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**MEMORANDUM**

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TO: JERRY A. BENTROTT, CITY MANAGER

THRU: ROGER G. ORR, CITY ATTORNEY 

FROM: AZLINA GOLDSTEIN SIEGEL, ASSISTANT CITY ATTORNEY 

DATE: OCTOBER 5, 2011

SUBJECT: TEMPORARY LICENSE AGREEMENT FOR RIGHTS OF ACCESS FOR  
THE EASTERN WATERSHED IMPROVEMENT PROJECT (EWIP)  
(SAM'S EAST, INC.)

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Attached for review, consideration and approval by the City Council of the City of Port St. Lucie is a Temporary License Agreement between the City of Port St. Lucie and Sam's East, Inc., an Arkansas corporation (Sam's). Sam's has an interest in, and a maintenance obligation for, a non-exclusive platted easement described as "Access Easement Number 1." The City needs to travel upon and use a portion of said Access Easement Number 1 to transport and haul equipment, landscaping, fill, and other materials to and from U.S. Highway One and designated project sites for the construction, installation and maintenance of certain improvements for the Eastern Watershed Improvement Project ("EWIP"). The attached Temporary License providing a temporary grant of access and entry over, upon and across Access Easement Number 1, is a final draft that is the result of negotiations with Sam's and its attorney. However, it should be noted that there may be still be minor changes made and the approval of the Temporary License Agreement will serve to authorize the execution of said Agreement, in substantially the same form that is attached.

Please place this matter on the consent agenda for the October 10, 2011, City Council meeting. If you have any questions, please do not hesitate to contact me.

AGS/bb

Attachment: Temporary License

cc: James Angstadt, P.E., Civil Engineer/Project Manager

H:\Real Estate\Eastern Watershed Drainage Basin aka EWIP\Sam's Club Easements\Sam's Temp License - council memo to Jerry.docx

**RECEIVED**

OCT 05 2011

City Manager's Office

Project: Eastern Watershed Improvement Project ("EWIP")  
Address: TBD – SE Lennard Road  
Parcel ID: 4507-706-0001-000/2 (Tract A, First Replat Lennard Square)

### TEMPORARY LICENSE

THIS **TEMPORARY LICENSE AGREEMENT** ("License"), dated September, 2011, is made by and between **Sam's East, Inc., an Arkansas corporation**, whose address is 702 S.W. 8<sup>th</sup> Street, Bentonville, AR 72716, with a mailing addresses of Sam M. Walton Development Complex, 2001 S.E. 10<sup>th</sup> Street Bentonville, AR 72716-0550, Attn: Realty Management ("Licensor") and **City of Port St. Lucie, a Florida Municipal Corporation**, whose address is 121 S.W. Port St. Lucie Boulevard, Port St. Lucie, FL 34984-5099 ("Licensee"). The following statements are a material part of this License:

**WHEREAS**, Licensor has an interest in a non-exclusive easement described as "Access Easement Number 1," as set forth on and dedicated to Licensor by the plat of Lennard Square, according to the plat thereof recorded in Plat Book 43, Pages 34 and 34A, and as replatted by First Replat Lennard Square, according to the plat thereof, as recorded in Plat Book 53, Pages 13 and 14, of the Public Records of St. Lucie County, Florida; and

**WHEREAS**, Licensee seeks from Licensor the temporary right, privilege and authority to travel upon and use for ingress and egress purposes a portion of Access Easement Number 1, which is identified and depicted on the attached Exhibit "A," as Licensee needs to transport and haul equipment, landscaping, fill, and other materials to and from U.S. Highway One and Licensee's designated project sites for the construction, installation and maintenance of certain improvements for the Licensee's Eastern Watershed Improvement Project ("EWIP"); and

**WHEREAS**, Licensor desires to give and grant to Licensee, and Licensee desires to accept and receive, a non-exclusive temporary license, providing a temporary grant of access and entry over, upon and across Access Easement Number 1 solely for the purposes set forth herein.

**THEREFORE**, in consideration of the covenants contained in this License and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. **Grant of License.** Licensor hereby gives to Licensee a non-exclusive and temporary grant of access and entry ("TGAE") over, across and upon a portion of Access Easement Number 1 that is depicted in the attached Exhibit "A" ("TGAE Area"), to permit the ingress and egress of vehicles, suppliers, contractors, employees or agents of Licensee to facilitate Licensee's construction activities for EWIP. Licensee, through its officers, employees and agents, at Licensee's sole cost and expense, shall have the right, privilege and authority to enter, travel upon, and use the TGAE Area

in such a manner as may be reasonably necessary and consistent with the purpose for which this License is given.

2. **Duration.** The rights and privileges granted herein shall expire on December 31, 2012, or upon the completion of Licensee's construction of EWIP improvements on the adjacent properties, whichever is sooner, unless otherwise extended by a written mutual agreement. Following the termination of the TGAE, Licensee shall provide Licensor, upon receipt of Licensor's written request, a release and extinguishment of all of Licensee's rights and privileges granted herein, in a mutually agreeable form. Notwithstanding the foregoing, any warranties, representations and indemnities provided for in this License shall survive the termination of this License for such time as any claim made be made pursuant to any applicable Statute of Limitations.
3. **Structures, Staging, Storage, Digging Prohibited.** Licensee shall not cause to be erected any temporary structures within the TGAE Area. Licensee covenants and agrees that the TGAE Area and other portions of Licensor's tract will neither be used as a staging area nor a storage location for Licensee's equipment, trucks, dirt, supplies, rubble, spoil or any other construction materials. Further, Licensee shall not dig any open pits, trenches, borings or holes on or under the TGAE Area.
4. **Non-Interference with Licensor's Business.** Licensee covenants and agrees that all construction access activities will be timed so as to not interfere with trucking schedules of Licensor, Licensee shall at all times cooperate with Licensor to not disturb Licensor's use of the TGAE Area or Licensor's adjacent property and the businesses that are operated thereon. In no event shall Licensee use the TGAE Area in a manner which, in Licensor's sole discretion, interferes with Licensor's use of Access Easement No. 1 or with Licensor's use of Licensor's property. Licensee shall cooperate and comply with the reasonable requests of Licensor that are not inconsistent with the purposes for which this TGAE is issued.
5. **Due Care and Maintenance Required.** Licensee shall exercise and use due care to avoid damaging the road and any pavement or improvements of Licensor that are within and adjacent to the TGAE Area. Licensee covenants and agrees to properly maintain the TGAE Area and keep same in good order that is not inconsistent with the purposes for which this TGAE is issued. Any rubbish deposited by Licensee, its suppliers, contractors, employees or agents shall be promptly removed. Driveways damaged by Licensee's use of the Access License will be promptly repaired in accordance with Licensee's specifications at Licensee's sole cost and expense, and to Licensor's satisfaction as and when such damage occurs.
6. **Completion of Construction.** Upon completion of the construction of the EWIP improvements, Licensee shall remove any rubbish within the TGAE Area that was not previously removed. Further, if Licensee has removed or damaged any of Licensor's improvements, including but not limited to paving, sod, herbage, lighting standards, signage or landscaping within the TGAE Area or otherwise on Licensor's property that has not previously been repaired pursuant to paragraph 5 above, then

Licensee, at its sole cost and expense, shall restore the property damaged by Licensee's activities to the same condition that existed prior to Licensee's entry upon the particular property or TGAE Area.

7. **Indemnification from Willful Misconduct or Negligent Actions.** Licensee and Licensee's successors and assigns shall indemnify, defend and hold harmless Licensor, Wal-Mart Stores, Inc., and any and all corporations, partnerships, companies, or other entities as have existed at any time, or may hereafter exist during the term of this License and in which Wal-Mart Stores, Inc. did or does have more than a 50% ownership interest, their employees, officers, directors and agents from and against any and all losses, liabilities (including strict liability), claims, causes of action, damages, injuries, liens (including mechanic's liens and materialman's liens), expenses and costs, including without limitation reasonable attorney's fees of any settlement, judgment or claims arising out of, relating to, or resulting from the willful misconduct or negligent actions performed under this License by Licensee, or that of its suppliers, contractors, employees, or agents using the TGAE Area solely in connection with the construction of the EWIP improvements. Notwithstanding anything to the contrary in this License, the indemnities provided by Licensee hereunder will not extend or apply to any claims, damages, suits, actions, expenses, losses, liabilities, liens, expenses and costs caused by or resulting from the negligence or willful misconduct of the Licensor, or its officers, employees, agents, invitees, licensees, agents, contractors, or instrumentalities.

8. **Insurance Requirements.** Licensee shall require all of its suppliers, contractors, employees or agents and consultants who will travel upon and use the TGAE Area to obtain and maintain in full force and effect, commercial general liability insurance insuring against loss or liability in connection with bodily injury, death, property damage or destruction occurring on or about the TGAE Area. Such insurance shall be as follows:

Each occurrence	\$1,000,000.00
Personal/advertising injury	\$1,000,000.00
Products/completed operations aggregate	\$2,000,000.00
General aggregate	\$2,000,000.00
Fire damage (any fire)	\$100,000.00
Medical expense (any one person)	\$10,000.00

Prior to the entry on and use of the TGAE Area by any of Licensee's suppliers, contractors, employees or agents, Licensee shall deliver to Licensor certificates of insurance evidencing the coverages required by this paragraph.

9. **Special Provisions Involving Hazardous Substances.** Licensee shall not introduce any substance, chemical or waste on or under the TGAE Area or its adjacent property that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation (collectively, "Hazardous Substances"). Licensee shall be responsible for, and shall promptly conduct any investigation and remediation as required by any applicable environmental laws for, all spills or other releases of any

Hazardous Substance to the extent the contamination is solely caused by Licensee's actions or activities on the TGAE Area and adjacent lands which are used by Licensee to construct EWIP improvements. Written notification of any and all spills or other releases, caused by Licensee, of any Hazardous Substances on the TGAE Area or adjacent lands, shall be provided to Licensor and Licensee shall be responsible for the investigation, cleanup and remediation of any such spill or release of said hazardous, toxic or dangerous substance. Notwithstanding the provisions of paragraph 7, the indemnification and hold harmless provisions of this paragraph 9 shall apply to spills or releases of Hazardous Substances. Licensee and Licensee's successors and assigns, shall indemnify, defend and hold harmless Licensor and Wal-Mart Stores, Inc., and any and all corporations, partnerships, companies, or other entities as have existed at any time, or may hereafter exist during the term of this License and in which Wal-Mart Stores, Inc. did or does have more than a 50% ownership interest, their employees, officers, directors and agents from and against any and all losses, liabilities (including strict liability), claims, causes of action, damages, injuries, expenses and costs, including without limitation reasonable attorney's fees of any settlement, judgment or claims of any and every kind whatsoever paid, incurred or suffered by, or asserted against, Licensor and/or Wal-Mart Stores, Inc., and any and all corporations, partnerships, companies, or other entities as have existed at any time, or may hereafter exist during the term of this License and in which Wal-Mart Stores, Inc. did or does have more than a 50% ownership interest, their employees, officers, directors and agents by any person or entity or governmental agency, for, with respect to, or as a direct or indirect result of, the use of the TGAE Area by Licensee, its suppliers, contractors, employees or agents resultant from the escape, seepage, leakage, spillage, emission, discharge or release of any Hazardous Substance. The provisions of this paragraph include, without limitation, any settlement or judgment or claims asserted or arising under, as amended, the Comprehensive Environmental Response, Compensation and Liability Act, the Superfund Amendment and Reauthorization Act, the Resource Conservation Recovery Act, the Federal Water Pollution Control Act, the Federal Environmental Pesticides Act, the Clean Water Act, any so called federal, state or local "Superfund" or "Superlien" statute, or any other statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to or imposing liability (including strict liability), or standards of conduct concerning any Hazardous Substance.

10. **Compliance with Applicable Law and Approvals.** Licensee shall secure, maintain and comply with all required licenses, permits and certificates relating to, or otherwise necessary or appropriate for, the construction, installation, repair, replacement and maintenance of Licensee's EWIP improvements. Licensee shall comply with any and all applicable federal, state and local laws, rules, regulations, statutes, codes, orders and ordinances, including, but not limited to, those governing the prevention, abatement and elimination of pollution and/or protection of the environment and the employment of its workers.
11. **Default.** If Licensee defaults in the performance of any provision contained in this License, and fails to cure any such default, then Licensor may terminate this License

following written notice and a fifteen-(15) day period during which Licensee shall have the opportunity to cure such default to Licensor's satisfaction.

12. **Execution in Counterparts.** This License may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A facsimile copy and/or email transmission of this License and any signatures thereon shall be considered for all purposes as originals.
13. **Applicable Law.** This License is governed by and will be construed in accordance with the laws of the State of Florida, and in the event of any litigation concerning the terms of this License proper venue thereof will be in St. Lucie County, Florida.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]**

**IN WITNESS WHEREOF**, the parties hereto have executed this instrument to be executed on behalf of their respective entities, successors and assigns, the day and year first written above, which shall be the date the last party signs this License.

**SAM'S EAST, INC. ("Licensor")**

ATTEST

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

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

Its:

Its: Assistant Secretary

**CITY OF PORT ST. LUCIE ("Licensee")**

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

Jerry A. Bentrrott

Its: City Manager