

Board of Park Commissioners Project Summary

**Various Parks
Norfolk & Southern Railway Company
Lease Agreement
Activity Number (s) 1297980, 1297983, and 1298030**

Project Approval Request

Scope of Work:

The Rivergreenway path stretches across the city and crosses various locations owned by other agencies. There are three such locations owned by Norfolk & Southern Railway Company. Each location is where the trail passes under a railroad track. Two of the locations are located near Roosevelt Park, off Main Street. The third location is near Juliette Avenue. When the trail was built, an agreement was made between the Board of Park Commissioners and Norfolk & Southern Railroad to lease the land in these locations. These agreements have not been updated for forty years.

N&S has requested that the lease fees be adjusted to more accurately reflect the current values. The previous agreements, signed in 1982 combined for a total amount of \$1,040.00. After negotiations between the two parties, with these revisions requested today, the new total will be \$1,440.00.

Board Approval:

For the annual sum of \$1,440.00 the **City of Fort Wayne, Board of Park Commissioners** does hereby agree to these lease agreements with **Norfolk Southern Railway Company** for use of the associated land described in the attached lease agreement documents. Any future lease changes shall be addressed and approved by the Executive Director of Parks.

Please see the attached lease agreement documents and maps for details.

The Fort Wayne Parks and Recreation and the Board of Park Commissioners met to host their regularly scheduled monthly Board meeting on **March 10, 2022**, to approve the above-referenced lease agreements, in the amount of **\$1,440.00**.

We The Board of Park Commissioners, on the date, stated, do ATTEST, sign to the above referenced and attached document, and approve as presented.

William Zielke, President

Justin Shurley, Vice President

Cory Miller, Commissioner

Rick Briley, Commissioner

LEASE

THIS LEASE, made and entered into this 10 day of March, 2022 ("Effective Date") by and between **NORFOLK SOUTHERN RAILWAY COMPANY** ("The Company"), a(n) Virginia corporation, and **CITY OF FORT WAYNE, PARKS AND RECREATION DEPT.** ("Lessee"), a(n) Indiana government entity, whose address is 705 E. State Blvd. Fort Wayne, IN 46805 (with The Company and Lessee referenced as "Party" or "Parties" as the context requires).

WITNESSETH:

The Parties hereto hereby agree as follows:

1. **Premises.** The Company, in consideration of the covenants of Lessee and other good and valuable consideration, to the extent that The Company's right, title, and interest permits (with Lessee waiving any claim or cause of action that may accrue if The Company's interest is found insufficient to make such a Lease) and without warranty or representation of any type, grants to Lessee the right to occupy and use the property at having an area of acres, more or less, as is more particularly depicted on the print dated November 24, 2021, attached hereto and made a part hereof as "Exhibit A" (hereinafter "Premises"). Lessee shall utilize the Premises for bike/hike trail outlined in red 7,200 sq ft, and shown in red 1,600 sq ft for use and maintenance of ditch outfall and no other purpose. Lessee shall not assign, transfer, or otherwise permit any third party to use or occupy the Premises without the prior written consent of Landlord. Lessee accepts the Premises subject to all other leases, agreements, encumbrances, conditions, restrictions, licenses, or other rights of any third party existing before the date of this Lease whether or not of record. Further, The Company, for itself, its affiliates, parent corporation, subsidiaries, and third parties under the direction of The Company reserves the right to maintain, operate and reconstruct upon, under, or over the Premises, any existing or future railroad facilities (and ingress and egress for access to the same) as The Company may deem necessary for The Company's railroad or business purposes.

2. **Rent.** Lessee will pay unto The Company as rent, on a (n) annual basis, the sum of **FIVE HUNDRED FORTY AND NO/100 DOLLARS (\$540.00)**, payable in advance, without demand, deduction, or abatement, beginning as of March 15, 2022, and by the first day of each succeeding year after the Effective Date ("Base Rent"). The Base Rent shall be increased (and not decreased) on an annual basis on each subsequent anniversary of the Effective Date until the termination, by the percentage of increase, if any, in the United States, Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (CPI-U) (1982-1984 = 100) the U.S. City Average, All Items (the "Index") that is most recently published before the applicable upcoming adjustment anniversary ("Adjustment Date"). If the Index is discontinued or revised during the term of this Lease, such other government index or computation with which it is replaced shall be utilized in place of the Index. Lessee's failure to pay Base Rent, or any other sum payable to The Company under this Lease, the following applicable due date shall result in a late charge equal to five percent (5%) of the unpaid amount accruing for each month that the Base Rent or other sum remains unpaid. In addition to rent, Lessee will also pay all property taxes assessed by any local taxing authority related to Lessee's use of the Premises (but not any operating taxes assessed as part of The Company's usual and customary operating tax return on the operating property), and other taxes, fees, or other charges arising from or related to Lessee's use of the Premises. Any sum payable under this Lease (including, but not limited to, Base Rent) not paid within thirty

(30) days of its due date shall accrue interest thereafter until paid at the rate per annum equal to the lesser of (a) the highest interest rate permitted by applicable law, or (b) eighteen percent (18%). All payments of Base or other sums payable to The Company shall be sent to the Treasurer of The Company at Mail Code 5629, P.O. Box 105046, Atlanta, Georgia 30348-5046, or such other address as The Company may designate in any invoice delivered to Lessee.

3. **Term.** Upon the Effective Date, this Lease shall continue until terminated by either party upon thirty (30) days prior written notice to the other party, provided that no rent or other sums paid before such termination will be pro-rated and refunded to Tenant. Before the end of such thirty (30) days, Lessee will vacate the Premises, remove all improvements, fixtures, equipment, personal property, owned by or placed thereon by Lessee, and leave the Premises, including the subsurface, in as good order and condition as said Premises were before the use and occupation thereof by Lessee. No termination of this Lease will relieve either party hereto from any obligation incurred hereunder. Any possession of the Premises after the termination of this Lease, by Lessee, shall subject Lessee (a Tenant At Sufferance) to immediate eviction. In such event, Lessee shall pay The Company any damages resulting from such holdover and pay monthly rent at the rate of three hundred percent (300%) of the then-current rental, pro-rated daily. Acceptance of holdover rental, back rental, or other damages by The Company shall not constitute consent or agreement by The Company to Lessee's holding over and shall not waive The Company's right to evict Lessee immediately.

4. **Use and Maintenance of Premises.** The Company shall have no responsibility or obligation whatsoever, monetary or otherwise (including but not limited to permitting, licensing, utilities, liens, encumbrances, agreements, and services), for anything related to Lessee's activity or modification(s) of and to the Premises and Lessee shall obtain prior written consent from The Company, which may be withheld in The Company's sole discretion, for any such modifications (excepting normal wear and tear and Lessee's use of non-affixed equipment and personal property on the Premises). Any accounts for any applicable utilities or other services shall be placed in the name of Lessee, with Lessee terminating the same before termination.

5. **Environmental Matters.** Lessee shall not dispose of any wastes of any kind, whether hazardous or not, on the Premises, and Lessee shall comply, at its own expense, with any and all applicable laws, ordinances, rules, regulations, and requirements respecting solid waste, hazardous waste, air, water, pollution or otherwise relating to the environment or health and safety. Lessee shall not install any underground tanks or associated underground piping for the storage of any product on the Premises without the express written consent of The Company given before installation.

6. **Indemnification.** Lessee hereby agrees to indemnify and save harmless The Company, its officers, agents, and employees, and the all of the corporate subsidiaries, parent corporation, and affiliates of The Company and all of their respective officers, agents and employees from and against all losses, fines, penalties, liabilities, claims, demands, causes of action, costs and expenses (including attorneys' fees) for any violation of any applicable law, rule, or regulation due to action or inaction of Lessee or any party under Lessee direction, including but not limited to any such action or inaction arising in whole or in part from Lessee's operations, or the placement of Lessee's equipment or other property, within twenty-five feet (25') of The Company's tracks, if any, as well as any personal injury to or death of any person or persons whomsoever, including, but not limited to, Lessee's agents, workmen, servants or employees, and liens, encumbrances, damage to or destruction of any property whatsoever arising from or growing out of, directly or indirectly, the presence of Lessee, its agents, servants or employees upon or about the Premises or in connection with the lease rights herein granted, whether or not such losses, fines, penalties,

liabilities, claims, demands, causes of action, costs or expenses shall have been contributed to by the negligence of any of the indemnitees.

7. **Default.** In addition to any other rights or remedies under this Lease, if Lessee shall fail to pay any rent or other sums within ten (10) days after the due date thereof, or otherwise violate any other covenants or restrictions required under this Lease, with such violation of covenants or restrictions of this Lease not cured within ten (10) days after written notice of such violation from The Company, The Company may, in addition to any remedy available at law or equity, do any one or more of the following: (a) terminate this Lease by written notice to Lessee, or (b) perform any unperformed obligation of Lessee (including, without limitation, any environmental remediation or other restoration of the Premises to the condition required by this Lease at termination), in which event any sums expended by The Company shall be repaid by Lessee, as an additional rental, within ten (10) days of demand therefore by The Company. Lessee agrees to pay all costs and expenses, including, but not limited to, reasonable attorneys' and consultants' fees, incurred by The Company in connection with enforcing the performance of any of the provisions of this Lease. Further, any property of any type left by Lessee upon the Premises after termination or abandonment, shall be deemed abandoned property.

8. **Insurance.** Lessee shall procure and maintain, at all times and at its expense, in a form and with an insurance The Company acceptable to The Company, Commercial General Liability Insurance for the Premises. Such coverage shall (a) have a single limit of not less than \$1,000,000.00 for each occurrence (or such greater amount over time to be commercially reasonable) and shall provide for a deductible of not more than \$5,000.00, (b) cover Lessee's contractual liability hereunder, (c) cover Lessee and The Company for liability arising out of work performed by any third parties for Lessee in or about the Premises, (d) name The Company and its subsidiaries and affiliates as additional insureds, and (e) be considered primary and noncontributory, regardless of any insurance carried by The Company. Any property insurance maintained by Lessee on its furniture, fixtures, equipment, and personal property shall include a waiver of subrogation in favor of The Company. Lessee shall deliver certificates of insurance to The Company's Risk Management Department, 650 West Peachtree St., NW, Atlanta, GA 30308, evidencing the insurance required hereinabove to The Company simultaneously with the execution of this Lease by Lessee, which certificates shall reflect that the policies shall not be canceled without at least thirty (30) days prior notice to The Company. If Lessee fails to obtain the necessary coverages, The Company may do so at Lessee's expense and the same shall constitute additional rental. The minimum limits of insurance provided for hereunder are not intended to be a limitation on the liability of Lessee hereunder and shall not waive The Company's right to seek a full recovery from Lessee.

9. **Miscellaneous.** If any provision of this Lease shall be deemed invalid or unenforceable, the remainder of this Lease shall not be affected thereby. Any provision of this Lease that imposes an obligation after termination shall be deemed to survive the termination of this Lease. Any term of this Lease inconsistent with any provision of any prior agreement shall be deemed to supersede and cancel the inconsistent provisions of the prior agreement.

10. **Notice.** All notices required by this Lease shall be deemed to be delivered, when deposited in the United States Postal Service or when deposited with a nationally recognized courier for overnight delivery at the addresses set forth below.



The Company:
Director – Real Estate

Lessee:
City of Fort Wayne, Parks and Recreation
Department

Norfolk Southern Corporation
650 West Peachtree St., NW, Atlanta, GA
30308

705 E. State Blvd.
Fort Wayne, IN 46805

(Signature Page to Lease)

IN WITNESS WHEREOF, the parties have executed this Lease in duplicate, each being an original, as of the date hereinafter first recited.

NORFOLK SOUTHERN RAILWAY
COMPANY

Signature:

Signature:

Name: _____

Name: _____

Title: _____

Title: Director of Fort Wayne Parks & Recreation
Dept.

Date: _____

Date: _____

SAA\December 11, 2020\Activity 1297980

EXHIBIT A



