February 2, 2017

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

FROM: Justin Fredin, Staff Attorney

SUBJECT: License Agreement with City of Boise – Surprise Valley Greenbelt
Staff Report for February 8, 2017 Commission Meeting

Executive Summary

The Legal Department has drafted the attached License Agreement, which authorizes the City of Boise to maintain a paved greenbelt path within ACHD’s right-of-way in the Surprise Valley Subdivision, as depicted on Exhibit A to the agreement.

The greenbelt in question was installed approximately twenty years ago. In 1996, ACHD granted the developer of Surprise Valley a license agreement for the installation and maintenance of landscaping and irrigation improvements adjacent to the greenbelt. However, that license agreement did not authorize the installation of the greenbelt itself. The City of Boise recently notified ACHD of this discrepancy and offered to take responsibility for the maintenance of the greenbelt.

The City of Boise approved and executed this agreement on December 2, 2016.

Fiscal Implications

None.

Recommendation

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

Attachment(s): License Agreement
LICENSE AGREEMENT

THIS LICENSE AGREEMENT (the "Agreement") is made and entered into this 20th day of December, 2016 (the "Effective Date"), by and between the ADA COUNTY HIGHWAY DISTRICT, a body politic and corporate of the State of Idaho, hereinafter referred to as "ACHD", and the CITY OF BOISE, a municipal corporation of the state of Idaho, hereinafter referred to as "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 (the "Right-of-Way") located in Ada County, Idaho, municipally described as Surprise Way, which is more particularly described and depicted on Exhibit A attached hereto.

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 grant such license to Licensee.

SECTION 2. LICENSE; LICENSE NOT EXCLUSIVE.

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

Maintenance, repair and replacement of an existing greenbelt, depicted as the "Paved Greenbelt Path" on Exhibit A attached hereto.

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, INSTALLATION OF IMPROVEMENTS. Any repairs or maintenance of Licensee’s improvements currently in the Right-of-Way or the installation or construction of improvements by Licensee (collectively, the “Improvements”) on, over, across and under the Right-of-Way 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. Licensee specifically warrants to ACHD that the Improvements shall not endanger motorist, pedestrian or bicyclist safety.

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 will commence on the Effective Date and will 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 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.

5.3 Upon termination of this Agreement, any encroachments remaining within the Right-of-Way shall be unauthorized and subject to removal in accordance with Idaho Code § 40-2319.

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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. Subject to the permitting requirements in section 9 below, 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 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 will be responsible for the expense of relocating any existing United Water utilities located on the Right-of-Way for Americana Boulevard and Fairview Avenue as may be required in connection with any construction or installation of Improvements by Licensee in the Right-of-Way. All other existing utilities located on the Right-of-Way shall be relocated, as necessary, at the expense of the respective utility companies owning such utilities. Requests for such relocations shall be made by ACHD.

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, and 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, pursuant to the license granted by this Agreement, shall be at the sole cost and expense of Licensee.

SECTION 12. TAXES AND ASSESSMENTS. Licensee is an Idaho Municipal Corporation, and the improvements are for a public purpose. Therefore, the Improvements are unlikely to be subject to taxes or assessments. However, should any special assessments or personal property taxes be levied and assessed on the Improvements during the term of the Agreement, Licensee agrees to pay them.

SECTION 13. RESTORATION ON TERMINATION. Upon termination of this Agreement, Licensee will promptly remove all Improvements and restore the Right-of-Way to at least the condition it was in prior to construction of the Improvements. Should Licensee fail or neglect to promptly remove the Improvements and restore the Right-of-Way, ACHD may, after providing Licensee with reasonable notice, do so, and assess Licensee for the actual 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.

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, repair or maintain the Improvements thereon, or that otherwise result from the use and occupation by Licensee of the Right-of-Way described in Exhibit A or arise out of and from this Agreement, and including any attorney fees and costs that may be incurred by ACHD in defense of such claims or

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actions indemnified against by Licensee hereunder, except those claims or actions that are caused by the action, inaction, or omission of ACHD or its employees, contractors, or agents. 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 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 or allow any nuisance on the Right-of-Way. 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, except to the degree such claim, demand, damage, lien, liability, or expense is caused by, or results from, any act, omission, or failure to act of ACHD or its employees, contractors, or agents. 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 will not be granted unless the assignee assumes all obligations, warranties, covenants and agreements of Licensee herein contained.

SECTION 17. ATTORNEY 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 attorney fees.

SECTION 18. NOTICE. Any notice under this Agreement shall be in writing and be delivered in person, or by United States Mail, 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

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Garden City, Idaho 83714
Attn: Development Review Section

If to Licensee:
City of Boise
Department of Parks and Recreation
1104 Royal Boulevard
Boise, Idaho 83706

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. 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. SELF-INSURANCE. As a self-insured public entity, Licensee represents and warrants that, at all times during the term of this Agreement, it will have ready access to a minimum of Five Hundred Thousand Dollars ($500,000.00) against all liability of Licensee arising out of and in connection with its use or occupancy of the Right-of-Way hereunder. The limits of such funds shall not limit Licensee's liability hereunder.

SECTION 23. Warranty of Authority to Execute.

23.1 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.

23.2 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.

LICENSEE: City of Boise
By: David Bieter
Its: Mayor

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STATE OF IDAHO  
County of Ada  

On this 2nd day of December, 2016, before me, Tracy Hall, a Notary Public in and for the State of Idaho, personally appeared David Bieter, known or identified to me to be the Mayor of the City of Boise, and Lynda Lowry, known or identified to me to be the Ex-Officio City Clerk of the City of Boise, the persons who executed and attested this instrument on behalf of said City, and acknowledged to me that the City of Boise executed the same.

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

Tracy Hall
Notary Public for Idaho
Residing at: Boise, ID
My Commission Expires: 12/11/20
ADA COUNTY HIGHWAY DISTRICT

By: Paul Woods
Its: President

ATTEST:

By: Bruce Wong
Its: Director

STATE OF IDAHO )
   ) ss.
County of Ada )

On this ___ day of ______, 20___, before me, ____________________________, a Notary Public in and for the State of Idaho, personally appeared, Paul Woods, known or identified to me to be the President of the Ada County Highway District Commission, and Bruce Wong, known or identified to me to be the director of the Ada County Highway District, the persons who executed this instrument on behalf of said District, and acknowledged to me that the Ada County Highway District executed the same.

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: _________________
My commission expires: _______
EXHIBITS

Exhibit A – Depiction of Greenbelt and Right-of-Way

The Ada County Highway District (ACHD) is committed to compliance with Title VI of the Civil Rights Act of 1964 and related regulations and directives. ACHD assures that no person shall on the grounds of race, color, national origin, gender, disability or age, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any ACHD service, program or activity.