

**SPECIAL MEETING OF THE
WEST VIRGINIA HIGHER EDUCATION POLICY COMMISSION**

By Conference Call

**May 18, 2020
2:00 p.m.**

AGENDA

- I. Call to Order**
- II. Approval of License and Work Agreement and Right of Entry Agreement with the City of South Charleston**
- III. Possible Executive Session under the Authority of West Virginia Code §6-9A-4**
 - A. Approval of Presidential Compensation
 - B. Approval of Appointments to the Chancellor Search Committee
- IV. Additional Board Action and Comment**
- V. Adjournment**

****To join by conference call, dial 1-646-558-8656 and enter meeting ID 380-987-909***

**West Virginia Higher Education Policy Commission
Special Meeting of May 18, 2020**

ITEM: Approval of License and Work Agreement and Right of Entry Agreement with the City of South Charleston

INSTITUTION: West Virginia Regional Technology Park

RECOMMENDED RESOLUTION: *Resolved*, That the West Virginia Higher Education Policy Commission approves execution of the License and Work Agreement and the Right of Entry Agreement with the City of South Charleston and delegates authority to the Chancellor to approve and execute the final documents on behalf of the Commission.

STAFF MEMBER: Kristin Boggs

BACKGROUND:

The City of South Charleston (City) needs earth and rock material for site work to create additional developable acreage in accordance with a TIF project approved by the West Virginia Development Office for the City. The West Virginia Regional Technology Park (Tech Park) has sufficient material for this purpose and is willing to allow the City to excavate the delineated area within the Tech Park property (Project Site) and remove the requisite material in exchange for developing and grading the site for future development by the Tech Park. The City will be required to follow certain plans and specifications with respect to excavating, grading, drainage, environmental controls, elevation, moving dirt, and other similar work and activity on the Project Site. As a result of the City excavation, development, and grading at the Project Site, the Tech Park will gain useful and valuable property that it can use for economic development projects of its own.

To effectuate this project, the City and the Tech Park, with the concurrence of the Commission as the property owner, would like to enter into a LICENSE AND WORK AGREEMENT that governs the scope of the work outlined above, and a RIGHT OF ENTRY AGREEMENT, which would allow the City and its contractor to enter onto the Tech Park property in order to perform the excavation, grading, earth moving, and other activities contemplated by the parties to carry out the project.

LICENSE AND WORK AGREEMENT

This License and Work Agreement (“Agreement”), dated April ___, 2020, is entered into by and between the **CITY OF SOUTH CHARLESTON** (the “City”), a West Virginia municipal corporation; the **WEST VIRGINIA HIGHER EDUCATION POLICY COMMISSION**, an agency of State government (the “Commission”); and the **WEST VIRGINIA REGIONAL TECHNOLOGY PARK CORP.** (the “Tech Park”), a West Virginia not for profit corporation. The Commission and the Tech Park are referred to collectively herein as the “Tech Park Parties.” All three parties are referred to collectively herein as the “Parties.”

RECITALS

WHEREAS, the Commission owns certain real property that the Tech Park manages, pursuant to W. Va. Code § 18B-1F-4(a)(5), and that is situate in South Charleston, Charleston South Annex Corp. Tax District, Kanawha County, West Virginia, more particularly described on **Exhibit A-1**, attached hereto and incorporated herein by reference (the “Project Site”); and

WHEREAS, the City has a need for earth and rock material (the “Material”) that is located on the Project Site; and

WHEREAS, the Tech Park Parties are willing to allow the City to excavate, develop and grade the Project Site and remove the Material; provided, however, that the City follows certain plans and specifications, that have been mutually agreed upon by the City and the Tech Park Parties, with respect to the grade, drainage, environmental controls, elevation, and other work and activity on the Project Site, including excavating, grading, moving the surface thereof, and/or other similar work (the “Project”); and

WHEREAS, as a result of the City’s excavation, development and grading at the Project Site, the Tech Park Parties will gain useful and valuable property that the Tech Park Parties intend to utilize for economic development projects; and

WHEREAS, the City is willing to accept the Material on the terms and conditions all as more particularly set forth herein; and

WHEREAS, the Project represents an endeavor within the scope of additional work that the City and the Tech Park Parties currently contemplate to enhance economic development opportunities, including possible construction of an additional access road for ingress and egress to the West Virginia Regional Technology Park property, with the location and design of such road and any other endeavors to be negotiated by the Parties and constructed with the consent and approval of the West Virginia Department of Highways and other applicable regulatory entities, and such endeavors shall be undertaken only to extent of available funding to complete such endeavors.

{R1510061.1}

Page 1 of 15

NOW, THEREFORE, in consideration of the recitals above, the mutual promises and covenants set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Incorporating Recitals.** The recitals above shall constitute part of this Agreement and are hereby incorporated herein by reference.

2. **Grant of License.** The Tech Park Parties hereby grant to the City, and its officers, employees, agents, successors, assigns, and contractors and subcontractors, a non-exclusive license (“License”) to enter onto the Project Site for the purpose of excavating, developing, blasting, grading, and/or removing any portion of the Project Site, as necessary for the City’s completion of the Project in accordance with the terms and conditions of this Agreement.

3. **Term.** This License shall be irrevocable until the completion of the Project as certified by a mutually agreeable engineer. Subject to the provisions of *force majeure* contained herein, the City shall commence the Project by August 1, 2020, and thereafter, shall diligently pursue the Project and continually work under this Agreement to its completion.

4. **Use of License.** The City agrees to use the License solely for the purpose of performing work necessary to the undertaking and completion of the Project. The City further agrees to exercise its rights under the License in compliance with the terms and conditions of this Agreement.

5. **Scope of Project.** The City agrees to complete the Project in accordance with this Agreement, including without limitation, complying with and completing the work set forth in the Grading and Construction Plans, Specifications, and Schedules, attached hereto as **Exhibit A-2** and incorporated herein by reference (the “Plans”). In the event that any overblast is necessary in conjunction with the Work, the City will cause its contractors to follow any such overblast requirements set forth in the Plans.

6. **Tax Increment Financing.** The City and the Tech Park Parties acknowledge that the Project is part of the South Charleston Park Place Project Economic Opportunity Development District (the “EOD District”) plan as approved by the West Virginia Development Office and will be included in the EOD District. The Tech Park Parties acknowledge that it is the intent of the City to use Tax Increment Financing (“TIF”) in this EOD District that is commonly referred to as a sales tax TIF. Additionally, the Tech Park Parties acknowledge that the material from the Project is being used by the City to remediate the former FMC site owned by the South Charleston Building Commission, the South Charleston Park Place Project, for the purposes of creating economic development in South Charleston, and the Tech Park Parties further acknowledge that

this South Charleston Park Place Project is financed by three separate tax-exempt bond issues. Further, the South Charleston Park Place Project is located in a real estate tax TIF district, and the City intends to issue bonds associated with this TIF district as well. The City and the Tech Park Parties intend that all costs associated with the Project shall be included in the TIF plan. The Park Place Parties agree to cooperate in good faith with the City to ensure that TIF funding is available for such purpose. To the extent that this Agreement may contain terms or obligations later determined to be detrimental to pursuing the TIF financing as referenced above, the Tech Park Parties agree to cooperate in good faith and, to the extent reasonable, modify the terms of this Agreement to enable and ensure the availability of TIF financing.

7. **Commencement of Project.** At least fourteen (14) days prior to commencement of the Project, the City shall provide the Tech Park Parties with written notice of its intent to commence. Commencement of the Project shall involve the substantial mobilization of the City's contractors, equipment and labor force to properly complete the Project.

8. **Completion of Project.** The City agrees that the Project will be completed no later than _____ months after commencement, subject to *force majeure* as defined in this Agreement. The parties agree that time is of the essence in completing the Project. For purposes of this Agreement, the completion of the Project shall only occur when the Tech Park receives a copy of a duly executed certificate of substantial completion or similar document, signed by an engineering professional licensed by the State of West Virginia and evidencing that the Project has been substantially completed in accordance with the Plans. Upon completion of the Project, the Tech Park Parties agree to make dedication of the appropriate public road easements applicable to the Access Road in order to vest the City with responsibility therefor, and the City agrees to accept such dedication and responsibility.

9. **Stormwater Retention and Control.** During all phases of the Project, the City shall construct, maintain and clean stormwater retention facilities sufficient to prevent an increase in stormwater discharge on properties adjoining or near the Project Site. Upon completion of the Project, the City shall leave in place (with the intent to create a permanent stormwater facility) any stormwater settlement ponds and related facilities constructed as part of the Project and as identified in the Plans. At the time of completion of the Project, the City shall clean and repair these settlement ponds and any related stormwater handling facilities and/or construct additional features such that the ponds and related facilities can retain and handle one hundred percent (100%) of their design capacity.

10. **Costs of the Project.** All costs and expenses of the Project shall be borne by the City, its contractors, subcontractors, employees, and assigns, without reimbursement from or cost to the Tech Park Parties.

11. **Removal of Equipment.** Within six (6) weeks after completion of the Project, the City shall cause its contractor to remove from the Project Site all of its contractor's personal property, goods, and equipment. On contractor's failure to do so, the Tech Park Parties, by their officers and/or agents, may cause such removal to be made and the property, goods, and equipment to be stored and/or removed at the cost and expense of the City.

12. **Improvements to Property of Tech Park.** All improvements installed by the City's contractor on the Project Site are to revert to the Tech Park Parties upon completion of the Project.

13. **No Warranty of Site Conditions.** The Tech Park Parties make no warranty, either expressed or implied, concerning the suitability of the Project Site in any of the cut or fill areas indicated on the Plans. It shall be the responsibility of the City's contractor to make site evaluations as needed to determine suitability. The City and its contractor accept the Project Site in its current condition, as is, and the Tech Park Parties shall not be liable for any changed site conditions, latent site conditions, or differing site conditions.

14. **No Warranty of Plans.** The Tech Park Parties make no warranty, whether expressed or implied, concerning the vertical or horizontal accuracy of the base mapping exhibited on the Plans and no warranty concerning the accuracy of the Plans.

15. **Quality of Work.** All work on the Project shall be performed in accordance with the Plans and shall be made in a good and workmanlike manner in accordance with all applicable legal requirements and insurance requirements.

16. **Fill Materials.** To the extent that any area of the Project Site will have fill materials added to it, the handling, transporting, placement and compaction of all such fill material shall be performed in compliance with the Plans. The Plans shall include standards for fill materials, including, without limitation, standards as to proctor, density, compaction, lift size and moisture content. The Tech Park Parties shall maintain a reservation of right to periodically test such fill materials to ensure compliance with such standards.

17. **Sediment and Erosion Control and Storm Water Runoff.** All sediment and erosion control and storm water runoff control required for the Project is the sole responsibility of the City and shall be performed at the City's expense in accordance with the Plans and with all laws, rules, regulations, and other promulgations of applicable governmental agencies of competent jurisdiction.

18. **Merchantable Timber.** Subject to the prior approval of the Tech Park Parties, which such approval shall not be unreasonably withheld, conditioned or delayed, a contractor retained by the City will be responsible for determining the salability of any timber on the Project Site that will require removal to facilitate the Project and will advise the Tech Park Parties and the City of the quantity and quality of any merchantable timber. The contractor also will coordinate and manage the sale of any merchantable timber and disposal of any non-merchantable timber. All proceeds from any sale of timber will be remitted by the contractor to the Tech Park Parties. The Tech Park Parties and the City agree to cooperate in order to facilitate the sale of the timber in conjunction with the Project.

19. **Utilities.** The City shall make all appropriate identifications, shall locate, mark and protect all utilities within the Project Site, and shall be responsible for relocating any utilities as reasonably required to complete the Project, including, without limitation, the development of the Access Road. All such relocations shall be subject to the prior written approval of the Tech Park Parties, which approval shall not be unreasonably withheld. The Tech Park Parties shall reasonably cooperate with the City to facilitate such utility relocations. Such cooperation shall include, without limitation, the granting of easements reasonably necessary to facilitate such utility relocations. Any utility damage shall be repaired at the City's expense.

20. **Permitting Fees and Other Fees.** All permitting and fees associated with the execution of the Project, including fees related to excavation sites, shall be the sole responsibility of the City.

21. **Insurance.** Prior to commencement of the Project and throughout the duration of the Project, the City agrees to provide, either directly or through its contractors or subcontractors, liability insurance to the benefit of the Tech Park Parties, their successors, and assigns. With respect to the City's contractors or subcontractors, the City agrees to cause its contractor or subcontractor to execute that certain Right of Entry Agreement in substantially the same form as **Exhibit A-2** attached hereto. The City further agrees to list the Tech Park Parties as additional named insured, and to provide the Tech Park Parties with certificates of insurance evidencing the same. The City shall obtain and maintain insurance in the following types and minimum amounts:

- a. **Commercial General Liability Insurance.** Commercial general liability insurance, which shall include premises operation (including explosion, collapse, and underground coverage), independent contractors, completed operations, and blanket contractual liability on all written contracts, including this Agreement, in the minimum amounts of:
 - i. Five million dollars (\$5,000,000) for personal injury per occurrence;

- ii. Five million dollars (\$5,000,000) for property damage per occurrence; and
 - iii. Five million dollars (\$5,000,000) additional per occurrence for personal injury or property damage arising from blasting or other ultra-hazardous activities.
- b. **Motor Vehicle Coverage.** Motor vehicle coverage, which shall cover claims for damages because of bodily injury or death or any person or property damage arising out of the ownership, maintenance, or use of any motor vehicle, in the minimum amount of one million (\$1,000,000) per occurrence for personal injury or property damage.
- c. **Workers' Compensation Coverage.** Statutory workers' compensation coverage that shall cover claims for damages because of bodily injury, occupational sickness or disease, or death of its employees under any applicable employers' liability law, including claims brought under West Virginia Code §23-4-2 and the decision of the West Virginia Supreme Court in *Mandolidis v. Elkins Industries, Inc.*

Requirements for insurance to be obtained by the contractor regarding coverage and minimum policy limits are set forth in Exhibit C to the Right of Entry Agreement attached hereto as Exhibit A-2 and incorporated herein.

22. **Indemnification.** To the extent permitted by law and available insurance coverage, the City agrees to indemnify, defend, and hold harmless the Tech Parties, their directors, officers, employees, agents, assigns, successors, contractors, and/or subcontractors from and against any and all liabilities, costs, fines, penalties, demands, actions, judgments, expenses, losses, or damages including (but not limited to) attorneys' fees, which the Tech Park Parties may incur, or which may be asserted against the Tech Park Parties, arising or alleged to arise, from or in connection with the performance or breach of this Agreement (including, but not limited to, blasting or other ultra-hazardous activities) by the City, its directors, officers, employees, agents, assigns, successors, contractors, and/or subcontractors.

23. **Standard of Work.** All work to be performed in connection with the Project by or on behalf of the City, its directors, officers, employees, agents, assigns, successors, contractors, and/or subcontractors (1) shall not impair the structural or architectural integrity of any improvement or property situated on or near the Project Site; (2) shall not be undertaken until all required local, state, and federal permits and authorizations have been procured and paid for; (3) shall be performed in a safe, diligent, and workmanlike manner and in compliance with all

applicable laws, ordinances, orders, rules, regulations, and requirements of all governmental authorities of competent jurisdiction; (4) shall be performed by contractors licensed by the State of West Virginia to do the work being undertaken; (5) shall be free from defects in material and workmanship; and (6) shall be diligently prosecuted to completion.

24. **Compliance with Laws.** The City shall be responsible for obtaining and maintaining in full force and effect, at its expense, any permits, licenses, or approvals as may be required from any local, state, or federal authority to permit the exercise of the City right's hereunder, and all work performed by the City shall be performed in compliance with such permits, licenses, and approvals and otherwise in accordance with all applicable laws, codes, ordinances and regulations. The City shall be responsible for compliance with all applicable environmental laws, codes, ordinances, regulations, and permitting requirements, including, but not limited to, the National Pollutant Discharge Elimination System and standards imposed by the Air Quality Division of the West Virginia Department of Environmental Protection.

25. **Notices.** Any notices or communications required by this Agreement shall be in writing and delivered or sent through certified or registered mail to the following:

If the notice is to the City:

Post Office Box 8597
South Charleston, West Virginia 25303
Attn: Mayor Frank Mullens

With a copy to: Moore & Biser PLLC
307 Fifth Avenue
South Charleston, West Virginia 25303
Attn: W. Michael Moore, Esq.

If the notice is to the Technology Park.:
1740 Union Carbide Drive,
South Charleston, West Virginia 25303
Attn: Jennifer Young

With a copy to: Robinson & McElwee PLLC
700 Virginia Street East, Suite 400
Charleston, West Virginia 25301
Attn: Kent J. George, Esq.

If the notice is to the Commission:
1018 Kanawha Boulevard East
Charleston, WV 25301
Attn: Dr. Sarah Armstrong Tucker, Interim Chancellor

With a copy to the Commission's General Counsel
1018 Kanawha Boulevard East, 8th Floor
Charleston, WV 25301
Attn: Kristin A. Boggs, Esq.

{R1510061.1}

Either party may change its address for purposes of this Paragraph by notice to the other in accordance with the foregoing requirements.

26. **No Waiver.** Except as otherwise expressly provided herein, the failure of the Tech Park Parties to exercise any right herein or to insist upon strict performance of any obligation hereunder, irrespective of the length of time for which such failure continues, shall not be a waiver of the Tech Park Parties' right to exercise such right or to demand strict compliance in the future, and no consent or waiver, express or implied, in the performance of any obligation hereunder, shall constitute a consent or waiver of any other breach in performance of the same or of any other obligation hereunder.

27. **Effect of Breach.** Failure by any party to abide by the terms and conditions set forth in this Agreement shall constitute a material breach of the Agreement and the other Parties shall be entitled to such remedies as may be provided by law.

28. **Third Parties.** Each party's rights, duties and obligations under this Agreement shall extend to its respective officers, employees, agents, successors, assigns, and contractors and subcontractors. The City agrees to incorporate the terms and conditions set forth herein into any agreements with third parties, including its contractors and subcontractors, related to the work to be performed as part of the Project.

29. **Relationship of Parties.** The parties hereby acknowledge that the relationship of the parties created by this Agreement is that of licensor and licensee, and that the City is not an independent contractor, joint venturer, or partner of the Tech Park Parties. The work performed to complete the Project is for the primary benefit of the City.

30. **Captions.** The captions and headings of this Agreement are for convenience of the parties and for context and reference only and in no way define, limit, or describe the scope or intent of this Agreement.

31. **Force Majeure.** In the event either party to this Agreement shall be delayed or hindered in or prevented from the performance of any act required under this Agreement by reason of acts of God (including inclement weather which prevents normal construction work), strikes, lockouts, labor troubles, failure of power, riots, insurrection, epidemic, pandemic, state of emergency, war or other reason of a like nature not the fault of or reasonably within the control of the party delayed in performing such act shall be extended for a period equivalent to the duration of the hindrance. In no event shall financial inability or acts or omissions within the control of the party seeking an excuse or extension be a cause for excuse or extension hereunder. If any event

covered by this Paragraph shall occur, the time period of the prohibition on condemnation set forth in the Agreement shall be extended by the duration of said event.

32. **Severability.** If any term or provision of this Agreement or applications thereof to any person, agency, entity, or circumstances shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement, or the application of such terms or provision to persons, agencies, entities, or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each and every term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

33. **West Virginia Law Applies.** This Agreement shall be construed under and in accordance with the laws of the State of West Virginia.

34. **Dispute Resolution.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator may be entered in any Court having jurisdiction thereof.

35. **Successors and Assigns.** All terms of this Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the parties hereto and their respective administrators, successors and assigns.

36. **Amendments.** This Agreement may be amended only by a written instrument executed by all of the parties hereto.

37. **Entire Agreement.** This Agreement and the Right of Entry Agreement attached hereto as **Exhibit A-2** and incorporated in its entirety constitute the full and complete agreement of the parties hereto with respect to the subject matter hereof and supersede all prior agreements or understanding with respect to such subject matter, whether written or oral.

38. **Further Assurances.** The parties hereto agree that they will cooperate with each other and will execute and deliver, or cause to be delivered, all such other instruments, and will take all such other actions, as either party hereto may reasonably request from time to time in order to effectuate the provisions and purposes hereof.

39. **Counterparts.** This Agreement may be executed in several counterparts, each of which will be deemed to be an original.

40. **Representations and Warranties.** Each party represents to the other party in order to induce such other party to enter into this Agreement as follows:

- a. Neither the execution and delivery of this Agreement nor the incurrance of the obligations herein set forth, nor the consummation of the transactions herein contemplated, nor compliance with the terms of this Agreement will conflict with or result in a breach of any of the terms, conditions or provisions of, or constitute a default under, any bond, note or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan agreement, lease or other agreement or instrument to which either is a party or by which either's property, or any portion thereof, is bound or with either party's charter or bylaws;
- b. Each party has the legal power, right and authority to consummate the transactions contemplated hereby; and
- c. All action required to be taken by each party to consummate the transactions contemplated hereby have been taken by the respective party, and upon its execution, this Agreement will be binding and enforceable against each party in accordance with its terms.

IN WITNESS WHEREOF, the parties have executed this License and Work Agreement to be effective as of the date first written above.

[REST OF THIS PAGE INTENTIONALLY LEFT BLANK]

**WEST VIRGINIA REGIONAL
TECHNOLOGY PARK CORP.**

By: _____
Jennifer Young

Its: _____
Interim Executive Director

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this _____ day of April 2020, by Jennifer Young, as Interim Executive Director of West Virginia Regional Technology Park Corp.

NOTARY PUBLIC

**WEST VIRGINIA HIGHER EDUCATION
POLICY COMMISSION**

By: _____
Dr. Sarah Armstrong Tucker

Its: _____
Interim Chancellor

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this _____ day of April 2020, by Dr. Sarah Armstrong Tucker, as Interim Chancellor of West Virginia Higher Education Policy Commission.

NOTARY PUBLIC

CITY OF SOUTH CHARLESTON

By: _____
Frank A. Mullens, Jr.

Its: _____
Mayor

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this ____ day of April 2020, by Frank A. Mullens, Jr., as Mayor of the City of South Charleston.

NOTARY PUBLIC

This instrument was prepared by Kent J. George, Esq., ROBINSON & MCELWEE PLLC, Post Office Box 1791, Charleston, WV 25326

EXHIBIT A
MAP OF PROJECT SITE

DRAFT

EXHIBIT A-1
THE PLANS

DRAFT

EXHIBIT A-2
RIGHT OF ENTRY AGREEMENT

DRAFT

RIGHT-OF-ENTRY AGREEMENT

This **RIGHT-OF-ENTRY AGREEMENT** (the “Agreement”) is entered into this _____ day of _____ 2020, by and between the WV Regional Technology Park Corp., a West Virginia not for profit corporation and the Higher Education Policy Commission, an agency of State government (collectively, “Grantor”); the City of South Charleston, a West Virginia municipal corporation (“City”); and [INSERT NAME OF CONTRACTOR, a _____] (“Grantee”).

WHEREAS, Grantor manages certain property, set forth on that certain map attached hereto as **Exhibit A** and incorporated herein by reference, that is located within the West Virginia Regional Technology Park (the “Project Site”); and

WHEREAS, pursuant to that certain License and Work Agreement (“Work Agreement”) entered into between *inter alia* Grantor and the City, certain plans and specifications have been mutually agreed upon by the City and Grantor, with respect to the grade, drainage, environmental controls, elevation, and other work and activity on the Project Site, and Grantor has contracted with the City to allow the City to excavate, develop and grade the Project Site and to remove certain earth and rock material from a borrow area located on the Project Site (the “Work”); and

WHEREAS, the City has engaged Grantee to provide and perform the Work on the Project Site; and

WHEREAS, Grantor seeks to provide Grantee the right to enter onto the Project Site for the purpose of performing the Work on the Project Site, subject the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of these premises, the mutual promises herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do agree as follows:

1. Basic Grant. Grantor does hereby grant unto Grantee a nonexclusive limited right-of-entry (“Right-of-Entry”) onto the Project Site for the sole purpose of performing the Work. This Right-of-Entry is limited solely to the area immediately surrounding the Project Site. Grantee shall be solely responsible for the provision of equipment, resources, utilities, and personal facilities. The Right-of-Entry is subject to Grantee’s compliance with all terms and conditions herein. This Agreement and the Right-of-Entry created thereby shall not (1) give the Grantee the right to extract any natural resources owned by Grantor, with the exception of any marketable timber as set forth more fully in the Work Agreement; (2) affect title to any property interest in any surface and/or mineral estate; and (3) create any easement, right of way, or leasehold of any kind or nature.

2. Grantor’s Use. The grant of the Right-of-Entry shall not exclude Grantor from enjoying and using the Project Site.

3. Indemnity. Grantor, City and Grantee hereby agree to the indemnification provisions set forth in **Exhibit B** attached hereto and made a part hereof.

4. Insurance. Grantor, City and Grantee hereby agree to the insurance provisions set forth in **Exhibit C** attached hereto and made a part hereof.

5. Termination. The Right-of-Entry created by this Agreement shall last only as long as is reasonably necessary for Grantee to perform the Work. The Right-of-Entry shall automatically terminate if Grantee does not undertake the Work within sixty (60) days of the effective date of this Agreement. Notwithstanding anything in this Agreement to the contrary and

{R1510061.1}

subject to the provisions of *force majeure* contained herein, the Right-of-Entry created by this Agreement shall terminate upon completion of the Work as certified by an engineer mutually agreed upon by the Grantor and the City.

6. Costs and Expenses. Grantee shall solely and exclusively bear all costs and expenses incurred in connection with this Agreement. Furthermore, to the extent that Grantor incurs any costs or expenses beyond overhead or infrastructure costs such as electricity, water or sewer fees, Grantor shall advise Grantee and the City of such additional costs or expenses within ten (10) business days of receiving notice of such additional costs or expenses and the Parties shall negotiate in good faith to reimburse the Grantor for such additional costs or expenses.

7. No Assignment. This grant of a Right-of-Entry shall bind and inure to the benefit of the parties hereto and to their respective successors and assigns. Grantee has no right to and shall not assign, transfer (including by operation of law, consolidation, merger, or otherwise), sublet, encumber, hypothecate, pledge or contract any of its interest in this Right-of-Entry without the prior written consent of Grantor. This provision does not limit the right of Grantee to retain third parties to assist with the activities described herein, which right Grantor specifically bestows upon Grantee.

8. No Waiver. Any failure by a party to assert its rights or remedies for any breach under this Agreement shall not affect the party's rights or remedies with respect to any subsequent breach and shall not be construed as a waiver of the party's right to assert and enforce its/his rights or remedies for any subsequent breach.

9. Severability. Any provision of this Agreement which is in conflict with any applicable statute, rule, or law shall be deemed, if possible, to be modified or altered to conform thereof or, if not

possible, to be omitted herefrom. The invalidity of any provision contained herein shall not affect the force and effect of the remaining valid provisions of this Agreement.

10. Relationship Between the Parties. Nothing in this Agreement is intended nor shall be construed to create an employer/employee relationship, a joint venture, or partnership relationship or to allow Grantor to exercise control or direction over the manner or method by which Grantee performs hereunder.

11. Entire Agreement. This Agreement is binding upon the parties hereto and, together with the License and Work Agreement executed contemporaneously herewith, constitutes the entire agreement between the parties hereto relating to the Project Site, and supersedes any prior understanding or agreements between the parties hereto, either oral or written. Except as expressly set forth herein, neither this Agreement nor any of its provisions may be released, waived, modified or amended except by a subsequent written agreement duly executed by all parties hereto.

12. Governing Law. This Agreement shall be construed, and the legal relations hereunder of the parties bound hereby will be determined, according to the internal laws of the State of West Virginia.

13. Force Majeure. In the event either party to this Agreement shall be delayed or hindered in or prevented from the performance of any act required under this Agreement by reason of acts of God (including inclement weather which prevents normal construction work), strikes, lockouts, labor troubles, failure of power, riots, insurrection, epidemic, pandemic, state of emergency, war or other reason of a like nature not the fault of or reasonably within the control of the party delayed in performing such act shall be extended for a period equivalent to the duration of the hindrance. In no event shall financial inability or acts or omissions within the control of the party seeking an excuse or extension be a cause for excuse or extension hereunder. If any event

covered by this Paragraph shall occur, the time period of the prohibition on condemnation set forth in the Agreement shall be extended by the duration of said event.

14. Headings. The captions preceding the rest of the paragraphs of this Agreement are inserted only for convenience of reference and shall not constitute a part of this Agreement, nor shall they in any way affect its meaning, construction or effect.

15. Counterparts. This Agreement may be executed in several counterparts, each of which will be deemed to be an original.

16. Notice. Any notice permitted or required by this Agreement shall be delivered by certified mail, postage prepaid, return receipt requested, to the following addresses:

If to Grantor:

WV Regional Technology Park Corp.
1740 Union Carbide Drive
South Charleston, West Virginia 25303
Attn: Jennifer Young
With a copy to: Robinson & McElwee PLLC
700 Virginia Street East, Suite 400
Charleston, West Virginia 25301
Attn: Kent J. George, Esq.

West Virginia Higher Education Policy Commission
1018 Kanawha Boulevard East
Charleston, West Virginia 25301
Attn: Dr. Sarah Armstrong Tucker, Interim Chancellor
With a copy to the Commission's General Counsel
1018 Kanawha Boulevard East, 8th Floor
Charleston, West Virginia 25301
Attn: Kristin A. Boggs, Esq.

If to the City:

Post Office Box 8597
South Charleston, West Virginia 25303
Attn: Mayor Frank Mullens

{R1510061.1}

Page 5 of 13

With a copy to: Moore & Biser PLLC
307 Fifth Avenue
South Charleston, West Virginia 25303
Attn: W. Michael Moore, Esq.

If to Grantee:

[REST OF THIS PAGE INTENTIONALLY LEFT BLANK]

DRAFT

EXECUTED and made effective as of the day and year first above written:

**WV REGIONAL TECHNOLOGY PARK
CORP.**

By: _____
Jennifer Young

Its: _____
Interim Executive Director

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this _____ day of _____
2020, by Jennifer Young, as Interim Executive Director of West Virginia Regional Technology
Park Corp.

NOTARY PUBLIC

**WEST VIRGINIA HIGHER EDUCATION
POLICY COMMISSION**

By: _____
Dr. Sarah Armstrong Tucker

Its: _____
Interim Chancellor

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this _____ day of _____
2020, by Dr. Sarah Armstrong Tucker, as Interim Chancellor of West Virginia Higher Education
Policy Commission.

NOTARY PUBLIC

GRANTEE:

By: _____

Its: _____

STATE OF _____;
COUNTY OF _____, to wit

This instrument was acknowledged before me this _____ day of _____ 2020, by _____, as authorized representative of _____, Grantee herein.

NOTARY PUBLIC

CITY OF SOUTH CHARLESTON

By: _____
Frank A. Mullens, Jr.

Its: _____
Mayor

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to wit

This instrument was acknowledged before me this ___ day of _____ 2020, by Frank A. Mullens, Jr., as Mayor of the City of South Charleston.

NOTARY PUBLIC

**EXHIBIT A
MAP OF PROJECT SITE**

DRAFT

EXHIBIT B INDEMNIFICATION

1.1 Grantee agrees to indemnify and save harmless Grantor and its board members, officers, and employees against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including cost of defense, settlement and reasonable attorney fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out as a result of bodily injuries (including death) to any person or damage (including loss of use) to any property occurring to, or caused in whole or in part by, Grantee (or any of his employees), any of his subcontractors (or any employee thereof), or any person, firm or corporation (or any employee thereof) directly or indirectly employed or engaged by either Grantee or any of his subcontractors, except to the extent such injury or damage is caused by the negligence of Grantor or its board members, officers or employees. Upon request, Grantee shall promptly defend any such demand, claim, cause of action or suit against which contractor is obliged, by the preceding sentence, to indemnify. In the case of joint negligence on the part of the Parties hereto (including their respective directors, board members, officers and employees), liability, losses, damages, costs and expenses on account of bodily injury or property damage caused thereby shall be borne by each party in proportion to that party's respective degree of negligence in causing such injury, damage, liability, losses, damages, costs and expenses.

1.2 Grantee agrees to make reimbursement for any damage, including loss of use, to Grantor's existing property or property being installed which may arise out of or in connection with the Work or from operations under or in connection with the Contract, and is caused, in whole or in part, by Grantee (or any of his employees), any of his subcontractors (or any employee thereof), or any person, firm or corporation (or any employee thereof) directly or indirectly employed or engaged by either Grantee or any of his subcontractors, except to the extent the same may be caused by, the negligence of Grantor, its directors, officers, or employees.

1.3 Grantor agrees that Grantee shall not be liable to Grantor under this Article for liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses arising out of bodily injury (including death) to any person or damage (including loss of use) to any property (other than Grantee's property) caused by or resulting from the sole negligence of Grantor or its board members, officers and employees.

1.4 Any damage to or loss of any property, tools or equipment of Grantee or any of his subcontractors, regardless of the cause or reason for said damage or loss and regardless of whether same may arise from or as a result of the sole or concurrent negligence of Grantor, shall be the loss of Grantee, his underwriters, or insurers, or, as the case may be, the loss of his subcontractor and said subcontractor's underwriters or insurers. Grantee hereby expressly relieves Grantor and its underwriters or insurers from any claim, liability or responsibility for such damage or loss and waives his and his underwriter's and insurer's right or rights of recovery, if any, against Grantor. Grantee hereby agrees that any insurance policy covering said property, tools and equipment of Grantee will be suitably endorsed to provide for this waiver of right of recovery. Further, Grantee hereby covenants and agrees to obtain from each of his subcontractors a written commitment whereby said subcontractor thereby expressly relieves Grantor and its underwriters and insurers from any claim, liability or responsibility for any such damage to or loss of any of said

subcontractor's property, tools and equipment and whereby said subcontractor waives his and his underwriter's and insurer's right or rights of recovery against Grantor. Grantee further agrees to require of each of his subcontractors that any insurance policy covering said property, tools or equipment of said subcontractor shall be suitably endorsed to provide for this waiver of right of recovery.

DRAFT

EXHIBIT C INSURANCE

1.1 Grantee shall take out and maintain, at its own expense throughout the progress of the Work, insurance as described in the following subparagraphs. Grantee shall secure from its workers' compensation carrier a waiver of subrogation in favor of Grantor, its board members, officers and employees.

1.1.1 Workers' Compensation Insurance. Statutory workers' compensation coverage that shall cover claims for damages because of bodily injury, occupational sickness or disease, or death of its employees under any applicable employers' liability law, including claims brought under West Virginia Code §23-4-2 and the decision of the West Virginia Supreme Court in *Mandolidis v. Elkins Industries, Inc.*

1.1.2 Employer's Liability Insurance. Such insurance shall be provided for bodily injury by accident or disease, including death at any time resulting there from, in amounts not less than:

\$1,000,000 each accident (bodily injury by accident);
\$1,000,000 each employee (bodily injury by disease); and
\$3,000,000 policy limit (bodily injury by disease).

1.1.3 Liability Insurance (Except Automobile Liability). Such insurance shall be in a form providing coverage not less than that of the Comprehensive or Commercial General Liability Insurance Policy ("occurrence type" coverage) and insuring the Grantee and all subcontractors. Such insurance shall include coverage for all operations exposures including coverage for explosion, collapse and underground damage, independent contractors liability, products liability, completed operations liability, contractual liability, and personal injury coverage. Grantee agrees to continue to maintain such completed operations coverage for two (2) years following the date of Grantor's final payment to Grantee for the Work. Such insurance shall include premises operation (including explosion, collapse, and underground coverage), independent contractors, completed operations, and blanket contractual liability on all written contracts, including this Agreement, in the minimum amounts of:

- a) Five million dollars (\$5,000,000) for personal injury per occurrence;
- b) Five million dollars (\$5,000,000) for property damage per occurrence; and
- c) Five million dollars (\$5,000,000) additional per occurrence for personal injury or property damage arising from blasting or other ultra-hazardous activities.

1.1.4 Automobile Liability Insurance. Such insurance shall cover all owned, non-owned, hired and rented automotive equipment used in the performance of the Work. It shall cover claims for damages because of bodily injury or death or any person or property damage arising out of the ownership, maintenance, or use of any motor vehicle, in the minimum amount of one million (\$1,000,000) per occurrence for personal injury or property damage.

1.1.5 Umbrella Liability Insurance. Such insurance shall provide excess coverage over the underlying primary insurance required by Subparagraphs 1.1.2 through 1.1.4 hereof in an amount not less than \$10,000,000 per occurrence and annual aggregate, combined single limit.

1.1.6 Equipment Floater Insurance. Such insurance shall protect all mobile construction equipment used by Grantee in the performance of the Work against physical damage.

1.2 The insurance policies providing the liability coverages identified in Subparagraphs 1.1.3 and 1.1.5 shall be endorsed to include Grantor as an additional insured; such insurance shall be primary to any similar coverage maintained by any additional insured; and such insurance shall be occurrence policies, not “claims made” policies. Grantee shall provide Grantor with certificates of insurance evidencing all coverages in effect as required by the Agreement.

1.3 Grantee shall not begin any of the Work at the Site until it has obtained all the insurance required by Paragraphs 1.1 and 1.2 hereof and certificates evidencing such coverage have been furnishing to and approved by Grantee’s authorized representative. If requested, Grantee shall provide to Grantor copies of the insurance policies providing the coverages required herein.

1.4 Grantee shall make such arrangements as are necessary to ensure that no reduction, cancellation or expiration of any policy of insurance providing the coverages required herein shall become effective until thirty (30) days after the date written notice thereof is actually mailed to Grantor at the address and to the attention of the individual shown in Article 15 hereof.

1.5 All policies of insurance providing the coverages required by Paragraphs 1.1 and 1.2 hereof shall be carried with insurance companies authorized to do business in West Virginia and in such companies which hold a current Policyholder’s Alphabetic and Financial Size Category Rating of not less than A XIII according to Best’s Insurance Reports.

1.6 Grantee shall assure that each of its subcontractors has and maintains insurance coverages similar to those herein required of Grantee.

1.7 Grantor reserves the right to increase the insurance required by the above paragraphs of this Article 1.0 (as to dollar limits, scope and/or duration of coverage) should the Work or its progress, or information developed during its progress, warrant such increase in Grantor’s sole judgment. Grantee agrees to obtain such increase in coverage when requested by Grantor, provided that such increase in coverage is commercially obtainable. Grantor shall reimburse Grantee for any costs associated with the requested increase in insurance coverage within ten (10) business days of presentation of an invoice to Grantor by Grantee. is reimbursed by Grantor to Grantee.

1.8 Grantee shall provide Grantor with certificates of insurance evidencing all coverages in effect as required by the Agreement.

**West Virginia Higher Education Policy Commission
Special Meeting of May 18, 2020**

ITEM: Approval of Presidential Compensation

INSTITUTION: West Virginia State University

RECOMMENDED RESOLUTION: *Resolved*, That the West Virginia Higher Education Policy Commission approves the compensation of Interim President R. Charles Byers as proposed by the West Virginia State University Board of Governors.

STAFF MEMBER: Kristin Boggs

BACKGROUND:

Pursuant to West Virginia Code §18B-1B-4(a)(18), the Commission must approve the total compensation package from all sources for presidents of institutions under its jurisdiction proposed by institutional governing boards.

At its meeting on May 8, 2020, the West Virginia State University Board of Governors approved, subject to the approval of the Commission, the total compensation package for Interim President Byers, as set forth in the attached appointment letter/contract.

It is recommended that the Commission approve Dr. Byers' compensation package as presented. Dr. Byers was confirmed as Interim President by the Commission during the meeting on April 26, 2020.

**West Virginia Higher Education Policy Commission
Special Meeting of May 18, 2020**

ITEM: Approval of Appointments to the Chancellor Search Committee

INSTITUTIONS: All

RECOMMENDED RESOLUTION: *Resolved*, That the West Virginia Higher Education Policy Commission approves the appointments to the Chancellor Search Committee.

STAFF MEMBER: Matt Turner

BACKGROUND:

During the April 17, 2020 meeting of the Commission, the Chancellor search process was approved and a national search has been implemented.

The individuals recommended to serve as members of the Chancellor Search Committee will be announced during the meeting.