



Rebecca W. Arnold, President
Mary May, 1st Vice-President
Sara M. Baker, 2nd Vice-President
Jim D. Hansen, Commissioner
Kent Goldthorpe, Commissioner

Development Services

13 Aug 2019

STAFF REPORT

TO: ACHD Commission
FROM: Christy Little - Development Services Manager - clittle@achdidaho.org
SUBJECT: Easement Agreement for Air Rights
MEETING: Commission Meeting - 21 Aug 2019

EXECUTIVE SUMMARY:

Boise Caddis, LLC is constructing an 8-story mixed use development with commercial uses on the ground floor, structured parking, and 174 apartments on the top 4 floors. The site is located on the north side of Myrtle Street between 2nd and 3rd Street in downtown Boise. There is a north-south public alley in the middle of the development between Myrtle Street and Broad Street. This application was on the ACHD Commission Consent Agenda on February 20, 2019 because the applicant is proposing to construct a building/deck over the alley to connect the west building with the east building, for approximately ½ the length of the alley. The building elevation on the attachment is of the south side of the building on Myrtle Street, and the alley is circled in yellow.

ACHD requires an easement agreement for buildings or improvements located over rights-of-way. This agreement includes provisions for payment, maintenance and inspection of the structure.

This agreement has been reviewed and approved by ACHD Legal staff.

FISCAL IMPLICATIONS:

Per the conditions of approval from February 2019 approval, the applicant was required to obtain an appraisal, and is to pay ACHD for the easement area a sum equal to 50% of the appraised value.

RECOMMENDATIONS:

Authorize the President of the Commission to sign the Easement Agreement.

ATTACHMENT(S):

[Vicinity Map and Site Rendering](#)

[2019-07-19 Air Rights Easement - Boise Caddis](#)





SOUTH ELEVATION - DESIGN REVIEW

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

Fredric V. Shoemaker
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone: 208-562-4900

(Space Above For Recorder's Use)

EASEMENT AGREEMENT FOR AIR RIGHTS

This Easement Agreement for Air Rights (“**Agreement**”) is made and entered into as of this _____ day of August, 2019 by and between Ada County Highway District, a body corporate and body politic of the State of Idaho, whose address is 3775 Adams Street, Boise, Idaho 83714 (the “**District**”), and BOISE CADDIS, LLC, a Michigan limited liability company, whose address is 1038 Trowbridge Road, Lansing, Michigan 488233 (the “**Developer**”). District and Developer are each a “**Party**” and are collectively, the “**Parties.**”

RECITALS

A. WHEREAS, pursuant to the terms and provisions of title 40 of the Idaho Code, Highways and Streets, District is the statutory owner of the right-of-way known as the alleyway lying between West Broad Street and West Myrtle Street in a portion of Block 6 of Central Subdivision situate in a portion of Gov’t Lot 3, Section 10, Township 3 North, Range 2 East, Boise Meridian, City of Boise, Ada County, Idaho (the “**Alley**”).

B. WHEREAS, Developer is the owner of: (a) certain real property located at the northwest corner of the intersection of S 2nd Street and W Broad Street, in the City of Boise, County of Ada, State of Idaho, all as more specifically described in Exhibit “A” attached hereto and incorporated herein (collectively, the “**Property**”).

C. WHEREAS, the Developer proposes to construct a Building on the Property (the “**Developer’s Improvements**”).

D. WHEREAS, the Developer’s Improvements shall include a projection of the Building containing the Developer’s Improvements extending out and over and above certain portions of the Alley, as graphically depicted in **Exhibit A**, attached hereto and incorporated herein.

E. WHEREAS, Developer and the Broad Street Condominium Association, Inc. (“**Owners’ Association**”) desire to obtain from District, and District desires to grant to Developer and Owners’ Association, subject to the terms and provisions of this Agreement, an easement permitting the construction, location, maintenance, operation, occupancy, and use of such Developer’s Improvements on, over, above, and through those portions of the air space

above the Alley, as legally described and depicted in **Exhibit B**, attached hereto and incorporated (the “**Easement Area**”).

F. WHEREAS, time is of the essence.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Grant of Air Rights Easement. District does hereby declare, grant, create, and establish to and for the benefit and use of Developer, the Owners’ Association and any successive owner of the Property, a perpetual, exclusive easement in the air space of the Easement Area to the extent reasonably necessary to accommodate the construction, location, maintenance, operation, occupancy, of the Developer’s Improvements as such shall extend over and into the Easement Area.

2. Appraisal and Compensation. Upon execution of this Agreement, Developer shall pay or cause to be paid to District the sum of \$69,311.50 as consideration for the easement granted herein. Such sum is the fair market value of the Easement Area at such property’s highest and best use, as of a date not more than three (3) months prior to the date of this Agreement, as determined through an appraisal by a MAI certified appraiser obtained by Developer from the list provided and approved by District to act as an independent appraiser. The parties agree that Developer shall bear the costs associated with the appraisal. Each party shall have the opportunity to meet with the appraiser, in the presence of the other party, to provide the appraiser with any information each party deems appropriate.

3. Damages and Indemnities. In exercising the rights granted under the terms hereof and satisfying the obligations imposed herein, Developer shall take precautions to avoid unlicensed encroachment upon and interference with those portions of the Alley lying outside of the Easement Area, and if such are disturbed or harmed in any way by Developer’s activities, Developer shall, at its sole cost, repair any and all such damage.

Developer hereby covenants and agrees to defend, indemnify and hold harmless District and District’s officers, employees, representatives, agents, successors and assigns (hereinafter collectively the “**Indemnitees**”) from all claims, losses, expenses, liens (including, without limitation, liens or claims for services rendered or labor or materials furnished), encumbrances, liabilities, penalties, judgments, settlements, fines, losses, damages, proceedings, actions (civil, criminal or administrative) (whether brought by any governmental entity or non-governmental entity or person), and costs, including without limitation, attorney’s fees, court costs, consultant fees, expert fees and other litigation-related expenses (hereinafter, collectively, the “**Claims**”), brought against, imposed upon, suffered by or paid by Indemnitees or arising out of or in connection with or resulting from: (i) Developer’s excavation and construction activities within the Easement Area; (ii) the negligence of Developer or Developer’s officers, employees, contractors, subcontractors, consultants, agents, or assigns (collectively, “**Developer’s Agents**”) in connection with the Project; (iii) damage to District’s properties and rights of way; (iv) damage to any third party’s property in connection with the Project; (v) damage to Developer’s

or Owners' Association's property or (vi) injury to a person or persons including accidental injury or death arising out of, indirectly or directly, the utilization of the Easement Area including the construction of the Developer's Improvements and the maintenance or utilization thereof by Developer or Developer's Agents, or the invitees of either Developer, or Developer's Agents at any time following such construction of the Developer's Improvements.

In addition, Owners' Association hereby covenants and agrees to defend, indemnify and hold harmless the District and its officers, employees, representatives, agents, successors and assigns (hereinafter collectively the "Indemnitees") from all claims, losses, expenses, liens (including, without limitation, liens or claims for services rendered or labor or materials furnished), encumbrances, liabilities, penalties, judgments, settlements, fines, losses, damages, proceedings, actions (civil, criminal or administrative), and whether brought by any governmental entity or non-governmental entity or person), and costs, including without limitation, attorney's fees, court costs, consultant fees, expert fees and other litigation related expenses (hereinafter collectively the "Claims"), brought against, imposed upon, suffered by or paid by Indemnitees or arising out of or in connection with or resulting from (i) damage to District's properties and rights of way; (ii) damage to Developer's or Owners' Association (if applicable) property; (iii) damage to any third parties property; or (iv) injury to a person or persons including accidental injury or death arising out of, indirectly or directly, the location, maintenance or utilization of the Developer's Improvements by the Association and its members or their agents and invitees. The foregoing indemnities shall survive and continue after the execution hereof and the termination or revocation of the easements granted hereunder.

The foregoing indemnities shall survive and continue after the execution hereof and the termination or revocation of the easements granted hereunder.

4. Duty of Maintenance. Developer, on behalf of all subsequent owners of the Developer's Improvements and the Owners' Association, shall have the duty and obligation, to at all times, to maintain the Developer's Improvements erected on, over, above and through the Easement Area in a safe and structurally sound condition. Upon completion of the Project, and at intervals not exceeding two (2) years thereafter, Owners' Association shall cause the Developer's Improvements to be inspected by a certified bridge/structural inspector under the supervision of a licensed structural engineer and Developer or Owners' Association shall provide the District with a copy of all documentation related to any such inspection within thirty (30) days of the inspection. All maintenance required by the above inspections shall be the responsibility and duty of Developer or Owners' Association and must be completed by a properly licensed and insured contractor approved by the District within ninety (90) days of the inspection, or as directed by the inspection report, whichever is sooner. Developer or Owners' Association shall provide District with a copy of all documentation related to the maintenance within thirty (30) days of the completion of said maintenance. In the event that Developer or Owners' Association fails to satisfy the ongoing inspection and maintenance duties and requirements set forth in this Agreement, and such failure continues for a period of thirty (30) days following written notice from District to Developer thereof (provided, however, if the nature of such duties and requirements reasonably requires a period longer than thirty (30) days to complete, then Developer shall not be deemed to have failed to timely perform such duties and requirements so long as Developer commences such performance within the initial thirty (30) day period and diligently prosecutes the same to completion), District is authorized to complete inspections and maintenance as deemed appropriate by District or District's agents, and in

District's sole discretion, District may seek payment from Developer and Owners' Association for District's actual, out of pocket costs and expenses in connection therewith and may place a lien on the Property for such costs and expenses if Developer fails to reimburse District within thirty (30) days following written demand therefor, which shall include reasonable supporting documentation for such costs and expenses.

5. Easement Runs with the Alley and Property. The Easement hereby granted shall be an easement running with the real property rights constituting the Alley, for the benefit of the Property and shall be binding upon District and its successors and assigns and successive owners of the Easement Area and inure to the benefit of Developer, the Owners' Association, the owners of the Property and the Developer's Improvements and their successors and assigns. The Easements granted under this instrument shall continue so long as the Developer's Improvements, as they are to be constructed, remain in existence.

6. Restrictions, Covenants, and Indemnities Run with the Developer's Improvements. The restrictions, covenants and agreements of indemnity hereby imposed in connection with the construction and utilization of the subject Developer's Improvements (collectively the "**Restrictions**") shall run with the Property and the Developer's Improvements for the benefit of the Easement Area and shall be binding upon the Developer and Owners' Association and the owners of the subject Developer's Improvements and their successors and assigns and shall insure to the benefit of the District and its successors and assigns and all successive owners of the Easement Area. The Restrictions shall be perpetual obligations and shall not terminate, notwithstanding any termination, expiration or revocation of the terms of the Easement, until satisfied in accordance with terms hereof.

7. Non-waiver. No failure to exercise and no delay in exercising any right, power, or privilege on the part of any Party shall constitute a waiver of any other or further exercise thereof or the exercise of any right, power, or privilege. Further, the rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law. No waiver of any of the provisions of this instrument shall be deemed or shall constitute a waiver of any other provisions whether or not similar, nor shall any constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.

8. Further Assurances. Each Party further covenants to the other to execute any and all other documents which may be necessary to effect the terms and conditions of this Agreement and any other agreements or documents as contemplated by this Agreement.

9. Governing Law. The terms of this instrument shall be governed by and construed in accordance with the laws of the State of Idaho.

10. Incorporation by Reference. All recitals and exhibits to this Agreement are hereby incorporated by reference as if set forth herein. However, in the event of a conflict between such exhibit and the text of this Agreement, the exhibit shall control.

11. Right of Specific Performance. Each Party shall have the right to require the other Party to specifically perform such Party's obligations hereunder, including the right to enjoin the other Party from exercising any right that may interfere with the rights granted hereunder to the other Party.

12. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument. This Agreement may be signed and delivered by facsimile or via email in PDF or other similar format, each of which shall be effective as an original.

13. Miscellaneous Provisions.

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

b. Exhibits; Headings. All Exhibits to the Agreement are incorporated by reference and made a part of this Agreement; provided, however, if there is any conflict between the Exhibits attached hereto and the provisions of this Agreement, the terms of the Agreement shall govern. The headings used in this Agreement are used for convenience only and are not considered in construing or interpreting this Agreement.

c. Entire Agreement. This Agreement sets forth the entire understanding of the Parties, and supersedes all prior understandings relating to them, whether written or oral. This Agreement may be amended in whole or in part only by mutual written agreement of District and Developer or Owners' Association.

d. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and permitted assigns. This Agreement shall not confer any rights or remedies upon any person other than the Parties and their respective successors and permitted assigns.

e. Attorneys' Fees. In the event any action or proceeding is initiated to enforce or interpret the provisions of this Agreement, the prevailing Party in such action or proceeding shall be entitled to recover from the other Party the prevailing Party's reasonable attorneys' fees and other legal costs.

f. Recordation. Upon mutual execution of the Agreement, Developer, at Developer's cost, shall promptly record this Agreement.

g. Further Acts and Cooperation. Each Party shall deliver to the other Party, from time to time, at no additional cost to the requesting Party, such further information, plans, instruments, records, or other documents or assurances as may be reasonably necessary to give full effect to this Agreement and to allow each Party fully to exercise such Party's obligations and enjoy such Party's rights accorded by this Agreement.

[end of text; signatures on next page]

“DEVELOPER”

BOISE CADDIS, LLC,
a Michigan limited liability company

By: _____
Kevin T. McGraw
Its: Manager

STATE OF _____)
) ss.
County of _____)

This record was acknowledged before me on _____, _____
[date]

by _____
[name(s) of individual(s)]

as _____
[type of authority, such as officer or trustee]

of _____.
[name of party on behalf of whom record was executed]

Signature of notary public

My commission expires: _____

EXHIBIT B

LEGAL DESCRIPTION

Page 1 OF 1



July 11, 2019
Project No.: 118111

ACHD AERIAL EASEMENT
PORTION OF BLOCK 6 CENTRAL SUBDIVISION
RIVER CADDIS DEVELOPMENT – BOISE CADDIS 3&M

An aerial easement being the vertical air space over, above and contained within the herein described perimeter of that portion of Block 6 of Central Subdivision, according to the official plat thereof, filed in Book 1 of Plats, Page 7, Records of Ada County, Idaho, located in a portion of Government Lot 3, Section 10 Township 3 North, Range 2 East, Boise Meridian, City of Boise, Ada County, Idaho, more particularly described as follows:

COMMENCING at the southerly corner of said Block 6, from which a brass cap monument marking the centerline intersection of West Myrtle Street and South 2nd Street bears South 09°47'35" East, 56.55 feet;
Thence on the southwesterly boundary line of said Block 6, North 54°48'28" West, 139.94 feet;
Thence leaving said southwesterly boundary line, North 35°14'22" East, 13.16 feet to the **POINT OF BEGINNING.**

Thence North 54°48'28" West, 20.00 feet;
Thence North 35°14'22" East, 129.33 feet;
Thence South 54°48'28" East, 20.00 feet;
Thence South 35°14'22" West, 129.33 feet **POINT OF BEGINNING.**

The bottom plane (the beginning) of the vertical space contained within herein described easement shall be 17.00 feet over and above the finished grade elevation of the ground surface contained within the herein described perimeter.

The above described easement perimeter contains 0.059 acres (2587 Sq. Ft.) more or less, subject to all existing easements and rights-of-way of record.

PREPARED BY:
The Land Group, Inc.
Michael Femenia, PLS



07/11/2019