

GEOTHERMAL WATER SYSTEM AGREEMENT WITH CHAMPLAIN COLLEGE

This Agreement is made by and between the City of Burlington, a municipal corporation organized and validly existing under the laws of the State of Vermont (hereinafter “City”) and Champlain College, Inc., a Vermont non-profit educational corporation with its principal offices in Burlington, Vermont (hereinafter “Champlain”).

WHEREAS, Champlain seeks to construct, maintain, repair, replace and use an underground pipe/line/conduit (“utility corridor”) upon and across Maple St. for the benefit of an energy-efficient geothermal water system (“Geothermal System”) to serve Champlain’s residential housing known as Res-Tri Dormitories located on the north side of Maple St; and

WHEREAS, such activity requires the running of said utility corridor upon and across the City’s right of way on Maple St., such occupation of the right of way to be approximately twenty (20) feet in width and running from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said occupation being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled “Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 (“Plan”) and adopted by reference into this Agreement and

WHEREAS, the occupation of the City’s right of ways requires approval of the Burlington City Council and the excavation of right of ways requires the approval of the Department of Public Works;

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the above and the following mutual covenants the City and Champlain enter into the following Agreement:

1. **UTILITY CORRIDOR PLACEMENT, CONSTRUCTION, MAINTENANCE, REPLACEMENT & USE**

Champlain may construct, maintain, repair, replace and use an underground utility corridor for the benefit of an energy-efficient Geothermal System to serve Champlain's residential housing known as Res-Tri Dormitories located on the north side of Maple St upon and across the City's right of way on Maple St., subject to the terms and conditions set forth in this Agreement.

Such occupation of the right of way is to be at a depth as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement.

The utility corridor is approximately twenty (20) feet in width. The utility corridor will run from the southerly sideline of the right of way for Maple Street to the northerly sideline of the right of way for Maple St., the centerline of said occupation being located approximately 438 feet west of the westerly sideline of South Willard St. at the Maple St. intersection, as depicted and shown on a Plan entitled "Geothermal Water System Plan and Profile, Champlain College, prepared by Engineering Ventures PC, dated January 10, 2012, last revised on February 3, 2012 ("Plan") and adopted by reference into this Agreement.

Any and all construction, maintenance, repair, or replacement shall be done pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

The right to construct, maintain, repair, replace and use an underground utility corridor in the above location is offered and accepted "AS IS, WHERE AS" and "WITH ALL FAULTS;" and neither the City nor its agents, employees or other representatives make any guarantee, representation or warranty, express or implied (and the City shall not have any liability whatsoever) as to the value, uses, habitability, condition, design, operation, financial condition or prospects, or fitness for a particular purpose or use of the right of way or the City's land adjacent thereto, or any part thereof, or any other guarantee, representation or warranty whatsoever, express or implied, with respect to the right of way or any part thereof or the City's land adjacent thereto, or information supplied to Champlain with respect thereto. Further, the City shall have no liability for any latent, hidden, or patent defect as to the right of way or the City's land adjacent thereto.

2. **RELOCATION**

The Parties acknowledge and agree that the use, repair, improvement and maintenance

of the Maple St. right of way, including sidewalks, street, and combined sewer/stormwater and stormwater system have first priority to, within, on, or about the right of way.

The Parties acknowledge and agree that the City Engineer or his/her designee may at a future date determine that it is necessary to relocate utility corridors, including Champlain's, within and/or upon the Maple St. right of way for the proper maintenance and improvement of this right of way, including the maintenance and improvement of the street, sidewalks, and stormwater and/or combined sewer/stormwater system located upon and within the right of way,.

In the event of such a determination and upon reasonable written notice of no less than six (6) calendar months, Champlain shall relocate said utility corridor pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

3. MAINTENANCE & PERFORMANCE OF WORK

Except during construction, maintenance, replacement, repair or relocation, Champlain shall maintain the utility corridor and the land needed to support it in a manner that does not impair the public rights of way, including the protection of utilities, pedestrians and vehicles traveling upon the public right-of-ways within and adjacent to the property occupied by the utility corridor.

Champlain may enter onto the City's Maple St. right of way to bore under, excavate, support, fill and otherwise take such actions as may be necessary or appropriate as required from time to time to ensure the structural integrity of the Geothermal System pursuant to and in compliance with all applicable governmental requirements, approvals and permits required for such work.

Champlain shall maintain the utility corridor and the land needed to support it in a manner that protects the right of way and all utilities, existing or future, located within the right of way or adjacent to the rights-of-ways. Champlain agrees that any and all expenses assumed by a utility to repair damages caused to the utility by the construction, use, maintenance, repair or relocation of the utility corridor allowed by this Agreement shall be reimbursed by Champlain. Utilities currently located in the right of way are depicted in the Plan and are incorporated herein by reference. Prior to the commencement of any future work by Champlain on the right of way pursuant to this Agreement, a then current drawing(s) of utilities located in and adjacent to the relevant portions of the right of way shall be prepared by Champlain and submitted to the City.

Champlain agrees to protect vehicles and pedestrians traveling upon the Maple St. right-of-way from damage caused by its or its officers', representatives', agents', employees', or contractors' in connection with the construction, maintenance, repair, relocation, or use of the utility corridor.

In the exercise of its rights under this Agreement, Champlain will perform all work in the right of way in a good and workmanlike manner, in conformance to the requirements of any and all permits and permit requirements required for such activity by the City. Champlain shall perform all work so as to cause no unnecessary damage or disturbance to the City's lands or the utilities located therein or the public's rights in the right of way. In each and every instance, Champlain shall restore each portion of the right of way disturbed by Champlain's entry to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

4. RIGHT OF PROTECTION

Upon reasonable notice to the City, Champlain shall have the right to enter upon the Maple St. right of way from time to time for the purposes of the protection of the utility corridor, including but not limited to conducting inspections, surveys, preparing appraisals, conducting soils tests or engineering studies, and obtaining other information about the right of way.

Champlain's entry onto the right of way for the purposes set forth herein and its activities on the right of way as permitted herein shall occur at the sole risk of Champlain. Champlain shall indemnify, hold the City harmless and defend the City from and against any and all claims, liens, damages, losses and causes of action which may be asserted by Champlain or Champlain's employees and agents or any third party as a result of any such entry. Champlain's entry onto or testing of the right of way shall be conducted in a manner that minimizes any disturbance to the land and to the use and enjoyment of the right of way by the City or the public. Subsequent to completing said inspections, surveys and tests, Champlain shall, at its sole expense, return the right of way as nearly as is practicable to the same and as good a state and condition as they were immediately prior to Champlain's entry unless otherwise required by a permit or permit condition issued by the City concerning said work.

5. PERMITS

Champlain is subject to any and all permits and permit conditions required for the above stated activity by the City, including but not limited to applicable permits for land use, excavation, obstructions, stormwater and building construction. Prior to the commencement of work, Champlain must obtain all requisite governmental approvals and permits necessary to construct, maintain and use the utility corridor and the improvements benefiting from the utility corridor described herein. All work done and

improvements made in connection with the utility corridor granted herein shall be completed in accordance with the governmental approvals and permits issued to Champlain and shall be made at Champlain's sole cost and expense. Grantee shall restore the Maple St. right-of-ways, if disturbed, following any disturbance in accordance with all governmental regulations, permits and approvals, and such restoration shall be made at Champlain's sole cost and expense.

6. PAYMENT FOR FAILURE TO PERFORM

If Champlain fails to perform its obligations hereunder as and when called for, then Champlain shall make payment to the City of reasonable compensation for the failure to perform. After notice to the Champlain and failure to timely cure by Champlain, City also shall have the right, in its sole discretion, to recover all amounts expended by City in furtherance of purposes and terms of this Agreement and pursue any further legal or equitable remedies provided by law, including specific performance and damages. In the event that a legal action is instituted arising out of a breach of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs.

7. INSURANCE

Champlain shall maintain in effect throughout the term of this Agreement comprehensive public liability insurance with an A rated insurance carrier, or better, qualified to transact business in the State of Vermont, insuring against all legal liability for injuries or damages suffered as a result of the exercise of rights granted pursuant to this Agreement in an amount not less than \$1,000,000 each occurrence and \$3,000,000 general aggregate. The City shall be named as an additional insured on such insurance policy.

Prior to execution of this Agreement, Champlain shall furnish the City with a certificate of insurance which shall include the provision that the City is named as an additional insured and shall be given 30 days written notification prior to cancellation of such insurance. The certificate shall be attached to this Agreement.

It is the responsibility of Champlain to ensure that a current certificate of insurance are on file with the City at all times.

8. INDEMNIFICATION

Champlain agrees to indemnify, defend and hold the City harmless and free from any and all liability arising out of Champlain's use of the right of way pursuant to this Agreement and Champlain agrees to make no claim against the City or any of its officers, employees, agents or representatives for any loss or damage caused by the City's use or maintenance of its right-of-way.

9. **FEE**

There shall be an annual fee paid by Champlain for the rights provided by this Agreement equal to 2.5% of the percentage of annual rent paid by the residents of the Res-Tri Dormitories attributable to the heat and cooling costs. The percentage of the annual rent paid by the residents of the Res-Tri Dormitories attributable to the heat and cooling costs shall be declared by Champlain on an annual basis as part of its annual October 1 installment payment. This fee shall be paid to the Burlington City Clerk-Treasurer's Office in installments due October 1 and February 1 annually.

10. **REVOCATION**

This Agreement is immediately revoked in the event Champlain discontinues the use of the utility corridor. Upon revocation, Champlain must remove at its own expense the utility corridor and appurtenances thereto. If Champlain refuses to promptly remove the utility corridor and appurtenances thereto, they may be removed by the City and Champlain shall be liable for all expenses of such removal.

11. **NUISANCES PROHIBITED**

Champlain shall not, during the effectiveness of this Agreement, maintain the utility corridor in a manner which creates a nuisance or violation of any applicable City of Burlington ordinance, State or Federal statute, or controlling bylaw, regulation, or condition imposed, whether existing at the time of commencement of this Agreement or enacted, amended, or otherwise put into effect during the term of this Agreement. Such prohibition of nuisances or violations of law shall include permitting the creation of a nuisance or violation of law.

12. **ASSIGNMENT OF RIGHTS**

Champlain shall not sell or assign its rights pursuant to this Agreement or permit the use of the premises or any part thereof by any other entity without the express prior written consent of the City. Any unauthorized action in violation of this provision shall be void, and shall terminate Champlain's rights pursuant to this Agreement.

13. **LIMITATION OF RIGHTS**

Champlain acknowledges that no property or other right is created other than that specifically defined and limited by this Agreement.

DATED at Burlington, Vermont this _____ day of _____,
2012.

CITY OF BURLINGTON

Witness

By: _____
Mayor
Duly Authorized

Champlain College, Inc.

Witness

By: _____
Duly Authorized

\\Cob001\Users\EBergman\My Documents\ATTORNEY\COUNCIL\Easements, Leases & License Agreement\Champlain College Geothermal Project\License Agreement.doc