

## CITY COUNCIL REPORT

DATE: November 21, 2019

TO: City Council

FROM: Charity Lee, Real Estate Manager  
Robert Wallace, Open Space Specialist

CC: Greg Clifton, City Manager  
Shane Dille, Deputy City Manager  
Shanon Anderson, Deputy City Manager

SUBJECT: Temporary License across City property at 1751 N. Gemini Drive

### **Background:**

On December, 21, 2007 the City of Flagstaff received 4.16 acres of property located at 1751 N. Gemini Drive, Flagstaff, Assessor Parcel Number 101-37-001E ("the Property"). This property was acquired for urban trails and open space per Ordinance No. 2007-38. The Property is located adjacent to the McMillan Mesa protected open space but was not included in Proposition 413 and is not legally designated open space. The current zoning on the Property is Research and Development.

August 8, 2019 the City Real Estate Program received a request for a temporary construction easement (TCE) over and across the Property. The purpose of the TCE is to construct a retaining wall on the neighboring property at 1830 N. Jasper Drive, Assessor Parcel Number 101-46-012A for the Highgate Congregate Care Facility.

Staff brought the request to the internal Property and Development Team meeting on August 21<sup>st</sup>, 2019. The direction of the team was to issue a license instead of a TCE. A license agreement would provide better protection for the City and would include a monthly fee, a security deposit, parameters for the use of the Property, insurance requirements and mitigation measures.

Staff has prepared the form of license which is attached hereto. The license will be effective for six (6) months starting November 20<sup>th</sup>, 2019 to May 29<sup>th</sup>, 2020. The temporary license is only permitted for ingress/egress via foot, along a six-foot (6') corridor along the east property boundary line of the Property. This license does not allow vehicle access or machinery access across the Property. The Property will be fully restored according to Open Space specifications and

requirements as identified in the license within six months after the retaining wall has been constructed.

The license has been approved by the City Manager per his authority under the City charter.

**Recommendation / Conclusion:**

This City Council Report is for information only.

**LICENSE AGREEMENT**  
**between**  
**The City of Flagstaff and**  
**Highgate Flagstaff**

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This License Agreement (the "Agreement") is made this \_\_\_\_ day of \_\_\_\_\_, by and between the City of Flagstaff ("City/Licensor") and Highgate Flagstaff ("Licensee") to provide Licensee with limited use of the City-owned parcel located at 1751 N. Gemini Drive, Flagstaff, AZ 86001, Assessor Parcel Number 101-37-001E ("City Property").

**RECITALS**

- A. The City is the owner of the City Property, which is located at 1751 N. Gemini Drive, Flagstaff, AZ 86001, Assessor Parcel Number 101-37-001E (Exhibit A), located on the McMillan Mesa.
- B. The City Property is subject to Ordinance 2007-38, which states that the City Property is for Urban Trails and Open Space. The adoption of Ordinance 2007-38 secured the desired alignment for FUTS and Open Space as selected by the Open Spaces Commission.
- C. Highgate Flagstaff LLC is developing a Congregate Care Facility on adjacent parcel 101-46-012A (Exhibit B), at 1831 N. Jasper Drive Flagstaff Arizona, 86001 ("Licensee Property") and is requesting a temporary use of the City Property to construct a retaining wall on its site.
- D. The City is authorized to enter into this Agreement under Article I, Section 3, of the Flagstaff City Charter.

NOW, THEREFORE, in consideration for valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

**1. Term**

This Agreement will be in effect from November 20<sup>th</sup>, 2019, to May 29<sup>th</sup>, 2020, unless terminated earlier pursuant to the terms of this Agreement.

**2. Permitted Uses of Property**

City agrees to:

- Provide Licensee and its agents temporary access to the City Property to construct a retaining wall on the Licensee Property along its west boundary, subject to the following limitations and restrictions:
  - Temporary access is only permitted for ingress/egress via foot, along a six-foot (6') corridor identified in Exhibit C to gain access to the retaining wall construction site.
  - Temporary access will allow building material, such as block, mortar, rebar, to be moved and handled on the City Property.
  - Temporary access does not allow vehicle access or machinery access.
  - Storage of building materials and excavated material should take place only when there is no other option and will be removed immediately upon the completion of the boundary wall.
  - Licensee must make reasonable efforts to limit impacts and the removal of vegetation within the corridor.
- Oversee restoration of the City Property to ensure the area is remediated to Open Space standards.

Licensee agrees to:

- Survey the property line to designate the 6' access corridor with temporary fencing to prevent unintentional impacts to the City Property before the commencement of work.
- Provide tree resource protection on the City Property. Work conducted shall include the prevention of physical injury to trunk and crown, root cutting, soil compaction, and smothering roots by adding soil. Temporary snow fencing shall be placed around each tree within the corridor and within 10 feet of the work area. Snow fencing shall be set approximately 6 inches from the trunk for each inch of trunk diameter. Snow fenced areas around trees shall be kept clear of building material, waste, and excess soil. No digging, trenching or other disturbance shall occur in the snow fenced zones.
- Notify the City immediately of any changes or plans that could affect the City Property.
- Access the City Property via foot only.
- Educate workers about the Agreement to ensure the Agreement is upheld.
- Prevent all vehicle use on the Flagstaff Urban Trail System (FUTS).
- Remove building material, excavated soil, and temporary fencing from the City Property immediately upon the completion of the boundary wall.
- Develop and submit a narrative explanation to the City for preventing/mitigating invasive plants on the Licensee's Property (Parcel 101-46-012A) to limit negative impacts to neighboring City Property prior to the commencement of work.
- Control erosion, sediment, and construction site debris/wastes on the project site through the installation of stormwater control measures (i.e., rock trackout pad, sediment wattles, silt fence, etc.) where appropriate to prevent impact to the City Property.
- Carry out remediation work to restore the temporary access corridor of the City Property within six months after the retaining wall construction has been completed.
  - Complete revegetation work according to Flagstaff City Code Engineering Standards (Title 13, Chapter 17), <https://www.codepublishing.com/AZ/Flagstaff/>, and the standards below.
  - The work shall consist of seedbed preparation (surface ground has been tilled, and then smoothed to break up large clods; also, areas that have been compacted by heavy materials or other operations should be ripped to a depth of at least 6 inches to ensure adequate permeability), sowing seed via broadcast seeding and lightly bury seed with some type of raking action, proper compaction of the seedbed, and covering seeding area with an erosion control blankets.
  - Sowing native seeds shall take place at the appropriate time to promote survival.
  - Broadcast seeding shall require 10–20% more seed to increase success.
  - Rake out tracks/signs of construction to reduce visibility.
- Provide invasive plant mitigation for five years, targeting Scotch Thistle, Bull Thistle, Yellow Star Thistle, and Diffuse Knapweed on the temporary access corridor of the City Property.
- Conduct invasive weed mitigation on disturbed areas of the Licensee Parcel during and immediately following construction to further prevent invasive plants from establishing and potentially spreading seed to City Property.

### **3. Payment**

The Licensee agrees to pay \$500 per month to the City of Flagstaff for the use of the City Property.

### **4. Security Deposit**

Licensee agrees to deposit \$2,500 to the City of Flagstaff at the time of the commencement of this Agreement as a security deposit, which will be fully refunded after all remediation efforts have been completed and approved by the City. If by final inspection, it is deemed by the City's authorized agent

that the Licensee had failed to diligently complete the remediation work within the deadline or the Licensee is unwilling or unable to make satisfactory corrections following sixty (60) days' notice from the City to the Licensee, the City may draw upon the security deposit to complete or correct the remediation work. The City is the sole arbiter of the estimated amount necessary to complete or correct the remediation work associated to Flagstaff City Code Engineering Standards and the specific standards stated above in section two of the 'Licensee Agrees To'.

If funds are drawn by the City to complete or correct any remediation work, the Licensee agrees to allow the City, its agents, representative, and employees to proceed to use City staff or hire a contractor who will complete or correct the remediation work in accordance with the open space standards. The City may deduct from the proceeds obtained from the security deposit its reasonable attorneys' fees, costs and administrative costs for enforcing or administering the terms of this assurance. By signing this Agreement, the Licensee is hereby granting the City permission to use these funds in the instance that the City must complete the remediation work on the City Property pursuant to this Agreement. After remediation work has been completed any remaining balance of the security deposit, if any, will be refunded to the Licensee.

## **5. Indemnification**

Licensee agrees to indemnify, defend, save, and hold harmless the City, its officers, officials, agents, and employees from and against any and all claims, demands, actions, liabilities, damages, losses, or expenses, including court costs, attorney's fees, and costs of claim processing, investigation and litigation (hereinafter collectively referred to as "Claims") that arise out of any actual or alleged bodily injury to any person (including death) or property damage caused or alleged to have been caused, in whole or in part, by the acts, errors, omissions, or negligence of the Licensee or any of Licensee's directors, officers, agents, employees, or volunteers in connection with or incident to this Agreement. This indemnity does not apply to the sole negligence of the City. This indemnity provision shall survive the termination, cancellation, or revocation, whether in whole or in part, of this Agreement.

## **6. Insurance**

The insurance requirements herein (the "Insurance Requirements") are minimum requirements and in no way limit the indemnity covenants contained in any agreement between the parties contained herein. The City in no way warrants that the minimum limits contained herein are sufficient to protect the Licensee or the Licensor from liabilities that might arise out of this Agreement.

### **Minimum Scope and Limits of Insurance**

Licensee shall provide coverage with limits of liability not less than those stated below:

#### **1. Commercial General Liability - Occurrence Form**

The policy shall include bodily injury, property damage, and broad form contractual liability coverage:

- |   |             |
|---|-------------|
| • General Aggregate                       | \$2,000,000 |
| • Products-Completed Operations Aggregate | \$1,000,000 |
| • Personal and Advertising Injury         | \$1,000,000 |
| • Damage to Rented Premises               | \$50,000    |
| • Each Occurrence                         | \$1,000,000 |

a. The policy shall be endorsed, as required by this written agreement, to include the City of Flagstaff, and its departments, agencies, boards, commissions, universities, officers, officials,

agents, and employees as additional insureds with respect to liability arising out of the activities performed by or on behalf of the Licensee.

b. The policy shall contain a waiver of subrogation endorsement, as required by this written agreement, in favor of the City of Flagstaff for losses arising from work performed by or on behalf of the Licensee.

## 2. Workers' Compensation and Employers' Liability

- Workers' Compensation                      Statutory
- Employers' Liability
- Each Accident                                      \$1,000,000
- Disease-Each Employee                      \$1,000,000
- Disease- Policy Limit                      \$1,000,000

a. The policy shall contain a waiver of subrogation endorsement, as required by this written agreement, in favor of the City of Flagstaff for losses arising from work performed by or on behalf of the Licensee.

b. This requirement shall not apply to each subcontractor that is exempt under A.R.S. § 23-901, and when such subcontractor executes the appropriate waiver form (Sole Proprietor or Independent Subcontractor).

## Additional Insurance Requirements

The policies shall include, or be endorsed to include, as required by this written agreement, the following provisions: The Licensee's policies, as applicable, shall stipulate that the insurance afforded the Licensee shall be primary and that any insurance carried by the City of Flagstaff, shall be excess and not contributory insurance, as provided by A.R.S. §41-621 (E). Insurance provided by the Licensee shall not limit the Licensee's liability assumed under the indemnification provisions of this contract.

## Notice of Cancellation

Applicable to all insurance policies required within the Insurance Requirements of this contract, Licensee's insurance shall not be permitted to expire, be suspended, be canceled, or be materially changed for any reason without thirty (30) days prior written notice to the City. Within two (2) business days of receipt, the Licensee must provide notice to the City that a policy has been or will be suspended, canceled, materially changed for any reason, expired, or will be expiring. Such notice shall be mailed directly to Dean Coughenour- City of Flagstaff Risk Manager at 211 West Aspen Avenue, Flagstaff, AZ. 86001 and e-mailed [dcoughenour@flagstaffaz.gov](mailto:dcoughenour@flagstaffaz.gov).

## Acceptability of Insurers

Licensee's insurance shall be placed with companies licensed in the State of Arizona or hold approved non-admitted status on the Arizona Department of Insurance List of Qualified Unauthorized Insurers. Insurers shall have an "A.M. Best" rating of not less than A-VII. The State of Arizona, in no way warrants, that the above-required minimum insurer rating is sufficient to protect the Licensee from potential insurer insolvency.

## Verification of Coverage

The Licensee shall furnish the City with certificates of insurance (valid ACORD form or equivalent approved by the State of Arizona) evidencing that the Licensee has the insurance as required by this contract. An authorized representative of the insurer shall sign the certificates. All such certificates of insurance and policy endorsements must be received by the City before work commences. The City's

receipt of any certificates of insurance or policy endorsements that do not comply with this written agreement shall not waive any right of the City. Each insurance policy required by this contract must be in effect at, or prior to, the commencement of work under this contract. Failure to maintain the insurance policies as required by this contract, or to provide evidence of renewal, is a material breach of contract. All certificates required by this contract shall be sent directly to the City.

### **Subcontractors**

Licensee's certificate(s) shall include all subcontractors as insureds under its policies or Licensee shall be responsible for ensuring and/or verifying that all subcontractors have valid and collectible insurance as evidenced by the certificates of insurance and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum Insurance Requirements identified herein. The city of Flagstaff has the right to require, at any time, throughout the life of the contract, proof from the Licensee that its subcontractors have the required coverage.

### **Exceptions**

In the event the Licensee or subcontractor(s) is/are a public entity, then the Insurance Requirements shall not apply. Such public entity shall provide a certificate of self-insurance. If the Licensee or subcontractor(s) is/are a State of Arizona agency, board, commission, or university, none of the Insurance Requirements shall apply.

### **7. Revocation/ Termination by Parties**

The City may revoke this Agreement by providing at least thirty (30) days written Notice of License Revocation, instructing the Licensee to vacate the premises and remove any and all construction materials and equipment from the City Property. In the event this Agreement is revoked, the license fee will be prorated as of the date the License is revoked. Licensee may terminate this Agreement by giving the City thirty (30) days' written notice.

### **8. Notices**

All notices or other communications under this License shall be in writing and shall be deemed to be delivered on the date of delivery if delivered in person or on the date of receipt indicated on the return receipt if delivered by U.S. Mail, certified or registered, return receipt requested, postage prepaid and addressed as follows:

If to City:                   City Manager, City of Flagstaff  
211 W. Aspen. Avenue Flagstaff, Arizona 86001  
[Greg.Clifton@flagstaffaz.gov](mailto:Greg.Clifton@flagstaffaz.gov)  
928-213-2053

City Attorney, City of Flagstaff  
211 W. Aspen. Avenue Flagstaff, Arizona 86001  
[SSolomon@flagstaffaz.gov](mailto:SSolomon@flagstaffaz.gov)  
928-213-2043

City Real Estate Manager, City of Flagstaff  
211 W. Aspen. Avenue Flagstaff, Arizona 86001  
[clee@flagstaffaz.gov](mailto:clee@flagstaffaz.gov)  
928-213-2072

Or to such other person/address as a party may provide to the other by written notice. E-mail is sufficient and is deemed delivered on the day it is sent.

**9. Governing Law, Jurisdiction and Forum**

This Agreement shall be construed and interpreted in accordance with the laws of the State of Arizona. The parties agree that the courts of Arizona shall have exclusive jurisdiction and that Coconino County shall be the proper venue.

**10. Relationship of the Parties**

Nothing contained in this Agreement shall be construed as creating the relationship of principal or agent or of partnership or joint venture.

**11. Cancellation**

This Agreement is subject to the cancellation provisions of ARS § 38-511.

**12. Compliance with Laws and Regulations**

The Licensee will comply with all laws, ordinances, regulations, and rules of the federal, state, county, and municipal governments that may be applicable to its use of the City Property.

**13. Assignment Prohibited**

This License is a personal right to Licensee and is not subject to assignment without the written consent of the City, which consent shall not be unreasonably withheld. In the event the City consents to assignment, Licensee as the Assignor shall give written notice to the Assignee that the Assignee shall be subject to and obligated under all terms and conditions of this Agreement. Furthermore, the Licensee hereby consents that any assignment shall not relieve the Licensee of its obligations under all terms and conditions of this Agreement.

In witness whereof, the parties have caused this Agreement to be executed by their duly authorized representatives on the dates(s) set forth below.

City of Flagstaff, Licensor

Highgate Flagstaff LLC, Licensee

Sign: \_\_\_\_\_  
Greg Clifton, City Manager  
Dated: \_\_\_\_\_

Sign: \_\_\_\_\_  
Name/Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
City Clerk  
Dated: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney  
Dated: \_\_\_\_\_

Exhibit A: City of Flagstaff  
Parcel #101-37-001E



Exhibit B: Highgate Flagstaff  
Parcel #101-46-012A



# Exhibit C: Temporary Access Corridor

