

ORDINANCE NO. 98-22

AN ORDINANCE AUTHORIZING THE MAYOR TO ENTER INTO A PUBLIC LIMITS CROSSING AGREEMENT WITH WHEELING AND LAKE ERIE RAILWAY COMPANY AS PART OF THE WEST SMITH ROAD RECONSTRUCTION PROJECT.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEDINA, OHIO:

- SEC. 1:** That the Mayor is hereby authorized and directed to enter into a Public Limits Crossing Agreement (No. 094125) with Wheeling and Lake Erie Railway Company as part of the West Smith Road Reconstruction Project.
- SEC. 2:** That the funds to cover this agreement, in the estimated amount of \$450.00 are available in Account No. 108-0610-54411.
- SEC. 3:** That a copy of the Public Limits Crossing Agreement is marked Exhibit A, attached hereto and incorporated herein, and is subject to final approval of the Law Director.
- SEC. 4:** That in accordance with Ohio Revised Code §5705.41(D), at the time that the contract or order was made and at the time of execution of the Finance Director's certificate, sufficient funds were available or in the process of collection, to the credit of a proper fund, properly appropriated and free from any previous encumbrance.
- SEC. 5:** That it is found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with the law.
- SEC. 6:** That this Ordinance shall be in full force and effect at the earliest period allowed by law.

PASSED: May 9, 2022

SIGNED: John M. Coyne, III
President of Council

ATTEST: Kathy Patton
Clerk of Council

APPROVED: May 10, 2022

SIGNED: Dennis Hanwell
Mayor

ORD. 98-22
Exhibit A

PUBLIC LIMITS CROSSING AGREEMENT

No. 094125

Between

CITY OF MEDINA

AND

WHEELING & LAKE ERIE RAILWAY COMPANY

Located in the
City of Medina
County of Medina
State of Ohio

Akron Subdivision
Mile Post 140.12

(Lat.: 41.13625538958503, Long.: -81.86695267241093)



PUBLIC LIMITS CROSSING AGREEMENT
No. 094125

THIS PUBLIC LIMITS CROSSING AGREEMENT, made as of the 7th day of April, 2022, between the CITY OF MEDINA an Ohio municipality, having an address of 132 N Elmwood Ave., Medina, OH 44256, hereinafter called "UTILITY" and WHEELING & LAKE ERIE RAILWAY COMPANY, a Delaware corporation, having an address of 100 East First Street Brewster, OH 44613, hereinafter called "RAILWAY" or "W&LE" (the "Agreement")

I. PREMISES

RAILWAY (which when used herein shall include any successor or assignee of or operator over its RAILWAY) insofar as it has the legal right and its present title permits, and in consideration of the covenants and conditions hereinafter stated on the part of UTILITY, to be kept and performed, hereby permits UTILITY to construct, maintain, repair, alter, renew, and ultimately remove from over or under RAILWAY's track:

[A water pipeline crossing under the track of RAILWAY at a minimum depth of eight feet (8') below the base of the rails, at Mile Post 140.12 of the Akron Subdivision (Lat. 40.58848, Long. - 81.08228), within the public street limits of W Smith Road, in the City of Medina, County of Medina, and State of Ohio, attached hereto and made a part hereof;]

and in accordance with the drawings attached entitled "MED-SMITH ROAD (2 sheets)", "Pipe Crossing Data Sheet (1 sheet)", and "GENERAL SHORING REQUIREMENTS (1 sheet)", and approved by the Vice President of Engineering of RAILWAY, or his duly authorized representative, incorporated herein by reference; all and any part thereof being hereafter referred to as the "FACILITIES" shall be under and subject to the following terms, covenants, and conditions as hereinafter recited..

II. TERMS AND CONDITIONS

In consideration of the covenants and agreements herein contained and other good and valuable consideration, and intending to be legally bound, it is agreed as follows:

1. RENT/CONSIDERATION.

UTILITY will pay the sum of \$450.00 to RAILWAY for the preparation of this agreement.

2. CONSTRUCTION.

2.1 The FACILITIES shall be located, constructed and maintained in accordance with the construction plans attached hereto and for the purpose as outlined above. No departure shall be made at any time therefrom except upon permission in writing granted by the Vice President of Engineering of RAILWAY, or his duly authorized representative; provided, however, that if any commission or other regulatory body duly constituted and appointed in compliance with the laws of the State of Ohio, has by lawful 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, provided said ruling or general order does not interfere with or adversely impact the safe use or operation of the property of RAILWAY.

2.2 The work of constructing, maintaining, repairing, altering, renewing, or removing the FACILITIES shall be done under such general conditions as will be satisfactory to and approved by the Vice President of Engineering of RAILWAY, or his duly authorized representative, and will not interfere with the proper and safe use, operation and enjoyment of the property of RAILWAY. UTILITY, at its own cost and expense, shall, when performing any work in connection with the FACILITIES, arrange with RAILWAY to furnish any necessary inspectors, flagmen or watchmen to see that men, equipment and

materials are kept a safe distance away from the tracks of RAILWAY. In any event, UTILITY shall not enter RAILWAY's right-of-way without first notifying and obtaining permission to enter from RAILWAY.

2.3 In addition to, but not in limitation of any of the foregoing provisions, if at any time RAILWAY should deem inspectors, flagmen or watchmen desirable or necessary to protect its operations or property, or its employees, patrons, permittees, or UTILITY during the work of construction, maintenance, repair, alteration, renewal, relocation or removal of the FACILITIES of UTILITY, RAILWAY shall have the right to place such inspectors, flagmen or watchmen at the sole risk, cost and expense of UTILITY, which covenants and agrees to bear the full cost and expense thereof. The furnishing or failure to furnish inspectors, flagmen or watchmen by RAILWAY, however, shall not release UTILITY from any and all other liabilities assumed by UTILITY under the terms of this Agreement.

3. ADDITIONS.

If UTILITY desires or is required, as herein provided, to revise, renew, or alter in any manner whatsoever the FACILITIES, it shall submit plans to RAILWAY and obtain the written approval of the Vice President of Engineering of RAILWAY, or his duly authorized representative, before any work or alteration of the structure is performed and the terms and conditions of this Agreement with respect to the original construction shall apply thereto.

4. MAINTENANCE.

4.1 UTILITY shall at all times be obligated to promptly maintain and repair the FACILITIES; and shall, upon notice in writing from RAILWAY and requiring it so to do, promptly make such repairs thereto as may be required by RAILWAY. However, in no event shall UTILITY enter RAILWAY's right-of-way without first notifying and obtaining permission to enter from RAILWAY.

4.2 In the event of an emergency, UTILITY will take immediate steps to perform any necessary repairs, subject to first immediately notifying and obtaining permission to enter from RAILWAY.

5. GOVERNMENT COMPLIANCE.

UTILITY shall comply with all federal, state and local laws, and assume all cost and expense and responsibility in connection with the FACILITIES, without any liability whatsoever on the part of RAILWAY.

6. INDEMNIFICATION.

6.1 IT IS UNDERSTOOD BETWEEN THE PARTIES HERETO THAT THE OPERATION OF RAILWAY AT OR NEAR SAID FACILITIES INVOLVE SOME RISK, AND UTILITY AS PART OF THE CONSIDERATION FOR THIS AGREEMENT HEREBY RELEASES AND WAIVES ANY RIGHT TO ASK FOR OR DEMAND DAMAGES FOR OR ON ACCOUNT OF LOSS OF OR INJURY TO THE FACILITIES (AND CONTENTS THEREOF) OF UTILITY THAT ARE OVER, UNDER, UPON OR IN THE PROPERTY, TRACK, OR FACILITIES OF RAILWAY INCLUDING THE LOSS OF OR INTERFERENCE WITH SERVICE OR USE THEREOF AND WITHOUT REGARD TO WHETHER ATTRIBUTABLE (IN WHOLE OR IN PART) TO THE FAULT, FAILURE OR NEGLIGENCE OF RAILWAY OR OTHERWISE.

6.2 AND UTILITY ALSO COVENANTS AND AGREES TO CAUSE ITS CONTRACTOR(S) TO AT ALL TIMES INDEMNIFY, PROTECT AND SAVE HARMLESS RAILWAY FROM AND AGAINST ALL COST OR EXPENSE RESULTING FROM ANY AND ALL LOSSES, DAMAGES, DETRIMENTS, SUITS, CLAIMS, DEMANDS, COSTS AND CHARGES WHICH RAILWAY MAY DIRECTLY OR INDIRECTLY SUFFER, SUSTAIN OR BE SUBJECTED TO BY REASON OF ON ACCOUNT OF THE CONSTRUCTION, PLACEMENT, ATTACHMENT, PRESENCE, USE, MAINTENANCE, REPAIR, ALTERATION, RENEWAL, OR REMOVAL OF SAID FACILITIES IN, ON,

ABOUT OR FROM THE PREMISES OF RAILWAY WHETHER SUCH LOSSES AND DAMAGES BE SUFFERED OR SUSTAINED BY RAILWAY DIRECTLY OR BY ITS EMPLOYEES, PATRONS, OR LICENSEES, OR BE SUFFERED OR SUSTAINED BY OTHER PERSONS OR CORPORATIONS, INCLUDING UTILITY, ITS EMPLOYEES AND AGENTS WHO MAY SEEK TO HOLD RAILWAY LIABLE THEREFOR, AND WHETHER ATTRIBUTABLE TO THE FAULT, FAILURE OR NEGLIGENCE OF RAILWAY OR OTHERWISE, EXCEPT WHEN PROVED TO BE DUE DIRECTLY TO THE SOLE NEGLIGENCE OF RAILWAY.

6.3 IF A CLAIM OR ACTION IS MADE OR 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.

6.4 To protect, in whole or in part, its primary obligations under the indemnification provisions of this Agreement, UTILITY shall obtain and carry at its own cost contractual insurance in such form as shall be approved by RAILWAY covering the liability assumed by UTILITY herein, in the following amounts: Bodily Injury \$5,000,000 for each person and \$5,000,000 for each incident; Property Damage \$5,000,000 for each incident. UTILITY shall furnish RAILWAY an appropriate certificate or certificates of insurance executed by an authorized representative of the insurer, evidencing the maintenance of the insurance coverage required herein and containing a provision to the effect that the insured will give RAILWAY at least ten (10) days' prior written notice of any cancellation or modification of any such insurance policy. The aforesaid insurance requirement shall not be deemed to limit or relieve the primary liability of UTILITY under the indemnification provisions hereof, but shall be deemed additional security therefor.

6.5 If UTILITY contracts for new construction or structural alterations to the premises, UTILITY shall provide or shall cause its contractor to provide, at no cost to RAILWAY, Protective Liability Insurance designating RAILWAY as a named insured, with a limit of not less than Five Million Dollars (\$5,000,000.00) per occurrence subject to a Ten Million Dollars (\$10,000,000.00) aggregate limit for all bodily injury and property damage occurrences during each annual policy period. If the construction or alterations involve an exposure to train operations on tracks of RAILWAY, the protective liability insurance shall be on the AAR-AASHTO Form of RAILWAY Protective Insurance. The original protective liability policy shall be submitted to and approved by RAILWAY's Director Real Estate at 100 East First Street, Brewster, Ohio 44613, prior to commencement of the construction or alterations. Said address shall be the name insured's address for the purpose of all notices from the insurer.

7. UTILITY'S COST.

All cost and expenses in connection with the construction, maintenance, repair, alteration, renewal, and removal of the FACILITIES shall be borne by UTILITY.

8. CROSSING OR GRADE RELOCATION.

UTILITY shall at its sole cost and expense, upon request in writing of RAILWAY, promptly change the location of said FACILITIES covered by this Agreement, where located over, upon or in the property or facilities of RAILWAY, to another location, to permit and accommodate changes of grade or alignment and improvements in or additions to the facilities of RAILWAY upon land now or hereafter owned or used by RAILWAY to the extent that said construction shall at all times comply with the terms and conditions of this Agreement with respect to the original construction.

9. REMOVAL.

Upon the removal or abandonment of the FACILITIES covered hereby, all the rights of UTILITY hereunder shall cease, and this instrument shall become null and void.

10. SUBSIDENCE.

In the event the FACILITIES consist of an underground occupation, UTILITY will be responsible for any settlement caused to the roadbed, right of way and/or tracks, facilities, and appurtenances of RAILWAY arising from or as a result of the installation of the FACILITIES for the term of this Agreement and UTILITY agrees to pay to RAILWAY on demand the full cost and expense therefor.

11. ELECTRICAL INTERFERENCE.

In the event the FACILITIES consist of electrical power or communication wires and/or appurtenances, UTILITY shall at all times be obligated promptly to remedy any inductive interference growing out of or resulting from the presence of the FACILITIES; and if UTILITY should fail to do so, then RAILWAY may do so, and UTILITY agrees to pay to RAILWAY on demand the full cost and expense therefor.

12. TAX ASSESSMENTS.

As part of the consideration of this Agreement, UTILITY covenants and agrees that no assessments, taxes or charges of any kind shall be made against RAILWAY or its property by reason of construction of the FACILITIES of UTILITY, and UTILITY further covenants and agrees to pay to RAILWAY promptly the full amount of any assessments, taxes or charges of any kind which may be levied, charged, assessed or imposed against RAILWAY or its property by reason of the construction and maintenance of the FACILITIES of UTILITY.

13. EXCLUSIVE LICENSE.

The rights conferred hereby shall be the privilege of UTILITY only, and no assignment or transfer hereof shall be made without the consent and agreement in writing of RAILWAY being first had and obtained.

14. TERMINATION.

In the event of a breach of any of the covenants, terms and conditions hereof by UTILITY, RAILWAY shall have the right to terminate this Agreement.

15. EFFECTIVE DATE.

This Agreement shall take effect as of the day RAILWAY executes it, subject to the provisions of Paragraph 16.

16. APPROVAL.

This Agreement will not become valid until the method of installation and all related matters have been approved by the Vice President of Engineering of RAILWAY, or his duly designated representative.

17. SPECIFICATION.

In the design, construction, arrangement and maintenance of the FACILITIES, the Rules and Specifications of the Public Utilities Commission of Ohio covering the construction at crossings of underground line of public utilities, shall govern, if applicable; if not applicable, the decision of the Vice President of Engineering of RAILWAY, or his duly authorized representative, shall govern and control.

18. **ENTRY NOTICE.**

UTILITY agrees to contact the Vice President of Engineering of RAILWAY, or his duly authorized representative, in advance, and receive his approval before entering upon the right-of-way of RAILWAY for any reason. And at the discretion of the Vice President of Engineering of RAILWAY, or his duly authorized representative, UTILITY must schedule flag protection before entering upon the right-of-way of RAILWAY, which is provided by RAILWAY at the expense of UTILITY.

19. **FIBER CABLE and SIGNAL CABLES LOCATION.**

It is the responsibility of UTILITY to have knowledge of, locate, and protect against damage to fiber optic cables along, across or under the right-of-way of RAILWAY. Any damage to or disruption of any fiber optic cable will be the sole responsibility of UTILITY which will indemnify and hold harmless RAILWAY for any expense resulting therefrom. Before any construction may commence, Ohio Utilities Protection Services (OUPS) must be contacted, where applicable, at the following number: 1-800-362-2764. Calling such number or numbers shall not release or otherwise diminish the remaining obligations of UTILITY hereunder. **UTILITY shall contact the Signals and Communications Supervisor of RAILWAY, or his duly authorized representative, to have all signal cables marked and located. RAILWAY is NOT registered with any underground utility notification service and must be contacted directly to ensure all RAILWAY facilities are accounted for, i.e. signal cables, electric services, culverts, conduits, data lines, communication cables, fiber, water lines, gas lines, sewage, storm drains, bridge footers, and pilings, etc. All expenses incurred by RAILWAY for such services will be invoiced to, and paid by, UTILITY.**

20. **GENERAL PROVISIONS.**

20.1 A determination that any part of this Agreement is invalid shall not affect the validity or enforceability of any part of this Agreement.

20.2 This Agreement shall be governed by the laws of the State of Ohio.

20.3 As used in this Agreement, the words, "RAILWAY" and "UTILITY" shall include the respective subsidiaries, directors, officers, agents, and employees of RAILWAY and UTILITY.

20.4 This Agreement is for the exclusive benefit of the parties and not for the benefit of any other party. Nothing herein contained shall be taken as creating or increasing any right in any third party to recover by way of damages or otherwise against RAILWAY and UTILITY.

20.5 Section headings are inserted for convenience only and shall not affect the construction or interpretation of this Agreement.

20.6 This Agreement contains the entire agreement of the parties and supersedes any prior written or oral understanding, agreements or representations.

20.7 This Agreement may not be amended, waived or discharged except by an instrument in writing signed by the parties.

20.8 All words, terms, and phrases used in this Agreement shall be construed in accordance with their generally applicable meaning in the railroad industry.

20.9 Except as otherwise provided in this Agreement, all notices to be sent from one party to the other shall be in writing and mailed by United States certified mail, postage prepaid. Notices directed to RAILWAY shall be addressed to Wheeling & Lake Erie Railway Company, 100 East First

Street, Brewster, OH 44613. Notices directed to UTILITY shall be sent to the address first listed above for UTILITY.

III. EXECUTION

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

CITY OF MEDINA

WHEELING & LAKE ERIE RAILWAY COMPANY

Dennis Hanwell
Print Name

JONTHAN CHASTEK
Print Name

D Hanwell
Signature

Signature

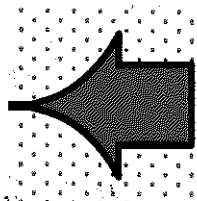
Mayor
Title

PRESIDENT
Title

May 10, 2022
Date

Date

STATE OF Ohio §
COUNTY OF Medina §



This instrument was acknowledged before me on the 10th day of May, 2022, by Dennis Hanwell, as Mayor of the City of Medina, an Ohio municipality.

(SEAL) Sherry A. Crow
Notary Public

SHERRY A. CROW
Notary Public
State of Ohio, Medina County
My Commission Expires 5-27-24

My Commission Expires: 5-27-24
Commission No.: _____

STATE OF OHIO §
COUNTY OF STARK §

This instrument was acknowledged before me on the _____ day of _____, 2022, by Jonathan Chastek, as President of **Wheeling & Lake Erie Railway Company**, a Delaware corporation.

(SEAL) _____
Notary Public

My Commission Expires: _____
Commission No.: _____