September 15, 2015

TO: ACHD Board of Commissioners & Bruce S. Wong, Director

FROM: Justin Fredin, Staff Attorney

SUBJECT: Temporary License Agreement with CCDC – Pioneer Pathway

Staff Report for September 23, 2015 Commission Meeting

Executive Summary

The Legal Department has drafted the attached Temporary License Agreement, which authorizes CCDC to install and maintain a brick and/or concrete pathway across a small portion of Pioneer Avenue (approximately 359 square feet), as depicted on Exhibit “B” to the agreement. A vicinity map and a site and landscape plan depicting the location of the proposed pathway are attached for your reference.

As with all temporary license agreements, no improvements may be installed unless the designs, plans and specifications have been approved in advance and in writing by ACHD.

CCDC approved and executed this agreement at its September 14, 2015 meeting.

Fiscal Implications

None.

Recommendation

Staff recommends that the Commission approve the agreement and authorize its execution by President Hansen and Director Wong.

Attachment(s): Vicinity Map
Site and Landscape Plan
First Addendum to Master License Agreement
TEMPORARY LICENSE AGREEMENT

THIS TEMPORARY LICENSE AGREEMENT (the "Agreement") is made and entered into this ____ day of ________________, 2015 ("Effective Date"), by and between the ADA COUNTY HIGHWAY DISTRICT, a body politic and corporate of the state of Idaho ("ACHD"), and the CAPITAL CITY DEVELOPMENT CORPORATION, an independent public body corporate and politic of the State of Idaho ("Licensee").

WITNESSETH:

For good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties:

SECTION 1. RECITALS.

1.1 ACHD owns and has exclusive jurisdiction over the public right-of-way located within the City of Boise, Ada County, Idaho, more particularly described as Pioneer Street ("Right-of-Way").

1.2 Licensee desires a license to use the Right-of-Way for the limited purposes hereinafter set forth, and, for the consideration and on the terms and conditions hereinafter set forth, ACHD is willing to extend such license to Licensee.

SECTION 2. LICENSE; LICENSE NOT EXCLUSIVE.

2.1 On the terms and conditions hereinafter set forth, ACHD hereby extends to Licensee a license on, over, across and under the Right-of-Way for the following uses and purposes ("Authorized Use") and no others:

Installation and maintenance of a brick and/or concrete pathway, as described and depicted in Exhibits "A" and "B" attached hereto. Notwithstanding anything to the contrary in said Exhibits, ACHD is granting Licensee a license rather than an easement.

2.2 This Agreement does not extend to Licensee the right to use the Right-of-Way to the exclusion of ACHD for any use within its jurisdiction, authority and discretion or of others to the extent authorized by law to use public right-of-way. If the Right-of-Way has been opened as a public Highway (as used in the Agreement, the term "Highway" is as defined in Idaho Code § 40-109(5)), Licensee's Authorized Use is subject to the rights of the public to use the Right-of-Way for Highway
purposes. Licensee’s Authorized Use is also subject to the rights of holders of easements of record or obvious on inspection of the Right-of-Way and statutory rights of utilities to use the public right-of-way. This Agreement is not intended to, and shall not, preclude or impede the ability of ACHD to enter into other similar agreements in the future allowing third parties to also use its public rights-of-way, or the ability of ACHD to redesign, reconstruct, relocate, maintain and improve its public rights-of-way and Highways as authorized by law and as it determines, in its sole discretion, is appropriate.

SECTION 3. CONSTRUCTION OR INSTALLATION OF IMPROVEMENTS. Any repairs or maintenance of the Licensee’s improvements currently located in the Right-of-Way or the installation or construction of improvements by Licensee in the Right-of-Way as permitted by the Authorized Use (the “Improvements”) shall be accomplished in accordance with designs, plans and specifications approved in advance and in writing by ACHD as required to satisfy applicable laws, its policies and good engineering practices. In approving such plans and specifications, ACHD assumes no responsibility for any deficiencies or inadequacies in the design or construction of the Improvements, and the responsibility therefor shall be and remain in Licensee.

SECTION 4. WAIVER AND ESTOPPEL STATEMENT BY LICENSEE. Licensee acknowledges and agrees that the license granted herein is temporary, non-transferable and merely a permissive use of the Right-of-Way pursuant to this Agreement. Licensee further acknowledges and agrees that it specifically assumes the risk that the license pursuant to this Agreement may be terminated before Licensee has realized the economic benefit of the cost of installing, constructing, repairing or maintaining the Improvements, and Licensee hereby waives and estops itself from asserting any claim that the license is in any way irrevocable because Licensee has expended funds on the Improvements and the Agreement has not been in effect for a period sufficient for Licensee to realize the economic benefit from such expenditures.

SECTION 5. TERM.

5.1 The term of this Agreement shall commence on the Effective Date, and shall continue until terminated by either party, with or without cause, which termination shall be effective following thirty (30) days’ advance written notice of termination given to the other party.

5.2 If Licensee defaults in the performance of any obligations incumbent upon it to perform hereunder, ACHD may terminate this Agreement and the rights extended to Licensee hereunder at any time, effective at the end of thirty (30) days following the date ACHD shall provide written notice of termination to Licensee, which notice shall specify such default(s). Licensee shall have such thirty (30) day period to correct and cure the specified defaults, and if so corrected and cured, to the satisfaction of ACHD, this Agreement shall not be terminated but shall continue in full force and effect.

SECTION 6. FEE. There is no fee for Licensee’s Authorized Use of the Right-of-Way under this Agreement.
SECTION 7. MAINTENANCE; FAILURE TO MAINTAIN; RELOCATION OF UTILITIES.

7.1 At its sole cost and expense, Licensee shall maintain the Improvements in good condition and repair and as required to satisfy applicable laws, the policies of ACHD and sound engineering practices. Licensee shall have access over, across and under the Right-of-Way for the purposes of accomplishing such repair and maintenance.

7.2 If the Highway on and/or adjacent to the Right-of-Way is damaged as a result of:

(i) the performance by Licensee of the maintenance required by section 7.1, or the failure or neglect to perform such maintenance; and/or

(ii) Licensee’s design, installation or use of the Improvements, regardless of cause;

at its sole cost and expense Licensee shall forthwith correct such deficiency and restore the Highway and the surface of the Right-of-Way to the same condition it was in prior thereto, and if Licensee shall fail or neglect to commence such correction and restoration within twenty-four (24) hours of notification thereof, ACHD may proceed to do so, in which event Licensee agrees to reimburse ACHD for the costs and expenses thereof, including, without limitation, reasonable compensation for the use of staff and equipment of ACHD.

7.3 Notwithstanding the provisions of section 7.2, should an emergency exist related to the Licensee’s use of this license which threatens the stability or function of the Highway on or adjacent to the Right-of-Way or the safety of the public use thereof, ACHD shall have the right to immediately perform, on behalf of and at the cost of Licensee, necessary emergency repairs.

7.4 Licensee shall be responsible for the relocation of any existing utilities located on the Right-of-Way as may be required in connection with any construction or installation of Improvements by Licensee in the Right-of-Way.

SECTION 8. RELOCATION OF IMPROVEMENTS. If during the term of this Agreement ACHD requires, in its sole discretion, at any time, and from time to time, that the Highway on and/or adjacent to the Right-of-Way be widened and/or realigned, redesigned, improved and/or reconstructed, Licensee hereby accepts responsibility for all costs for relocating, modifying or otherwise adapting the Improvements to such realignment and/or relocation and/or reconstruction if required by ACHD, which shall be accomplished by Licensee according to designs, plans and specifications approved in advance by ACHD in writing; provided, Licensee may elect to terminate this Agreement in lieu of complying with this responsibility, and further provided ACHD gives Licensee adequate written notice as necessary to allow Licensee to redesign, relocate, modify or adapt the Improvements to the realignment and/or relocation and/or reconstruction of
the Highway and also licenses Licensee such additional area of its right-of-way, if any, as may be necessary for the proper operation of the Improvements.

SECTION 9. PERMIT. If the proposed construction and installation of the Improvements, or any reconstruction, relocation or maintenance thereof, requires Licensee to obtain a permit under ACHD policies, Licensee shall first obtain such permit from ACHD (Construction Services Division) before commencing such work, pay the required fees and otherwise comply with the conditions set forth therein.

SECTION 10. NO TITLE IN LICENSEE. Licensee shall have no right, title or interest in or to the Right-of-Way other than the right to temporarily use the same pursuant to the terms of this Agreement.

SECTION 11. NO COSTS TO ACHD. Any and all costs and expenses associated with Licensee's Authorized Use of the Right-of-Way, or any construction or installation of Improvements thereon, or the repair and maintenance thereof, or the relocation of Improvements or utilities thereon, or the restoration thereof at the termination of this Agreement, shall be at the sole cost and expense of Licensee.

SECTION 12. TAXES AND ASSESSMENTS. Licensee agrees to pay all special assessments and personal property taxes that may be levied and assessed on the Improvements during the term of this Agreement.

SECTION 13. RESTORATION ON TERMINATION. Upon termination of this Agreement, Licensee shall promptly remove all Improvements and restore the Right-of-Way to at least its present condition, less ordinary wear and tear. Should Licensee fail or neglect to promptly remove the Improvements and restore the Right-of-Way, ACHD may do so and assess Licensee for the costs thereof. Provided, ACHD and Licensee may agree in writing that some or all of such Improvements are to remain on the Right-of-Way following termination, and by entering into such an agreement Licensee thereby disclaims all right, title and interest in and to the same, and hereby grants such Improvements to ACHD, at no cost. Further provided, if the Authorized Use of the Right-of-Way under this Agreement is for landscaping in ACHD right-of-way and the irrigation and maintenance thereof, and the general purpose government with jurisdiction has adopted ordinances, rules and regulations governing the landscaping and maintenance of such right-of-way by owners of the adjacent property, to the extent such owners are obligated to maintain and irrigate the landscaping Licensee need not remove the same from the Right-of-Way.

SECTION 14. INDEMNIFICATION. Licensee hereby indemnifies and holds ACHD harmless from and against any and all claims or actions for loss, injury, death, damages, mechanics and other liens arising out of the failure or neglect of Licensee, Licensee's employees, contractors and agents to properly and reasonably make Authorized Use of the Right-of-Way or properly construct, install, plant, repair or maintain the Improvements thereon, or that otherwise result from the use and occupation of the Right-of-Way by Licensee, including, without limitation, any attorneys' fees and costs that may be incurred by ACHD in defense of such claims or actions.
indemnified against by Licensee hereunder. For claims or actions arising out of failures or neglects occurring during the term of this Agreement, Licensee’s obligations pursuant to this section shall survive the termination of this Agreement.

SECTION 15. COMPLIANCE WITH LAW; WASTE AND NUISANCES PROHIBITED. In connection with Licensee’s use of the Right-of-Way, throughout the term of this Agreement Licensee covenants and agrees to: (i) comply with and observe in all respects any and all federal, state and local statutes, ordinances, policies, rules and regulations, including, without limitation, those relating to traffic and pedestrian safety, the Clean Water Act and/or to the presence, use, generation, release, discharge, storage or disposal in, on or under the Right-of-Way of any Hazardous Materials (defined as any substance or material defined or designated as hazardous or toxic waste, material or substance, or other similar term, by any federal, state or local environmental statute, regulation or ordinance presently in effect or that may be promulgated in the future); (ii) obtain any and all permits and approvals required by ACHD or any other unit of government; and (iii) commit no waste nor allow any nuisance on the Right-of-Way. To the extent permitted by law, Licensee covenants and agrees to indemnify and hold ACHD harmless from and against any and all claims, demands, damages, liens, liabilities and expenses (including, without limitation, reasonable attorneys’ fees), arising directly or indirectly from or in any way connected with the breach of the foregoing covenant. These covenants shall survive the termination of this Agreement.

SECTION 16. ASSIGNMENT. Licensee cannot sell, assign or otherwise transfer this Agreement, the license herein extended or any of its rights hereunder except with the prior written consent of ACHD, which consent shall not be granted unless the assignee assumes all obligations, warranties, covenants and agreements of Licensee herein contained.

SECTION 17. ATTORNEYS’ FEES. In any suit, action or appeal therefrom to enforce or interpret this Agreement, the prevailing party shall be entitled to recover its costs incurred therein, including reasonable attorneys’ fees.

SECTION 18. NOTICE. Any notice under this Agreement shall be in writing and be delivered in person, or by United States Mails, postage prepaid, or by public or private 24-hour overnight courier service (so long as such service provides written confirmation of delivery), or by facsimile verified by electronic confirmation. All notices shall be addressed to the party at the address set forth below or at such other addresses as the parties may from time to time direct in writing by notice given the other. Any notice shall be deemed to have been given on (a) actual delivery or refusal, (b) three (3) days following the day of deposit in the United States Mails, (c) the day of delivery to the overnight courier or (d) the day facsimile delivery is electronically confirmed.
If to ACHD: Ada County Highway District  
3775 Adams Street  
Garden City, Idaho 83714  
Attn: Right of Way Division

If to Licensee: Capital City Development Corporation  
121 N. 9th Street, Suite 501  
Boise, Idaho 83702

SECTION 19. SUCCESSORS AND ASSIGNS. This Agreement, the license herein extended and the covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto and their successors and, if consented to by ACHD under section 16, Licensee's assigns.

SECTION 20. EXHIBITS; RECITALS. All exhibits attached hereto and the recitals contained herein are incorporated herein as if set forth in full herein.

SECTION 21. NO RECORDATION. This Agreement shall not be recorded in the Official Real Property Records of Ada County, Idaho.

SECTION 22. WARRANTY OF AUTHORITY TO EXECUTE.

22.1 The person executing this Agreement on behalf of ACHD represents and warrants due authorization to do so on behalf of ACHD, and that upon execution of this Agreement on behalf of ACHD, the same is binding upon, and shall inure to the benefit of, ACHD.

22.2 The person executing the Agreement on behalf of Licensee represents and warrants due authorization to do so on behalf of Licensee, and that upon execution of this Agreement on behalf of Licensee, the same is binding upon, and shall inure to the benefit of, Licensee.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed the day, month and year first set forth above.
<table>
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<tr>
<th>ATTEST:</th>
<th>ADA COUNTY HIGHWAY DISTRICT</th>
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<tr>
<td>By:</td>
<td>By:</td>
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<tr>
<td>Name: Bruce S. Wong</td>
<td>Name: Jim D. Hansen</td>
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<td>Title: Director</td>
<td>Title: President, Board of Commissioners</td>
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<td>Name: Dean Caronetto</td>
<td>Name: John Brunelle</td>
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<tr>
<td>Title: Secretary Pro Temp</td>
<td>Title: Executive Director</td>
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STATE OF IDAHO )
) ss.
COUNTY OF ADA )

On this _____ day of _____________, 2015 before me, a notary public in and for said state, personally appeared JIM D. HANSEN and BRUCE S. WONG, PRESIDENT of the ADA COUNTY HIGHWAY DISTRICT BOARD OF COMMISSIONERS and DIRECTOR of the ADA COUNTY HIGHWAY DISTRICT, respectively, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same for and on behalf of said highway district.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

__________________________  
Notary Public for Idaho  
Residing at ________________, Idaho  
My commission expires:  

STATE OF IDAHO )
) ss.
COUNTY OF ADA )

On this 14th day of September, 2015, before me, the undersigned, personally appeared ______________ and ______________, Executive Director and Secretary, Pro Temp of the CAPITAL CITY DEVELOPMENT CORPORATION, respectively, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same for and on behalf of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

__________________________  
Notary Public for Idaho  
Residing at ________________, Idaho  
My commission expires:  

TEMPORARY LICENSE AGREEMENT - Page 8
June 10, 2015
Project No. 115016

EXHIBIT “A”

PIONEER PATHWAY
LICENSE AGREEMENT DESCRIPTION

An easement located in Lots 6 and 7, Block 1 of Forest River No. 2 Subdivision, and Lot 8 and 9, Block 1 of Forest River No. 3 Subdivision, in the Northeast One Quarter of Section 9, Township 3 North, Range 2 East, Boise Meridian, Boise, Ada County, Idaho, more particularly described as follows:

Commencing at the Southeast Corner of Lot 6, Block 1 of Forest River No. 2 Subdivision, which point is also common with the Southwest Corner of Lot 8, Block 1 of Forest River No. 3 Subdivision, said point being on the northerly boundary of the Boise City Greenbelt;
Thence North 64°45'55" East, a distance of 347.27 feet on the Southerly lot line of lot 6, Block 1 of Forest River No. 2 Subdivision to the Northwesterly corner of the Right-of-Way of South Pioneer Avenue, said point being on the westerly line of the Pioneer Pathway Easement as same is delineated and dedicated on the Plat of Forest River No. 2 Subdivision, recorded in Book 53 of Plats at Page 4634 of Ada County Records, said point also being the POINT OF BEGINNING;
Thence North 64°45'55" East, a distance of 43.87 feet on the Northerly Right-of-Way Line of South Pioneer Avenue and the Southerly line of said existing Pioneer Pathway easement;
Thence South 44°16'34" West, a distance of 46.84 feet to a point on the Westerly Right-of-Way Line of said South Pioneer Avenue;
Thence North 25°14'05" West, a distance of 16.39 feet on said Westerly Right-of-Way Line to the point of beginning.

Prepared By:
THE LAND GROUP, INC.

James R. Washburn