October 2, 2017

TO: ACHD Board of Commissioners & Bruce S. Wong, Director
FROM: Justin Fredin, Staff Attorney
SUBJECT: License Agreement with City of Boise – Alto Via Court
Staff Report for October 11, 2017 Commission Meeting

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Executive Summary

On May 5, 2016, the Commission approved Resolution No. 2139, which declared Alto Via Court to be hazardous, closed to public access, and excluded from the ACHD Highway System until such time as the developer installs sufficient landslide mitigation. In an effort to enforce this decision, the City of Boise has requested a license from ACHD to mark the boundary of the closed access, exclude unauthorized persons from Alto Via Court, and enforce applicable laws, ordinances, and building codes and regulations. Consequently, the Legal Department has drafted the attached License Agreement.

The City of Boise approved and executed this agreement on August 22, 2017.

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 22nd day of August, 2017 (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 City, a municipal corporation of the state of Idaho, hereinafter referred to as "Licensee." Together, ACHD and Licensee may be referred to as the "Parties" and each separately as a "Party."

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 rights-of-way located in Ada County, Idaho, and is the owner of the unopened rights-of-way known as North Alto Via Court, as depicted on Exhibit A and more particularly described on Exhibit B, both of which are attached hereto (the "Unopened Rights-of-Way").

1.2 Due to the significant risk to motorists or pedestrians caused by the conditions on the Unopened Rights-of-Way, which have prevented ACHD from maintaining the Unopened Rights-of-Way in a safe condition, the ACHD Board of Commissioners, in Resolution 2139, ordered that the Unopened Rights-of-Way be declared hazardous and unopened to public access and excluded from the ACHD Highway System.

1.3 In the interests of ensuring the safety of persons and protection of property, Licensee desires a license to access the Unopened Rights-of-Way for the purposes of (i) marking the boundary of the Unopened Rights-of-Way, (ii) excluding unauthorized persons, on ACHD's behalf, from the Unopened Rights-of-Way, and (iii) enforcing Idaho laws and Licensee's ordinances and building codes and regulations.

1.4 In the interests of public safety and risk management, ACHD desires to authorize Licensee to (i) mark the boundary of the Unopened Rights-of-Way, (ii) exclude unauthorized persons, on ACHD’s behalf, from the Unopened Rights-of-Way, and (iii) enforce Idaho laws and Licensee’s ordinances and building codes and regulations, and, therefore, is willing to grant a license to Licensee to perform those actions.

SECTION 2. LICENSE; LICENSE NOT EXCLUSIVE.

2.1 On the terms and conditions hereinafter set forth, ACHD hereby grants to Licensee a license to access the Unopened Rights-of-Way as needed to carry out acts within the lawful authority of the Licensee and to authorize its agents to do so on Licensee’s behalf ("Authorized Use") for the following purposes and no others:

LICENSE AGREEMENT - Page 1
Marking, posting, and signing the Unopened Rights-of-Way, as necessary to lawfully exclude unauthorized persons from the Unopened Rights-of-Way and to enforce such exclusion using applicable state laws and Licensee’s ordinances and building codes and regulations.

2.2 This Agreement does not extend to Licensee the right to use the Unopened Rights-of-Way to the exclusion of:

2.2.1 ACHD for any use within its jurisdiction, authority, and discretion, including (i) reopening the Unopened Rights-of-Way as public Highways (as defined in Idaho Code § 40-109(5)), (ii) entering into agreements allowing third parties to access the Unopened Rights-of-Way, or (iii) redesigning, reconstructing, or relocating its rights-of-way and Highways as authorized by law and as it determines, in its sole discretion, is appropriate;

2.2.2 Adjacent property owners, holders of easements of record or those obvious on inspection, and their respective agents, to the extent necessary to access their property; and

2.2.3 Public utilities, to the full extent of the statutory rights of such utilities to access or service utility lines, conduits, and infrastructure.

SECTION 3. 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 Unopened Rights-of-Way.

SECTION 4. TERM. 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. Upon termination of this Agreement, any device used to mark, post, or sign the Unopened Rights-of-Way and not removed by Licensee prior to such termination will become the property of ACHD.

SECTION 5. FEE. There is no fee for Licensee’s Authorized Use of the Unopened Rights-of-Way under this Agreement.

SECTION 6. NO TITLE IN LICENSEE, NO RECORDATION. This Agreement does not convey and Licensee shall not have any right, title, or interest in or to the Unopened Rights-of-Way, other than the Authorized Use granted by this Agreement, which shall not be recorded in the Official Real Property Records of Ada County, Idaho.

SECTION 7. NO COSTS TO ACHD. Any and all costs and expenses associated with Licensee’s Authorized Use of the Unopened Rights-of-Way, or any construction or installation of Improvements thereon, or the repair and maintenance thereof, or the relocation of Improvements, or the removal of such Improvements at the termination of this Agreement, pursuant to the license granted by this Agreement, shall be at the sole cost and expense of Licensee. The exception being for those costs or expenses that are
caused by the action, inaction, or omission of ACHD or its employees, contractors, or agents.

SECTION 8. MUTUAL HOLD HARMLESS.

8.1 Licensee agrees to indemnify and hold ACHD harmless from any and all liability, loss, damage, or claims, of any description, which results from the negligence of the Licensee, its employees, officers, or agents that ACHD may suffer arising out of or in connection with this Agreement, to the extent not caused by the action, inaction, or omission ACHD, its employees, contractors, or agents. Licensee’s obligations pursuant to this section shall survive the termination of this Agreement. Nothing herein shall be deemed a waiver of any privilege, immunity, protection, or defense afforded to the Licensee as an entity of the state of Idaho, under the Idaho Constitution, the Idaho Tort Claims Act, or any other applicable law.

8.2 ACHD agrees to indemnify and hold the Licensee harmless from any and all liability, loss, damage, or claims, of any description, which results from the negligence of ACHD, its employees, officers, or agents that the Licensee may suffer arising out of or in connection with this Agreement, to the extent not caused by the action, inaction, or omission of the Licensee, its employees, contractors, or agents. ACHD’s obligations pursuant to this section shall survive the termination of this Agreement. Nothing herein shall be deemed a waiver of any privilege, immunity, protection, or defense afforded to ACHD as an entity of the state of Idaho, under the Idaho Constitution, the Idaho Tort Claims Act, or any other applicable law.

SECTION 9. COMPLIANCE WITH LAW. In connection with Licensee’s use of the Unopened Rights-of-Way, throughout the term of this Agreement Licensee covenants and agrees to comply and observe in all respects any and all, federal, state, and local statutes, ordinances, policies, rules and regulations.

SECTION 10. ASSIGNMENT. Licensee cannot sell, assign, or otherwise transfer this Agreement, the license herein extended, or any of its rights hereunder.

SECTION 11. ATTORNEY FEES. In any suit or action between the Parties 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. In any suit or action between any third party and the Parties or appeal therefrom, each Party to this Agreement found liable to the third party shall bear its own costs and attorney fees incurred therein.

SECTION 12. NOTICE. Every 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), by facsimile verified by electronic confirmation, or by email verified by read receipt or reply from the recipient. 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, (d) the day facsimile
delivery is electronically confirmed, or (e) the day email read receipt or recipient's reply is received by the sender.

If to ACHD: Ada County Highway District
3775 Adams Street
Garden City, Idaho 83714
Attn: Right-of-Way Department

If to Licensee: Boise City Attorney's Office
Attn: Christine Starr, Public Safety Section Sr. Mgr.
150 N. Capitol Boulevard, 4th Floor, Building 2
Boise, Idaho 83701

SECTION 13. EXHIBITS. All exhibits attached hereto and the recitals contained herein are incorporated herein as if set forth in full herein.

SECTION 14. SELF-INSURANCE. As fully or partially self-insured public entities, ACHD and Licensee each represent and warrant that, at all times during the term of this Agreement, each will maintain a minimum of Five Hundred Thousand Dollars ($500,000.00) comprehensive general liability coverage against the foreseeable liabilities each may incur arising out of and in connection with its functions as bodies politic and corporate of the state of Idaho related to this Agreement.

SECTION 15. Warranty of Authority to Execute.

15.1 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.

15.2 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.
On this 22nd day of August, 2017, before me, Debbie Westervelt, a Notary Public in and for the State of Idaho, personally appeared David H. 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.

DEBBIE WESTERVELT
Notary Public for Idaho
Residing at: Boise, Idaho
My Commission Expires: 8/24/2021
ADA COUNTY HIGHWAY DISTRICT

By: Paul Woods
Its: President

ATTEST:

By: Bruce Wong
Its: Director

STATE OF IDAHO
County of Ada

On this ____ day of ____________, 2017, 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: ____________
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.
EXHIBITA
Aerial Depiction of the Unopened Rights-of-Way*

*Specifically the area notated within the red outlines.
EXHIBIT B
LEGAL DESCRIPTION

North Alto Via Court:

The legal rights-of-way (including roadway and sidewalk) of North Alto Via Court, generally south from the northern property lines of Ada County Parcels R5983430100 and R5983390014 and including the rights-of-way along Ada County Parcels R5983390080, R5983390070, R5983390060, R5983390050, R5983390040, R5983390030, R5983390028, and R5983390024.

More particularly described as:

- Lot 24, Block 6 of Nativa Terra Subdivision No. 8
- Lots 18, 19, 20, 21, 22 and 23, Block 6 of Nativa Terra Subdivision No. 04
- Parcel No. 0014 of Lot 16, Block 6 of Nativa Terra Subdivision No. 4
- Parcel No. 0024 of Lots 16-17 of Block 6 of Nativa Terra Subdivision No. 4
- Parcel No. 0028 of Southeasterly Portion of Lot 17 of Block 6 of Nativa Terra Subdivision No. 4