



AGENDA ITEM EXECUTIVE SUMMARY

Agenda Item number: 5.i

Title:

Recommendation to Approve Acceptance of Electric Easement at 315 S. Kirk Road

Presenter:

Tom Bruhl

Meeting: Government Services Committee

Date: May 29, 2018

Proposed Cost: \$0

Budgeted Amount: \$0

Not Budgeted:

Executive Summary *(if not budgeted please explain):*

The Electric Utility has a project to reinforce the distribution system along Kirk Road. To complete the project, an easement for a pad mounted switchgear was needed from the property owner at 315 S. Kirk Road. The City and the Owner worked collaboratively to draft the attached easement document. The City Attorney has reviewed and approved the document.

Attachments *(please list):*

* Plat of Easement

Recommendation/Suggested Action *(briefly explain):*

Recommendation to Authorize Mayor and City Clerk to Execute Electric Utility Easement 315 S. Kirk Road.

This Document Prepared by:

Keith J. Wenk, Esq.
Mason, Wenk & Berman, L.L.C.
630 Dundee Road, Suite 220
Northbrook, Illinois 60062

After Recording Return to:

Keith J. Wenk, Esq.
Mason, Wenk & Berman, L.L.C.
630 Dundee Road, Suite 220
Northbrook, Illinois 60062

SPACE ABOVE THIS LINE RESERVED FOR RECORDER'S USE ONLY

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT (this “**Agreement**”) dated April 24 2018, is made by and between **VK 315 KIRK, LLC**, an Illinois limited liability company (“**Grantor**”), and **THE CITY OF ST. CHARLES**, an Illinois municipal corporation (“**Grantee**”).

Recitals:

WHEREAS, Grantor owns that certain real property located in the City of St. Charles, County of Kane, State of Illinois, and more particularly described in Exhibit A attached hereto and made a part hereof (the “**Land**”);

WHEREAS, subject to the terms and conditions of this Agreement, Grantor desires to grant to Grantee, and Grantee desires to accept from Grantor, a non-exclusive public utility easement and right-of-way upon, over, across, under and through the portion of the Land, as described on Exhibit B, attached hereto (the “**Easement Area**”), and depicted on Exhibit C, attached hereto.

Agreement:

1. Grant of Easement. Subject to the terms and conditions of this Agreement, Grantor does hereby grant, bargain and convey “as-is”, “where-is”, a non-exclusive public utility easement (the “**Easement**”) upon, over, across, under and through the Easement Area, to be maintained by Grantee as herein provided, with certain rights and privileges solely for the construction, reconstruction, restoration, maintenance, review, access and repair of public electric utility facilities including, but not limited to poles, communication equipment, cable television, service connections, and such appurtenances and additions thereto as said Grantee may deem necessary, together with the right of access thereto for the necessary personnel and equipment to do any or all of the above work provided (collectively, the “**Facilities**”), along with the right of reasonable ingress and egress upon and across the Land for access to and from the Easement Area, together with the full authority and unqualified right to trim, remove, clear, keep clear, and otherwise control (by such methods as Grantee, in its reasonable judgment, may deem necessary or proper, including but not limited to the use of herbicides) any and all trees, underbrush, or other vegetation located within the Easement Area; provided, however, that Grantee’s use of the Land for ingress and egress to and from the Easement Area shall not interfere with Grantor’s (or its tenants’) use and enjoyment of that portion of the Land not included in the Easement Area or otherwise disturb Grantor’s (or its tenants’) business operations.

Grantee accept the Easement absolutely "AS IS." Grantor makes and has made no representations or warranties, express or implied, with respect to the condition of the Easement Area or with respect to the fitness of the Easement for any purpose, and Grantee acknowledges that Grantee is not relying on and have not relied on any statement (oral or written), representation or warranty by Grantor or any representative of Grantor with respect to the Easement or the Easement Area. Grantor makes and has made no representations or warranties, express or implied, with respect to the title or ownership of the Easement Area or the Land. Notwithstanding anything to the contrary stated herein, Grantee accepts the Easement subject to all easements and servitudes (whether recorded or not) affecting the Easement Area as of the date hereof ("**Existing Easements**"), including, but not limited to, the easements described on **Exhibit D**, attached hereto.

2. **Construction of Facilities / Maintenance of Easement Area and Facilities.** Prior to installation of the Facilities, Grantee shall provide plans and specifications relating to the Facilities to Grantor for its approval, which approval shall not be unreasonably withheld or delayed. Grantee (and/or Grantee's successors and assigns) shall, at its sole cost and expense, (i) construct or cause to be constructed the Facilities in a good and workmanlike manner in accordance with the plans and specifications approved by Grantor, (ii) maintain the Facilities and the Easement Area in good condition and repair, (iii) comply with all laws in the construction, reconstruction, restoration, maintenance, review, access and repair and removal of the Facilities, (iv) secure all permits and approvals, whether from governmental entities or private parties, necessary to utilize the Easement Area in accordance with the terms herein, and Grantee shall not commence construction of the Facilities until such times as all necessary permits and approvals are secured, and (v) promptly repair or replace, at Grantee's sole cost and expense, all damage to the Easement Area or the Land, including, without limitation, fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on the Land or, at Grantor's election, pay Grantor for all damage to the Easement Area or the Land caused by Grantee.

In connection with the construction and maintenance of the Facilities, Grantee shall not permit to be created nor to remain undischarged any lien, encumbrance, or charge arising out of any work or work claim of any contractor, subcontractor, mechanic, laborer, supplier, vendor, materialman, or agent of Grantee which might be or become a lien or encumbrance or charge upon the Grantor's real or personal property. If any lien or notice of lien on account of an alleged debt of Grantee or any contractor, subcontractor, mechanic, laborer, supplier, vendor, materialman, or agent of Grantee or any notice of contract shall be filed against the Grantor's property by a party engaged by Grantee or any contractor, subcontractor, or agent of Grantee, then Grantee shall, within ten (10) days after receipt of written notice from Grantor of the filing thereof, cause the same to be discharged of record by payment, deposit, or bond. If Grantee shall fail to timely cause such lien or notice of lien to be discharged by either paying the amounts claimed to be due or by procuring the discharge of such lien by deposit or by bonding, then Grantor shall be entitled, if it so elects, but without obligation to do so, to either defend any prosecution of an action for foreclosure of such lien by the lienor or to bond around or pay and discharge such lien or claim. Any money paid by Grantor and all reasonable costs and expenses, including reasonable attorneys' fees and expenses of litigation, incurred by Grantor in connection therewith, shall be paid by Grantee to such party within thirty (30) days after written demand. Grantee agrees that all costs to remove and defend such liens shall be included within Grantee's indemnity obligations set forth in Section 5 below.

3. **Reservations of Grantor's Rights.** Grantor reserves the right to use the Easement Area and other lands encumbered by this Agreement in any manner that is not inconsistent with the rights granted to Grantee hereunder. In addition to the enforcement rights of Grantor hereunder, Grantor reserves to itself and to their successors and assigns, all rights accruing from ownership of the Easement Area and the Land, including, without limitation, the right to engage in, or permit or invite others to engage in all uses of the Easement Area that are not prohibited herein and are not inconsistent with Grantee's rights hereunder.

4. **Default and Remedies.** In the event Grantee or Grantor default in the observance of any term hereunder, Grantee or Grantor, as applicable, may provide written notice of such default to the defaulting party. If within twenty (20) days after receipt of such written notice the defaulting party fails to cure, or has not begun and is not diligently pursuing such cure, the non-defaulting party shall be entitled to any remedy set forth herein and to bring an action at law or equity in a court of competent jurisdiction to enforce the terms hereunder; to require the restoration of the Easement Area to the condition required herein; to enjoin such non-compliance by ex-parte temporary or permanent injunction in a court of competent jurisdiction; and/or to recover any damages arising from such non-compliance including, if such court determines that the violating party has failed to comply with this Agreement, costs of restoration, court costs and reasonable attorneys' fees, in addition to any other payments ordered by such court. In addition, in the event Grantee fails to comply with its obligations set forth herein after twenty (20) days following written notice to Grantee, Grantor shall have the right, but not the obligation, to perform such obligations on behalf of Grantee and submit an invoice to Grantee for all costs related thereto, which costs Grantee shall pay within ten (10) days of receipt thereof. The foregoing notwithstanding, in the event Grantee materially breach this Agreement, subject to the notice and cure period specified above, Grantor shall have the right to terminate this Agreement upon ten (10) days' written notice to Grantee and without additional approval from Grantee, and Grantor may unilaterally record a termination of this Agreement in the Kane County, Illinois Recorder of Deeds. In the event of such termination by Grantor, this Agreement shall be without further force or effect (except for indemnification provisions specified herein, which shall survive termination). The Easement shall be used by Grantee in accordance with the terms herein and for no other purpose whatsoever. In the event the Easement is not used and occupied in accordance with the terms, covenants, conditions and restrictions herein set forth, including, without limitation, Grantee's failure to comply with its maintenance and repair obligations set forth herein, Grantor shall have all rights and remedies specified herein and all right and remedies available at law or in equity.

5. **Limitation of Liability and Indemnity.** In no event shall Grantor be liable to Grantee or any of its employees, agents, tenants, licensees, invitees, guests or to any other persons for any injury to persons or damage to property on or about the Easement Area or caused by Grantee's use or ingress or egress to the Easement Area or by Grantee's breach of this Agreement, unless caused by the gross negligence or willful misconduct of Grantor, and Grantee shall indemnify and hold Grantor, any tenant or occupant of the Land and their employees, officers, members, directors, agents, contractors, subcontractors and employees harmless for all liabilities, costs, damages, expenses, claims, demands or judgments, including without limitation, court costs and reasonable attorneys' fees, incurred by Grantor, or any tenant or occupant of the Land in defense of any claim or action brought against Grantor, any tenant or occupant of the Land, in connection with (i) the use of the Easement, the Facilities, or the Easement Area; (ii) any act or omission of Grantee in the operation, maintenance, repair, and/or management of the Easement, Facilities, or the Easement Area; (iii) any injury to persons or property on the Land or the land adjacent to the Easement Area resulting from Grantee's failure to comply with the terms hereof; and (iv) any Existing Easement. Notwithstanding the foregoing, and to the maximum extent permitted by law, Grantee waives any statutory immunity and/or limitation of liability with respect to its indemnification obligations set forth in this paragraph. Nothing contained herein shall ever be construed to place upon Grantor any manner of liability for injury to or death of persons or for damage to or loss of property arising from or in any manner connected with the acts, conduct, negligence or omission of Grantee, or its employees, agents or contractors, in the design, construction, or maintenance of the Facilities.

6. **Insurance.** Grantee shall obtain, prior to commencing construction of the Facilities, and maintain at its sole cost and expense for the benefit of Grantor, or the then-current owner of the Land, a policy or policies of commercial general liability insurance that provide coverage in the greater of One Million and 00/100 Dollars (\$1,000,000.00) or the amount maintained by prudent private owners of property in Kane County used for similar purposes. Grantee shall cause Grantor to be named as an additional insured on

such policy or policies, and Grantee will deliver to Grantor certificates of insurance covering all contractors performing work on the Land and/or Easement Area, as applicable, establishing that such insurance is being maintained. In the event Grantee fails to obtain such insurance, or to provide Grantor reasonable proof thereof, Grantor shall have the right, but not the obligation, to obtain such insurance on Grantee's behalf and Grantee shall reimburse Grantor for the cost of such insurance within ten (10) days after receipt of an invoice therefor.

7. **Relocation of Easement Area.** Grantor shall have the right, upon not less than thirty (30) days' advance written notice to Grantee, to cause the Easement Area and any Facilities to be relocated to another area on the Land; provided, however, that (i) Grantor shall be responsible for the cost of relocating the Easement Area and any such Facilities, (ii) such new Easement Area shall be of similar size as the Easement Area, (iii) and Grantee's use of the Easement Area and the Facilities for their intended purposes shall not be materially interfered with due to such relocation. In the event the Easement Area and any Facilities are relocated as herein provided, all of the terms of this Agreement shall apply to the new Easement Area, and the parties shall promptly re-record this Agreement with a revised **Exhibit B** and **Exhibit C**, describing such new Easement Area.

8. **Miscellaneous.**

(a) The easements, benefits and burdens hereby granted shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns. Nothing herein is or shall be construed to be an express or implied grant of an easement, a right of access or a right of use to the public or to any party other than to Grantee; and this Agreement is not, and does not create, an express or implied dedication or reservation of any portion of the Land, including, without limitation the Easement Area, for public use.

(b) Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally, by first class mail, postage, prepaid, or by receipted delivery service, addressed as follows:

To Grantee:

City Administrator
City of St. Charles
2 E. Main Street
St. Charles, IL 60174

To Grantor:

VK 315 Kirk, LLC
c/o Venture One Real Estate, LLC
9500 Bryn Mawr, Suite 340
Rosemont, Illinois 60018

(c) In the event it becomes necessary for any party hereto to file a suit to enforce this Agreement or any provisions contained herein, the party prevailing in such action shall be entitled to recover from the non-prevailing party therein, in addition to all other remedies or damages, reasonable attorneys' fees and court costs, including appellate costs, incurred in such suit.

(d) This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, without regard to conflicts of law.

(e) In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

(f) This Agreement contains the entire agreement between the parties relating to the rights herein granted and the obligations herein assumed, and no representations or statements, verbal or written, have been made modifying, adding to or changing the terms of this Agreement. This Agreement may be terminated or amended only upon the express written agreement signed by the Grantor and Grantee or their respective successors-in-interest; provided, however, this Agreement and the Easement granted hereby shall terminate without further action by any of the parties hereto if the Facilities installed pursuant to this Agreement are unused for utility purposes for at least one-hundred and eighty (180) consecutive days. Upon termination of this Agreement, Grantee shall remove all Facilities from the Easement Area and restore the Easement Area to the condition that existed as of the date hereof. If Grantee fails to so remove the Facilities after sixty (60) days' written notice by Grantor, then Grantor may remove and dispose of the Facilities and demand payment therefor by Grantee, which Grantee shall pay within thirty (30) days after receipt of such demand.

(g) The person or persons executing this instrument on behalf of Grantor and Grantee each hereby represent that they have the authority to bind Grantor or Grantee, respectively, to the terms and conditions set forth herein.

(h) This Agreement may be executed in one (1) or more counterparts, each of which shall be deemed an original and considered to have the same binding legal effect as if it were the original signed version thereof delivered in person, and all of which shall constitute one and the same agreement.

[signature page follows]

GRANTEE:

THE CITY OF ST. CHARLES, an Illinois municipal corporation

By: _____

Name: _____

Title: _____

STATE OF _____)

) SS:

COUNTY OF _____)

I hereby certify that on this _____ day of _____, 2018, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____, on behalf of **THE CITY OF ST. CHARLES**, an Illinois municipal corporation, to be the person(s) whose name(s) is/are signed to the written instrument hereto annexed and acknowledged before in my said County that he/she/they executed the same for the purposed therein contained.

Notary Public

My Commission Expires: _____

EXHIBIT A

The Land

LOT 1 AND THE EAST 90.23 FEET OF LOT 2 OF UNIT NO. 2, THE "ST. CHARLES" ILLINOIS INDUSTRIAL DEVELOPMENT OF THE CENTRAL MANUFACTURING DISTRICT IN SECTIONS 25, 26, 35 AND 36, TOWNSHIP 40 NORTH, RANGE 8 EAST OF THE THIRD PRINCIPAL MERIDIAN, (EXCEPT THAT PART CONVEYED TO THE COUNTY OF KANE BY DEED RECORDED JAN. 12, 1994 AS DOCUMENT 94K004621) IN THE CITY OF ST. CHARLES, KANE COUNTY, ILLINOIS. PARCEL A IS ALSO KNOWN AS: LOT 1, AND THAT PART OF LOT 2 LYING EAST OF THE EAST LINE OF THE FOLLOWING DESCRIBED PARCEL AS DESCRIBED IN DOCUMENT NO. 1748616: BEGINNING AT A POINT ON THE SOUTH LINE OF LOT 2 WHICH POINT IS 90.23 FEET WEST OF THE SOUTHEAST CORNER OF SAID LOT 2, MEASURED ALONG SAID SOUTH LINE, AND RUNNING THENCE WEST ALONG THE SOUTH LINE OF SAID LOT 2 A DISTANCE OF 160.0 FEET TO A POINT WHICH IS 250.23 FEET WEST OF THE SOUTHEAST CORNER OF SAID LOT 2, AS MEASURED ALONG SAID SOUTH LINE; THENCE NORTH PARALLEL WITH THE EAST LINE OF LOT 2 A DISTANCE OF 450.0 FEET TO A POINT ON THE NORTH LINE OF SAID LOT 2, SAID POINT BEING 250.23 FEET WEST OF THE NORTHEAST CORNER OF SAID LOT 2, AS MEASURED ALONG SAID NORTH LINE; THENCE EAST ALONG THE NORTH LINE OF SAID LOT 2, A DISTANCE OF 160.0 FEET; AND THENCE SOUTH ALONG A LINE PARALLEL WITH THE EAST LINE OF SAID LOT 2 A DISTANCE OF 450.0 FEET TO THE POINT-OF-BEGINNING, LYING AND BEING ALL IN UNIT NO. 2 THE "ST. CHARLES" ILLINOIS INDUSTRIAL DEVELOPMENT OF THE CENTRAL MANUFACTURING DISTRICT IN SECTIONS 25, 26, 35 AND 36, TOWNSHIP 40 NORTH, RANGE 8 EAST OF THE THIRD PRINCIPAL MERIDIAN, (EXCEPT THAT PART CONVEYED TO THE COUNTY OF KANE BY DEED RECORDED JANUARY 12, 1994 AS DOCUMENT 94K004621) IN THE CITY OF ST. CHARLES, KANE COUNTY, ILLINOIS.

EXHIBIT B

Easement Area

THAT PART OF LOT 1 OF UNIT 2, THE "ST. CHARLES" ILLINOIS INDUSTRIAL DEVELOPMENT OF THE CENTRAL MANUFACTURING DISTRICT IN SECTIONS 25, 26, 35, AND 36, TOWNSHIP 40 NORTH, RANGE 8 EAST OF THE THIRD PRINCIPAL MERIDIAN. DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF LOT 1, THENCE NORTH 88 DEGREES 11 MINUTES 33 SECONDS EAST ALONG THE NORTH LINE OF SAID LOT 1, 413.87 FEET TO THE WESTERLY RIGHT OF WAY OF KIRK ROAD; THENCE SOUTH 7 DEGREES 35 MINUTES 05 SECONDS WEST ALONG SAID RIGHT OF WAY, 139.15 FEET FOR THE POINT OF BEGINNING; THENCE SOUTH 81 DEGREES 51 MINUTES 12 SECONDS WEST 36.58 FEET; THENCE NORTH 0 DEGREES 00 MINUTES 00 SECONDS WEST 5.28 FEET; THENCE NORTH 90 DEGREES 00 MINUTES 00 SECONDS EAST 26.00 FEET; THENCE SOUTH 0 DEGREES 00 MINUTES 00 SECONDS EAST 26.00 FEET; THENCE NORTH 90 DEGREES 00 MINUTES 00 SECONDS EAST 26.00 FEET; THENCE NORTH 00 MINUTES 00 SECONDS WEST 8.22 FEET; THENCE NORTH 81 DEGREES 51 MINUTES 12 SECONDS EAST 34.86 FEET TO SAID WESTERLY RIGHT OF WAY; THENCE NORTH 7 DEGREES 35 MINUTES 05 SECONDS EAST 12.89 FEET TO THE POINT OF BEGINNING, IN THE CITY OF ST. CHARLES, KANE COUNTY, ILLINOIS.

EXHIBIT C

Depiction of Easement Area

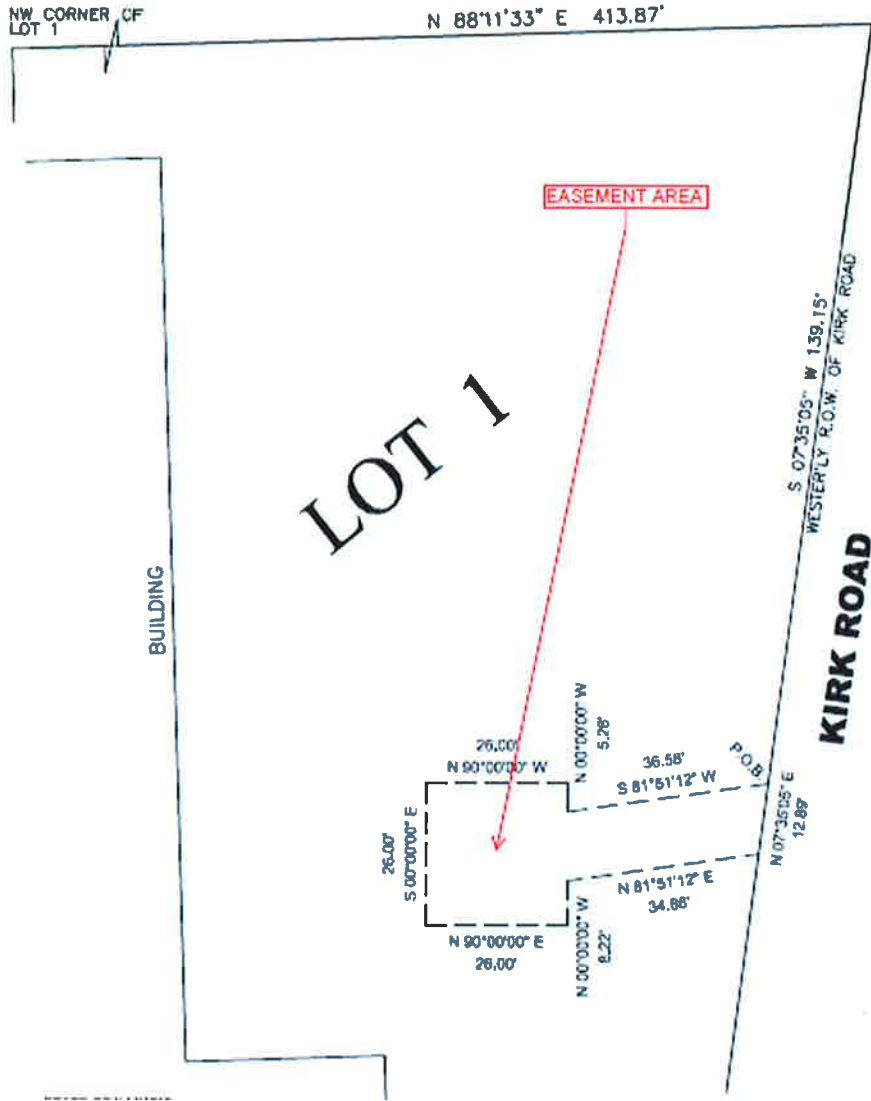


EXHIBIT D

Existing Easements

The Existing Easements include, but are not limited to, the following:

- Easements for public utility purposes as shown on plat of subdivision recorded on August 22, 1968 as document 1121431.
- Reservation of Utility Easements in the Deed from W. Wood Prince and James F. Donovan, as Trustees of Central Manufacturing District to the Prudential Insurance Company of America dated November 22, 1972 and recorded November 24, 1972 as document 1247196 for the purpose of reconstructing, extending, enlarging, altering, repairing, maintaining, renewing and operating poles, wires, cables, lines, pipes, mains, ducts, conduits, conductors and equipment and appurtenances necessary or convenient to the use of any of the same for the conveyance and transmission and distribution (via connections with the facilities aforesaid) of water, sewage, gas, steam, electricity or similar substances or utilities or any of them.