

COOPERATIVE DEVELOPMENT AGREEMENT

This COOPERATIVE DEVELOPMENT AGREEMENT (the “Agreement”) is made and entered into this ___ day of _____, 2016, by and between _____ (the “Developer”), and the ADA COUNTY HIGHWAY DISTRICT, a body politic and corporate of the state of Idaho (“ACHD”).

RECITALS

WHEREAS ACHD is a single county-wide highway district organized and existing under the laws of the State of Idaho, with the responsibility, jurisdiction, and authority to improve public roads and assess development impact fees in accordance with the Idaho Development Impact Fee Act;

WHEREAS the parties desire to describe and provide for the construction of the Project (as defined below); and

WHEREAS the parties desire to provide for the allocation and payment of the Project Costs (as defined below) between the parties.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

SECTION 1. **DEFINITIONS**

As used in this Agreement, the following terms shall have the following meanings:

1.1 The term “Construction Manager” shall mean Shawn Brownlee an employee of Trilogy Development, who shall coordinate and supervise the Project. For the purpose of this Agreement, the Construction Manager’s compensation shall be three percent (3%) of the Reimbursable Project Costs.

1.2 The term “Engineer’s Estimate” means an estimate of the Project Costs prepared by the Project engineer (or other engineer licensed under the laws of the state of Idaho).

1.3 The term “Impact Fee” shall mean a payment of money imposed by ACHD as a condition of development approval pursuant to ordinance adopted by ACHD under the authority granted to it by the Idaho Development Impact Fee Act, and shall not include any other fees, permits or assessments by ACHD or any other agency.

1.4 The term “Non-Impact Fee Eligible” portion of Project Costs shall mean that portion of the Reimbursable Project Costs which relate to irrigation, utility and landscaping costs as detailed in the ACHD 2016 Capital Improvements Plan.

1.5 The term “Project” refers to the following:

The extension of Orchard Street approximately 6,350 feet as a minimum 40 foot rural arterial street section from Gowen Road south to Lake Hazel Road extended; and the extension of Lake Hazel Road approximately 4,760 feet as a minimum 40 foot rural arterial street from approximately 640-feet east of Cole Road to Orchard Street extended.

1.6 The term “Project Costs” refers to all costs of completing the Project, including (i) all design, construction, testing and inspection costs, (ii) compensation for the Project Engineer and Construction Manager as provided herein, and (iii) all other costs related to and reasonably necessary for completion of the Project, excluding the cost of acquiring any additional right-of-way, costs associated with any necessary development approvals and all costs associated with the preparation, review and negotiation of this Agreement.

1.7 The term “Project Engineer” shall mean a licensed engineer engaged by Developer to manage and coordinate the design, inspection and certification of the Project. The Project Engineer, the terms of his or her compensation including the scope of work shall be subject to approval by ACHD.

1.8 The term “Reimbursable Project Costs” shall mean all Project Costs excluding the following:

- a. Costs for any new utility services installed to serve exclusively Developer’s parcels within the development area;
- b. Costs to construct sidewalk;
- c. Costs for landscaping abutting Developer’s parcels;
- d. Administrative and overhead costs of Developer other than the Construction Manager’s compensation defined in Section 1.1;
- e. Interest on funds used for the Project;
- f. Liquidated damages.

1.9 The terms “Substantial Completion” and “Substantially Complete” shall have the same meaning as in the ACHD General Conditions for a construction contract, which provide as follows: “The Work is Substantially Complete when the Resident Engineer determines the Owner has full and unrestricted use and benefit of the facilities, both from an operational and safety standpoint, and only minor incidental work or correction or repair remains for the physical completion of the total Contract.”

SECTION 2.
DESIGN AND BIDDING OF THE PROJECT

2.1 Developer to Arrange for Project Design. Developer shall provide for the design of the Project by the Project Engineer who shall be a design professional acceptable to, and in accordance with the customary requirements of ACHD. The design of the Project shall be in accordance with the standards and specifications set forth in the ACHD Policy Manual.

2.2 Access to Public Right-of-Way. ACHD shall provide access to the public right-of-way to Developer and its agents as may be reasonably necessary in connection with the Project design and the Engineer's Estimate.

2.3 Final Approval of Final Plans. ACHD shall approve, in its reasonable discretion, the Engineer's Estimate and the Project plans. ACHD and Developer shall acknowledge in writing the final, approved Project plans and the Engineer's Estimate prior to commencement of construction, and neither shall thereafter be modified in any material way unless such modifications are approved in writing signed by ACHD and Developer.

2.4 Delivery of Documents to ACHD. Following the parties' written acknowledgment of the final Project plans and Engineer's Estimate, Developer shall cause the Project engineer to submit the following to ACHD:

- a. three (3) sets of the Project plans; and
- b. any other related information requested by ACHD.

2.5 Access to Information by ACHD. Developer shall provide ACHD with access to all designs, plans, specifications, reports, data and other materials (both digital, electronic and hard copy) produced by Developer and its agents and contractors under this Agreement.

2.6 Ownership of Design Plans. Upon execution of this Agreement and the parties' written acknowledgment of the final Project plans and Engineer's Estimate, Developer shall forward to ACHD copies of all previously prepared design plans for the Project in its and/or its consultant's possession, including but not limited to design plans, data, consultant reports prepared by third parties, soil reports, engineering reports, and right-of-way plans (collectively "design plans"). Developer shall obtain any necessary third-party consents required by ACHD for ACHD's possession and potential use of the design plans. In the event of Developer's default under this Agreement, all ownership interest in the design plans shall transfer to ACHD and ACHD shall become the exclusive owner of said design plans for any use whatsoever including but not limited to completion of the Project. ACHD shall not be obligated to reimburse Developer for the cost of said design plans unless the design plans have been completed to ACHD standards and specifications and ACHD proceeds to utilize the design plans to complete the project or any portion of the project. Developer hereby indemnifies and holds ACHD

harmless from and against any and all loss, injury, death and damage, and attorney's fees and cost that might be incurred by ACHD in defending any claim that may result solely from the use of the design plans by ACHD, its Commissioners, employees, contractors and/or agents.

SECTION 3. **CONSTRUCTION CONTRACT**

3.1 Soliciting Bids. After ACHD has approved the Project plans and the Engineer's Estimate, Developer shall solicit a minimum of three (3) bids for construction of the Project in compliance with the approved Project plans and the related requirements for public highway projects as required by Idaho law. As an alternative, Developer may hire, at Developer's sole cost and expense, a construction project manager to solicit competitive bids from subcontractors following the requirements set forth above.

- a. ACHD shall review and approve the bid amount prior to Developer awarding contract.

3.2 Contract Terms. The construction contract shall include, at minimum, the following provisions:

- a. a requirement that the contractor provide payment and performance bonds required by the Public Contracts Bond Act, Chapter 19, Title 54, *Idaho Code* naming ACHD as an additional beneficiary;
- b. a requirement that the successful bidder be licensed as a public works contractor (Chapter 19, Title 54, *Idaho Code*);
- c. a requirement that the construction of the Project in accordance with the approved designs, plans and specifications be Substantially Complete within thirty-eight (38) weeks from the date Developer issues a notice to proceed to the contractor, or no later than May 31, 2018 and final completion of the total contract within four (4) weeks from the date of Substantial Completion;
- d. a provision that the time for Substantial Completion and completion of the Project will only be extended by (i) acts of God, (ii) war, (iii) delays caused by ACHD, (iv) unreasonable delays caused by utilities or if rock is encountered in the excavation, as reasonably determined by ACHD, or (v) any request for extensions of time approved in writing by ACHD;
- e. a requirement that the contractor shall pay liquidated damages of One Thousand Dollars (\$1,000) per day for each day that Substantial Completion of the construction is delayed beyond thirty-eight (38) weeks from the date Developer issues a notice to proceed, or no later than May 31, 2018, or beyond the extended date as allowed by Section 3.2(e) above and for each day that final completion of the total contract for the Project is delayed beyond four (4) weeks from the date of Substantial Completion;

- f. a requirement that the contractor maintain liability insurance insuring against bodily injury or death with limits of not less than Two Million Dollars (\$2,000,000) per person and per occurrence, and property damage with a limit of One Million Dollars (\$1,000,000) per occurrence, naming both Developer and ACHD as additional insureds;
- g. a provision that the contractor shall indemnify ACHD and Developer from any and all claims by third persons arising out of the performance of the contract;
- h. a provision that the contractor shall obtain the Environmental Protection Agency (EPA) Construction General Permit (CGP) and that the contractor shall file a Notice of Intent (NOI) and develop and implement an approved Storm Water Pollution Prevention Plan (SWPPP) prior to commencement of construction, and that the contractor shall not file a Notice of Termination (NOT) with the EPA until authorized in writing by ACHD. Authorization for the contractor to file the NOT will be granted by ACHD when the area subject to the CGP has achieved final stabilization as defined in the CGP;
- i. A provision that the contractor shall provide quality control and process control testing following ACHD QC-QA Procedures attached hereto as Exhibit A;
- j. at least a two (2) year warranty on the work and materials of the Project that is assignable to ACHD, said warranty period shall begin immediately upon issuance of Certificate of Completion; and
- k. a provision that provides for the Contractor's agreement to the assignment of the construction contract to ACHD in the event of a default by Developer under this Agreement.

3.3 Conditions Precedent to Execution of Construction Contract. Prior to execution of the construction contract, the following conditions shall be satisfied:

- a. Approval of Construction Contract. Developer shall obtain the written approval of ACHD of the form and terms of the construction contract, which may be withheld for any reason, including but not limited to Developer's failure to obtain a construction contract that contains the provisions set forth in Section 3.2 above, but which shall not otherwise be unreasonably withheld;
- b. Right-of-Way Easements. The project may require right-of-way easements from adjacent land owners. The right-of-way easements required for the Project shall be conveyed to ACHD and recorded prior to execution of the construction contract, issuance of ACHD permits and construction of the Project.
- c. Letter of Credit or Cash Bond. Developer shall provide ACHD with an irrevocable and unconditional letter of credit in favor of ACHD in an amount equal to one hundred and ten percent (110%) of the total of the contract price of the Project Costs minus the Reimbursable Project Costs for the purpose of assuring ACHD

that Developer will perform its obligations hereunder. The letter of credit shall be issued by either a national bank with a branch in Ada County, Idaho or another financial institution acceptable to ACHD and include a provision that ACHD may present documents for any draws on the letter of credit at the local branch. The letter of credit shall be delivered to ACHD prior to Developer's execution of the construction contract. In lieu of a letter of credit, the Developer may provide a cash bond (cash deposit to ACHD) in the same amount, or pledge other security acceptable to ACHD of equal value. When all Developer's contractors for the Project have been paid and ACHD has issued its certificate of completion of the Project, such assurance shall be released to Developer. In its sole discretion, ACHD may allow the reduction of the assurance as payments of Costs of the Project are made during the course of construction.

3.4 Copy of Contract to ACHD. Developer shall provide ACHD with a copy of the executed construction contract.

SECTION 4. **CONSTRUCTION AND COMPLETION OF THE PROJECT**

4.1 Permits and Fees and Notice to Proceed. Prior to the commencement of construction, Developer shall require that the contractor (i) has obtained all applicable permits to work in the right-of-way, and (ii) has paid all applicable fees for such permits. ACHD permits shall be issued at no charge. Developer acknowledges that this Agreement will not function as an ACHD permit to work in the public right-of-way.

4.2 Manner of Construction. Upon ACHD's written approval of the construction contract, Developer shall provide for construction of the Project in compliance with the construction contract and with the customary requirements of ACHD, and shall diligently and continuously prosecute such construction to completion.

4.3 Change Orders to Contract. Developer shall obtain the written approval of ACHD before approving any change order in the construction contract if (i) the cost of the change order will exceed one percent (1%) of the original contract price; and/or (ii) the cumulative total of all previously approved change orders exceeds ten percent (10%) of the original contract price.

4.4 Inspections. Inspecting and testing of that portion of the Project within ACHD right-of-way and associated with the installation of the signal equipment shall be provided by ACHD at no charge to Developer and accomplished as required by and in accordance with ACHD standards.

4.5 Issuance of Certificate of Completion.

- a. Upon completion of the construction of the Project, Developer shall furnish to ACHD the Project Engineer's written certification that the Project is complete in accordance with the approved plans.

- b. Within fifteen (15) days after delivery of the Project Engineer's written certificate, ACHD shall either (i) accept the same or (ii) provide a written itemization of those matters it reasonably finds to be non-conforming, in which case Developer shall promptly cause the remediation of all non-conforming matters.
- c. ACHD shall acknowledge its acceptance of the Project in writing as complete and issue a certificate stating that the project is complete (a "Certificate of Completion") within fifteen (15) days after the later of (i) delivery of the Project Engineer's certification to ACHD, or (ii) remediation of any non-conforming matters.
- d. Within thirty (30) days after the issuance of the Certificate of Completion, Developer shall deliver to ACHD drawings for the Project, as-built, in electronic files in AutoCAD format.

4.6 Warranty. Upon issuance of the Certificate of Completion, Developer shall complete all paperwork necessary to assign to ACHD the contractor's (2) two year warranty of the work and materials on the Project.

4.7 Representations and Warranties. Developer represents and warrants that upon completion of the Project, the Project shall be free and clear of all liens and encumbrances that were not created by or with the written consent of ACHD. Developer shall provide ACHD lien waivers from all contractors prior to ACHD payment of Reimbursable Project Costs.

SECTION 5.
PAYMENT OF PROJECT COSTS;
FINAL ACCOUNTING AND SETTLEMENT

5.1 Payment of Project Costs. All Project Costs shall be paid and funded by Developer.

5.2 Payment of Reimbursable Project Costs. ACHD shall pay the Reimbursable Project Costs to Developer in the following manner:

- a. Final Accounting. Within a reasonable period after issuance of the Certificate of Completion, Developer shall submit to ACHD a final accounting of the Reimbursable Project Costs.
- b. Agreement of Final Amount. Within fifteen (15) business days (3 weeks) after Developer's submittal of the Reimbursable Project Costs, Developer and ACHD shall reach an agreement and acknowledge in writing the final amount of the Reimbursable Project Costs.

Payment of Reimbursable Project Costs. ACHD shall pay to Developer the following installments, until all Reimbursable Project Costs have been paid to Developer:

- i. One Million dollars (\$1,000,000) shall be subject to an Impact Fee Credit Agreement attached hereto as **Exhibit B** and made available within thirty (30) days after agreement as to the final amount of the Reimbursable Project Costs.
 - ii. The remaining balance of the Reimbursable Project Costs up to a maximum of One Million dollars (\$1,000,000) following the payment in i. above, shall be paid within thirty (30) days after agreement as to the final amount of the Reimbursable Project Costs.
 - iii. The remaining balance of the Reimbursable Project Costs exceeding the payments made in i. and ii. above, shall be paid no later than October 31, 2018.
- c. No Obligation for Reimbursement. ACHD shall have no obligation under the terms and provisions of this Agreement to make any payments towards Reimbursable Project Costs if the Project is not completed by Developer and ACHD has not issued the Certificate of Completion.
 - d. Option to Accelerate Payment. ACHD may at its sole discretion make reimbursement payments to Developer other than those required to be made by Section 5.2(c), thereby accelerating reimbursement of the Reimbursable Project Costs. Any such additional payments shall not be a waiver of the requirement to make future payments required by Section 5.2(c) until all Reimbursable Project Costs have been reimbursed to Developer.
 - e. No Interest. No interest shall accrue on Reimbursable Project Costs.

SECTION 6. **REMEDIES**

6.1 Default by Developer. In addition to such other remedies at law or in equity for default that ACHD may have, in the event Developer fails or neglects to perform its obligations under the terms and provisions of this Agreement in the time and manner required herein, ACHD may withhold any reimbursement due to Developer hereunder until such defaults are corrected to the satisfaction of ACHD.

6.2 Default by ACHD. In the event ACHD fails or neglects to perform its obligations under the terms and provisions of this Agreement in the time and manner required herein, Developer shall be entitled to all remedies available at law or in equity.

6.3 Mediation and Arbitration. ACHD and Developer shall attempt in good faith to settle by negotiation any controversy or claim arising out of or relating to this Agreement, or the breach thereof (the "Dispute"). If no settlement can be reached, the Dispute shall upon the request of either party be submitted for mediation administered by the American Arbitration Association ("AAA") under its Commercial Mediation Rules. If mediation is not requested or is terminated, such Dispute shall upon the

request of either party be settled by arbitration administered by the AAA under its arbitration rules most relevant to the nature of the Dispute, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

- a. Any mediation and arbitration shall be administered in Boise, Idaho, or at the place of the AAA regional office nearest thereto. All costs of mediation and arbitration shall be allocated between ACHD and Developer in a manner consistent with the provisions of Section 6.4 below. The arbitrator shall issue an opinion in support of the award if requested by either party.
- b. The provisions hereof shall be governed by the Federal Arbitration Act and, where applicable, the Idaho Uniform Arbitration Act. Either party may seek judicial relief if arbitration is not requested, or otherwise in a manner compatible with such arbitration.

6.4 Attorney Fees. Should either party find it necessary to employ an attorney for representation in any action seeking enforcement of any of the provisions of this Agreement, or to recover damages for the breach of this Agreement, or to resolve any disagreement in interpretation of this Agreement, or to obtain assistance in any arbitration, the unsuccessful party in any final judgment or award entered therein shall reimburse the prevailing party for all reasonable costs, charges and expenses, including attorneys' fees expended or incurred by the prevailing party in connection therewith and in connection with any appeal, and the same may be included in such judgment or award.

SECTION 7.
OTHER PROVISIONS

7.1 Notices. Any notice required to be given hereunder shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (c) four (4) days after having been sent by prepaid registered or certified mail, or (d) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be to the respective parties to this Agreement at the following addresses:

Ada County Highway District
Attn: Gary Inselman, Development Services Manager
3775 N. Adams Street
Garden City, Idaho 83714-6499
Telephone: (208) 387-6180
E-Mail: ginselman@achdidaho.org

Attn: _____

_____, ID 83 ____
Telephone: (208) ____-____
E-Mail: _____

7.2 Choice of Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Idaho.

7.3 Exhibits. All exhibits to this Agreement are incorporated by reference and made a part of this Agreement as if the exhibits were set forth in their entirety in this Agreement.

7.4 Entire Agreement. This Agreement and the exhibits hereto constitute the full and entire understanding and agreement between the parties with regard to the transaction contemplated herein, and no party shall be liable or bound to any other in any manner by any representations, warranties, covenants and agreements except as specifically set forth herein.

7.5 Acknowledgments and Modifications. No acknowledgments required hereunder, and no modification or waiver of any provision of this Agreement or consent to departure therefrom, shall be effective unless in writing and signed by ACHD and each of the parties comprising Developer.

7.6 Headings. The headings used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

7.7 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, successors and assigns.

7.8 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

DEVELOPER:

By _____

Name: _____

Its: _____

ACHD:

ADA COUNTY HIGHWAY DISTRICT

By _____

Name: Kent Goldthorpe

Its: Commission President

Exhibits

Exhibit A ACHD QC-QA Procedure

Exhibit B Impact Fee Credit Agreement IFCA16-0001