

**TOWNSHIP OF LOWER MACUNGIE**  
Lehigh County, Pennsylvania

**RESOLUTION NO. 2022-39**  
(Duly Adopted July 21, 2022)

**RESOLUTION AUTHORIZING THE TOWNSHIP OF LOWER  
MACUNGIE TO ENTER INTO AGREEMENTS WITH  
NORFOLK SOUTHERN RAILWAY COMPANY AND  
LIBERTY PROPERTY LIMITED PARTNERSHIP  
REGARDING THE CONSTRUCTION AND MAINTENANCE  
OF A STORMWATER PIPE THROUGH NORFOLK  
SOUTHERN RAILWAY COMPANY LAND**

**WHEREAS**, the Township of Lower Macungie (“Township”), through its designees, submitted to Norfolk Southern Railway Company (“Railway”) an application to construct and maintain an underground transverse crossing consisting of one (1) 12-inch ductile iron pipe encased in a 24-inch steel pipe to convey stormwater (“Stormwater Facilities”) located in the right-off-way of Railway; and

**WHEREAS**, Railway has approved the application subject to the Township entering into an agreement titled “Acknowledgement Form for Wire and/or Pipe Occupation within the Limits of a Public Right of Way” (“Acknowledgement”) to govern the installation, subsequent maintenance, operation and any removal of the Stormwater Facilities, a copy of which agreement is attached to the Resolution at Exhibit “A;” and

**WHEREAS**, the Acknowledgement requires the Township to provide certain insurance coverage and indemnify the Railway in regard to the Stormwater Facilities work; and

**WHEREAS**, pursuant to a court-approved settlement agreement in or around 2013 and certain subsequent agreements, Liberty Property Limited Partnership (“Liberty”) is responsible for the construction of a portion of the extension of Sauerkraut Lane, which includes the installation of the Stormwater Facilities; and

**WHEREAS**, in furtherance of the installation of the Stormwater Facilities, the Township and Liberty will enter into a related agreement by which Liberty will provide insurance coverage and indemnify the Township in regard to the installation of the Stormwater Facilities, to the same extent as the Township’s obligations to the Railway under the Acknowledgment (“Indemnification Agreement”), in substantially the form attached hereto at Exhibit “B;” and

**WHEREAS**, the Township desires to enter into the Acknowledgement with the Railway and the Indemnification Agreement with Liberty, subject to any final revisions to each that are reviewed and approved by the Township Solicitor.

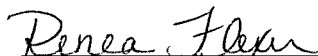
**NOW, THEREFORE, BE IT ADOPTED AND RESOLVED** that the Board of Commissioners of the Township of Lower Macungie hereby resolves as follows:

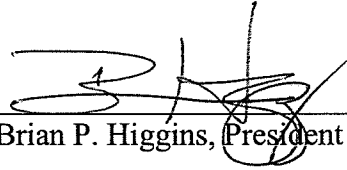
- 1) The foregoing recitals are incorporated herein.
- 2) The Board of Commissioners hereby authorizes the Township to enter into the Acknowledgement with Railway and the Indemnification Agreement with Liberty in substantially the form attached hereto at Exhibits "A" and "B" respectively, subject to any final revisions to each that are reviewed and approved by the Township Solicitor.
- 3) The Board of Commissioners hereby authorizes Bruce Beitel, Township Manager, Lower Macungie Township, to execute the Acknowledgement and the Indemnification Agreement on behalf of the Township once the final form of each is approved by the Township Solicitor.
- 4) The Board of Commissioners authorizes the Township Manager and Township Solicitor to take all other actions necessary, related or convenient in connection therewith.

**DULY ADOPTED** this 21st day of July 2022, by the Board of Commissioners of Lower Macungie Township, in lawful session duly assembled.

LOWER MACUNGIE TOWNSHIP  
BOARD OF COMMISSIONERS

ATTEST:

  
\_\_\_\_\_  
Renea Flexer, Secretary

  
\_\_\_\_\_  
Brian P. Higgins, President



# **EXHIBIT “A”**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**ACKNOWLEDGMENT FORM FOR WIRE AND/OR PIPE OCCUPATION  
WITHIN THE LIMITS OF A PUBLIC RIGHT OF WAY.**

APPLICANT: Lower Macungie Township  
3400 Brookside Road  
Macungie, Pennsylvania, 18062

SUBJECT: Albutis, Lehigh County, Pennsylvania  
Milepost FJ-13.37, C&F Secondary, Keystone Division  
Latitude 40.521081, Longitude -75.601443

**Norfolk Southern Activity No. 1295233**

Proposed installation of an underground transverse crossing consisting of one (1) 12-inch DIP water encased in a 24-inch steel pipe (collectively, the "Facilities")

In response to Applicant's submittal dated July 30, 2021 regarding the proposed construction of the subject project, Norfolk Southern Railway Company ("Railway") does not object to the installation of the Facilities as shown on the attached Drawing marked Exhibit "A", last revised May 13, 2022, provided Applicant adheres to the following terms and conditions:

- The Facilities shall be installed, constructed, maintained, repaired, operated and removed by and at the sole risk, cost and expense of the Applicant, (collectively, "Operate" or "Operations").
- The Facilities must conform with all Federal, State and local laws, rules and regulations and will not be attached to any railroad structure or appurtenance and will not be located on any private property of Railway.
- The design and construction of aerial Facilities shall comply with Railway's NSCE-4 Specification, latest edition, and underground Facilities shall comply with Railway's NSCE-8 Specification, latest edition.
- Insurance

(a) Insurance Requirements. Without limiting in any manner the liability and obligations assumed by Applicant under any other provision of this Agreement, and as additional protection to Railway, Applicant shall comply with the following provisions:

(i) Subject to subsection (ii) below, upon execution of this Agreement, Applicant shall pay Railway a risk financing fee of \$1,900 (the "Risk Financing Fee") to provide Railroad Protective Liability Insurance or such supplemental insurance (which may be self-insurance) as Railway, in its sole discretion, deems to be necessary or appropriate with respect to the initial construction and installation of the Facilities.

(ii) Prior to commencement of each Operations project that requires access to the Premises, unless Railway elects to make available and Applicant pays the then-current Risk Financing Fee for a given Operations project, Applicant shall furnish Railway with an original Railroad Protective Liability ("RPL") Insurance Policy naming Railway as the named insured and having a limit of (1) not less than a combined single limit of \$2,000,000 each occurrence and \$6,000,000 aggregate, or (2) if the value of a given operations project exceeds \$350,000, not less than a combined single limit of \$5,000,000 per occurrence and \$10,000,000 in the aggregate. Each RPL policy shall conform to CG 00 35 04 13 or equivalent and include coverage for Terrorism and the Physical Damage to Property Endorsement and shall name Norfolk Southern Corporation and its affiliates and subsidiaries as the insured. Applicant shall ensure that the project location, Applicant identification and work description appear on the declaration pages of a given RPL policy. Applicant shall provide an electronic copy of each RPL policy (and not merely the binder) to Railway at [ns.permitting@railpros.com](mailto:ns.permitting@railpros.com) for review and approval prior to commencing any work on the associated Operations project. Applicant may submit inquiries about RPL issues at [ns.permitting@railpros.com](mailto:ns.permitting@railpros.com).

(iii) Applicant shall maintain a Commercial General Liability ("CGL") policy containing products and completed operations and contractual liability coverage, with a combined single limit of not less than \$2,000,000 for each occurrence. Any portion of this requirement may be satisfied by a combination of General Liability and/or Excess/Umbrella Liability Coverage. The policy shall not deny any obligation of any insured under the Federal Employer's Liability Act, as amended. The CGL policy shall provide additional insured coverage equivalent to ISO CG 20 10 11/85.

(iv) Applicant shall maintain Automobile Liability Insurance with a current ISO occurrence form policy (or equivalent) and apply on an "any auto" (Symbol 1) basis, including coverage for all vehicles used in connection with the Work or Services on the leased property, providing annual limits of at least \$1,000,000 per occurrence for bodily injury and property damage combined including uninsured and underinsured motorist coverage, medical payment protection, and loading and unloading.

(v) Applicant shall maintain Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Applicant's officers, agents, servants or employees arising directly or indirectly out of the performance of this Agreement;

(vi) Applicant shall maintain Employers' Liability Insurance with limits of not less than \$1,000,000 each accident \$1,000,000 policy limit for disease, and \$1,000,000 each employee for disease;

(b) General Insurance Requirements. Each insurance policy referred to in subsection (a) above shall also comply with the following requirements:

(i) Additional Insureds. Each insurance policy (excluding any RPL policy and Workers' Compensation policy) shall name Railway and its parent, subsidiary and affiliated companies as additional insureds with an appropriate endorsement to each policy.

(ii) Applicant's Coverage Primary and Without Right to Contribution. All policies secured by Applicant, whether primary, excess, umbrella or otherwise, and providing coverage to the Railway as an additional insured (i) are intended to take priority in responding and to pay before any insurance policies Railway may have secured for itself must respond or pay and (ii) may not seek contribution from any policies the Railway may have secured for itself.

(iii) Severability of Interests (Cross Liability). No cross-liability exclusions are permitted that would apply to the additional insureds, and there may not be any restrictions in any policy that limits coverage for a claim brought by an additional insured against a named insured.

(iv) Waiver of Subrogation. To the fullest extent permitted by law, all insurance furnished by Applicant pursuant to this Agreement, except for any Workers' Compensation Policy, shall include a waiver of subrogation in favor of Railway with an appropriate endorsement to each policy.

(v) Notice of Cancellation, Modification or Termination. Each insurance policy shall not be subject to cancellation, termination, modification, changed, or non-renewed except upon thirty (30) days prior written notice to the additional insureds.

(vi) No Limitation. Each insurance policy shall not limit any of Applicant's indemnity obligations or other liabilities under this Agreement. The insurance available to Railway and its parent, subsidiary and affiliated companies as additional insureds shall not be limited by these requirements should Applicant maintain higher coverage limits.

(vii) Any deductibles or self-insured retentions of Applicant over \$50,000 must be declared and approved by Railway. Approval of such requests shall not be unreasonably withheld.

(viii) Applicant shall require all subcontractors who are not covered by the insurance carried by Applicant to maintain the insurance coverages set forth in subsection (a) above, except

for the RPL insurance, including but not limited to additional insured status for Railway and its parent, subsidiary and affiliated companies.

(ix) Applicant shall furnish their memorandum of insurance and the RPL Insurance Policy to Railway's Managing Agent prior to execution of this Agreement at [ns.permitting@railpros.com](mailto:ns.permitting@railpros.com). The insurance coverage required herein shall in no way limit Applicant's liability under this Agreement.

- Railway shall, at Railway's option, furnish, at the sole expense of Applicant, Support Services. The term "Support Services" means such materials and services as necessary, in Railway's sole judgment, to support Railway's tracks and to protect Railway's traffic, including without limitation flagging services and construction monitoring during the installation, maintenance, repair, renewal or removal of the Facilities. Support Services shall be provided unless Railway's Division Engineer or his or her authorized representative provides to Applicant a written waiver of Support Services, whether in whole or in any part, in a given instance. The term "Construction Monitoring" means services comprised of one or more Railway representatives being assigned and present to monitor construction activities of Applicant, which may include a preconstruction site assessment and a post-construction site assessment.
- Prior to commencement of any work to be performed on or about Premises, Applicant shall notify the appropriate Division Engineer or their authorized representative for the scheduling of "Support Services". Within seventy-two (72) hours after the Division Engineer's or their authorized representative's actual receipt of such notification, they shall review the necessity and availability of Support Services for the proposed work and advise Applicant of such matters and the estimated cost therefor. No work shall be permitted on or about the Premises without the presence of Railway's Support Services or the Division Engineer's waiver of the requirement for Support Services. Entry on or about the Premises or any other Railway right-of-way without the Division Engineer's prior approval shall be deemed trespassing. Applicant agrees to pay Railway, within thirty (30) days after delivery of an invoice therefor, for any protection and inspection costs incurred by Railway, in Railway's sole judgment, during any such entry.
- In the event it becomes necessary for Applicant to deviate from the approved plans and specifications, Applicant shall seek prior approval from Railway's Division Engineer or his or her authorized representative and, when applicable, an authorized representative of the Division Engineer in the field during Construction Monitoring or inspection.
- All cost or expense resulting from any and all loss of life or property, or injury or damage to the person or property of any person, firm or corporation (including the parties hereto and their respective officers, agents and employees) and any and all claims, demands or actions for such loss, injury or damage, caused by or growing out of the presence or use, or the construction, maintenance, renewal, change or relocation and subsequent removal of the Facilities and appurtenances herein referred to shall be borne by Applicant unless caused solely by the negligence or willful misconduct of Railway.
- Upon abandonment of the Facilities by Applicant, Applicant shall seek direction from Railway's Chief Engineer, or his representative, regarding the method of abandonment if the Facilities will be abandoned in place.
- In the event the Facilities consist of electrical power or communication wires and appurtenances, Applicant shall promptly remedy any inductive interference growing out of, or resulting from the presence of, the Facilities.
- In the event the Facilities consist of an underground occupation, Applicant 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, and Applicant shall pay to Railway on demand the full cost and expense.
- All rights and obligations conferred hereby shall extend to the successors and assigns of the parties hereto, provided that the Applicant shall in no event transfer or assign its rights hereunder without the written consent of Railway, which will not be unreasonably withheld.

- If the public road is abandoned by the appropriate governmental authority and the Facilities remain within the limits of Railway's right of way after such abandonment, as a condition for the continuing presence of the Facilities within Railway's right of way, Railway and Applicant shall agree upon an appropriate occupancy fee or rental for the Facilities and execute an amendment to this Agreement within ninety (90) days after the date upon which such public road is abandoned.
- Any and all notices, demands or requests by or from Railway to Applicant, or Applicant to Railway, shall be in writing and shall be sent by (a) postage paid, certified mail, return receipt requested, or (b) a reputable national overnight courier service with receipt therefor, or (c) personal delivery, and addressed in each case as follows:

If to Railway: c/o Norfolk Southern Corporation  
 650 West Peachtree St. Box 22  
 Atlanta, Georgia 30308  
 Attention: Director Real Estate

If to Applicant: Lower Macungie Township  
 3400 Brookside Road  
 Macungie, Pennsylvania, 18062  
 Attention: Bruce Beitel

Either party may, by notice in writing, direct that future notices or demands be sent to a different address. All notices hereunder shall be deemed given upon receipt (or, if rejected, upon rejection).

ACCEPTED BY:

**NORFOLK SOUTHERN RAILWAY COMPANY**

\_\_\_\_\_  
 Real Estate Manager

DATE \_\_\_\_\_

**LOWER MACUNGIE TOWNSHIP**

\_\_\_\_\_  
 Title \_\_\_\_\_

DATE \_\_\_\_\_

Activity Number: 1295233  
 Mitch Murphy: 06/07/2022

# **EXHIBIT “B”**



## **INSURANCE AND INDEMNIFICATION AGREEMENT**

This Insurance and Indemnification Agreement (“Agreement”) is entered by and between the Township of Lower Macungie (“Township”), 3400 Brookside Road, Macungie, PA 18062, and Liberty Property Limited Partnership (“Liberty”), whose principal place of business is \_\_\_\_\_ (the Township and Liberty may be referred to herein as a “Party” or collectively as the “Parties”).

**WHEREAS**, the Township conditionally approved a Subdivision Plan for the Spring Creek Properties Settlement Subdivision on or about October 17, 2013, pursuant to Resolution No. 2013-26, which approval was thereafter updated and amended; and

**WHEREAS**, pursuant to said approval and certain subsequent agreements, Jaindl Land Company (“Jaindl”) agreed to perform certain public improvements in connection with the Subdivision, including but not limited to the extension of Sauerkraut Lane in the Township (“Sauerkraut Lane Extension”); and

**WHEREAS**, Jaindl thereafter sold certain portions of the Subdivision to Liberty and in turn transferred its obligation to construct certain portions of the Sauerkraut Lane Extension to Liberty; and

**WHEREAS**, in connection with the Sauerkraut Lane Extension, the Township and Norfolk Southern Railway Company (“Norfolk”) entered into an agreement providing in part for the construction of a new Sauerkraut Lane public at-grade crossing over Norfolk’s railroad tracks (the “Sauerkraut Lane Crossing”), which the Pennsylvania Public Utility Commission approved by Secretarial Letter dated December 9, 2021 at PUC Docket No. A-2021-3025099; and

**WHEREAS**, as part of its obligations for the Sauerkraut Lane Extension, Liberty is required to pay to Norfolk, on behalf of the Township, the cost to construct the new Sauerkraut Lane Crossing; and

**WHEREAS**, also as part of its obligations for the Sauerkraut Lane Extension, Liberty is required to install a stormwater pipe (the “Stormwater Facilities”) under the Norfolk railroad tracks and through Norfolk’s right-of-way in the area of the Sauerkraut Lane Crossing; and

**WHEREAS**, as a condition of Norfolk’s approval of the Stormwater Facilities, Norfolk has required that the Township enter into an agreement entitled “Acknowledgement Form for Wire and/or Pipe Occupation within the Limits of a Public Right of Way” (the “Norfolk Pipe Agreement”), a copy of which is attached hereto as Exhibit “A;” and

**WHEREAS**, the Norfolk Pipe Agreement sets forth certain insurance, indemnification, and other requirements relating to the installation of the Stormwater Facilities; and

**WHEREAS**, as a condition to the Township approving and executing the Norfolk Pipe Agreement, the Township is requiring that Liberty provide to the Township equal insurance coverages and limits as required of the Township in the Norfolk Pipe Agreement, and indemnify the Township to the same extent as the Township is required to indemnify Norfolk by the Norfolk Pipe Agreement; and

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, and with the intent to be legally bound hereby, the Parties agree as follows:

1. The WHEREAS clauses are incorporated herein by reference as if set forth in full.
2. Within thirty (30) days of the date of this Agreement, and before the commencement of any work on the installation of the Stormwater Facilities, Liberty and any of its contractors and subcontractors performing any portion of the Stormwater Facilities work, shall provide to the Township a certificate of insurance confirming that they have obtained all of the insurance coverages required in the Norfolk Pipe Agreement and has complied with all of the limits and other insurance requirements set forth therein. The certificate(s) of insurance shall further indicate that the Township and Norfolk are named as additional insureds on each of the required insurance policies listed therein. Further, it is understood and agreed that any insurance maintained by the Township pursuant to the Norfolk Pipe Agreement shall be deemed excess, non-contributory and not co-primary in relation to the insurance coverage maintained by Liberty and its contractors in regard to the Stormwater Facilities work.
3. To the fullest extent of the Township's indemnification obligations as set forth in the Norfolk Pipe Agreement and the fullest extent permitted by law, Liberty shall defend, indemnify and hold harmless the Township, its agents, commissioners, officers, directors, and employees from and against claims (including all attorney's fees and costs of defense) for bodily injury, property damage, and liability of every kind arising out of or relating to the acts or omissions of Liberty, its contractors, subcontractors, agents and representatives in performing the installation of the Stormwater Facilities. The indemnification obligations under this section shall not be construed to be limited by the coverage limits of any insurance policy referenced herein or in the Norfolk Pipe Agreement, or by any limitation on the amount or types of damages or benefits set forth in any worker's compensation acts, disability acts or other employee benefit acts. Further, Liberty waives all rights against the Township and its agents, commissioners, officers, directors and employees for recovery of damages to the extent the damages are covered by commercial general liability, commercial umbrella/excess liability, auto liability, worker's compensation or employer's liability insurance maintained per the requirements set forth herein or in the Norfolk Pipe Agreement.
4. Liberty shall comply with all other terms and conditions of the Norfolk Pipe Agreement.
5. If any provision of this Agreement is deemed unenforceable by any court or tribunal having jurisdiction over the enforcement of the Agreement, then the remainder of this Agreement shall remain in full force and effect to the fullest extent practicable and allowable by law.
6. No modification of this Agreement shall be valid and enforceable unless in writing and signed by the Township and Liberty.
7. This Agreement shall be construed and enforced under the laws of the Commonwealth of Pennsylvania.

8. This Agreement constitutes the entire agreement between the Township and Liberty with respect to the subject matter set forth herein, and supersedes all prior negotiations and discussions relating thereto, which are merged herein.

9. This Agreement may be signed in counterparts and the counterparts shall together constitute one complete document. Photocopied, scanned or facsimiled signatures shall be deemed original signatures for purposes of enforcement.

10. The effective date of this Agreement is the date the Agreement is fully executed by the Parties.

11. The Parties acknowledge that each has read and fully understands this Agreement, that each has had a full and fair opportunity to consult with counsel regarding this Agreement, and that each has executed this Agreement freely and without coercion by any other Party. While the Township Solicitor has undertaken the initial draft of this Agreement, such draft has been submitted to Liberty's counsel for full review and revision as deemed necessary and, as such, any ambiguity in this Agreement shall not be construed against its drafters, but shall be construed as if prepared jointly on behalf of all of the Parties hereto.

IN WITNESS WHEREOF, the Parties have hereunto set their respective hands:

ATTEST:

TOWNSHIP OF LOWER MACUNGIE

\_\_\_\_\_  
Renea Flexer, Secretary

By: \_\_\_\_\_  
Bruce Beitel  
Township Manager

Date: \_\_\_\_\_

ATTEST:

LIBERTY PROPERTY LIMITED  
PARTNERSHIP

\_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Title:

Date: \_\_\_\_\_