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City of Missoula
435 Ryman St
Missoula, MT 59802

**ENCROACHMENT EASEMENT FOR SIDE YARD IMPROVEMENTS ON
PUBLIC PARKLAND**

THIS ENCROACHMENT EASEMENT is entered into effective as of the ____ day of December, 2021 ("Effective Date"), between the **City of Missoula**, a municipal corporation pursuant to the laws of the State of Montana ("Grantor") and Brian S. Weston, who currently resides at 2415 South Hills Drive, Missoula, MT 59803 ("Grantee").

RECITALS

- A. Grantor is the owner of real property described as Peery Park, an approximately 7.7 acre public park dedicated in 1977 with the Meadowlark Acres subdivision (hereinafter "the Park") as depicted in the attached Exhibit A;
- B. Grantee is the owner of real property legally described as Lot 13 of Meadowlark Acres subdivision known as 2415 South Hills Drive, Missoula, MT 59803 (hereinafter "the Property"), which is adjacent to and west of the Park.
- C. On November 23, 2015 the Missoula City Council passed Resolution # 8024 entitled "A Resolution of the Missoula City Council Adopting Policy and Criteria Including Exhibit A, to Prevent Future Parkland Encroachments and Address current Parkland Encroachments throughout the City of Missoula."
- D. In May, 2021, City completed a boundary survey of Peery Park, which identified encroachments owned by the Permittee into the City's Park property, as depicted in the attached Exhibit B;
- E. Grantee is currently residing in the house located on the Property, which they purchased in 2012. In 1998, a prior property owner secured a City building permit (Permit # B98-1699) to construct a garage on the Property, but did not secure the required paving permit for the associated driveway, as depicted in the attached Exhibit C. At that time, the prior homeowner constructed a portion of the concrete driveway, entire wood deck, concrete wall, and entire gravel parking pad (totaling 2,101 sq ft) were constructed onto the Park, as depicted in the attached Exhibit D. These encroachments into the Park have remained for over 20 years and function as part of the side yard and to access the properly permitted garage. Recently, the Grantee added additional landscape improvements, including seeded lawn with topsoil to the east of the concrete driveway, as depicted in the attached Exhibit B
- F. Grantee desires to continue permanently occupying a portion of the encroached area into the Park with the driveway and deck improvements to allow access to their garage and backyard from South Hills Dr.

In consideration of the agreements hereinafter recited, it is agreed as follows:

1. **Grant and Purpose of Encroachment Easement.** Grantor, grants and conveys to the Grantee a permanent encroachment easement for the paved driveway and wood deck upon the northern portion of the Park, an approximate area of .028 acres (1,300 sq. ft.), as shown in Exhibit E (hereinafter “Easement Area”) in exchange for payment as defined in Resolution # 8024. This payment consists of a variance processing fee of \$495.00, and permit issuance fee calculated as \$500.00 plus the current fair-market property value estimate for the area of encroachment for a total of \$3,635.63 (see Section 2 below for calculation of fair-market value).

The eastern edge of the paved driveway denotes the edge of the allowed development covered by this easement. This easement allows Grantee, his invitees, successors and assigns, the right to continue accessing and using the Easement Area as their front yard exclusively. It is his right to prohibit and exclude public use of the Easement Area during the term of the encroachment easement. Funds from the issuance of this easement will be directly used to improve Peery Park (see Section 3 below for discussion of proposed improvements).

2. **Calculation of Current Fair Market Value for Encroachment Area.** Per square foot value for the proposed encroachment was calculated from a recent assessment (August 2020) of an unimproved, undevelopable 1,600 sq. ft. City of Missoula owned parcel approximately ½ mile south of 2415 South Hills Drive, which estimate the value of that property at \$1.5625 / sq. ft. (Exhibit F). To assess the change in property values in the surrounding neighborhood between August 2020 and September 2021, value estimates for ten randomly selected homes in the surrounding neighborhood were compared between those two dates, with prices increasing approximately 30% during that period. To account for increased property values, we increased the assessed per sq. ft. value 30% for a current value of \$2.03125 / sq. ft. The 1,300 sq. ft. encroachment would thereby be valued at \$2,640.63 for a total permit fee of \$3,140.63.
3. **Use of Permit Funds for Cost Recovery and Park Improvements.** The variance processing fee will be utilized for cost recovery of staff time used to inspect, negotiate, and process homeowner variance request. The encroachment permit issuance fee (total \$3,140.63) will only be utilized for the direct improvement and management of Peery Park, through construction, improvement, and management of recreation and natural resources within the park. These improvements will potentially consist of new trail construction, trail resurfacing, and installation or improvement of informational and navigational signage, and vegetation management and maintenance. Proposed improvements will improve access for many neighbors to the Peery Park trail system, rather than needing to travel to adjacent streets for access. Exhibit G shows potential additional trail construction and improvements to increase neighborhood connections to Peery Park.
4. **Term of the Encroachment Easement.** This encroachment easement is permanent and runs with the land unless and until the encroachments are removed and/or abandoned by the property owner.
5. **Conditions of the Encroachment Easement.** The Grantee shall only use the Easement Area as his side yard and driveway with the existing concrete driveway, concrete block wall, and wood deck improvements. Grantee may resurface or reconstruct the driveway or deck only within their existing footprint. Structures are prohibited within the Easement Area.
6. **Cessation of Management of Areas not Included in Encroachment Easement.** Grantee and his assigns are to immediately cease any and all management of areas of Peery Park not included within the scope of the authorized encroachment

easement. Grantor will coordinate with Grantee on removal of materials on this portion of Peery Park.

7. **City Saved Harmless from Claims.** Grantee or his assigns agree to indemnify and protect the City of Missoula and defend and save it harmless from all claims, actions or damage of every kind and description which may accrue to, or be suffered by, a person or persons, corporations or property by reason of being within the Easement Area, and in case any suit or action is brought against the City and arising out of, or by reason of any causes related to the encroachment easement, the Grantee or his assigns, will, upon notice to them of the commencement of such action, defend the same at their sole cost and expense and satisfy any judgment which may be rendered against the City in any such suit or action.
8. **Maintenance at Expense of Grantee.** Grantee shall maintain, at his sole expense, the concrete driveway, wood deck, and other such improvements that are within the Easement Area.
9. **City Not Liable for Damage to Encroachment Area Installations.** In accepting this easement, Grantee agrees that any damage or injury done to any improvements within the Easement Area by any person or thing shall be at the sole expense of the Grantee to repair or replace and the City shall not be liable for any such damage or injury.
10. **Binding Effect.** This encroachment easement shall be recorded at the Missoula County Clerk and Recorder's Office and shall be binding on all heirs, executors, personal representatives, assigns and successors.
11. **Entire Agreement – Amendments.** The entire agreement of the parties is set forth in this encroachment easement and the parties are not bound by any agreements, understandings, conditions, or inducements otherwise than are expressly set forth and stipulated hereunder. No change, alteration, amendment, modification or waiver of any of the terms or provisions hereof shall be valid unless the same is in writing and signed by the parties.

IN WITNESS WHEREOF, the parties hereto have executed this encroachment easement, to be effective as of the date and year first above written.

GRANTOR:

GRANTEE:

City of Missoula

By: _____
John Engen, Mayor

Brian S. Weston

ATTEST: _____
Martha Rehbein, City Clerk

(seal)

State of Montana)
) ss.
County of Missoula)

The foregoing instrument was acknowledged before me this _____ day of December, 2021 by Brian S. Weston.

Notary Public for the State of Montana
Residing at:

My commission expires:

(seal)