS AND LONGITUDINAL OCCUPATIONS

THIS AGREEMENT, made and entered into _____, between **ECUSTA RAILS2TRAIL, LLC AND COUNTY OF HENDERSON**, which has a mailing address at **1 HISTORIC COURTHOUSE SQUARE, HENDERSONVILLE, NC 28792** party of the first part (hereinafter called “Greenway”), and _____ having a mailing address at _____ as party of the second part (hereinafter called “Licensee”).

WITNESSETH, that said Greenway (which when used herein shall include any licensor, lessor, successor or assignee) insofar as it has the legal right to do so, without warranty and subject to all encumbrances, covenants and easements to which the Greenway’s title may be subject, and in consideration of the covenants and conditions hereinafter stated on the part of Licensee to be kept and performed, hereby permits, as a temporary license, Licensee to construct, maintain, repair, alter, renew, relocate and ultimately remove:

Licensee has submitted to Greenway an Application related to the proposed installation and construction of [Description of facilities] (herein called the “Facilities”) located in, over or under, across, along and upon the right-of-way or property of Greenway at or near:

LOCATION (NC State Plane Coordinates or Latitude / Longitude):

the same to be located in accordance with and limited to the installation shown on the diagram set forth in **EXHIBIT A** attached hereto and made part hereof (such right-of-way or property of Greenway).

Greenway hereby grants to Licensee, insofar as Greenway has the right to do so, in accordance with engineering plans, submitted by Licensee to and approved by the Greenway’s Engineer or his or her authorized representative, incorporated herein by reference, all and any part thereof being hereinafter referred to as the “**FACILITIES**”; said license, however, shall be under and subject to the following terms, covenants and conditions as hereinafter recited, which are hereby accepted and agreed to, by Licensee, to wit:

1. (a) Licensee shall, at its expense, construct and maintain in exact accordance with said construction plans and for the purpose as outlined in Page 1. No departure shall be made at any time there from except upon prior written permission granted by the Greenway’s Engineer or his or her authorized representative, provided, however, that if any commission or other regulatory body duly constituted and appointed in compliance with the laws of the State in which the installation or occupancy herein provided is situated, and having jurisdiction in the premises, has by ruling or other general order determined and fixed the manner and means of construction, maintenance, repair, alteration, renewal, relocation or removal thereof, then said ruling or general order shall prevail for the crossing or occupancy herein mentioned.
- (b) The work of constructing, maintaining, repairing, altering, renewing, relocating or removing the said Facilities shall be done under such general conditions as will be satisfactory to and approved by the Greenway’s Engineer or his or her authorized representative, and as will not interfere with the operations of the Greenway, endanger persons or property of Greenway, and enjoyment of the property of Greenway. With respect to each Operations project that require access to the Premises, Greenway shall, at Greenway’s option furnish, at the sole expense of Licensee, furnish any necessary inspectors or traffic control to see that personnel, equipment and materials are kept a safe distance away from the Greenway, to support Greenway’s corridor and to protect Greenway’s traffic.

(c) In addition to, but not in limitation of any of the foregoing provisions, if at any time, at Greenway's option, should deem inspectors, observers, monitors, or traffic control desirable or necessary to protect its operations or property, or its employees, patrons or Licensees during the work of construction, maintenance, repair, alteration, renewal, relocation or removal of said Facilities, of Licensee, Greenway shall have the right to place such inspectors, observers, monitors, or traffic control at the sole risk, cost and expense of Licensee, which covenants and agrees to bear the full cost and expense thereof and to promptly reimburse Greenway upon demand. The furnishing or failure to furnish inspectors, or traffic control by Greenway, however, shall not release Licensee from any and all other liabilities assumed by Licensee under the terms of this Agreement. Licensee shall enter the Premises in any given instance only pursuant to an approved Application. Prior to commencement of any work to be performed on or about the Premises, Licensee shall notify the appropriate Greenway Engineer or their authorized representative for the scheduling of protection services. Within seventy-two (72) hours after the Engineer's actual receipt of such notification, the Engineer shall review the necessity and availability of traffic control or other protection services for the proposed work and advise Licensee of such matters and the estimated cost of protection services. No work shall be permitted on or about the Premises without the presence of Greenway's protection services or the Engineer's waiver of the requirement for protection services. Entry on or about the Premises or any other Greenway's right-of-way without the Engineer's prior approval shall be deemed trespassing. Licensee agrees to pay Greenway, within thirty (30) days after delivery of an invoice, for the cost of protection services provided by or on the behalf of Greenway.

2. The Premises shall be used by Licensee only for the Operations of the Facilities and for no other purposes. Licensee accepts the Premises in their current "as is" condition, as suited for Operations, and without the benefit of any improvements to be constructed by Greenway. If Licensee desires or is required, as herein provided, to revise, renew, add to or alter in any manner whatsoever the aforementioned Facilities, it shall submit an application with plans conforming to Greenway's then-current standards and procedures and obtain the written approval of the Greenway's Engineer or his or her authorized representative thereto before any work or alteration of the facility is performed and the terms and conditions of this Agreement with respect to the original construction shall apply thereto.
3. (a) Licensee shall at all times be obligated to promptly maintain, repair, reinforce and renew said Facilities; and shall, upon notice from Greenway requiring it so to do, promptly make such repairs and renewals thereto as may be required by Greenway; or Greenway, for the purpose of protecting and safeguarding its property, traffic, patrons or employees from damage or injury, may with or without notice to Licensee at any time make such repairs and renewals there to and furnish such material therefore as it deems adequate and necessary all at the sole cost and expense of Licensee.

(b) In the event of an emergency, Licensee will take immediate steps to perform any necessary repairs, and in the event, Licensee fails so to do, Greenway will perform said necessary repairs at the sole cost and expense of Licensee.
4. (a) The supervision over the location of the construction work and inspection of the Facilities and the approval of the material used in construction, maintenance, repair, alteration, renewal, relocation and removal of the aforesaid Facilities covered by this Agreement shall be within the jurisdictional rights of Greenway.

(b) The right of supervision over the location of the construction work and inspection of the Facilities from time to time thereafter by Greenway, shall extend for an appropriate distance on each side of the property of Greenway as the method of construction and materials used may have an important bearing upon the strength and stability of the Facilities over, under, upon or in the property of Greenway.
5. Licensee shall comply with all Federal, State and Local laws, and assume all cost and expense and responsibility in connection therewith, without any liability whatsoever on the part of the Greenway.

6. (a) It is understood between the parties hereto that the operations of Greenway at or near the Facilities involve some risk, and Licensee as part of the consideration for this license hereby releases and waives any right to ask for or demand damages for or account of loss of or injury to the Facilities (and contents thereof) of Licensee that are over, under, upon or in the property and facilities of Greenway including the loss of or interference with service or use thereof and whether attributable to the fault, failure or negligence of Greenway or otherwise.
- (b) And Licensee also covenants and agrees to and shall at all times indemnify, protect and save harmless Greenway from and against all cost or expense resulting from any and all losses, damages, detriments, suits, claims, demands, costs and charges which the said Greenway may directly or indirectly suffer, sustain or be subjected to by reason or on account of the construction, placement, attachment, presence, use, maintenance, repair, alteration, renewal, relocation or removal of said Facilities in, on, about or from the premises of Greenway whether such losses and damages be suffered or sustained by Greenway directly or by its employees, patrons or licensees, or be suffered or sustained by other persons or corporations, including Licensee, its employees and agents who may seek to hold Greenway liable therefore, and whether attributable to the fault, failure or negligence of Greenway or otherwise, except when proved by Licensee to be due directly to the sole negligence of Greenway. **IRRESPECTIVE OF THE ABOVE AND REGARDLESS OF THE FAULT OF GREENWAY, UNDER NO CIRCUMSTANCES SHALL GREENWAY HAVE ANY LIABILITY TO THE OTHER PARTY, THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, OR THIRD PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, OR OTHER INDIRECT LOSS OR DAMAGES, PUNITIVE, OR EXEMPLARY DAMAGES OR COSTS HOWSOEVER CAUSED ON ACCOUNT OF THE CONSTRUCTION, PLACEMENT, ATTACHMENT, PRESENCE, USE, MAINTENANCE, REPAIR, ALTERATION, RENEWAL, RELOCATION OR REMOVAL OF SAID FACILITIES IN, ON, ABOUT OR FROM THE PREMISES OF GREENWAY DESCRIBED HEREIN AND LICENSEE SHALL INDEMNIFY AND HOLD HARMLESS GREENWAY FROM THE SAME.**
- (c) If a claim or action is brought against either party and for which the other party may be responsible hereunder in whole or in part, such other party shall be notified and permitted to participate in the handling or defense of such matter.
7. All cost and expenses in connection with the operation, construction, maintenance, repair, alteration, renewal, relocation and removal of said Facilities shall be borne by Licensee, and in the event of work being performed or material furnished by Greenway under the stipulated right to perform such work of construction, maintenance, repair, alteration, renewal, relocation or removal under any section hereof, Licensee agrees to pay to Greenway the actual cost of material plus the current applicable overhead percentages for storage, handling, transportation, purchasing and other related material management expenses and the actual cost of labor plus the current applicable overhead percentages as developed and published by the accounting department of Greenway for fringe benefits, payroll taxes, administration, supervision, use of tools, machinery and other equipment, supplies, employers liability insurance, public liability insurance and other insurance, taxes and all other indirect expenses. It is to be understood that the aforementioned material and labor overhead charges are to be applied at the rates which are effective at the time of the performance of any work by employees of Greenway on the said Facilities. Licensee agrees to pay such bills within thirty (30) days of the presentation thereof by Greenway.
8. Licensee shall, at its sole cost and expense, upon thirty (30) days prior written notice from Greenway, promptly change the location of said Facilities covered by this Agreement, where located over, under, upon and along, or in the property and facilities of Greenway, to another location, to permit and accommodate changes of grade or alignment and improvement in or additions to the facilities of Greenway upon land now or hereafter owned or used by Greenway to the intent that said construction shall at all times comply with the terms and conditions of this Agreement with respect to the original construction; or in the event of the lease, sale or disposal of the premises or any part thereof encumbered

by this license, then said Licensee shall make such adjustments or relocations in its Facilities as are over, under, upon and along or in the property and facilities of Greenway as may be required by said Greenway or its grantee; and if Licensee shall fail or refuse to comply therewith, then the duly authorized agents of Greenway may make such repairs or adjustments or changes in location and provide necessary material therefore.

9. Upon termination of this Agreement or upon the removal or abandonment of the Facilities covered hereby, all the rights, title and interest of Licensee hereunder shall cease and determine, and this instrument shall thereupon become and be null and void, without any liability on the part of either party to the other party except only as to any rentals and liability accrued prior thereto, and Licensee shall remove its said Facilities and appurtenances from Greenway property, and right of way and all property of Greenway shall be restored in good condition and to the satisfaction of Greenway. If Licensee fails or refuses to remove its Facilities and appurtenances under the foregoing conditions, Greenway shall be privileged to do so at the cost and expense of Licensee, and Greenway shall not be liable in any manner to Licensee for said removal.
10. In the event the Facilities consist of an underground occupation, Licensee will be responsible for any settlement caused to the roadbed, right of way and/or pavement, facilities and appurtenances of Greenway arising from or as a result of the installation of the said Facilities for a period of one (1) year subsequent to the date of completion of the installation, and Licensee agrees to pay to Greenway on demand the full cost and expense, therefore.
11. If the Facilities cause degradation of Greenway's signal, communications and other electronic systems or endanger Greenway's personnel or other individuals entitled to be on or about the Premises, through inductive or electrostatic interference or otherwise, Licensee, at its expense shall immediately remedy any inductive interference to the satisfaction of Greenway growing out of or resulting from the presence of its Facilities; and if Licensee should fail so to do, then Greenway may take any/all corrective measures deemed necessary. The provisions of this Section 12 shall apply to the Electronic Systems existing as of the date of this Agreement and to any Electronic Systems that Greenway may install in the future.
12. If Licensee fails to take any corrective measures requested by Greenway in a timely manner, or if an emergency situation is presented which, in Greenway's sole judgement, requires immediate repairs to the Facilities, Greenway, at Licensee's expense, may undertake such corrective measures or repairs as it deems necessary or desirable.
13. (a) The rights conferred hereby shall be the privilege of Licensee only, and no assignment, transfer, sell, mortgage, encumber, sublease or otherwise convey (whether voluntarily, or involuntarily or by operation of law) this Agreement or any interest therein, nor license, mortgage, encumber or otherwise grant to any other person or entity (whether voluntarily, involuntarily or by operation of law) any right of privilege in or to the Premises (or any interest therein), in whole or in part, without the prior written consent of Greenway, which consent may be withheld by Greenway in its sole discretion. Any such assignment or other transfer made without Greenway's prior written consent shall be null and void and, at Greenway's option, shall constitute an immediate default of this Agreement. Notwithstanding the foregoing, upon prior written notice to Greenway, Licensee or a wholly owned subsidiary of Licensee's part without Greenway's consent; provided, however, that no such assignment shall relieve Licensee of its obligations under this Agreement.

(b) Greenway shall have the right to transfer and assign, in whole or in part, all its rights and obligations hereunder and in or to the Premises. From and after the effective date of any such assignment or transfer, Greenway shall be released from any further obligations hereunder; and Licensee shall look solely to such successor-in-interest of Greenway for the performance of the obligations of "Greenway" hereunder.

14. This Agreement shall take effect after signed by both parties. This Agreement will automatically renew for one (1) year terms thereafter if neither party submits in writing the desire to terminate.
15. (a) This Agreement with the rights granted may be terminated at any time by either party hereto upon not less than thirty (30) days' written notice to the other; and upon the expiration of the said thirty (30) days after service of such notice, this Agreement and the permission and privileges hereby granted shall absolutely cease and terminate.

(b) The Facilities are and shall remain the personal property of Licensee. Upon the expiration or termination of this Agreement, Licensee shall remove the Facilities from the Premises within thirty (30) days after the effective date thereof. In performing such removal, unless otherwise directed by Greenway, Licensee shall restore the Premises to the same condition as existed prior to the installation or placement of Facilities, reasonable wear and tear excepted. In the event Licensee shall fail to so remove the Facilities or restore the Premises, the Facilities shall be deemed to have been abandoned by Licensee, and the same shall become the property of Greenway for Greenway to use, remove, destroy or otherwise dispose of at its discretion and without responsibility for accounting to Licensee therefor; provided, however, in the event Greenway elects to remove the Facilities, Greenway, in addition to any other legal remedy it may have, shall have the right to recover from Licensee all costs incurred in connection with such removal and the restoration of the Premises. Notwithstanding anything to the contrary contained in this Agreement, the expiration or termination of this Agreement, whether by lapse of time or otherwise, shall not relieve Licensee from Licensee's obligations accruing prior to the expiration or termination date, and such obligations shall survive any such expiration or other termination of this Agreement.

(c) If licensee shall fail to install the Facilities within one (1) year from the date of the Agreement, or if Licensee shall discontinue the use or operation of the Facilities for one (1) year. Licensor may, at its sole discretion, terminate this Agreement by written notice to Licensee.
16. Automobile mileage charges incurred by aforementioned Greenway inspectors, flagmen or watchmen in connection with the installation, maintenance, etc., of said Facilities will be based on allowances approved by the United States Government in effect at the time the expenses are incurred.
17. Environmental Compliance
 - 17.1 Licensee represents that it has conducted a complete inspection of the Facilities and except as noted herein, finds the Facilities to be reasonably free from pollution-induced conditions.
 - 17.2 Licensee assumes all responsibility for any environmental obligations imposed under applicable laws, regulations, ordinances or other requirements of federal, state and local governmental authorities relating to (a) any operations, including notification and reporting of any releases, and (b) any contamination of any property, water, air, or groundwater arising or resulting, in whole or in part, from Licensee's operations or use the Premises pursuant to this Agreement. Licensee agrees to indemnify and hold harmless Greenway from and against any and all fines, penalties, demands or other Losses (including attorneys' fees) incurred by Greenway or claimed by any person, company or governmental entity relating to (a) any contamination of any property, water, air or grand water due to the use or presence of the Facilities on the Premises, (b) Licensee's violation of any laws, regulations or other requirements of federal, state or local governmental authorities in connection with the use or presence of the Facilities on the Premises, or (c) any violation of Licensee's obligations.

- 17.3 Without limiting any other provisions of this Agreement, Licensee, at its expense, will at all times maintain and keep the Facilities and all improvements and property now or hereafter erected or placed thereon, including but not limited to, the structures, equipment, and operations, in compliance with all federal, state, and local laws, rules and regulations designed to prevent or control the discharge of substances in the land, water, or air, and Licensee agrees to indemnify, hold harmless and defend Greenway from and against any and all fines, penalties, demands, suits, actions, proceedings, fines, claims, losses (including attorneys' fees) or the cleanup, response, removal or remediation of any environmental condition arising from or alleged to arise from a violation of any such environmental law, rule, or regulation, unless and except where such violation shall have been caused solely by the fault of the Greenway.
- 17.4 Without limiting any other provision of this Agreement, Greenway shall have the right to enter and inspect the Facilities in order to determine whether Licensee is complying with such laws, rules, and regulations, but no such inspection or absence of inspection by Greenway shall be construed to relieve Licensee of its obligations to comply with all such laws, rules and regulations.
- 17.5 In the event any cleanup, response, removal or remediation of any environmental condition is required by a governmental entity (hereinafter collectively referred to as "Response Action"), Licensee shall not be entitled to any damages, actual or consequential, by reason of the Response Action's interference with Licensee's use of the Facilities. Licensee shall not be entitled to abatement in the rent for any interference with Licensee's use of the Facilities due to a Response Action. Licensee shall permit Greenway and its contractor's full, unrestricted and unconditional access to the Facilities for the purpose of completing or engaging in a Response Action for which Licensee is responsible should Licensee fail to diligently pursue and complete such Response Action to the satisfaction of Greenway. Greenway's completion of any Licensee's obligations hereunder shall not be deemed a waiver of Licensee's obligations under this Agreement. Greenway shall have the right, but not the obligation, to conduct reasonable inspections of Licensee's Response Action and Licensee shall provide Greenway all information requested by Greenway regarding Licensee's Response Action or any environmental condition for which Licensee is responsible.
18. This agreement contains the entire agreement of Greenway and Licensee and supersedes any prior understanding or agreement between Greenway and Licensee respecting the subject matter hereof, and no representations, warranties, inducements, promises or agreements, oral or otherwise, between the parties not embodied in this Agreement shall be of any force or effect.
19. Licensee shall, at its sole cost and expense, procure and maintain during the life of this Agreement the insurance coverage as outlined in **Exhibit "B"**.
20. (a) Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of any work on Greenway's property performed by Licensee or its contractor, and takes precedence over any work on Licensee's Facilities to be performed by Licensee or its contractors. Licensee shall be responsible for initiating, maintaining and supervising all safety operation and programs in connection with any work on Licensee's Facilities.
- (b) Licensee shall keep the job site on Greenway property free from safety and health hazards and ensure that their employees are competent and adequately trained in safety and health aspects of the work.
- (c) Licensee represents and warrants that all parts of the Licensee's Facilities within and outside of the limits of Greenway property will not interfere whatsoever with the constant, continuous, and uninterrupted use of the greenway, property, and facilities of Greenway, and nothing shall be done or suffered to be done by Licensee at any time that would in any manner impair the safety thereof.

- 21. Notwithstanding any other provision contained herein, in no circumstance shall the Licensee be allowed to take or permit any action which would cause this property to be out of compliance with the requirements of the railbanking provisions of the National Trails System Act (P.L 90-543 as it exists and may be amended).
- 22. Any Notice required or permitted to be served under the terms of this License shall be sent by certified mail, postage fully prepaid, and return receipt requested, to the parties at the following addresses:

To Greenway: County of Henderson
Attention: County Engineer
1 Historic Courthouse Square
Hendersonville, NC 28792
\\

To Licensee: _____

Attn: _____

or at such other address as the respective parties may from time to time give notice of.

- 23. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one instrument. This Agreement may be validly executed and delivered by telephonic facsimile transmission, e-mail transmission, or other electronic means including, without limitation, through the use of DocuSign or similar service, and the signatures on such electronic copies, whether generated electronically or manually, shall be deemed to be original signatures.

The terms of this Agreement shall be binding and effective upon all the parties hereto, and unless and until terminated, as hereinbefore provided, this Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns, subject, however, to the provisions of Article "16" of this Agreement.

Signatures on following page

IN WITNESS WHEREOF, the said parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

***ECUSTA RAIL2TRAIL, LLC. AND COUNTY OF
HENDERSON
(as Greenway)***

***APPLICANT
(as Licensee)***

By: _____

By: _____

Name: Marcus A. Jones, PE

Name: _____

Title: County Engineer

Title: _____

Witness as to Greenway

Witness as to Licensee

Name: _____

Name: _____

EXHIBIT A

(applicant's detail plans and location of proposed encroachment)

EXHIBIT B
(County's risk management requirements of applicant)