MUNICIPAL CLERK
ATLANTA, GEORGIA

A RESOLUTION BY:

CITY UTILITIES COMMITTEE

02-R-1985

A RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE AN ENCROACHMENT AGREEMENT ON BEHALF OF THE CITY OF ATLANTA WITH METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY PROVIDING FOR THE ENCROACHMENT OF A CANOPY OVER A PORTION OF THE PUBLIC SIDEWALK AT THE LINDBERGH CENTER STATION AND OTHER PURPOSES

WHEREAS, the City and Metropolitan Atlanta Rapid Transit Authority ("MARTA") entered into that certain Rapid Transit Contract and Assistance Agreement ("RTCAA") dated September 1, 1971, which sets forth certain duties governing the City and MARTA with respect to the establishment, construction, improvement, operation and maintenance of a system of public transportation in the metropolitan Atlanta area (the "System"); and

WHEREAS, providing a safe and convenient system of public transportation within the Atlanta area is an essential governmental function vital to the health, safety, and welfare of the City and its citizens; and

WHEREAS, MARTA currently operates the Lindbergh Center Station in the City of Atlanta; and

WHEREAS, in order to improve services at the Lindbergh Center Station, MARTA desires to construct a canopy over the entrance to the Station to protect passengers from inclement weather; and

WHEREAS, the proposed canopy will encroach over a portion of the public sidewalk which is in front of the Lindbergh Center Station entrance; and

WHEREAS, the proposed canopy will enhance, benefit and compliment current public use of the sidewalk; and

WHEREAS, the proposed canopy will not adversely impact the ability of the sidewalk to handle pedestrian traffic or otherwise perform its intended function; and

WHEREAS, pursuant to the RTCAA, the City shall convey without cost to MARTA, any and all easements in, across, through and above public property as may be

necessary or desirable to facilitate acquisition, construction, improvement, and efficient operation of the System; and

WHEREAS, pursuant to the RTCAA, the City shall issue all construction permits, licenses and other privileges necessary or convenient to the acquisition, construction and improvement of the System without cost; and

WHEREAS, pursuant to the RTCAA, the City may enter into additional contracts with MARTA that are in the public interest for the joint use of public facilities and such other agreements as may benefit the public with respect to the System and its acquisition, construction, improvement and operation; and

WHEREAS, MARTA has approached the City seeking an encroachment that will allow the construction of the proposed canopy; and

WHEREAS, the Commissioner of Public Works has reviewed the plans for the development and installment of the proposed canopy and has determined that the plans meet the appropriate technical requirements and believes it to be desirable and in the best interest of the City to authorize the City to execute an Encroachment Agreement with MARTA allowing for installation of the proposed canopy; and

WHEREAS, a copy of the proposed Encroachment Agreement is attached hereto as Exhibit "A".

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF ATLANTA, as follows:

Section 1. That the proposed canopy and encroachment between MARTA and the City is necessary for the improvement of the Lindbergh Center Station and is necessary and beneficial to public use and convenience.

Section 2. That the requirements outlined in Section 138, Article II of the City's Code of Ordinances for posting a performance bond and paying annual rental of space for air rights are hereby waived for the encroachment set forth in this Resolution due to the important public purpose served by MARTA, the public benefit provided by improvements to the System, and the City's obligation to convey to MARTA without cost any and all easements in, across, through and above public property as may be necessary for the acquisition, construction, improvement and efficient operation of the System, as well as the City's obligation to issue all construction permits, licenses and other privileges necessary or convenient to the acquisition, construction and improvement of the System without cost.

Section 3. That the Mayor is hereby authorized to enter into an Encroachment Agreement, with MARTA for the installation of the proposed canopy over the public sidewalk at the northerly entrance of the Lindbergh Center Station.

Section 4. That the City Attorney is directed to prepare an Encroachment Agreement for execution by the Mayor.

Section 5. That the Encroachment Agreement will not become binding upon the City and the City will incur no liability under it until it has been executed by the Mayor, sealed by the Municipal Clerk and delivered to the contracting party.

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ENCROACHMENT AGREEMENT BETWEEN CITY OF ATLANTA AND THE METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

This **ENCROACHMENT AGREEMENT** ("Agreement") is entered into effective as of this _____ day of _____, 2002, between the **Metropolitan Atlanta Rapid Transit Authority** ("MARTA") a public body corporate and a joint instrumentality of Fulton, DeKalb, Clayton and Gwinnett Counties and the City of Atlanta organized and existing under an Act of the General Assembly of the State of Georgia approved on March 10, 1965, Ga. Laws 1965, p. 2243 as amended, and the **City of Atlanta**, a Georgia municipal corporation (the "City").

BACKGROUND:

MARTA is the owner of the real property described on Exhibit A attached, located in the City of Atlanta at 2420 Piedmont Road, in Land Lot 59 of the 17th District, Fulton County, Georgia (the "Property"); and

MARTA desires to make certain improvements to the Property and to obtain a building permit from the City for those improvements; and

The improvements which MARTA wishes to make to the Property include the installation of a canopy (the "Canopy") on the existing MARTA Lindbergh Center Transit Station (the "Station") to be located at the northerly entrance to the Station above areas traversed by passengers and patrons of the transit-oriented development at the Station; and

The Canopy is more particularly depicted on Exhibit B attached; and

MARTA passengers and patrons presently use the public sidewalk between the northerly entrance to the station and Morosgo Drive, which sidewalk shall be protected by the Canopy; and

To protect MARTA passengers and patrons using the Station from inclement weather, MARTA seeks to install a Canopy of decorative steel plate and translucent panels and with steel and concrete supports to extend over a portion of the public sidewalk along Morosgo Drive; and

The City and MARTA desire to enter into this Agreement to govern the installation of the Canopy and to comply with the City's Code of Ordinances, including Section 138-44, as well as the Rapid Transit Contract and Assistance Agreement of 1971, by and among the MARTA, Fulton County, DeKalb County, Gwinnett County, Clayton County and City of Atlanta, as amended (the "RTCAA"); and

This Agreement has been authorized by the City Council and Mayor of the City by a Resolution adopted by the City Council on _____, 2002, and approved by the Mayor on _____, 2002, attached as Exhibit C.

Accordingly, the parties agree as follows:

1. **Subsequent Sale; Assumption Agreement.** MARTA may, subsequent to installation of the Canopy, sell the Station to a third party or to third parties; provided, however, that, as a part of the closing of the sale, MARTA obtains from the purchaser(s) an agreement ("Assumption Agreement"), in a form satisfactory to the City, to assume all of MARTA's obligations under this Agreement. Within fifteen (15) days of the closing of the sale of the Station and Property, MARTA will deliver to the City an original of MARTA's Assumption Agreement with the purchaser(s) and all bond and insurance certificates required to be obtained by the purchasers under this Agreement, the Assumption Agreement and the City's Code of Ordinances, including Section 138-44. Upon delivery of the Assumption Agreement, bond and insurance certificates in a form satisfactory to the City, MARTA will be released from all of its obligations under this Agreement. MARTA will be promptly notified of that release by letter issued by the City's Department of Public Works; provided, however, that the release will not be effective until the issuance of the notice.

2. **Permits.** MARTA must obtain at MARTA's own cost and expense all permits or approvals required by the State of Georgia, the City, or other properly constituted authority to install, maintain and use the Canopy, as such requirements may be affected by the RTCAA.

3. **Assessments.** MARTA must pay all taxes, licenses or other charges, if any, assessed or levied upon the Canopy by reason of the installation, maintenance and use of the Canopy to the extent that MARTA is not exempt from such taxes, licenses or other charges by the RTCAA or applicable law.

4. **Construction, Maintenance of Canopy; Modifications or Adjustments to Canopy.** MARTA must cause the Canopy to be constructed and maintained so that it, or any portion of it, does not become detached or fall to the street or sidewalk below. If any modifications or other adjustments are required to be made to the Canopy by City Ordinance or other applicable laws, MARTA must make those modifications or adjustments, at its sole cost and expense, within thirty (30) days after receiving written notice from the City directing the modification or adjustment. MARTA further agrees to maintain the Canopy as designed and not to enlarge, diminish or alter the Canopy without the express written permission of the Commissioner of City's Department of Public Works.

5. **Indemnification.** MARTA shall defend, indemnify and hold the City, its officers, agents and employees, harmless from and against all claims arising out of the construction, maintenance, use of or removal of any of the Canopy, including claims arising out of persons falling or jumping from the Canopy or arising out of objects being dropped or thrown from the Canopy; provided, however, that MARTA shall not indemnify nor hold harmless the City, its officers, agents or employees for any negligent or intentionally tortious acts or omissions by the City, its officers, agents or employees.

6. **Insurance.**

6.1. MARTA shall furnish a policy of public liability insurance and property damage insurance. Notwithstanding the forgoing provisions of this Section 6.1, MARTA may, in lieu of such insurance policy, maintain self insurance providing equivalent protection, satisfactory to the City and naming the City as a named insured or an additional named insured, in the amount of $1,000,000, approved by the City's Commissioner of Public Works, which protects the City, and its officers, agents and employees, from claims arising out of the construction, maintenance, use of or removal of the Canopy, including claims arising out of any person falling or jumping from any such Canopy or throwing or dropping any objects from any Canopy.

6.2. MARTA shall provide insurance, or self-insurance providing equivalent protection, covering the obligation of MARTA under this Agreement to defend, indemnify and hold the City, and its officers, agents and employees, harmless as provided in Paragraph 5 herein. MARTA's obligation to defend, indemnify and hold the City and its officers, agents and employees harmless will not be limited to the amount of the public liability and property damage insurance naming the City as a named insured or an additional named insured, as required by this Agreement.

7. **Title Certificate.** MARTA shall provide to the City, contemporaneously with the execution and delivery of this Agreement to the City, a title certificate of an attorney authorized to practice law in the state of Georgia, setting forth the names and the addresses of the owner and lessee (if any) of the Station, the names and addresses of any creditors that are secured by all or any part of the Property. If any of the parties set forth in the title certificate are corporate or other similar entities (i.e. not natural persons), the title certificate must provide the full formal organizational name of the entity, as reflected in any of the entity's organizational papers or filings with any applicable governmental or other authorities in the state in which the entity was formed.

8. **Default and Termination of Agreement.** If MARTA defaults in its performance of this Agreement, and fails to cure the default within thirty (30) days of the City's written notice to MARTA of the default, this Agreement may be terminated. Upon termination of this Agreement by the City, MARTA shall remove the Canopy within sixty (60) days of the City's written removal order.

9. **Covenant Running with Property.** This Agreement constitutes a covenant running with the Property, binding upon all successors in title to the Property. This Agreement, and any subsequent Assumption Agreement(s), will be recorded in the real property records of Fulton County, Georgia.

10. **Parties Bound.** This Agreement will be binding upon and inure to the benefit of the City and MARTA and their respective permitted successors, successors in title and assigns.

11. Notices.

11.1. **Delivery.** All notices given by either party to the other under this Agreement must be in writing and may be delivered by:

11.1.1. regular mail, first class, postage prepaid;
11.1.2. certified or registered mail;
11.1.3. facsimile, with a hard copy sent within 24 hours of transmission by one of the other permitted delivery means; or
11.1.4. hand-delivery, to the parties at the addresses and facsimile numbers specified in the Clause titled "Addresses".

11.2. **Receipt.** Notices sent by mail will be deemed received three (3) Days after deposit in the mail, properly addressed. Notices sent by certified or registered mail will be deemed to be received upon the date of the acknowledgment. Notices sent by facsimile will be deemed to be received upon successful transmission to the proper facsimile number; if the sender can produce a facsimile transmission confirmation report. Notices delivered by hand-delivery will be deemed to be received upon written acceptance by the respective party.

11.3. **Change of Address or Facsimile Number.** Either party may, at any time, change its respective address or facsimile number by sending written notice to the other party of the change.

11.4. **Addresses.**

11.4.1. To the City. For all notices to the City the address will be:

55 Trinity Avenue, Suite 4700
Atlanta, GA 30335
Attention: Commissioner, Department of Public Works
(404) 658-7379

11.4.2. To MARTA For all notices to MARTA the address will be:

Metropolitan Atlanta Rapid Transit Authority
2424 Piedmont Road
Atlanta, Georgia 30324-3330
Attention: Legal Department

With a copy to: Pursley Lowery Meeks LLP
Suite 4540
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
Attention: Charles N. Pursley, Esq.
(404) 888-7180

With a copy to: Powell, Goldstein, Frazer & Murphy LLP
191 Peachtree Street, 16th Floor
Atlanta, Georgia 30303
Attention: Jay J. Levin, Esq.
(404) 572-6600

12. **Governing Law.** This Agreement will be construed and interpreted under Georgia law. MARTA and the City fix jurisdiction and venue for any action brought with respect to this Agreement in Fulton County, Georgia.

13. **Legal Construction.** If any provision contained in this Agreement is held to be invalid, illegal or unenforceable, that invalidity, illegality or unenforceability will not affect any other provision of this Agreement and this Agreement will be construed as if the invalid, illegal or unenforceable provision had never been contained in this Agreement.

14. **Prior Agreements Superseded.** This Agreement constitutes the sole and only agreement between MARTA and the City with respect to the subject matter of this Agreement and supersedes any prior understandings or written or oral contracts between the City respecting the subject matter of this Agreement.

15. **Waiver.** The failure of either party to seek redress for any violation of, or to insist upon the strict performance of, any term of this Agreement will not prevent a subsequent violation of this Agreement from being actionable by either party. The provision in this Agreement of any particular remedy will not preclude either party from any other remedy.

16. **Further Acts.** The City and MARTA each agree to perform any additional acts and execute and deliver any additional documents as may reasonably be necessary in order to carry out the provisions and effectuate the intent of this Agreement.

17. **Modifications.** This Agreement may be altered or amended only by written instrument signed by the City and MARTA.

18. **Ethics: Gratuities and Kickbacks.**

    18.1. **Gratuities and Kickbacks.** This Agreement may be terminated if MARTA, or any other representative of MARTA, gave or agreed to give, any employee or former employee of the City a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal for a contract or subcontract.

18.2. **Contingent Fees.** MARTA warrants that it has not employed or retained any company or Person, other than a bona fide employee or attorney working for MARTA, to solicit or secure this Agreement; and that MARTA has not paid or agreed to pay any company, association, corporation, firm or person any fee, commission, percentage, gift or any other consideration contingent upon the award or making of this Agreement. For the breach or violation of this warranty, the City may terminate this Agreement and, at its discretion, may recover the full amount of any fee, commission, percentage, gift or consideration.

18.3. **Rights and Remedies.** The rights and remedies of the City and MARTA provided in this Agreement are not exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

19. **EEO Ordinance.** In performing its obligations under the terms of this Agreement, MARTA agrees to comply with City's EEO Ordinance, Section 2-1414 of City's Code of Ordinances, which EEO Ordinance is incorporated into this Agreement by reference.

CITY:

_____
MAYOR

ATTEST:

_____
MUNICIPAL CLERK (Seal)

APPROVED:

_____
COMMISSIONER, DEPARTMENT OF PUBLIC WORKS

APPROVED:

_____
CHIEF FINANCIAL OFFICER

MARTA:

BY:_____
NAME: Nathiel P. Ford, Jr.
TITLE: General Manager/CEO

ATTEST:

BY: _____
SECRETARY
[MARTA SEAL]

APPROVED AS TO LEGAL FORM:

_____
ATTORNEY FOR MARTA

RECOMMENDED:

_____

DIRECTOR, CITY OF ATLANTA BUREAU OF PURCHASING AND REAL ESTATE

APPROVED AS TO FORM:

_____

CITY ATTORNEY