



Legislation Text

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Fiscal Note

Initial annual rent of \$2,526.83 will be deposited into the General Fund (Munis Charge Code 63026). The annual rent may be adjusted to reflect any change in size after receipt of the as-built survey upon completion of construction, and again to reflect any future changes in the assessed value of the land.

Title

Authorizing the Mayor and City Clerk to execute Subterranean and Air Space Lease with 202 E. Washington, LLC, the owner of property located at 1 N. Webster Street, to accommodate proposed encroachments of certain building features into the E. Washington Avenue and N. Webster Street public rights-of-way.

Body

WHEREAS, 202 E. Washington, LLC (the "Owner") owns the property located at 1 N. Webster Street and legally described on attached Exhibit A (the "Property"), which is improved with a multi-story building (the "Owner's Improvement"); and

WHEREAS, the Owner's Improvement includes various subterranean and air space features, including foundation footings, an electrical vault, a canopy, and a protruding building brow (collectively, the "Encroachments") that encroach into the East Washington Avenue and North Webster Street public rights-of-way; and

WHEREAS, the Owner desires to lease certain portions of the East Washington Avenue and North Webster Street public rights-of-way to accommodate the Encroachments, as detailed herein; and

WHEREAS, the City of Madison and the Owner (collectively, the "Parties") have agreed to enter into a Subterranean and Air Space Lease (the "Lease") in accordance with Wisconsin Statutes § 66.0915(4); and

WHEREAS, the terms of the Lease have been negotiated between the Owner and the Office of Real Estate Services, and the City Attorney's office has reviewed and approved the Lease as to form.

NOW THEREFORE BE IT RESOLVED that the Mayor and City Clerk are authorized to execute a Subterranean and Air Space Lease (the "Lease") with the Owner, 202 E. Washington, LLC (the "Lessee") of the property located at 1 N. Webster Street to accommodate encroachments of certain building features, including foundation footings, an electrical vault, a canopy, and a protruding building brow (collectively, the "Encroachments") into portions of the North Webster Street and East Washington Avenue public rights-of-way, subject to the following terms and conditions:

- 1. Leased Premises.** The City of Madison (the "City") hereby leases to the Lessee 424.67 square feet of subterranean space and 586.06 square feet of air space in portions of the North Webster Street and East Washington Avenue public rights-of-way (collectively, the "Leased Premises") for the construction, use and maintenance of the Encroachments. The Leased Premises are described and depicted on Exhibits B and C, which exhibits are attached and will be made a part of the Lease. The Leased Premises are contiguous and adjacent to the Property.
- 2. Term.** The Lease shall be for a term of fifty (50) years, subject to early termination pursuant to the terms of the Lease. The Lease shall commence on April 1, 2017 (the "Effective Date") and expire on March 31, 2067. The term "Lease Year" shall mean a full one (1) year period. The first Lease Year shall begin on

the Effective Date. Each succeeding Lease Year shall begin on the anniversary of the Effective Date. The final Lease Year shall end on the last day of the term of this Lease, as may be extended or earlier terminated.

3. Plat of Survey. The Parties mutually acknowledge that an accurate, three-dimensional, legal description of the Leased Premises will not be available until an as-built plat of survey of the Owner's Improvement is prepared by a registered land surveyor. Within ninety (90) days following issuance of the final certificate of occupancy for the Lessee's Improvement, the Lessee shall, at its sole cost and expense, have an as-built plat of survey of the Lessee's Improvement, Property, and Leased Premises prepared by a registered land surveyor. Such plat of survey shall include three-dimensional legal descriptions of the various Encroachments which comprise the Leased Premises. Vertical dimensions in the as-built plat of survey shall be tied to City Datum. The Lessee agrees to provide a copy of the plat of survey to the City, delivered to the address specified in the Lease. The Parties shall then enter into an amendment to the Lease for the purposes of inserting such as-built three-dimensional legal description of the Leased Premises as Exhibit B. In addition, if such plat of survey shows the square footage areas of any of the Encroachments to be different from those set forth in Exhibit C, the Parties hereby agree that the annual rent payable shown in Exhibit D, which exhibit is attached and made a part of the Lease, shall be recalculated and the Lease amended accordingly.

4. Rent.

- a. The Lessee shall pay an annual rent of Two Thousand Five Hundred Twenty Six and 83/100 Dollars (**\$2,526.83**), as determined by the calculations shown on Exhibit D.
- b. The first payment shall be due at the time of execution of the Lease and subsequent payments shall be due on or before each anniversary of the Effective Date for the duration of the Lease, with no proration of the rent for any partial year the Lease may be in effect.

5. Rent Adjustments.

- a. Rent will be subject to adjustment, if necessary, based on the as-built plat of survey to be furnished by the Lessee in accordance with Paragraph 3.
- b. Rent shall be adjusted to reflect changes in the assessed land value of the Leased Premises. The City shall notify the Lessee of any change that results in a change to the annual rent that is payable.

6. Option to Renew.

- a. If, at the end of the original term of the Lease, the Lessee is not in default under the terms and conditions of the Lease, then the Lessee may renew the Lease for a successive term of forty-eight (48) years, under the same terms and conditions provided in the original term of the Lease, with rent as set forth in Paragraph 4 and subject to the right of either party to otherwise terminate the Lease in accordance with the Lease.
- b. If the Lessee desires to renew the Lease, the Lessee must give notice in writing to the City a minimum of one hundred eighty (180) days prior to the expiration of the initial term.
- c. Following receipt of such notice, the City may indicate by written notice to the Lessee its approval or denial of the Lessee's request for renewal. If the City does not assent to a renewal notice pursuant to this Paragraph within sixty (60) days after receipt of such notice, renewal shall be deemed denied.

7. Use and Restrictions on Use of Leased Premises. The Lessee shall use the Leased Premises for the sole purpose of accommodating the Encroachments, which are ancillary to the business operations of the Lessee's Improvement.

8. Assignment of Lease. It is understood that the Lessee is the owner of the Property and that the Lessee's interest in the Lease is appurtenant to the Lessee's ownership of the Property.

It is further understood that this leasehold interest shall not be severed from the ownership of the Property. Accordingly, the Lessee shall at any time, with notice to the City, be permitted to sell, assign, transfer, sublease, mortgage, pledge, encumber, grant and convey its interest in the Lease and the Encroachments located on the Leased Premises (which actions are collectively referred to herein as "Transfers"), but only if such Transfer is made simultaneously with the Transfer of the Property to the same purchaser or transferee of the Lease and the Encroachments located on the Leased Premises. Furthermore, foreclosure of any such mortgage, pledge or encumbrance shall also be a Transfer permitted hereunder, subject to the restriction that this leasehold interest shall not be severed from the ownership of the Property. All such Transfers shall be subject to all of the terms of the Lease, and all applicable statutes, laws and ordinances. Any purchaser or transferee of all of the Lessee's right, title and interest in and to the Lease shall be considered as having assumed and become bound by all of the Lessee's obligations hereunder, and shall take the Lease subject to all prior breaches and shall be liable therefore in the same manner as the Lessee or prior transferee.

9. Subletting. The Lessee shall not sublet the Leased Premises or any portion thereof.

10. Construction. Except as approved by the City in the base building plans and specifications submitted by the Lessee and its agents (and as such are subsequently modified with the City's approval during construction), no further material construction, modification, improvement, alteration, or remodeling of the Leased Premises shall be undertaken without prior written approval of the City's Office of Real Estate Services and any plans for any of the same shall be subject to written approval of the City's Office of Real Estate Services. In all cases, the Lessee is responsible for following all applicable ordinances, codes, statutes and laws, and obtaining all permits required for any construction activity.

11. Electrical Vault Conditions.

- a. The Lessee shall receive separate approval of the vault covers by the City Engineer prior to construction.
- b. The Lessee shall contact Digger's Hotline prior to any excavation in the right-of-way and identify existing facilities to avoid conflict with the proposed vault. The Lessee shall be responsible for all costs to identify and/or relocate existing utilities.
- c. The Lessee shall obtain a Permit to Excavate in Right-of-Way, at the Lessee's expense, prior to beginning work or performing any maintenance on the structure of the vault.
- d. The Lessee shall contact John Fahrney, Construction Engineer (608-266-9091), or his successor, two working days prior to starting work.
- e. The design of the vault shall be completed by a registered professional engineer.
- f. The design and construction of the vault shall be in accordance with all local and state building codes and ordinances and general design standards.

- g. The Lessee shall inspect the condition of the vault and vault cover regularly and shall be responsible for its repair as needed to maintain the vault and vault cover in a safe condition in the event of damage or general depreciation.
- h. The Lessee shall be responsible for repairing any water damage that occurs to the vault, water proofing membranes, or any other associated vault features in, around and adjacent to the vault that are owned by the Lessee. The City is not responsible for any water infiltration or damage.

12. Liens.

- a. The Lessee shall not suffer or permit any construction lien to be filed, or if filed, to remain uncontested, against the fee of the Leased Premises, nor against the Lessee's leasehold interest in the Leased Premises, by reason of work, labor, services or materials supplied or claimed to have been supplied to the Lessee or anyone holding the Leased Premises or any part thereof through or under the Lessee; and nothing contained herein shall be deemed or construed in any way as constituting the consent or request of the City, express or implied, by inference or otherwise, to any contractor, subcontractor, laborer or supplier for the performance of any labor or the furnishing of any materials for any specific improvement, alteration or repair of or to the Leased Premises or any part thereof, nor as giving the Lessee any right, power or authority to contract for or permit the rendering of any services or the furnishing of any materials that would give rise to the filing of any construction lien against the fee of the Leased Premises. If any such lien is filed, the Lessee shall immediately cause the same to be discharged or released or shall upon request provide adequate and acceptable security or bond to protect the City's interest.
- b. If any such construction lien shall at any time be filed against the Leased Premises, the Lessee covenants that it will promptly take and diligently prosecute appropriate action to have the same discharged by payment, bonding or otherwise, and that it will hold the City free and harmless of and from any and all liability to any contractor, subcontractor, supplier, laborer or any other person relating to or arising because of any improvements or alterations on or to the Leased Premises, and that it will also defend, on behalf of the City, at the Lessee's sole cost and expense, any action, suit or proceeding which may be brought for the enforcement of any such lien, and that it will pay any damages and discharge any judgments entered therein. Upon the Lessee's failure to do any of the foregoing things, the City may take such action as may be reasonably necessary to protect the City's interest, in addition to any other right or remedy which it may have; and any amount paid by the City in connection with such action shall be repaid by the Lessee to the City upon demand, together with interest thereon at the rate of twelve percent (12%) per annum.

13. Maintenance.

- a. The Lessee shall, at its own expense, keep and maintain the Leased Premises in a presentable condition consistent with good business practice and in a manner consistent with the preservation and protection of the general appearance and value of other premises in the immediate vicinity.
- b. In addition, the Vault shall be maintained in accordance with the provisions of Madison General Ordinances Section 10.31(4) and Paragraph 11.
- c. The City shall have no responsibility or liability for any maintenance of the Leased Premises.

14. Repairs, Replacements and Demolition.

- a. The Lessee shall be responsible for the cost of and contracting for all repairs and replacements of

the Encroachments within the Leased Premises during the term of the Lease. Repairs and replacements to the Encroachments shall require City approval if the associated work causes deviation from the originally approved Encroachments and the result is not an exact replica.

- b. Any repairs, replacement, or demolition of the Vault shall be subject to the provisions of Madison General Ordinances Section 10.31(4) and Paragraph 11.
 - c. If the Lessee's Improvement is destroyed or demolished, the Lease shall terminate on the date three years after such destruction or demolition, unless construction of a replica of the Lessee's Improvement has commenced during such three-year period, and the Lease shall remain in full force and effect provided that the replica shall be the same size and number of stories as the original approved redevelopment of the Lessee's Improvement.
 - d. If, as a result of the construction of a replica, part or all of the Encroachments are no longer located within the public right-of-way or are of a different size or nature than the original Encroachments, the Parties shall enter into an amendment to the Lease for the purposes of revising the legal description of the Leased Premises, adjusting the rent based on the changes in the square footage area of the Leased Premises, and for making such other changes to the Lease as may be appropriate.
15. Taxes and Assessments. The Lessee shall be responsible for and shall pay promptly all property taxes, personal property taxes, assessments and special assessments that accrue to the Leased Premises.
16. Utilities. The Lessee shall be solely responsible for and promptly pay all charges for water, gas, heat, electricity, sewer and any other utility used upon or furnished to the Leased Premises. The obligation of the Lessee to pay for such utilities shall commence as of the date on which possession of the Leased Premises is delivered to the Lessee, without regard to the formal Effective Date of the Lease.
17. Indemnification. The Lessee shall be liable to and agrees to indemnify, defend and hold harmless the City, and its officers, officials, agents, and employees, against all loss or expense (including liability costs and attorney's fees) by reason of any claim or suit, or of liability imposed by law upon the City or its officers, officials, agents or employees for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons or on account of damages to property, including loss of use thereof, arising from, in connection with, caused by or resulting from the acts or omissions of the Lessee or its officers, officials, members, agents, employees, assigns, guests, invitees, sublessees or subcontractors, in the performance of the Lease, whether caused by or contributed to by the negligence of the City, its officers, officials, agents, or employees.
18. Insurance. The Lessee shall carry commercial general liability insurance covering as insured the Lessee and naming the City, its officers, officials, agents and employees as additional insureds, with a minimum limit of One Million Dollars (\$1,000,000) per occurrence as may be adjusted, occasionally by the City of Madison's Risk Manager. This policy shall also be endorsed for contractual liability in the same amount, apply on a primary and noncontributory basis, and provide the City thirty (30) days advance written notice of cancellation, non-renewal or material changes to the policy during the term of the Lease. As evidence of this coverage, the Lessee shall furnish the City with a certificate of insurance on a form approved by the City, and, if requested by the City Risk Manager, the Lessee shall also provide copies of additional insured endorsements or policy. If the coverage required above expires while the Lease is in effect, the Lessee shall provide a renewal certificate to the City for approval.
19. Hazardous Substances; Indemnification. The Lessee represents and warrants that its use of the Leased Premises will not generate any hazardous substance, and it will not store or dispose on the Leased

Premises nor transport to or over the Leased Premises any hazardous substance in violation of any applicable federal, state or local law, regulation or rule. The Lessee further agrees to hold the City harmless from and indemnify the City against any release of such hazardous substance and any damage, loss, or expense or liability resulting from such release including all attorneys' fees, costs and penalties incurred as a result thereof except any release caused by the sole negligence or intentional acts of the City, its employees or agents. "Hazardous substance" shall be interpreted broadly to mean any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, hazardous or toxic radioactive substance, or other similar term by any federal, state or local environmental law, regulation or rule presently in effect or promulgated in the future, as such laws, regulations or rules may be amended from time to time; and it shall be interpreted to include, but not be limited to, any substance which after release into the environment will or may reasonably be anticipated to cause sickness, death or disease or damage to or loss of use of real or personal property.

20. The City shall have the right to terminate the Lease upon 30 days written notice in the event of the Lessee's default or upon 180 days written notice in the event the Leased Premises are desired for any public use or purpose.
21. The Lessee shall have the right, at its sole option, to terminate the Lease upon 180 days written notice.
22. Restoration of Leased Premises. Upon the expiration or termination of the Lease, the Lessee, at the Lessee's cost, shall remove from the Leased Premises the Encroachments installed by the Lessee. The Lessee shall also restore the Leased Premises to a condition equivalent to that which existed prior to the date that the Lessee first occupied the Leased Premises, including abandonment of the Vault in accordance with the provisions of Madison General Ordinances Section 10.31(4).

BE IT FINALLY RESOLVED, that the Mayor and City Clerk are authorized to execute any other documents necessary to accomplish these Lease agreements.