

**ORDINANCE NO. 20051201-010**

**AN ORDINANCE GRANTING T-MOBILE USA, INC. A NON-EXCLUSIVE LICENSE TO INSTALL AND OPERATE A WIRELESS COMMUNICATION STATION AND RELATED EQUIPMENT.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1. GRANT OF LICENSE.**

**SECTION 1. RECITALS.**

The City owns or otherwise controls 1.2 acres of real property and improvements known locally as 5309 East Riverside Drive in Austin, Travis County, Texas, and legally described in Plat Number 68, Page 64 document number 416863 of the Plat Records of Travis County, Texas, as Tract 1 of the Fire Station No. 22 Subdivision, and depicted as the "licensed premises" in Exhibit A. The permanent improvements, the parking lot, and other surrounding property and improvements currently house City of Austin Fire Station No. 22.

The City grants to Licensee a non-exclusive License to install and operate a wireless communications station and related antenna(s), equipment and accessories on a 20' x 32' (640 sq. ft) segment of real property near existing Fire Station No. 22, and related facilities.

**SECTION 2. DEFINITIONS.**

**DAYS** mean calendar days.

**EMERGENCY** means an unexpected or sudden occurrence warranting urgent and immediate action to protect lives or property, or to promptly restore communications or utility services.

**FIRE CHIEF** means the Austin Fire Department officer in charge of Fire Station No. 22, or designee.

**LICENSED PREMISES** means a 20' x 32' (640 sq. ft) area of real property, located within the real property and improvements known locally as 5309 East Riverside Drive in Austin, Travis County, Texas, and legally described in Plat Number 68, Page 64 document number 416863 of the Plat Records of Travis County, Texas, as Tract 1 of the Fire Station No. 22 Subdivision, and depicted as the "licensed premises" in Exhibit A.

**WIRELESS COMMUNICATIONS STATION** ("Station") means a wireless telephone antenna tower, amplifier, receiver, repeater, and other devices or equipment, along with cables, risers, guy wires, anchors and other appurtenant facilities necessary or incidental to the provision of wireless telephone service from the licensed premises.

**USAGE FEE** means the annual use and occupancy charge payable to the City for the use of the licensed premises.

→ **SECTION 3. PURPOSE.**

- (A) The City grants to Licensee a non-exclusive License to install and operate a wireless communications station and related antenna(s), equipment and accessories on a 20' x 32' (640 sq. ft) segment of real property near existing Fire Station No. 22, and related facilities, to provide wireless communication services to its customers in the Austin, Texas area.
- (B) Nothing in this agreement grants the Licensee the right to use or occupy the public rights of way as defined in Chapter 14-11 of the City Code, inside the City of Austin.
- (C) Licensee will install its station as described in Exhibit B, principally by erecting a wireless telecommunications tower approximately 100 feet in height, and using the ground space within and adjacent to the tower footprint to house related improvements and equipment. The Licensee is responsible for all costs associated with the installation of Licensee's station.
- (D) Licensee shall enclose the licensed 20' by 32' (640 sq. ft.) area with fencing, and install all necessary station facilities within this designated area. Station facilities include all weatherproof cabinets, the monopole tower, and any and all other related devices.
- (E) Licensee is granted the exclusive use of only that portion of the licensed premises necessary to the installation and function of Licensee's station and related equipment. This license does not grant Licensee use of or access to City buildings or any other improvements located on the licensed premises without advance written consent of the City or the Fire Chief. The City will not interfere with Licensee's operation except in the event of an emergency. Non-Emergency interference will result in a material breach of this agreement by the interfering party. The breach may be cured only if the responsible party immediately terminates the interference.
- (F) The City retains priority over all uses of the licensed premises. If a City's use of the licensed premises conflicts with an actual or proposed use by the Licensee, the City's use maintains priority.

- (G) The City retains ownership and control over the licensed premises. No payment remitted by the Licensee creates any ownership right, title, or interest in the premises.
- (H) Nothing in this agreement limits the City's right to enter the licensed premises at any time to maintain, repair, or replace City facilities, or to conduct any official City business.
- (I) Licensee is granted a non-exclusive license to use the licensed premises. Nothing in this agreement limits the use of the licensed premises by another licensee, and does not limit the City's right to grant additional licenses to the premises so long as Licensee's rights and privileges are not adversely affected.

#### **SECTION 4. COMPLIANCE WITH LAWS.**

- (A) The Licensee must conform its use of the licensed premises to all applicable Federal, State, and local laws, rules, and regulations, including rules governing the placement of wireless communication service equipment. Licensee must also comply with all reasonable directives of the Fire Chief.
- (B) Nothing in this license exempts the Licensee from obtaining licenses, permits or other authorizations as required to provide service or to use, operate or maintain its station. If Licensee is denied any required license, permit or authorization, Licensee may terminate this license and any other permit predicated upon the grant of such license, permit or authorization. However, the City will not refund any usage charges paid in advance if Licensee terminates under this section.
- (C) Licensee shall construct, install, use, operate and maintain its station in a manner that does not interfere, either physically or electronically, with the use of the licensed premises by the City or other Licensees. If interference does occur, Licensee shall use its best efforts to promptly eliminate the interference, including as necessary the replacement, relocation or modification of its station. If the interference cannot be eliminated within a reasonable time, then either party may terminate this agreement upon thirty days' written notice without incurring any liability to the other party because of the termination. If the agreement is terminated under this section, Licensee shall be entitled to a pro-rata refund of any pre-paid but unearned usage fees. Use of the licensed premises by a subsequent licensee may not interfere, either physically or electronically, with the use of the licensed premises by Licensee.

→ **SECTION 5. ESTABLISHING USE.**

- (A) The City expressly disclaims all express or implied warranties regarding the licensed premises and its condition or fitness for any purpose, including the actual or proposed use by the Licensee. The City makes no claim as to the propriety or suitability of the licensed premises for the proposed use by the Licensee. Licensee accepts the licensed premises **AS IS, WHERE IS, and WITH ALL FAULTS**. Licensee represents that it has inspected the licensed premises, and finds it acceptable for Licensee's stated purpose.
- (B) The licensed premises may not be used for any purpose whatsoever other than the purpose expressly set forth in this agreement. Any unauthorized use of the licensed premises, or use of any additional City property or facilities other than that described in Exhibit A, is a material breach of this agreement.
- (C) Licensee shall perform the construction, installation, use, operation, relocation, and maintenance of Licensee's station at Licensee's sole expense. The Licensee shall pay for any preparation of the licensed premises necessary to facilitate installation of its station.
- (D) Licensee is solely responsible for the security of its station. The City assumes no responsibility for the security of Licensee's station, nor makes any representation concerning the adequacy of any security measures currently in place for the City's benefit.

→ **SECTION 6. STATION CHANGES AFTER INITIAL INSTALLATION.**

- (A) Except as provided in Section 6 (B), Licensee shall not change the type, nature, or location of its station or alter its use of the licensed premises without prior written consent from the City. Licensee may not install or construct any other equipment or facility on the licensed premises unless authorized by this license or by prior written consent from the City. Equipment changed or added in violation of this section constitutes a material breach of the agreement. The City may require an additional fee before approving a change or addition to the station.
- (B) Licensee is not required to obtain prior consent from the City for:
  - (1) changes incident to routine maintenance and repair of its facilities
  - (2) changes necessitated by an emergency
  - (3) changes required by the City, or
  - (4) removal of its station from the licensed premises

However, Licensee must provide the Fire Chief written notice identifying all such changes no later than the 10<sup>th</sup> day after initiating the change.

- (C) The Licensee shall remove, relocate, or alter its station and any other equipment on the licensed premises when the City determines that removal, relocation, or alteration is reasonably necessary to avoid interference (either physical or electronic) with City equipment, with other licensed uses in existence on the effective date of this license, to accommodate changes to the licensed premises, or to allow redevelopment of the licensed premises. The Licensee must remove, relocate, or alter its station or equipment no later than the 30<sup>th</sup> day after the City sends written notice to the Licensee. However, in case of an emergency as determined by the City and after verbal notice to the Licensee, the City may remove, relocate, or alter Licensee's station or equipment without incurring liability. The Licensee shall pay all removal or relocation expenses. If Licensee is required to relocate, remove, or alter its station or equipment, Licensee may elect to terminate this agreement and receive a pro-rata refund of all unaccrued usage fees prepaid to the City.
- (D) Licensee, at Licensee's expense and risk, shall relocate its station to allow for redevelopment of the licensed premises if requested to do so in writing by the City.
- (E) If the Licensee must relocate its station due to redevelopment of the licensed premises, the City will use its best efforts to locate a substitute location suited to the Licensee's intended use.
- (F) If the Licensee does not remove, relocate or alter its station on or before the 30<sup>th</sup> day after the City sends written notice, the City may remove, relocate, or alter the Licensee's station or equipment at the Licensee's sole risk and expense. The Licensee shall pay the City the full cost of performing such work, including overhead, general, and administrative expense.
- (G) The Licensee shall remove, relocate, or alter its station if the City determines that removal, relocation, or alteration is reasonably necessary to avoid interference (either physical or electronic) with a use licensed after the execution of this license if Licensee's use and operation of its station and equipment, and the quality of its wireless service is not materially impaired. The licensed use that benefits from such change shall pay the Licensee the full cost of performing such work, unless otherwise negotiated by the parties.
- (H) The City may use, change, operate and maintain the property in and around the licensed premises as the City determines is necessary to its original intended use. The City shall not be liable to the Licensee for any damage to or interference with the use, maintenance, or operation of Licensee's station that result from the City's use, maintenance or operation of the licensed premises. If Licensee fails or refuses

to change, alter, improve, or move its station on or before the 30<sup>th</sup> day after receiving written notice from the City (or as otherwise provided in such notice), the City shall have the right (but not the obligation) to perform such work at Licensee's sole risk and expense. Licensee shall pay the City upon receipt of invoice for the City's full cost for performing such work including overhead, general, and administrative expense.

- (I) The Licensee has the right to terminate this license without penalty if the City's use, maintenance or operation of the licensed premises has a materially adverse effect on the operation or use of the Licensee's facilities and equipment. Licensee may terminate the license and receive a refund of a pro-rata share of unearned usage fees prepaid to the City only if the City received written notice of the termination.

→ **SECTION 7. LICENSE OPERATIONS.**

- (A) All work performed by or on behalf of Licensee on the licensed premises shall be done in a good and thoroughly workmanlike manner, consistent with the best industry practices and according to all applicable Federal, State and local laws, rules and regulations. Licensee and its contractors shall employ only orderly and competent workers for all work conducted in, on or over the licensed premises. Licensee and its contractors shall comply with all City safety practices and procedures. Workers may not possess any weapon, or use, possess or be under the influence of any alcoholic or other intoxicating beverage, illegal drug or controlled substance while on the licensed premises. Anyone performing service for the Licensee who violates this provision shall be removed and may not return to the licensed premises.
- (B) Licensee has a right of access to the licensed premises throughout the term of this agreement. However, except in an emergency, the Licensee must notify the City no less than 24 hours in advance of entering the licensed premises. The City may, in cooperation with the Licensee, designate an access route that must be used when entering the licensed premises.
- (C) Licensee shall pay all taxes and assessments levied on its station. No lien may be filed against the licensed premises because of any claim or dispute against the Licensee. If a lien is filed against the licensed premises, Licensee agrees to promptly pay or bond whatever amount is necessary to discharge the lien and pay all fees and other expense associated with the claim.
- (D) The City shall provide access to electrical service on the licensed premises. Licensee shall be solely responsible for the costs of establishing, maintaining, and receiving electrical and any other utility service directly attributable to operation of Licensee's station.

- (E) Licensee must remove daily all construction debris and trash remaining after work is completed, leaving the licensed premises in the same clean condition as it appeared prior to performing the work. If Licensee fails to leave the licensed premises in a condition satisfactory to the Fire Chief, the City may perform the clean up and removal work. The Licensee shall reimburse the City for the full cost of performing such activity immediately upon receipt of an invoice.

## **SECTION 8. INDEMNITY REQUIREMENTS.**

- (A) Licensee shall, at the City's option, defend, indemnify, and hold the City, its successors, assigns, officers, elected and non-elected officials and employees harmless from and against any and all claims, demands, suits, causes of action, judgments and liability of every character type or description. Indemnification shall extend to all expenses of litigation, court costs and attorney's fees 1) arising out of or concerning this agreement, or 2) the installation, use, operation, maintenance, transfer, rearrangement or removal of Licensee's station on the licensed premises. Indemnification extends, but is not limited, to:
- (1) damage to or loss of the property of any person, including, but not limited to the licensed premises, the station, and all equipment located on the licensed premises;
  - (2) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person,
- caused in whole or in part, by the fault of Licensee or its agents, employees or contractors. The City shall in all instances be indemnified by the Licensee against all such loss, damages or claims, regardless of whether the loss, damages or claims are caused in part by the negligence or fault of the City. As used in this section, the term fault shall include negligence of every degree and kind, willful misconduct and strict liability.
- (B) The Licensee shall not indemnify the City if the loss, damage, or claim arises from the sole negligence of the City. Any contractor performing work or service for Licensee at the licensed premises must indemnify the City in writing to the same extent as provided above as a condition of gaining access to the License Premises.

## **SECTION 9. INSURANCE REQUIREMENTS.**

- (A) Licensee shall at all times during the term of this agreement carry insurance to protect Licensee and the City against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind which may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this

agreement. Companies duly licensed by the State of Texas, with an AM Best rating of A or higher, must provide insurance.

- (B) At a minimum, Licensee shall carry and maintain, at a minimum, the following coverage:
- Commercial General Liability coverage in the minimum amount of \$1,000,000 per occurrence;
  - Worker's Compensation coverage with statutory benefits as set forth in the Texas Worker's Compensation Act and Employer's Liability coverage of not less than \$250,000 bodily injury per accident, \$500,000 bodily injury per disease and \$250,000 per disease per employee; and
  - Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000
- (C) The Commercial General Liability and Business Liability Policies shall name the City of Austin as an additional named insured. Licensee shall furnish to the City's Risk Manager certificates of insurance showing that the City is a named insured on each policy. Each policy shall contain an endorsement obligating the insurer to notify the City Risk Manager not less than the 30<sup>th</sup> day prior to any non-renewal, cancellation or material change in coverage. The "other insurance" clause shall not apply to the City; each policy covering the Licensee shall be considered primary coverage for the City. Except as required by law, each policy shall contain a waiver of all rights of recovery or subrogation against the City, its officers, agents, employees, and elected officials.
- (D) Any contractor performing work or service for the Licensee on the licensed premises shall carry insurance to the same extent as provided above as a condition of gaining access to the licensed premises.

#### **SECTION 10. USAGE CHARGES AND PAYMENTS.**

- (A) Licensee shall pay to the City the following usage charge for the first year:

For Licensed Premises	<b><u>\$9,600.00</u> for first year</b>
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The usage charge shall be paid upon the execution of this license agreement for the upcoming twelve month period and then again on each anniversary date thereafter throughout the term of the license.

- (B) The usage charge paid by the Licensee shall increase by four percent (4%) per annum, beginning on the first anniversary of the execution date of this license agreement for the following twelve month period and each subsequent anniversary date thereafter throughout the term of the license agreement.
- (C) All monetary payments under this agreement shall be due and payable within thirty (30) days after the anniversary date of this license agreement. If payment is not timely made, interest shall accrue on the unpaid balance at the lesser of the maximum lawful rate or the prime rate of interest charged by Chase Bank - Austin, N.A. from the due date until paid. Failure to pay any monetary obligation in full when due shall constitute a material default of this agreement.

#### **SECTION 11. TERM.**

- (A) The initial term of this agreement is five years unless terminated sooner under Section 12.
- (B) The Licensee has the right to renew the agreement for two additional terms of five years each if not in default at the end of the initial term. Renewal is automatic on the anniversary of the effective date under the same terms and conditions, except for an increase in the usage charge as provided above.

#### **SECTION 12. MUTUAL TERMINATION, SUSPENSION, TERMINATION BY DEFAULT.**

- (A) Mutual Termination. Either party may terminate this agreement at any time during the term, but only if written notice of termination is delivered to the non-terminating party at least one year prior to the termination date. No liability shall result for either party if the agreement is terminated under this section. If the termination is initiated by the City, the Licensee is entitled to a pro-rata refund any unearned usage charges prepaid to the City. No refund is due if the termination under this section is initiated by the Licensee.
- (B) Suspension. The Licensee may have all rights under this License suspended if the Licensee does not remit a required payment by the 10<sup>th</sup> working day after the due date, or does not timely perform a material obligation under this License. The City must send the Licensee a written notice of suspension, listing any action the Licensee must take to have the suspension lifted. During the suspension, the Licensee may operate and maintain its station, but may not (1) add to, modify, remove, or alter any of its existing facilities; or (2) install or construct new

facilities. The City shall also suspend the review or approval of any pending permit applications.

(C) Termination by Default.

(1) A default occurs when:

- either party commits a material breach of this agreement;
- either party fails to make a required payment when due, and no payment has been received by the 30<sup>th</sup> day after written notice of non-payment was issued;
- either party fails to substantially perform a material obligation under this agreement, and no performance has taken place by the 30<sup>th</sup> day after written notice of the failure was issued;
- the Licensees' license from the Federal Communications Commission has expired, been revoked or has terminated, and the license has not been restored or renewed by the 60<sup>th</sup> day after notice was sent by the City;
- the Licensee makes an assignment for the benefit of creditors, appoints a receiver over its assets, files a petition for relief under the United States bankruptcy laws, or is the subject of an involuntary bankruptcy petition that is not dismissed by the 30<sup>th</sup> day after the filing date.

(2) If an event of default occurs, the party not in default may immediately terminate this agreement upon serving written notice to the defaulting party.

(D) If the licensed premises or any improvements contained therein are substantially destroyed by fire, storm, or other catastrophe, the City shall be under no obligation to rebuild or replace the facility. The City may instead elect to terminate this agreement by written notice to the Licensee without further obligation or liability to the Licensee. The Licensee may elect to terminate this agreement with no further liability to the City if, by the 90<sup>th</sup> day after the event, the City has not repaired the licensed premises. If the City terminates under this Section, the Licensee is entitled to a pro rata refund any unearned usage charges prepaid to the City. No refund shall be due if the Licensee terminates this agreement under this section.

(E) Licensee shall abide by these terms until its station is removed from the licensed premises, and includes the payment of usage charges for its station. If the Licensee has not removed the station from the licensed premises by the removal date, the Licensee shall pay the City liquidated damages in the amount of one and one-half times the annual usage fee for each month that the station occupies the licensed premises after the removal date. Neither payment of the fee by the Licensee, nor

the acceptance of the fee by the City, shall serve to cure the default that triggered the termination, or restore the Licensee's rights to use the licensed premises.

**SECTION 13. ASSIGNMENTS.**

- (A) Licensee may not assign or otherwise transfer this agreement, in whole or in part, without the prior written consent of the City. However, Licensee may mortgage any or all of its property, rights, privileges and franchises, or enter and/or assign to any parent or affiliate as a result of any merger, consolidation, or sale of its assets without obtaining such consent. In case of the foreclosure of such mortgage, or in case of such merger, consolidation, or sale of Austin area assets, Licensee's rights and obligations under this agreement pass to successors only if the City receives written notice of the foreclosure, merger, consolidation or sale, together with certified copies of the documents evidencing the succession.
- (B) A purported assignment or transfer made in violation of the provisions of this section shall not be binding upon the City, but is instead a material default of this agreement by Licensee.
- (C) The City may assign this agreement in whole or in part without the consent of Licensee to a successor entity acquiring the licensed premises occupied by Licensee's station. The City shall give Licensee written notice of the transaction not later than 10 days after the closing.
- (D) Licensee's station or that of any Third Party User shall at all times be and remain its or their respective property, with the full right of removal, and shall not become subject to any liens against any other party.

**SECTION 14. NOTICES.**

Any notice required by this agreement must be given by one party to the other in writing and mailed or delivered to such party at the following address or to such other address as either party may from time to time designate in writing for that purpose. All notices shall be effective upon receipt. Routine communications may be sent by first class mail, telefax, or other commercially acceptable means

CITY OF AUSTIN  
Financial and Administrative Services Department  
Office of Telecommunications & Regulatory Affairs  
P. O. Box 1088  
Austin, Texas 78767  
Attn: TARA Manager

Phone: (512) 974-2999

Fax: (512) 974-2416

LICENSEE

T-Mobile USA, Inc.

12920 SE 38th Street

Bellevue, WA 98006

Attn: PCS Lease Administrator

Attn: Legal Dept.

With a copy to:

VoiceStream PCS II Corporation

4401 Freidrich Lane, Suite 110

Austin, TX 78744

Attn: Lease Administration Manager

**SECTION 15. MISCELLANEOUS PROVISIONS.**

- (A) Integration. This agreement constitutes the entire understanding of the parties relating to the use of the licensed premises no modification or waiver shall occur unless in writing, signed by both parties
- (B) No Waiver. The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, and shall remain at all times in duly force and effect.
- (C) Headings. The descriptive headings of the provisions of this agreement are intended to be used only for the convenience of the parties, and do not affect the meaning or construction of any provision.
- (D) No Third Party Beneficiary. There is no third party beneficiary to this agreement, and the provisions of this agreement shall not impart any rights enforceable by any person not a party, successor, or assign to this agreement.
- (E) Applicable Law. The parties to this agreement intend that the laws of the State of Texas shall govern all disputes that may arise from, out of, under or respecting these terms and conditions, concerning the rights or obligations of the parties, or respecting any performance or failure of performance by either party. The parties further agree that venue shall lie exclusively in Travis County, Texas.
- (F) Future Amendment. Either party may propose amendments intended to address any substantially changed or unforeseen circumstances relevant to the performance of the agreement or the use, maintenance or operation of the station. Such

changes, on the agreement of both Parties, may be approved administratively by the Telecommunications and Regulatory Affairs Division of the City's Financial and Administrative Services Department. Neither party, however, shall ever be obligated to propose, consider or accept any amendment.

- (G) Redevelopment. If the City contemplates redeveloping the licensed premises in a manner that requires the removal of Licensee's station, the City will give Licensee at least six (6) months in advance written notice of such required relocation and will use its best efforts to relocate the station on or within the existing or proposed improvements situated at the Property. If the City and Licensee cannot agree on a location at the Property to relocate the station, the City will use its best efforts to relocate the station on other City owned property located near the Property. The Licensee is responsible for all costs associated with relocating the station whether on the property or elsewhere. In the event that the station is relocated to other property owned by the City, the City and Licensee agree to either amend this agreement or enter into another agreement on the same terms and conditions for the new location. In the event that the City designates a relocation site unacceptable to Licensee, Licensee may terminate this agreement effective on or before the date of such required relocation and remove the station. Licensee will receive a pro rata refund of all unapplied usage fees prepaid to the City, and all rights and responsibilities under the agreement are terminated. If the City and Licensee agree on an alternative location that Licensee later determines is unacceptable for technical considerations, Licensee may terminate this agreement no sooner than 60 days after written notice is sent to the City. Licensee shall, after removing its station, receive a pro rata refund of all unapplied usage fees prepaid to the City. All other rights and responsibilities under the agreement are terminated.

**PART 2. ACCEPTANCE OF LICENSE.**

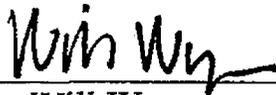
Licensee shall file with the City Clerk a statement accepting the terms of this license before the effective date of this ordinance. Licensee is ineligible to receive a permit of any kind from the City until and unless City Clerk receives the properly executed acceptance.

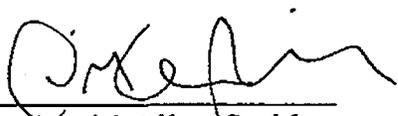
**PART 3.** This ordinance takes effect on February 1, 2006.

**PASSED AND APPROVED**

December 1, 2005

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\_\_\_\_\_  
Will Wynn  
Mayor

**APPROVED:**   
\_\_\_\_\_  
David Allan Smith  
City Attorney

**ATTEST:**   
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Shirley A. Brown  
City Clerk