

## **ROAD USE AGREEMENT**

This Road Use Agreement is entered into this \_\_\_ day of \_\_\_\_\_, 20\_\_ (“Effective Date”) between the Village of Endicott, having its offices at 1009 East Main St, Endicott, NY 13760 (hereinafter referred to as the “Municipality”) and American Horizons Group, LLC, having offices at 1550 Vestal Parkway East, Vestal, NY 13850 (hereinafter referred to as the “Company”). The Company and the Municipality are each a “Party” and referenced together as the “Parties”.

### **RECITALS**

WHEREAS, the Company has applied for a Planned Unit Development project to be located at 105 ½ Skye Island Drive, Endicott, NY, as set forth in the application and plans submitted to the Municipality (hereinafter referred to as the “Project”); and

WHEREAS, the Company intends to engage agents, vendors, contractors, subcontractors, and/or haulers (hereinafter “Contractors”) to perform construction work for the Project; and

WHEREAS, the Company/Contractors will necessarily need to traverse the Municipality’s roads, bridges, culverts, rights-of-way or easements owned or maintained by the Municipality (collectively “Roads”) with heavy machinery and vehicles, including trucks, construction machinery, equipment and other related items; and

WHEREAS, the Company acknowledges that such machinery and trucks may unintentionally cause damage to said Roads; and

WHEREAS, the Municipality seeks guarantees and assurances from the Company that the Company will pay and otherwise indemnify the Municipality for Damage (as defined herein) to the Roads arising from construction of the Project; and

WHEREAS, the Company recognizes that it is responsible to repair any Damage to Roads that it may cause as a result of the Project construction activities as set forth herein.

NOW, THEREFORE, in consideration of these promises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Municipality, each intending to be legally bound, agree as follows:

### **AGREEMENT**

#### **1. Road Route**

a. The route to the Project site within the Municipality is hereby established as follows: McKinley Avenue to Main Street to Nanticoke Avenue to E. Franklin Street to Skye Island Drive (hereinafter “Road Route”). The Company/Contractors shall only use the Road Route when going to and from the Project site.

b. The Parties recognize that, due to unforeseen circumstances, other Roads may become necessary to use to access the Project site. Should any Roads not listed in the Road Route be expected to be used by Company/Contractors, at least 10 days prior to the commencement of such use, the Company shall notify the Municipality in writing. The Company/Contractors may only use alternate routes/roads if authorized in writing by the Municipality and if the Company conducts a Road Level of Service Analysis, as required by the Municipality.

## **2. Road Level of Service Analysis**

The Company has prepared, at its own cost and expense, a Road Level of Service Analysis, attached hereto as Exhibit A, on Municipal Roads located along the Road Route. The Road Level of Service Analysis may be used as evidence, but not the exclusive evidence, of the baseline condition when determining Road Damage, as set forth in Section 3. In addition, prior to the commencement of construction activities on the Project, the Company will prepare a GPS encoded video to document the visual condition of the Roads immediately prior to start of construction, and interim weekly videos to confirm ongoing Road condition. The videos shall be shared with the Village Engineer at his/her request.

Any changes to the Road Route during construction shall require the Company to prepare a supplemental Road Level of Service Analysis and GPS encoded video on the proposed new Road Route, at its own cost and expense.

## **3. Road Damage.**

a. The terms "Damage" or "Damaged" as used in this Agreement shall mean injuries to Roads caused by Company/Contractors consisting of base failure, alligator cracking, greater than 40% chip seal surface loss, vehicle track marks, an increase in rutting or asphalt of more than ½ inch in depth in the wheel path, shoulder cracking, pot holes, raveling, wheel path in ditch lines, and greater than 40% aggregate surface loss on a dirt/gravel road. "Damage" or "Damaged" shall not include injuries to the Roads that (1) were present prior to the Company's/Contractor's use thereof or that were present during preconstruction documentation; (2) occurred after repairs to the Road were made, at a time Company's/Contractor's vehicles were not in use on the Road and that were not a result of Company/Contractor's defective repair work; or (3) ordinary wear and tear.

b. The Company shall be liable for any and all Damage to Roads caused by Company/Contractors in accordance with the procedures set forth herein. If any Damage occurs to Roads, Company shall notify the Municipality within 48 hours of such Damage in writing detailing the Damage. If the Municipality discovers said Damage, the Municipality shall submit a written notice to the Company detailing the Damage. The Company shall, at the request of the Municipality, undertake immediate repairs to the Damaged Roads, including retention of necessary contractors and subcontractors, and shall coordinate such activities with the Municipality. All such repairs shall be in accordance with a schedule approved by the Municipal Engineer and such repairs shall be subject to review, inspection and approval by the Municipality. Such repairs shall be at the sole cost and expense of the Company.

c. If Damage to Roads results in an immediate danger to the public, as determined by the Municipal Engineer, then the Municipality may undertake immediate emergency repairs to said Roads. Immediate danger to the public includes any condition that, in the opinion of the Municipal Engineer, creates a safety risk if not repaired within the next 10 days. Should the Municipality undertake such emergency repairs, the Company shall fully reimburse the Municipality for the reasonable repair costs within 30 days of receipt of an invoice for such repairs.

d. The manner of repair of any Road Damage described in this Agreement shall be at the reasonable discretion of the Municipal Engineer consistent with the Road standards that are otherwise applicable throughout the Municipality for the type of Road involved. Notwithstanding anything in this Agreement to the contrary, in no event shall the Company be required to pay for, or to install itself, road base materials or surfaces to a condition better than existed prior to the alleged Damage caused by the Company/Contractors.

e. Company warrants that all repairs to Damaged Roads that it completes under this Agreement (but not those repairs completed solely by the Municipality) shall withstand and sustain normal wear and tear for a period of 1 year from the initial repair.

#### **4. Additional Company Responsibilities.**

a. Company agrees that it shall be responsible for disposing of all debris, garbage and waste related to the Project that is left upon the Road Route by the Company/Contractors.

b. Company shall be responsible for obtaining any and all applicable approvals, permits and/or orders related to the Project.

c. Company/Contractors shall not unreasonably block, obstruct or interfere with the flow of traffic along the Road Route. Company agrees that any proposed temporary Road closings will be properly coordinated in advance with the Municipality and/or State.

d. Company shall require that each and every employee, agent, vendor, contractor, subcontractor, and hauler will comply with the terms and conditions of this Agreement and the Company shall be responsible for each and every employee, agent, vendor, contractor, subcontractor, and hauler that fails to comply with the terms of this Agreement.

e. The Company shall reimburse the Municipality for professional engineering fees that the Municipality reasonably incurs as a result of the review of any Road Level of Service Analysis and inspection of alleged Road Damage related to this Agreement within 30 days of the Municipality's submission of an invoice to the Company.

#### **5. Cure.**

In the event the Municipality believes a default in the obligations of the Company under this Agreement has occurred, the Municipality shall give the Company written notice of such

alleged default and the Company shall have five days from the receipt of such notice to cure such alleged default, except that should the nature of the alleged default be such that it cannot be reasonably cured within such five days, the Company need only commence cure activities within such five days and shall have a reasonable amount of time after the expiration of the five day period to cure such alleged default.

## **6. Term.**

The Term of this Agreement shall be from the Effective Date until substantial completion of the Project.

## **7. Dispute Resolution**

Any litigation related to this Agreement shall be initiated before a court of competent jurisdiction located in the State of New York. The parties hereby agree that any such litigation shall be venued in Broome County.

## **8. Bonding**

a. Prior to the commencement of construction of the Project and use of the Roads by the Company/Contractors, Company shall obtain and deliver to the Municipality a bond in the amount of Five Hundred Thousand Dollars (\$500,000.00). Such Bond shall be executed by a reliable bonding or insurance institution authorized to do business in the State of New York and reasonably acceptable to the Municipality.

b. Company shall be listed as principal with the instrument benefiting the Municipality, as obligee and shall be conditioned that the Company will comply with the terms and conditions of this Agreement. The original Bond shall be delivered to the Municipality.

c. In the event that the Company does not undertake repairs or reimburse the Municipality in the time allotted in this Agreement, the Municipality shall be authorized to demand payment from and against the Bond to recover any amounts due from the Company for repairs to the Roads. Upon receipt of the monies, the Municipality will proceed with completing the required repairs. Nothing in this subsection shall prevent the Municipality from proceeding by way of a civil action to obtain compliance and abate the default.

d. In the event the Bond contains a stated termination date, then Company shall renew or obtain a new Bond in the agreed upon amount no later than 30 days prior to the stated termination date. It is the intention of the parties that the Bond for the stated amount remains in effect throughout the term of this Agreement and for a period of one year thereafter. In addition, should Company convey any or all of its interest in this Agreement, then the new owner shall obtain a Bond to comply with this Agreement.

e. The Bond is to guarantee reimbursement to the Municipality for all reasonable costs of labor, material and equipment the Municipality may incur in repairing any Road consistent with the provisions of this Agreement.

f. The cancellation of any Bond shall not release the Company from its obligation to meet all of the requirements of this Agreement.

## **9. Indemnification and Insurance**

Upon the Effective Date, the Company shall purchase and maintain insurance of the following types and form during the Term (as defined in this Agreement) and the Company shall ensure that its vendors, contractors, subcontractors, and/or haulers obtain and maintain the types and forms of insurance during the Term. The Company shall furnish the Municipality with certificates of insurance and endorsements of all required insurance, as may be reasonably requested.

a. Commercial General Liability (CGL): Company shall maintain, at its own cost and expense, a minimum level of commercial general liability insurance of one million dollars (\$1,000,000) for each occurrence, and two million dollars (\$2,000,000) in the aggregate. The Company shall include the Municipality as an additional insured. Coverage for the additional insured shall apply as primary and non-contributing before any other insurance, including any deductible, maintained by, or provided to, the additional insured. All insurers shall have at least an A - (VII) or better rating by A.M Best and be qualified to do business in the jurisdiction where the Project is located. Company shall maintain CGL coverage for itself and all additional insured throughout the Term of this Agreement, and for at least two (2) years after the termination of this Agreement.

b. Workers' Compensation and Employers' Liability: Company shall have Workers' Compensation insurance indicating compliance with any applicable labor codes, acts, laws or statutes, state or federal, at the premises where the Project is constructed. Employer' Liability insurance shall not be less than five hundred thousand dollars (\$500,000) for injury or death each accident.

c. Notice: Said insurance shall provide for 30 days' notice to the Municipality prior to cancellation of any coverage.

d. Indemnification, Waiver and Forbearance: To the fullest extent permitted by law, the Company shall defend, indemnify and hold harmless the Municipality, its agents and employees from and against all claims, damages, losses and expenses (including reasonable attorneys' fees), arising out of or resulting from the Company's breach of this Agreement, Damage to the Roads caused by the Company/Contractors, or Company's negligent or willful misconduct in the course of Company's completion of Road repairs under this Agreement.

## **10. Captions and Headings**

Captions and headings throughout this Agreement are for convenience and reference only and the words contained in said captions and headings shall in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision or of the scope or intent of this Agreement.

## **11. Modifications.**

This Agreement cannot be changed orally, but only by agreement in writing signed by the Parties against whom enforcement of the change, modification or discharge is sought or by its duly authorized agent.

## **12. Severability; No Waiver.**

If any provision of this Agreement, or any portion of any provision of this Agreement, is declared null and void, such provision or such portion of a provision shall be considered separate and apart from the remainder of this Agreement, which shall remain in full force and effect. The waiver by any party hereto of a breach or violation of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach or violation.

## **13. Governing Law.**

This Agreement shall be governed and construed in accordance with the laws of the State of New York.

## **14. Binding Effect.**

This Agreement shall be binding upon, and inure to the benefit of the Parties hereto and their respective successors and assigns.

## **15. Entire Agreement.**

The entire agreement of the Parties is contained in this Agreement. No promises, inducements or considerations have been offered or accepted except as herein set forth. The parties hereto agree to execute and deliver such other documents and to perform such other acts as may, from time to time, be reasonably required to give full force and effect to the intent and purpose of this Agreement.

## **16. Counterparts.**

This Agreement may be entered in counterparts, each of which will be considered an original, and all of said counterparts shall together constitute one and the same instrument which may be sufficiently evidenced by one counterpart.

## **17. Authority of Parties.**

The individuals who have executed this Agreement on behalf of the respective Parties expressly represent and warrant that they are authorized to sign on behalf of such entities for the purpose of duly binding such entities to this Agreement.

## **18. Notice.**

a. Any notice or other communication required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given (1) upon hand delivery, or (2) on the first day following delivery via a nationally registered United States overnight courier service.

b. For purposes of this Agreement only, any notices to the Parties shall be directed as set forth below:

For Company: American Horizons Group, LLC  
Attn: Monarco DiFrancesco  
1550 Vestal Parkway East  
Vestal, NY 13850

With a copy to: Hinman, Howard & Kattell, LLP  
Attn: Sarah Campbell, Esq.  
80 Exchange St  
Binghamton, NY 13902

For Municipality: Village of Endicott  
Attn: Village Manager  
1009 East Main St.  
Endicott, NY 13760

With a copy to: Coughlin & Gerhart, LLP  
Attn: Robert H. McKertich, Esq.  
99 Corporate Dr.  
Binghamton, NY 13904

The parties may change their notice addresses upon written notice to the other Party using a method set forth in this Section.

**IN WITNESS WHEREOF**, Company and Municipality have caused their respective, duly authorized officers to execute this Agreement under seal as of the day and year first above written.

**AMERICAN HORIZONS GROUP, LLC**

**VILLAGE OF ENDICOTT**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT A**

*[Insert Road Level of Service Analysis]*