RESOLUTION NO. 2017-128

A RESOLUTION AUTHORIZING THE CITY MANAGER OR HIS DESIGNEE TO EXECUTE A RIGHT OF ACCESS AGREEMENT TO THOMAS & BETTS CORPORATION IN ORDER FOR THEM AND THEIR AGENTS AND CONTRACTORS TO REMEDIATE AND INVESTIGATE PETROLEUM RELEASES FROM 800 MOGADORE ROAD, WHICH ARE CROSSING NEARBY CITY PROPERTY AND TO RESTORE SAID PROPERTY, AND DECLARING AN EMERGENCY.

WHEREAS, the property owned by the Thomas & Betts Corporation known as 800 Mogadore Road, Kent, Ohio is releasing petroleum products across City owned property and into the Cuyahoga River as shown in the attached Exhibit "1"; and

WHEREAS, the Ohio Environmental Petroleum Agency (Ohio EPA) has approved an interim remedial action plan for Thomas & Betts Corporation, which will cause Thomas & Betts and their agents to remediate and investigate possible petroleum releases from 800 Mogadore Road; and

WHEREAS, the attached agreement (Exhibit "A") needs to be executed before the Thomas & Betts Corporation can begin its work to remediate the situation; and

WHEREAS, the Thomas & Betts Corporation will need to restore the City property to a condition similar to the property's current condition as described in the attached agreement; and

WHEREAS, time is of the essence as the Ohio EPA wants the remediation started as soon as is possible.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Kent, Portage County, Ohio, at least three-fourths (3/4) of all members elected thereto concurring:

SECTION 1. That Council does hereby authorize the City Manager, or his designee, to enter into a right of access agreement with the Thomas & Betts Corporation and their agents so they may cross City property near 800 Mogadore Road, for the investigation and possible remediation of petroleum releases and the restoration of said property as is more fully described in Exhibit "A" attached hereto and incorporated herein.

SECTION 2. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Resolution were adopted in an open meeting of this Council and that all deliberations of this Council, and of any of its committees that resulted in such formal action, were in meetings open to the public in compliance with all legal requirements of Section 121.22 of the Ohio Revised Code.

SECTION 3. That this Resolution is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety, and welfare of the residents of this City, for which reason and other reasons manifest to this Council this Resolution is hereby declared to be an emergency measure and shall take effect and be in force immediately after passage.

PASSED: October 18, 2017

Date

Jerry T. Fiala
Mayor and President of Council

ATTEST: Tara Grimm, CMC
Clerk of Council

I, TARA GRIMM, CLERK OF COUNCIL FOR THE CITY OF KENT, COUNTY OF PORTAGE, AND STATE OF OHIO, AND IN WHOSE CUSTODY THE ORIGINAL FILES AND RECORDS OF SAID COUNCIL ARE REQUIRED TO BE KEPT BY THE LAWS OF THE STATE OF OHIO, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF RESOLUTION No. ______________, ADOPTED BY THE COUNCIL OF THE CITY OF KENT ON ________________________, 20_______.

______________________________
TARA GRIMM, CMC
CLERK OF COUNCIL
(SEAL)
This CONDITIONAL RIGHT OF PROPERTY ACCESS AGREEMENT (the “Agreement”) is made and entered into and shall be effective as of this ______ day of ______, 2017, by and between the CITY OF KENT (the “City”) and Thomas & Betts Corporation (T&B) and their authorized representatives, including Contractors and Consultants.

WHEREAS, the City owns certain parcels of real property in the State of Ohio, County of Portage, known as the North Ditch, Kramer Ball Field Complex, East Bank of the Cuyahoga River, and the surrounding park land known as permanent parcel numbers 17-025-20-00-014-000, 17-012-10-00-007-000, 17-011-10-00-049-000, 17-012-10-00-006-000, and 17-011-10-00-048-000 (collectively, the “Property”) and as depicted on the attached map as “Exhibit A”; and

WHEREAS, T&B (the “Owner”), owns a certain parcel of real property in the State of Ohio, County of Portage, 800 Mogadore Road, Kent, known as permanent parcel number 17-012-10-00-001-000 (the “Site”) and has hired contractors and consultants, including but not limited to HZW Environmental Consultants, LLC, to assess the environmental conditions at the Property as a result of releases from the Site; and

WHEREAS, T&B is requesting access to the Property to investigate the nature and extent of petroleum impacts potentially related to the Site, including the area identified by the state of Ohio Environmental Protection Agency (OEPA) as “Camp Seep”; as well as to monitor and restore, as may be appropriate, vegetation installed pursuant to the Interim Remedial Action Plan (the “IRAP”) document for the Resource Conservation and Recovery Act (RCRA) and Ohio Voluntary Action Program (VAP) Memorandum of Agreement (MOA) for the Off-Property North Ditch Area submitted to OEPA on ______ and approved and modified by OEPA in its September 27, 2016 response; and

WHEREAS; the investigation, monitoring and/ or restoration activities (the “Activities”) shall also comply with the methodology and conditions stipulated in the United States Army Corps of Engineers (the “Corps”) in Department of the Army Permit No. 2015-01012, Nationwide Permit No. 20 as published in the Federal Register, Volume 77, No. 34, on Tuesday, February 21, 2012 and modified by the Corp in their response dated October 27, 2016.

THEREFORE, it is agreed as follows:

1. **Grant of Access.** The City hereby conditionally grants access to Owner, their agents, employees, consultants, contractors, and subcontractors (collectively the “Owner’s Agents”) a limited right to access to enter upon the Property for the sole purpose of performing the Activities.

2. **Duration and Termination of Access.** Conditional access shall be allowed upon the execution of this Agreement. Based on the IRAP monitoring requirements, the Agreement shall be in effect through March 2022 or such time as the North Ditch restoration no longer requires monitoring, whichever comes first, at which time it will expire unless extended in writing by the City. If the Consultant
continues Activities after this date without written consent from the City, the City maintains the right to issue a stop work order.

In the event the Owner or its Agents breaches any covenant or obligation under this Agreement and a cure of such breach is not initiated and pursued to the reasonable satisfaction of the City within thirty (30) days after receipt of notice thereof, the City may terminate this Agreement and revoke the access granted herein upon delivery of notice to Owner and Agents, and take all other action authorized by law or pursuant to this Agreement, to remedy such breach.

3. **Covenants of Agents.** The cost of the Activities shall be borne by the Owner and its contractors and consultants. The work undertaken at the Property shall be conducted in accordance with standards customarily employed in the industry and in an expeditious, safe and diligent manner. In addition, all work shall be performed in compliance with all applicable federal, state, and local laws, ordinances, rules, and regulations and Owner shall be responsible for ensuring their contractors and consultants have knowledge of all the terms and conditions of this Agreement, the IRAP, and Corp Permit.

4. **Information Sharing.** At no cost to the City, the Owner shall provide the City with all data collected by the Agents, including but not limited to laboratory analyses, monitoring reports, photographs and field notes associated with the Activities undertaken on the Property.

   The City maintains the right to provide its own representative to observe the Activities undertaken on the Property and to obtain its own samples for analyses.

5. **Scope of Work.** Activities are limited to the Property and shall be conducted in accordance with the IRAP, Corp Permits or a written Scope of Work to be provided to and approved by the City in advance of the Activities. All work shall be conducted in a manner that does not risk further release and migration of petroleum from the Property or the Site. The Owner and its contractors and consultants shall not use the Property for any unrelated purpose or business.

6. **Local Permits, Approvals, and Conditions.** The Owner and their Agents shall secure written approval from the Parks & Recreation Director, or his designee, prior to the placement /staging of all materials, equipment and supplies; the removal of trees, shrubs, and other vegetation; the expansion of existing or development of new access roads or paths to allow for ingress/egress to the Property; or any other activity that will alter the existing condition of the Property.

   The Owner and their Agents shall obtain all permits and approvals necessary to comply with local laws prior to initiating authorized Activities.

   The Owner and their Agents shall notify the City of actual start dates prior to the commencement of Activities, any alterations to the schedule of planned Activities, and/or any changes to the scope of the Activities.

   The Owner or its contractors and consultants shall provide all control measures necessary to limit public access to the work areas, including all materials and equipment staging locations,
and provide appropriate traffic control measures, including but not limited to signage and flagger personnel.

7. **Restoration.** Restoration of the Property and affected park lands, including but not limited to any and all temporary access roads or paths, shall be in accordance with the terms of this Agreement, the IRAP, or the Corp Permit.

   The Owner’s contractors and consultants shall provide the City with an inventory of all trees, shrubs, and vegetation planned for removal prior to initiating Activities. Trees shall be replaced at a ratio of no less than 2:1; shall have a minimum caliper of 1.75 to 3 inch, and be comprised of species variety native to the northeast Ohio region as specified in the City’s Urban Forestry Management Plan (the “UFMP”) and as approved by the City.

   The Owner’s contractors and consultants shall provide written certification and details on all materials to be utilized for the Activities.

   The Owner’s contractors and consultants shall provide the City with the name and mobile telephone number for the representative(s) responsible for on-site management of the Activities at the Property.

8. **Materials Removed from the Property.** Any samples, waste materials, contaminants, pollutants collected and removed from the Property shall be handled, stored, treated, transported, and disposed of by the Owner or Owner’s Agents as necessary and in accordance with all federal, state, and local environmental regulations and requirements.

   At no time shall waste materials, contaminants, or pollutants collected and removed from the Property be stored on the Property.

9. **Tools and Equipment.** All tools, equipment or other items placed upon the Property by the Owner and Owner’s consultants and contractors shall remain under the ownership of the Owner and its consultants and contractors and shall be removed from the Property no later than thirty (30) days after the completion of Activities.

10. **Insurance.** Prior to commencing the Activities and at all times during the performance of Activities, the Owner and its Consultants and Contractors Agents shall maintain Workers’ Compensation and Employer’s Liability Insurance in the amount required by State of Ohio law; Commercial General Liability (“CGL”) Insurance with combined single limits of One Million Dollars ($1,000,000.00) per occurrence and Two Million ($2,000,000.00) in the aggregate; and Comprehensive Automobile Liability Insurance (owned, not owned and hired) with a combined single limit of Five Hundred Thousand Dollars ($500,000.00). The City shall be added as an additional insured to the CGL policy and such policy shall be considered primary insurance without recourse to or contribution from any similar insurance carried by the City.

   The insurance certificate shall contain a provision that coverage afforded under the policy evidenced by such certificate will not be canceled or changed without providing at least thirty (30) days
prior written notice to the City. The Owner’s Contractors and Consultants shall deliver certificates of insurance to the City evidencing the existence of such policy prior to the commencement of Activities.

11. **Bond.** The Owner’s Agents has provided the City with a performance bond in the amount of $25,000, $10,000 of which remains in place after the initial work conducted in accordance with the IRAP on the Property to guarantee the satisfactory completion of the Activities on the Property as specified in the Agreement.

12. **Indemnity.** The Owner for itself, Consultants and Contractors shall indemnify, hold harmless and defend the City from and against any and all claims, demands, liabilities, causes of action, losses, costs, damages and expenses of any kind, including reasonable attorney fees, that may be asserted against or incurred by the City in any way relating to, arising out of, caused by or in connection with (i) the acts or omissions of the Owner or Owner’s Agents performance of the Activities on the Property, (ii) violations or liens that may be filed against the Property as a result of the performance of the work, (iii) personal injury, wrongful death, costs, expenses or property damage resulting from the performance of the work or contamination at the Property, and (iv) injunctive relief or other claims sought by any governmental authorities or third parties as a result of the work or contamination at the Property. The Owner or its Consultants or Contractors shall not be required to indemnify the City for claims, liabilities, damages, losses or expenses caused by wrongful acts or omissions by the City. The provisions of this paragraph shall survive the termination of this Agreement.

13. **No Admission.** The granting of conditional property right of access herein by the City is not intended, and shall not be construed, as an admission of liability on the part of the City or the City’s successors and assigns for any contamination at the Property.

By execution of this Agreement, the City is not providing any consent or agreement to the contamination or conditions at the Property and the City does not waive any rights or remedies in connection with any contamination at the Property.

14. **Miscellaneous.**

(a) **Entire Agreement.** This Agreement shall constitute the entire agreement between the parties regarding the granting of conditional property right of access to the Owner and Owner's Agents for the purpose herein. No modification, modification, amendment, or waiver of the terms and conditions of this Agreement shall be binding on the City, Owner, or Owner’s Agents unless approved in writing by an authorized representative of the City, Owner and Owner’s Agents.

(b) **Governing Law. Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. Venue for any action or proceeding arising from or related to this Agreement shall be in the appropriate Ohio court having jurisdiction.

(c) **Severability.** Any provision of this Agreement that is prohibited or unenforceable shall be ineffective without invalidating the remaining provisions thereof.
EXHIBIT "A"

(d) No Third Party Beneficiaries. This Agreement is solely for the benefit of the parties hereto and their respective successors and assigns and shall not be deemed to confer upon third parties any remedy, claim, liability, or reimbursement, claim of action or other right.

(e) Representations. Each of the parties hereto represents and warrants to the other party executing the Agreement it has the authority to do so knowing that each of the other parties to this Agreement are acting in reliance upon such representation. The provisions of this Section shall survive termination of this Agreement.

(f) Notices. Any notice, demand, request payment or other communication which any party hereto may require or may desire to give hereunder shall be in writing and shall be deemed to have properly given (a) if hand received, (b) if received via United States mail service or other reliable express courier service, or (c) if sent via e-mail to the addresses set forth below:

City of Kent:
Name: ________________________________
Address: ________________________________
e-mail: ________________________________

Owner:
Name: ________________________________
Address: ________________________________
e-mail: ________________________________

Name: ________________________________
Address: ________________________________
e-mail: ________________________________

EXECUTED ON this day ______ of ________, 2017

City of Kent:
By: ________________________________

Thomas & Betts Corporation:
By: ________________________________

By: ________________________________
Approved as to Legal Form:

Jim Silver, Law Director