

ROAD USE ENCROACHMENT AGREEMENT

THIS AGREEMENT made in triplicate this ____ day of August 2020

B E T W E E N:

THE CORPORATION OF THE TOWN OF KINGSVILLE
(hereinafter referred to as the “**Town**”)

OF THE FIRST PART

-AND-

RED SUN FARMS ONTARIO LIMITED.
(hereinafter referred to as the “**Owner**”)

OF THE SECOND PART

WHEREAS:

- A. Her Majesty The Queen In Right Of The Province Of Ontario, Represented By The Minister Of Transportation For The Province Of Ontario (the “**MTO**”), represents that it is the owner of the lands described as Highway 3 under the jurisdiction and control of MTO in Essex County, designated as a Controlled Access Highway (the “**Highway**”);
- B. The Owner has requested the permission of the Town, insofar as it may lawfully do so, to authorize the Owner to construct a 300mm diameter DR 17 PE casing housing 2-100mm sanitary force mains as shown in the Highway 3 Crossing Plan and Profile: Project No. 18- 6970: Sheet No. 14, a 150mm diameter SDR 35 PVC gravity sewer crossing under Graham Sideroad Crossing Plan and Profile : Project 18-6970 Sheet 8, and a 100mm diameter SDR 35 PVC forcemain running within the Road 3 E road allowance Plan and Profile : Project 18-6970 Sheet 15 as illustrated in Schedule “A” (the “**Watermain Line**”), under, along, over, through or across a road allowance, municipal land, or municipal infrastructure under jurisdiction of the Town;

- C. The proposed location of the Watermain Line shall also cross the Highway under the jurisdiction of the MTO, and the Owner must obtain the consent of the MTO with respect to same;
- D. The MTO will only enter into an agreement with the Town with respect to the construction, maintenance, repair and replacement of the Watermain Line, which agreement is dated the ____ day of _____, 2020 (the “**MTO Agreement**”), a copy of which is attached hereto as Schedule “B”;
- E. The Owner must enter into an agreement with the Town to indemnify and save harmless the Town for all losses, costs, and damages in relation to the construction, maintenance, repair and replacement of the Watermain Line, including but not limited to the Town’s obligations to the MTO under the MTO Agreement;
- F. By entering into this Agreement with the Town, the Owner agrees to perform any and all obligations and liabilities of the Town as set forth in the MTO Agreement, and bear any and all costs in relation thereto; and,
- G. The parties hereto deem it expedient to enter into this Agreement to give effect to the Owner’s proposal of constructing the Watermain Line.

NOW THEREFORE IN CONSIDERATION of the undertakings and agreement hereinafter expressed and upon the terms hereinafter set forth, the Town and Owner mutually covenant and agree as follows:

1. In this Agreement the following words shall have the following meanings:
 - (a) “As-Constructed Drawings” shall mean the drawings signed and sealed by a licensed Professional Engineer that reflect all elements of the completed work. The drawings shall depict coordinates and elevations at 5.0 m intervals along the completed installation based on geodetic datum and a typical detail cross-section;

- (b) "Location" shall mean the area of the Highway 3 at station 15+950 on ETR 116- 3/17-0, as referenced in the MTO Agreement;
- (c) "MTO" means Her Majesty The Queen In Right Of The Province Of Ontario, Represented By The Minister Of Transportation For The Province Of Ontario;
- (d) "Municipal Infrastructure" means the basic physical and organizational structure and facilities (e.g. buildings, roads, sanitary sewers, storm sewers, water lines, municipal drains etc.) under the jurisdiction of the Town;
- (e) "Municipal Land" means any and all real property under the jurisdiction or control of the Town;
- (f) "PTHIA" shall mean the Public Transportation and Highway Improvement Act, R.S.O. 1990, c. P.50 and any amendments thereto from time to time;
- (g) "Town" means The Corporation of the Town of Kingsville;
- (h) "Owner" means Red Sun Farms Ontario Limited. who is liable in connection with this Agreement and the MTO Agreement, and who owns the property known municipally as 2173 Road 4 E;
- (i) "Crossing Plan and Profile" means Project No 18-6970 prepared by Dillon Consulting attached hereto and marked as Schedule "A";
- (j) "Director of Municipal Services" means the Director of Municipal Services for the Town, or designate;
- (k) "Road" or "Road Allowance" means a municipal road allowance or public highway under the jurisdiction of the Town and shall include not only the travelled portion of a public highway but also ditches, driveways, sidewalks

and grassy areas forming part of the road allowance now or at any future time;

- (l) “Watermain” means the 300mm diameter DR 17 PE casing housing 2-100mm sanitary force mains as shown in the Highway 3 Crossing Plan and Profile: Project No. 18- 6970: Sheet No. 14, a 150mm diameter SDR 35 PVC gravity sewer crossing under Graham Sideroad Crossing Plan and Profile : Project 18-6970 Sheet 8, and a 100mm diameter SDR 35 PVC forcemain running within the Road 3 E road allowance Plan and Profile : Project 18-6970 Sheet 15 as illustrated in Schedule “A”;
2. Upon the Director of Municipal Services providing written approval and agreeing in writing to the location of the proposed Watermain Line, being the location as illustrated in Schedule “A”, permission to construct, reconstruct, maintain, remove or alter the Watermain Line is granted to the Owner subject to the terms and conditions contained within this Agreement and the MTO Agreement.
3. The Watermain Line shall be constructed, reconstructed, maintained, removed or altered, at the Owner’s sole cost and expense, and in accordance with good engineering and construction practices and with the *Occupational Health and Safety Act* (of Ontario) (the “**OHS**A”) and the *Environmental Protection Act* (the “**EPA**”). In any event, the Watermain Line shall conform to the drawing contained in in Schedule “A” and the requirements set forth in Schedule “B” of the MTO Agreement and be installed as directed by the Director of Municipal Services.
4. When constructed and completed, the Watermain Line shall not obstruct or interfere with or render more difficult or dangerous the use of the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure. In the event that as a result of the construction, reconstruction, maintenance, removal or alteration of the Watermain Line, an obstruction or interference is caused,

then, the Owner shall do all things necessary, at its sole expense, to remove such obstruction or interference without delay.

5. The Owner, its successors in title or permitted assigns, shall repair the Highway, Road Allowance, Municipal Land, and/or Municipal Infrastructure, as applicable, and replace materials moved or removed therefrom, in as nearly the same condition as that in which they are found at the time of commencement of any work undertaken in connection with the said Watermain Line construction or reconstruction, or its future maintenance, alteration or removal. In the event of an open cut to the road or shoulder, all backfilling materials shall be in accordance with the requirements of the Director of Municipal Services.
6. The Owner, at its sole cost and expense shall obtain any and all necessary approvals/permits from MTO and the Town for any and all construction, maintenance and repair to the Watermain Line. In the case of any constructions, maintenance and repair (emergency or otherwise), all costs associated with the repair of the Highway, Road Allowance, Municipal Land, and Municipal Infrastructure as a result of this activity shall be borne by the Owner. The Owner agrees to indemnify and hold harmless the Town from any costs and expenses associated with the MTO coordinating and implementing any and all required traffic management and infrastructure repairs in accordance with MTO standards and Ontario Traffic Manual, Book 7 (January 2014), and in consultation with the Municipality.
7. Except in cases of emergency, at least forty-eight (48) hours written notice shall be given by the Owner to the Director of Municipal Services of any work to be undertaken in constructing, maintaining or repairing the Watermain Line under, over or across the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure. Any maintenance or repair of an emergency nature shall be reported to the Director of Municipal Services or

other appropriate official of the Town as soon as possible, with a written notice to follow detailing the nature of the emergency and the actions taken. Any damage to the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure shall be reported forthwith in writing to the Director of Municipal Services and shall be repaired, altered or relocated by Town forces, and all expenses and liabilities shall be the responsibility of the Owner and shall be assumed and paid by them forthwith on demand. Failure of the Owner to pay within thirty (30) days of demand will cause this Agreement to become voidable at the discretion of the Town.

8. The location, elevation and method of construction, reconstruction, maintenance or removal of the said Watermain Line under, over or across the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure shall be subject, respectively, to the written approval of the Director of Municipal Services. The Owner shall provide to the Town, prior to construction, two (2) copies of construction drawings for the entire route of the Watermain Line and showing the materials to be used and the method by which the materials will be installed. Within sixty (60) days of the completion of the works, two (2) hard copies and one (1) electronic copy of "As-Constructed Drawings" shall be provided to the Town.
9. A certified cheque in the amount of Seventy-Five Thousand (\$75,000.00) Dollars shall be deposited by the Owner with the Town prior to construction each time the Owner submits a request to construct, reconstruct, replace, maintain or alter the Watermain Line (the "**Deposit**"). The said monies deposited shall be held by the Town as security to ensure that the Owner satisfies the conditions of this Agreement and rectifies any matters required by the Director of Municipal Services acting reasonably. Each crossing of the Municipal Road or Municipal Infrastructure will be considered as a separate Watermain Line crossing and will require separate deposits. Any deposits held by the Town will be returned to the Owner within ninety (90)

days of written notification by the Owner to the Town provided that the Director of Municipal Services, acting reasonably, is satisfied that all of the conditions of this Agreement have been fully satisfied.

10. It is understood and agreed that under the terms of this Agreement, the Owner shall be responsible for bearing all costs in relation to, and providing all necessary warning signs, safety devices and traffic diversion to adequately warn the public of construction in Highway areas and the Owner hereby indemnifies and saves harmless the Town, its employees and agents, from and against all claims, liabilities, losses, costs, damages, or expenses of every kind, including legal fees, that may be incurred or suffered as a consequence of the Owner failing to place, maintain and operate such warning signs, protective devices and traffic diversion.
11. The Owner, at its own expense, at any time on the receipt of written notice (the "**Notice**"), from the Town and/or MTO as the case may be, shall suspend operations, remove, alter, or relocate any or all of the Watermain Line contemplated herein as may be required by the Town or the MTO to facilitate any Town or MTO construction project, reconstruction project, or maintenance project within the Highway, a Road Allowance, Municipal Land, or Municipal Infrastructure which requires the construction of buried foundations, or any other works, at the same location as Watermain Line. The Town and MTO shall act reasonably in the design and specification of any such construction or reconstruction project, and prior to requiring any such removal, alteration, or relocation of any portion of the Watermain Line, MTO and the Town shall assess all reasonable design alternatives which do not necessitate any removal or relocation of the Watermain Line. The Owner acknowledges and agrees that:
 - i. Any Notice from MTO shall:

- a) specify either the portion or the whole of the Watermain Line to be dealt with; and,
 - b) specify a relocation and/or temporary diversion date of at least 60 calendar days after the date of the postmark, if by mail, or after the date of transmission, if by facsimile.
- ii. On or following any respective relocation and/or temporary diversion date, the Owner shall cause the area of the Highway, specified in the Notice, to be left in a neat and tidy condition.
- iii. On the relocation and/or temporary diversion date referred to in the Notice, the use by the Owner of the portion of the Highway specified by that Notice is hereby deemed to be ended.
- iv. Notwithstanding the other provisions of this Agreement, in the event of an emergency, as determined by MTO or the Town in its sole discretion, requiring the MTO or the Town to act to repair or maintain the Highway in respect of matters of highway safety or highway traffic flow:
 - a) The MTO or the Town, may give the Owner oral or written notice of such emergency. Upon such notice, the MTO or the Town, may temporarily suspend the rights of the Owner under this Agreement; and,
 - b) The MTO or the Town, shall not be liable to the Owner for any costs or damages incurred by the Owner as a result of such temporary suspension.
- v. Notwithstanding the other provisions of this Agreement, in the event of an emergency, as determined by the Owner in its sole discretion, requiring the Owner to act to repair or maintain the Watermain Line:
 - a) The Owner shall give the Town oral and written notice of such emergency, and provide a written description of the nature and extent of the emergency repairs required and the potential impacts to highway traffic flow and/or the Highway;

- b) All work shall be completed to the satisfaction of the Town and the MTO, in accordance with the OHS and the EPA. All traffic control shall be in compliance with Ontario Traffic Manual, Book 7 (January 2014);
 - c) Neither the MTO or the Town shall be liable to the Owner for any costs or damages incurred by the Owner as a result of undertaking the required emergency repairs; and,
 - d) Nothing in this section shall be construed as lessening the obligation of the Owner to the Town and/or the MTO under paragraph 17 herein.
- vi. The Town or the MTO as applicable may charge the Owner for the cost of any and all work against the Deposit held by the Town, as hereinbefore described any deficiency shall be paid by the Owner within thirty (30) days of written demand, otherwise this Agreement shall be voidable at the discretion of the Town.
12. When it is necessary for work to be done on the Watermain Line for any purpose, the Owner shall consult with the Director of Municipal Services so that service corridors may be readily located when the need arises. The Watermain Line shall be posted at the completion of its installation at the sole expense of the Owner.
13. Nothing in this Agreement shall relieve the Owner from compliance with the provisions of any applicable by-laws of the Town.
14. The Owner shall be responsible to pay the Town's reasonable legal fees, plus tax and applicable disbursements, associated with the preparation and review of this Agreement.
15. Upon termination of this Agreement and/or abandonment of the Watermain Line, the Owner shall abandon the Watermain Line and all other obligations of the Owner shall continue under the provisions of this Agreement until all

of such obligations have been complied with and completed in full to the satisfaction of the Director of Municipal Services acting reasonably.

16. If the Owner should fail to abandon and remove the Watermain Line from the Highway within one (1) year of abandonment or termination of this Agreement and the Town or the MTO requires the removal of all or any part of the Watermain Line for the purpose of altering or improving the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure in order to facilitate the construction of utility or other works, the Town or the MTO, may remove and dispose of so much of the Watermain Line as the Town or the MTO may require for such purposes and the Owner shall have no recourse against the Town for any losses, costs, expenses or damages occasioned thereby.
17. The Owner shall indemnify and save harmless the Town from and against all claims, demands, proceedings, actions, obligations, liabilities, losses, damages, costs, interest, or other expenses of every kind including legal fees that the Town may incur or suffer as a consequence of anything done or omitted to be done by the Owner and/or in connection with the placing, maintenance, operation, replacement or repair of the Watermain Line or any part thereof.
18. Forthwith upon execution of this Agreement, the Owner shall deliver to the Town, a certificate of a comprehensive liability policy of insurance with policy limits in the amount of not less than Five Million (\$5,000,000.00) Dollars, the form and content of which shall be satisfactory to the Town and/or the MTO and naming both the Town and the MTO as an additional insured. Said policy must contain a cross liability clause endorsement. The policy shall not be subject to cancellation until such time as this Agreement is terminated.

19. During the term of this Agreement and any subsequent renewals thereof, the Owner shall be responsible for maintaining the Watermain Line and, where the same has to be repaired, altered, removed or relocated, the Owner shall return the Highway, Road Allowance, Municipal Land, or Municipal Infrastructure to its original condition to the satisfaction of the Director of Municipal Services acting reasonably.
20. If any dispute or controversy shall occur between the parties hereto relating to the interpretation or implementation of any of the provisions of this Agreement, such dispute shall be resolved by arbitration. Such arbitration shall be conducted by a single arbitrator. The arbitrator shall be appointed by agreement between the parties or, in default of such agreement, such arbitrator shall be appointed by a Judge of the Ontario Superior Court of Justice, upon the application of either of said parties and a Judge of the Ontario Superior Court of Justice shall be entitled to act as such arbitrator if he or she so desires. The arbitration shall be held in the Town of Kingsville or such other location in Essex County that the parties and the arbitrator may agree upon. The procedure to be followed shall be agreed by the parties or, in default of an agreement, determined by the arbitrator. The arbitration shall proceed in accordance with the provisions of the *Arbitration Act* (Ontario), S.O. 1991, c.17. The arbitrator shall have the power to proceed with the arbitration and to deliver his or her award notwithstanding the default by either party in respect of any procedural order made by the arbitrator. It is further agreed that such arbitration shall be a condition precedent to the commencement of any action at law. The decision arrived at by the board or arbitration, howsoever constituted, shall be final and binding and no appeal shall lie therefrom. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.
21. The Owner may not assign any part of this Agreement unless the Town and/or the MTO as applicable consents in writing to such assignment, and provided that the Owner enters into a form of Agreement guaranteeing

compliance with the terms of this Agreement by the assignee and such assignment shall be effective only upon execution of an Agreement binding the assignee to the terms of this Agreement.

22. Any notice to be given under the provisions of this Agreement may be effectually given to the Town by delivering same by registered mail, postage prepaid, addressed as follows:

To the Town:

Attention: Director of Municipal Services
The Corporation of the Town of Kingsville,
2021 Division Road North,
Kingsville, Ontario N9Y 2Y9

To the Owner:

Red Sun Farms Ontario Limited
1233 Road 4 E
Kingsville, Ontario N9Y 2E5

23. The notices as aforesaid shall be deemed to have been given and received on the fifth (5th) business day following the date it was mailed.
24. This Agreement shall enure to and be binding upon the parties hereto, their successors and permitted assigns.

[Balance of page left intentionally blank, signature page follows]

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the day first written above.

SIGNED, SEALED AND DELIVERED
in the presence of

**THE CORPORATION OF THE
TOWN OF KINGSVILLE**

Per: _____
Name: Nelson Santos
Title: Mayor

Per: _____
Name: Jennifer Astrologo
Title: Clerk

I/We have the authority to bind the corporation.

RED SUN FARMS ONTARIO LIMITED.

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have the authority to bind the corporation.