EXHIBIT A
TO 2020 EXTRAORDINARY PETITION OF KIC FOR AFFIRMATION OF 2019 VARIANCE
June 10, 2019

VIA HAND DELIVERY AND EMAIL: BOB.MCDONALD@DENVERGOV.ORG

Mr. Robert McDonald
Executive Director and Public Health Administrator
Denver Department of Public Health & Environment
200 West 14th Avenue, Suite 200
Denver, CO 80204

RE: Extraordinary Petition of Kiewit Infrastructure Company for Affirmation of Variance, pursuant to Part 3, Rules Governing Hearings Before the Denver Board of Public Health & Environment

Dear Mr. McDonald:

On August 20, 2018, Kiewit Infrastructure Company ("KIC") filed an Amended Petition for Variance on Appeal (the "Amended Petition") with the Board of Public Health and Environment for the City and County of Denver (the "Board") seeking a variance from requirements of Denver's Noise Ordinance, Denver Revised Municipal Code Chapter 36, for and respecting the Central 70 Project (reconstruction of a 10-mile segment of I-70 between I-25 and Chambers Road).

On August 28, 2018, the Department of Public Health and Environment (the "Department") filed its Findings and Recommendations, wherein the Department recommended that the Board approve Petitioner's Amended Petition for nighttime construction with certain conditions. Following a hearing, the Board found on September 6, 2018 that Petitioner had met its burden of proof pursuant to Section 3.10 of the Rules and Regulations Governing Hearings Before the Board of Environmental Health, dated March 14, 2014 and, as such, granted and approved the Amended Petition for Variance on Appeal as conditioned by the Department's Findings and Recommendations (the "Variance"). The Board’s Variance is attached here as Exhibit A.

The Board’s Variance included the following conditions: (1) Petitioner shall comply with all conditions outlined in the Department's Findings and Recommendations, dated August 28, 2018, attached as Attachment 1 to the Variance, and (2) the duration of the Variance shall extend until no later than September 6, 2019.

KIC hereby submits this Extraordinary Petition for Affirmation of Variance (the "Extraordinary Petition") from terms of the Denver Revised Municipal Code ("DRMC"), Chapter 36, for and respecting the Central 70 Project. KIC requests that the Board affirm its Variance, subject to the same conditions outlined in the Department's Findings and Recommendations (attached as Attachment 1 to the Variance), but with no limitation on the term of variance except as prescribed in the original Findings and Recommendation of the Department. KIC also requests that the defined term, Major Structure Activity, be redefined to mean: "any demolition involving a Major Structure," so as to clarify the definition of General Construction. The Department has concurred in these requests, which are set forth in a redline document attached as Exhibit B.
KIC has previously paid the non-refundable filing fee required by paragraph 3.01 of the Rules Governing Hearings before the Board of Environmental Health ("Rules"). At KIC's request, a hearing before the Denver Board of Public Health and the Environment has been scheduled for July 11, 2019 to consider this Extraordinary Petition.

I. BACKGROUND

The Central 70 Project ("Central 70" or "Project") will reconstruct Interstate Highway 70 between the intersection of I-70 and I-25 and a designated location at/near I-70 and Chambers Road, including addition of one new Express Lane in each direction, removal of the aging (54-year old) viaduct between Brighton Boulevard and Colorado Boulevard, lowering the interstate highway elevation between Brighton Boulevard and Colorado Boulevard, and installation of a four-acre park over a portion of the relocated interstate highway (between Columbine Street and Clayton Street). More than 95% of this Project is located within the City and County of Denver.

Project Work activity by KIC began in the late summer of 2018 and is (and has always been) scheduled to continue until approximately December 15, 2022 (approximately 52 months).

The Project will improve a major east/west transportation corridor within the Denver metropolitan area which carries upwards of 200,000 vehicles per day; and CDOT Project specifications require at least three unobstructed lanes of traffic be available from 5:00 a.m. to 10:00 p.m. every calendar day of Project Work. As a result, and as contemplated by DRMC, Section 36-7(5)(c), the continued Project Work requires a variance to allow Project Work completion that does not ‘interfere with traffic or jeopardize public safety if completed during daytime.’

KIC anticipates that Project Work will continue to be conducted on two 10-hour shifts, and regular construction activity is anticipated during Nighttime Hours five days a week.

CDOT planners have determined that, when all Project Work is completed, Central 70 will reduce traffic congestion, improve highway safety, and better accommodate future growth along the I-70 transportation corridor. CDOT has also determined that the completed Project will facilitate greater access to areas adjacent to the I-70 corridor for affected businesses and residents, and that long-term effects of the completed Project will positively enhance the I-70 corridor, and the affected areas, as a whole.

II. THE PETITIONER

Petitioner KIC is the Design-Build Contractor for Central 70 pursuant to its agreement with Kiewit Meridiam Partners, Concessionaire to the Colorado Department of Transportation. Petitioner KIC is a business entity located within the City and County of Denver, at 3543 E. 46th Avenue, Denver, CO 80216. KIC’s main telephone number is 720-920-4777.

KIC is represented by Hubert A. Farbes, Jr. and Justin Cohen of the law firm of Brownstein Hyatt Farber Schreck (the "Legal Representative"). The Brownstein mailing address is 410 17th Street, Suite 2200, Denver, CO 80202. The main office telephone number is 303-223-1100.

Petitioner requests that the Board affirm its Variance, which granted KIC a specific variance from the requirements of DRMC Chapter 36 (respecting reduction, control and prevention of noise), upon the following terms: (1) the duration of the Variance shall extend through December 15, 2022 (estimated Project completion), and (2) the defined term, Major Structure Activity, shall be redefined to mean: "any demolition involving a Major Structure." Petitioner’s Proposed Affirmation of Variance is attached here as Exhibit C.
Supporting exhibits for this Extraordinary Petition are attached here as Exhibits D through M, and are referenced in this Extraordinary Petition, and the Board’s Variance, as appropriate.

KIC, as Petitioner, will suffer undue hardship if the Variance is not affirmed; the existing Variance, if affirmed as requested, will not adversely affect public health; and requested affirmation of the Variance is in harmony with the spirit and purposes of DRMC Chapter 36.

III. DEFINITIONS

Unless otherwise noted, the words and phrases used in this Extraordinary Petition for Affirmation of Variance and the Proposed Affirmation of Variance have the meanings prescribed in Exhibit A, attached, and at DRMC Section 36-2.

IV. SUMMARY OF PROJECT WORK NECESSITATING AFFIRMATION OF VARIANCE AND DEMONSTRATION OF UNDUE HARDSHIP

The Project Agreement between CDOT and KMP prescribes the obligations for design and construction of the Project, which obligations have been delegated to KIC.

Project Work Locations

Project Work will proceed in three principal work areas:

- The East Work area, between the Chambers Road intersection and Quebec Street (at Sand Creek Bridge) intersection;
- The Central Work area, between Quebec Street (at Sand Creek Bridge) and the Colorado Boulevard intersection; and
- The West Work area, between Colorado Boulevard and the intersection of I-25 and I-70.

Residential Properties within or adjacent to the existing Central 70 corridor are concentrated in the West Work area, between the I-25 / I-70 interchange and Colorado Boulevard. Some Residential Properties are also located in the Central Work area and East Work areas, generally east of Colorado Boulevard and north of I-70, extending as far east as Chambers Road. Hotels/motels located along the existing Central 70 corridor, throughout all three Project Work areas, may be affected by Project Noise levels. A Denver fire station located on Brighton Boulevard, near the highway, may also be affected. However, there are no other noise or vibration sensitive commercial properties (such as hospitals, medical clinics or laboratories) located in the Central 70 corridor or Project Work areas.

The following general categories of Project Work will be conducted during Nighttime Hours:

1. Maintenance of Traffic ("MOT") Lane Closures
2. MOT Concrete Barrier set/remove
3. MOT Temporary Paving detours
4. Asphalt Paving
5. Excavation/Embankment
6. Mechanically Stabilized Earth ("MSE") Walls
7. Surface Removals
8. Drilled Shafts
9. Cast In Place ("CIP") Walls
10. Drainage/Utility Tie Ins
11. Bridge Construction
12. Bridge Demolition

[See, Project Overview Map, attached as Exhibit D.]

V. SUMMARY OF THE PROPOSED TERMS FOR AFFIRMATION OF THE VARIANCE

As set forth in this Extraordinary Petition, KIC requests that the Board affirm its Variance upon the same conditions outlined in the Department's Findings and Recommendations dated August 28, 2018 and attached as Attachment 1 to the Variance. But KIC also requests the Variance extend through Project completion, or approximately December 15, 2022; and

KIC further requests that the defined term, Major Structure Activity, be redefined to mean: "any demolition involving a Major Structure" so as to clarify the definition of General Construction. The reason for this change is that, as a practical matter, work activity currently defined as Major Structure Activity is no different than General Construction Activity, except that demolition may occur at major structures. KIC recognizes that some demolition work, if performed without mitigation, may exceed an hourly Leq of 75 dBA or an Lmax of 86 dBA; and KIC will therefore fully comply with all Variance obligations (respecting protection of adjacent properties) during Nighttime Hours. KIC will continue complying with all conditions of the Variance with respect to all operations during Nighttime Hours throughout the duration of Project Work.

VI. SUMMARY OF SUPPORTING TECHNICAL ANALYSES/SOUND ENGINEERING DATA

KIC previously obtained, and has attached again, here, an extensive universe of engineering and related technical data which supported the Variance and supports this Extraordinary Petition.

A. KIC commissioned Wave Engineering, Inc. to predict both maximum noise levels anticipated from Nighttime Hours construction activity, and the expected impacts of the Proposed Affirmation of Variance for Nighttime Hours construction work activity. Wave Engineering used the Roadway Construction Noise Model ("RCNM"), developed by the Federal Highway Administration ("FHA"), to both make these predictions and evaluate/confirm Ambient Background Noise levels along the Project corridor. Results of the complete Wave Engineering analysis have been compiled at Exhibit H to this Extraordinary Petition.

B. KIC also commissioned Wave Engineering to compile and collate Source Sound Levels from all relevant KIC construction equipment to be employed for Project Work, including Lmax values for qualifying equipment at a 50-foot distance from receptors. Wave Engineering also prepared an analysis of expected sound mitigation effects of the Project Sound Barrier and related analyses. Results of these separate Wave Engineering compilations have been presented at Exhibit I to this Extraordinary Petition.
VII. SUMMARY OF SUPPORTING PUBLIC HEALTH ANALYSES

KIC, having compiled and modeled all Source Sound Levels throughout the corridor, previously determined that a variance authorizing KIC Nighttime Hours Noise levels would not adversely affect public health.

KIC also previously engaged an expert in effects of Noise upon human health and public health to evaluate the Nighttime Hours Noise levels prescribed in the original Amended Petition for Variance. This expert concluded that no aspect of the proposed Nighttime Hours Noise levels in the Variance would adversely affect public health, and her supporting analyses and conclusions were presented to the Board.

Moreover, the Board’s history of approval for noise variance requests, over the past nine years, evidences a repeated affirmation of the Nighttime Hours Noise levels proposed by KIC as levels that would not adversely affect public health. Since 2010, the Board has determined, on at least 20 different occasions, that Nighttime Hours Noise L_{eq} levels of 75 dB(A) and L_{max} levels of 86 dB(A) do not adversely affect public health and are appropriate for Noise created by Nighttime Hours activity [see Exhibit J]. And the KIC Proposed Affirmation of Variance will not alter or disturb this consistent pattern of Board approvals for Nighttime Hours Noise levels.

VIII. SUMMARY OF WORK SINCE THE BOARD GRANTED THE VARIANCE

Since the Board granted the Variance, Project Work has progressed as expected. KIC has completed Construction Activities and Major Structure Activities during Nighttime Hours at the following locations:

- Brighton Boulevard
  - MOT Concrete Barrier; Drainage; Utility Relocates; Surface Removals; Excavation
- 46th Avenue between Brighton Boulevard and UPRR
  - Surface Removals; Utility Relocates; Excavation
- UPRR
  - Excavation
- Lowered Section between UPRR and Columbine St
  - Surface Removals; Excavation
- Cover Section between Columbine St and Clayton St
  - Excavation; Bridge Construction at Columbine St and Clayton St
- Lowered Section between Clayton St and Colorado Boulevard
  - MOT Concrete Barrier; Surface Removals; Excavation
- Existing 46th Avenue between York St and Steele St
  - MOT Concrete Barrier; Drainage; Utility Relocates; Surface Removals; Excavation; Asphalt Paving
- Colorado Boulevard
  - Excavation; Embankment; Drainage; Asphalt Paving; Bridge Construction
- I-70 Mainline between Colorado Boulevard and Quebec St
  - MOT Concrete Barrier; Surface Removals; Excavation; Drainage; Embankment; Asphalt Paving
KIC's outreach to, and coordination with, the community regarding Project Work has been extensive. KIC routinely communicates with the community and community leaders—in Spanish and English—regarding Project Work by, among other things, holding community office hours, sending out a monthly newsletter and weekly traffic alerts, participating in community group meetings, hosting monthly calls, posting on social media, briefing elected officials, providing door-to-door notifications, updating community realtors, using a text alert system, and coordinating with local governmental agencies. KIC also advertises in the community, utilizing large and visible advertisements that have KIC's contact information. KIC's coordination, outreach, advertisement, and philanthropic efforts are documented in the PDF of the presentation to the Board scheduled for June 13, 2019 (attached here as Exhibit K). A sample monthly newsletter from June 2019, and a map showing where monthly newsletters are distributed, are attached here as Exhibit L. Notably, the June 2019 newsletter also specifically notifies the public regarding the July 11, 2019 hearing, and KIC's communication and outreach plan concerning the July 11, 2019 hearing is also included in Exhibit L.

KIC also mailed postcards to all residences and businesses (over 4,400 addresses) within a 1/2-mile radius of the Project regarding the commencement of work at night for the Project, and in its weekly traffic alert (to which over 4,000 subscribe), KIC notifies the local community regarding upcoming Nighttime noise activities. Examples of the postcards that were mailed, and lists of individuals who received the postcards, are attached here in Exhibit M. Since work began in September 2018, KIC has received seven noise complaint—none of which were substantiated by authorized noise testing. Those noise complaints can were as follows:

- 43rd Avenue and Elizabeth Street – two calls (2018)
  - No work in the area
- 43rd Avenue and Thompson Street (2018)
  - No work in the area
- 47th Avenue and York Street (2018)
  - Caller was testing system
- 44th Avenue and Pearl Street (2018)
  - Source was another City-related project
- Dahlia Street and 38th Avenue (2019)
  - Source was another City-related project
- 28th Avenue and Steele Street (2019)
  - Source was another City-related project

[See also Ex. K]
IX. KIC's PROPOSED AFFIRMATION OF VARIANCE IS IN HARMONY WITH THE SPIRIT AND PURPOSES OF DRMC CHAPTER 36

KIC's Proposed Affirmation of Variance, Exhibit C to this Extraordinary Petition, is consistent with, and harmonizes with the terms of DRMC Chapter 36.

The plain language of DRMC Chapter 36, the applicable Rules of the Board, the KIC evidence and the Variance establish that:

1. DRMC Chapter 36 contemplates and requires that construction equipment for activities be exempted from daytime noise limitations; and

2. DRMC Chapter 36 substitutes Ambient Background sound pressure levels for the standards prescribed at Section 36-6; and

3. DRMC Chapter 36 authorizes the Board to grant variances from Nighttime Hours sound pressure limits established at Chapter 36 wherever a construction project would interfere with traffic or jeopardize public safety if completed during daytime hours; and

4. DRMC Chapter 36 authorizes the Board, and the Rules (Section 3-02) compel the Board, to grant reasonable variance on appeal from the requirements of DRMC Chapter 36 wherever clear and convincing evidence is provided, and expert witness testimony supports, a petitioner's demonstration of its prescribed burden of proof (at Board Rules, Section 3.10).

X. CONCLUSION

KIC recognizes that the Board has ultimate authority to approve and effect this Proposed Affirmation of Variance, and to condition its approval upon specific modifications to the KIC proposal. But KIC also believes that, based upon the technical engineering analyses originally presented in its Amended Petition, the supporting expert opinions that were previously presented to the Board, the Board's September 6, 2018 grant of the Variance, and the Board's history of approvals for noise levels that do not adversely affect public health, the Board must accept this Extraordinary Petition for Affirmation of Variance and approve the Department's recommendation for, and KIC's submission of, the Proposed Affirmation of Variance attached as Exhibit C.

Respectfully submitted this 10th day of June, 2019.

BROWNSTEIN HYATT FARBER SCHRECK

Hubert A. Farbes, Jr.
Legal Representative for Petitioner KIC

cc: Anshul Bagga, Denver City Attorney's Office, via email

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