

POCATELLO DEVELOPMENT AUTHORITY
Board of Commissioners Meeting
June 17, 2020 – 11:00 a.m.
Council Chambers – Pocatello City Hall

**DUE to the COVID-19 pandemic guidelines,
no on-site public access is permitted for this meeting.**

**The regular Pocatello Development Authority Meeting will be live-streamed at:
<http://streaming.pocatello.us/> or on Sparklight Cable, channel 56**

City Hall is accessible to persons with disabilities. Program access accommodations may be provided with three days' advance notice by contacting Skyler Beebe at sbeebe@pocatello.us, 208.234.6248, or 5815 South 5th Avenue, Pocatello, Idaho.

In the event this meeting is still in progress at 12:00 p.m., a ten-minute recess may be called.

1. **CALL TO ORDER, DISCLOSURE OF CONFLICT OF INTEREST, AND ACKNOWLEDGMENT OF GUESTS.**
2. **ACTION ITEM – Minutes.** The Board may wish to waive the oral reading of the minutes and approve the minutes from the Board of Commissioners Regular Meeting held May 20, 2020, and the Special Meeting on June 2, 2020. *See attached document.*
3. **ACTION ITEM – Financial Report.** A financial report for the PDA will be provided by PDA Treasurer. The Board may wish to approve the financial report. *To be supplemented.*
4. **ACTION ITEM – Expense Payments & Reimbursements.** The Board may wish to approve the payment or reimbursement of the following PDA expenses:
 - a. \$8,116.50 from General Fund to Elam & Burke for legal fees for the month of May re: Special General Counsel
 - b. \$270.00 from North Portneuf fund to Stacey & Parks for legal services re: Client Communication.
5. **ACTION ITEM – North Portneuf TIF District.** The Board may wish to define and approve the terms of and authorize the Chair's signature on an owner participation agreement with Portneuf Capital, LLC. *To be supplemented.*
6. **ACTION ITEM – Airport TIF District.** The Board may wish to review and approve the following requested disbursements of funds under the previously approved reimbursement by the Board, and authorize the Chair's signature on the Confirmation of Agency Reimbursement. *See attached documents.*
 - a. Frigitek, LLC is requesting disbursement of \$68,182.50 under the owner participation agreement as approved by the Board on April 15, 2020 and authorized on September 18, 2019. The request is for civil engineering, geotechnical engineering and construction management services period of 03/26/20 – 4/25/20.
 - b. Frigitek, LLC is requesting disbursement of \$77,714.80 under the owner participation agreement as approved by the Board on April 15, 2020 and authorized on September 18, 2019 civil engineering, geotechnical engineering and construction management services 04/26/20 – 5/25/20.
 - c. Frigitek, LLC is requesting disbursement of \$35,000.00 under the owner participation agreement as approved by the Board on April 15, 2020 and authorized on September 18, 2019. The request is for professional services of infrastructure design and project management rendered between 08/7/2019-05/15/2020.
7. **ACTION ITEM – Potential TIF District.** Tanner Hernandez will present a TIF proposal for a potential urban renewal area/revenue allocation district in the South 5th area. *See attached documents.*
8. **CALENDAR REVIEW –** The Board may wish to take this opportunity to inform other Board members of upcoming meetings and events that should be called to their attention.
9. **ADJOURN.**

AGENDA ITEM

NO. 2

Anderson, Carl

From: AT&T TeleConference Services <teleconferences@att.com>
Sent: Friday, June 12, 2020 8:44 AM
To: Anderson, Carl
Subject: AT&T TeleConference Reservation Confirmation - Host Copy (580826320)

Follow Up Flag: Follow up
Flag Status: Flagged



Audio Dial In Conference

Conference Information

Start Date: Jun 17 2020
Start Time: 11:00 AM
Time Zone: MDT
Duration (HH:MM): 02:00
Dial In Ports: 8
Conference ID: HCA1961

Host and Arranger Information

Host: CARL ANDERSON
Phone Number: (208)234-6278
Arranger: CARL ANDERSON
Phone Number: (208)234-6278

Primary Access Information

Caller Paid: 646-364-1250
Host Code: 520255
Participant Code: 7531472

Conference Options

- Automatic Port Expansion
- Tones on Entry/Exit

To Attend an Audio Conference

1. Dial the Conference Bridge.
 2. If Hosting the call, enter the Host Code 520255#
- Quick Tip - hit # to bypass announcements

Support Tips

- * Information is subject to change. If so, you will be notified by a TeleConference Associate. Cancel reservations at least 30 minutes before start time to avoid No Show fees.
- * Please do not share conference access information.
- * Should you need assistance during your conference, please press *# for a list of menu options including Specialist assistance.
- * Please review this information and contact TeleConference Services at (800)526-2655 if there are any changes.
- * If your individual TeleConference account is not used within a six month period, deactivation will occur.
- * For your protection, do not publish your conference Access Information (e.g., Dial In Number, Access Codes.).

Thank you for choosing AT&T TeleConference Services!

Stacey & Parks, PLLC
 802 W Bannock Suite LP 110
 BOISE, ID 83702
 United States
 (208) 917-7780

Stacey & Parks, PLLC

Scott Smith
 CARL ANDERSON
 CITY OF POCATELLO
 Senior Planner | Planning & Development
 Services
 911 N 7th Avenue | PO Box 4169 | Pocatello ID
 83205-4169

Balance \$472.50
Invoice # 00268
Invoice Date June 8, 2020
Payment Terms Net 30
Due Date July 08, 2020

Hoku Property Sale

Time Entries

Date	EE	Activity	Description	Rate	Hours	Line Total
05/06/2020	MP	Client Communication	Review email from Carl Anderson re public records request response. Identify additional responsive materials and follow up with Carl Anderson regarding same and lack of comments on response letter.	\$225.00	0.5	\$112.50
05/19/2020	MP	Client Communication	Receive and reply to email from Chad Hansen (Portneuf Capital) regarding lien action filed by entity hired by Solargise prior to Portneuf's closing.	\$225.00	0.2	\$45.00
05/21/2020	MP	Client Communication	Review public records request and proposed response. Draft reply to Carl Anderson re same identifying additional responsive documents.	\$225.00	0.5	\$112.50

Totals: 1.2 \$270.00

Unpaid Invoice Balance Forward

Invoice #	Invoice Total	Amount Paid	Due Date	Balance Forward
00247	\$202.50	\$0.00	--	\$202.50

Balance Forward: \$202.50

Time Entry Sub-Total:	\$270.00
Sub-Total:	\$270.00
Balance Forward:	\$202.50
Total:	\$472.50
Amount Paid:	\$0.00
Balance Due:	\$472.50

Anderson, Carl

From: Kim Kline <ksk@elamburke.com>
Sent: Friday, June 12, 2020 9:57 AM
To: Anderson, Carl
Cc: Linton-Welsh, Ashley
Subject: RE: PDA Invoices

Thank you Carl. I should be getting the invoice Monday but Meghan told me the amount didn't change. No problem in the delay. Thanks for letting me know.

Kim

From: Anderson, Carl <canderson@pocatello.us>
Sent: Friday, June 12, 2020 9:49 AM
To: Kim Kline <ksk@elamburke.com>
Cc: Linton-Welsh, Ashley <alinton@pocatello.us>
Subject: RE: PDA Invoices

Hi Kim,

Thank you, the invoice for the month of May is on listed on the agenda as \$8,116.21 for special counsel general.

Regarding the unpaid invoices below, these have been approved by the Board and your office should be seeing a check hopefully within the next week! I apologize for the delay in payment.

Thank you,

Carl

From: Kim Kline <ksk@elamburke.com>
Sent: Thursday, June 11, 2020 10:51 AM
To: Anderson, Carl <canderson@pocatello.us>
Cc: Linton-Welsh, Ashley <alinton@pocatello.us>
Subject: PDA Invoices

Carl, Meghan hasn't reviewed the prebills yet so I don't have invoices to send to you. Without any changes being made the May invoice for matter 9212-3 is **\$8,116.21** (\$8,105.50 fees; \$10.71 costs). This may change a little when Meghan returns the prebills to accounting. As of right now, this is the only invoice that I know that will be printed this month.

Also our accounting manager sent me this chart that shows the following invoices unpaid. Please let me know if you have questions or need me to resend the invoices. There is also the possibility that you have send checks and they just haven't gotten here yet.

Pocatello Development Authority
Balance Sheet by Class
As of May 31, 2020

	1-General Fund	3-North Yellowstone	4-Naval Ordnance	6-North Portneuf	7-Pocatello Regional Airport	TOTAL
ASSETS						
Current Assets						
Checking/Savings						
ICCU Checking	875,947.47	1,553.80	950,974.07	1,419,500.15	663,258.22	3,911,233.71
ICCU Savings	25.00	0.00	0.00	0.00	0.00	25.00
Total Checking/Savings	875,972.47	1,553.80	950,974.07	1,419,500.15	663,258.22	3,911,258.71
Accounts Receivable						
Notes Receivable	378,645.80	0.00	0.00	0.00	0.00	378,645.80
Total Accounts Receivable	378,645.80	0.00	0.00	0.00	0.00	378,645.80
Other Current Assets						
Accrued Interest Income	23,923.72	0.00	374.33	145.57	228.76	24,672.38
Property Tax Receivable	0.00	7,969.05	0.00	208,081.29	0.00	216,050.34
Total Other Current Assets	23,923.72	7,969.05	374.33	208,226.86	228.76	240,722.72
Total Current Assets	1,278,541.99	9,522.85	951,348.40	1,627,727.01	663,486.98	4,530,627.23
Other Assets						
Inventory - Leasehold	125,000.00	0.00	0.00	0.00	0.00	125,000.00
Total Other Assets	125,000.00	0.00	0.00	0.00	0.00	125,000.00
TOTAL ASSETS	1,403,541.99	9,522.85	951,348.40	1,627,727.01	663,486.98	4,655,627.23
LIABILITIES & EQUITY						
Liabilities						
Current Liabilities						
Other Current Liabilities						
Acct Payable	2,852.43	9,522.85	0.00	2,541.50	0.00	14,916.78
Total Other Current Liabilities	2,852.43	9,522.85	0.00	2,541.50	0.00	14,916.78
Total Current Liabilities	2,852.43	9,522.85	0.00	2,541.50	0.00	14,916.78
Long Term Liabilities						
Deferred Interest Receivable	23,632.57	0.00	0.00	0.00	0.00	23,632.57
Deferred Notes Receivable Rev	426,528.00	0.00	0.00	0.00	0.00	426,528.00
Deferred Tax Revenues	0.00	0.00	0.00	208,081.29	0.00	208,081.29
Total Long Term Liabilities	450,160.57	0.00	0.00	208,081.29	0.00	658,241.86
Total Liabilities	453,013.00	9,522.85	0.00	210,622.79	0.00	673,158.64
Equity						
Fund Balance	915,929.38	0.00	980,538.40	392,329.28	609,912.35	2,898,709.41
Net Income	34,599.61	0.00	-29,190.00	1,024,774.94	53,574.63	1,083,759.18
Total Equity	950,528.99	0.00	951,348.40	1,417,104.22	663,486.98	3,982,468.59
TOTAL LIABILITIES & EQUITY	1,403,541.99	9,522.85	951,348.40	1,627,727.01	663,486.98	4,655,627.23

Pocatello Development Authority
Profit & Loss by Class
May 2020

	<u>1-General Fund</u>	<u>4-Naval Ordnance</u>	<u>6-North Portneuf</u>	<u>7-Pocatello Regional Airport</u>	<u>TOTAL</u>
Ordinary Income/Expense					
Income					
Interest Income	194.99	203.47	305.21	144.13	847.80
Total Income	<u>194.99</u>	<u>203.47</u>	<u>305.21</u>	<u>144.13</u>	<u>847.80</u>
Gross Profit	194.99	203.47	305.21	144.13	847.80
Expense					
Administrative	49.66	0.00	0.00	0.00	49.66
Total Expense	<u>49.66</u>	<u>0.00</u>	<u>0.00</u>	<u>0.00</u>	<u>49.66</u>
Net Ordinary Income	<u>145.33</u>	<u>203.47</u>	<u>305.21</u>	<u>144.13</u>	<u>798.14</u>
Net Income	<u><u>145.33</u></u>	<u><u>203.47</u></u>	<u><u>305.21</u></u>	<u><u>144.13</u></u>	<u><u>798.14</u></u>

At month end, the Authority has cash on hand of \$3,911,258.71. The checking account was \$3,911,258.71 and the savings account balance was \$25.00.

Pocatello Development Authority recognized below average financial activity fro the month of May. The Authority received revenues totally \$847.80 for interest earnings on cash invested.

Expenses paid for the month totaled \$49.66. Administrative expenses were \$49.66 for the May lunch meeting.

Year to date revenues of \$1,440,704.49 (see page 3) are greater than expenses of \$356,945.31, so there is an overall net increase of reserves of \$1,083,759.18

Pocatello Development Authority
Profit & Loss by Class
October 2019 through May 2020

	<u>1-General Fund</u>	<u>4-Naval Ordnance</u>	<u>6-North Portneuf</u>	<u>7-Pocatello Regional Airport</u>	<u>TOTAL</u>
Ordinary Income/Expense					
Income					
Interest Income	1,656.98	1,981.00	2,211.26	1,276.22	7,125.46
Personal Property tax replace	0.00	0.00	6,448.12	1,262.85	7,710.97
Proceeds from sale of property	124,082.50	0.00	1,250,000.00	0.00	1,374,082.50
Property Taxes	0.00	0.00	0.00	51,035.56	51,035.56
Rental Income	750.00	0.00	0.00	0.00	750.00
Total Income	<u>126,489.48</u>	<u>1,981.00</u>	<u>1,258,659.38</u>	<u>53,574.63</u>	<u>1,440,704.49</u>
Gross Profit	126,489.48	1,981.00	1,258,659.38	53,574.63	1,440,704.49
Expense					
Administrative	6,416.17	0.00	57.43	0.00	6,473.60
Bank Fee	0.00	0.00	15.00	0.00	15.00
Capital Construction	0.00	31,171.00	0.00	0.00	31,171.00
Debt Service					
Principal	0.00	0.00	224,247.51	0.00	224,247.51
Total Debt Service	<u>0.00</u>	<u>0.00</u>	<u>224,247.51</u>	<u>0.00</u>	<u>224,247.51</u>
Dues and Memberships	1,750.00	0.00	0.00	0.00	1,750.00
Economic Grants Issued	50,234.00	0.00	0.00	0.00	50,234.00
Economic Loans	22,354.20	0.00	0.00	0.00	22,354.20
Professional Services					
Other Professional Services	11,135.50	0.00	9,564.50	0.00	20,700.00
Total Professional Services	<u>11,135.50</u>	<u>0.00</u>	<u>9,564.50</u>	<u>0.00</u>	<u>20,700.00</u>
Total Expense	<u>91,889.87</u>	<u>31,171.00</u>	<u>233,884.44</u>	<u>0.00</u>	<u>356,945.31</u>
Net Ordinary Income	<u>34,599.61</u>	<u>-29,190.00</u>	<u>1,024,774.94</u>	<u>53,574.63</u>	<u>1,083,759.18</u>
Net Income	<u><u>34,599.61</u></u>	<u><u>-29,190.00</u></u>	<u><u>1,024,774.94</u></u>	<u><u>53,574.63</u></u>	<u><u>1,083,759.18</u></u>

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Capital Construction	0.00	31,171.00	0.00	0.00	31,171.00
Debt Service					
Principal	0.00	0.00	224,247.51	0.00	224,247.51
Total Debt Service	<u>0.00</u>	<u>0.00</u>	<u>224,247.51</u>	<u>0.00</u>	<u>224,247.51</u>
Dues and Memberships	1,750.00	0.00	0.00	0.00	1,750.00
Economic Grants Issued	50,234.00	0.00	0.00	0.00	50,234.00
Economic Loans	22,354.20	0.00	0.00	0.00	22,354.20
Professional Services					
Other Professional Services	11,135.50	0.00	9,564.50	0.00	20,700.00
Total Professional Services	<u>11,135.50</u>	<u>0.00</u>	<u>9,564.50</u>	<u>0.00</u>	<u>20,700.00</u>
Total Expense	<u>91,889.87</u>	<u>31,171.00</u>	<u>233,884.44</u>	<u>0.00</u>	<u>356,945.31</u>
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**OWNER PARTICIPATION AGREEMENT
(GRANT AGREEMENT)**

By and Between

The Pocatello Development Authority

and

Portneuf Capital, LLC, an Idaho Limited Liability Company

for the

North Portneuf TIF District

**OWNER PARTICIPATION AGREEMENT
(GRANT AGREEMENT)**

THIS OWNER PARTICIPATION AGREEMENT (GRANT AGREEMENT) (hereinafter "Agreement") is entered into by and between the Pocatello Urban Renewal Agency, commonly known as the Pocatello Development Authority, an independent public body, corporate and politic (hereinafter "Agency"), organized pursuant to the Idaho Urban Renewal Law, Title 50, Chapter 20, Idaho Code, as amended (hereinafter the "Law"), and undertaking projects under the authority of the Local Economic Development Act, Title 50, Chapter 29, Idaho Code, as amended (hereinafter the "Act"), and Portneuf Capital, LLC, an Idaho Limited Liability Company authorized to do business in the State of Idaho (hereinafter "Participant"), collectively referred to as the "Parties" and each individually as "Party," on the terms and provisions set forth below.

RECITALS

WHEREAS, Agency, an independent public body, corporate and politic, is an urban renewal agency created by and existing under the authority of the Law and the Act;

WHEREAS, the Pocatello City Council adopted its Ordinance No. 2814 on May 3, 2007, approving the North Portneuf Urban Renewal Area and Revenue Allocation Area District Improvement Plan (hereinafter the "Urban Renewal Plan") establishing the North Portneuf revenue allocation area, which is located within the City of Pocatello (the "City") and in unincorporated Bannock County (the "Project Area"). The termination date of the Plan and Project Area is December 31, 2030;

WHEREAS, the Urban Renewal Plan and Project Area were originally established to incent the development of a polysilicon processing plant by funding certain public infrastructure improvements necessary to support development within the Project Area;

WHEREAS, while development occurred within the Project Area consistent with the Urban Renewal Plan, the polysilicon processing plant failed to become operational;

WHEREAS, following a competitive disposition process pursuant to Idaho Code Section 50-2011, Participant now owns or controls real property located within the Project Area in the City (hereinafter referred to as the "Site" as defined below) and intends to develop the Site into a commercial/industrial business park (the "Project");

WHEREAS, the Project is intended to remediate and mitigate the Project Area which continues to be a deteriorating area;

WHEREAS, many, but not all, of the public infrastructure improvements identified in the Plan have been completed;

WHEREAS, consistent with the Urban Renewal Plan, Participant intends on constructing certain traditional public infrastructure improvements on the Site and within the Project Area which are necessary to the proper development of the Site, including: installation and/or relocation of fiber optic cable and/or other communication system improvements; installation, extension, burying or relocation of natural gas infrastructure; installation, extension, burying or relocation of electrical distribution lines, transformers and/or related electrical infrastructure on the Site;

WHEREAS, the Urban Renewal Plan authorizes Agency to use revenue allocation financing to fund by reimbursement specific projects and improvements to implement the objectives of the Urban Renewal Plan;

WHEREAS, Agency and Participant have negotiated the major terms of Agency's participation in the funding of certain improvements to the public infrastructure, and other eligible expenses consistent with the Urban Renewal Plan (collectively the "Agency Funded Public Improvements");

WHEREAS, the Agency Funded Public Improvements implement several objectives outlined in the Urban Renewal Plan that were not completed by the prior entity in control of the Site;

WHEREAS, as a result of Participant's agreement to construct the Agency Funded Public Improvements, Participant's commitment to comply with the terms of the Urban Renewal Plan, and Agency's commitment to reimburse Participant in compliance with the Urban Renewal Plan, the Parties deem it necessary to enter into this Owner Participation Agreement to define their respective obligations;

NOW, THEREFORE, in consideration of the above recitals, which are incorporated into this Agreement, the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

I. EFFECTIVE DATE

The **Effective Date** of this Agreement shall be the date **when this Agreement has been signed by the Parties** (last date signed) and shall continue until all obligations of each Party are complete, this Agreement is terminated, or December

E. Agency Participation Policy

Generally, the Agency will agree to financially participate with a private developer when such participation achieves the objectives of the Urban Renewal Plan, is not duplicative of other public entity funding, and does not replace or substitute for the obligations imposed by other governmental agencies on the Participant. The specific participation by the Agency for this Site is as set forth herein.

F. Parties to This Agreement

1. Agency

The Agency is an independent public body, corporate and politic, exercising governmental functions and powers and organized and existing under the Law and the Act. The office of the Agency is located at City of Pocatello, 911 North 7th Avenue, Pocatello, Idaho 83201. "Agency," as used in this Agreement, includes the Urban Renewal Agency and any assignee of or successor to its rights, powers, and responsibilities.

2. Participant

The Participant is Portneuf Capital, LLC, an Idaho limited liability company authorized to do business in the State of Idaho. The principal address of the Participant is 9950 Peppergrass, Pocatello, ID 83204.

Whenever the term "Participant" is used herein, such term shall include any assignee or successor in interest approved or consented to by the Agency, which consent should not be unreasonably withheld.

G. The Private Development and City Agreements

1. The Private Development

The Private Development, or Project, shall mean the development undertaken by Participant or the approved successors or assigns upon the Site. The Private Development consists of the development and/or redevelopment of the Site into a commercial/industrial business park. The Private Development and any further development upon the Site or any portion of the Site shall comply with the applicable provisions of the Urban Renewal Plan and all applicable City codes and ordinances, and any other City Agreements and Approvals as defined in Section II.G(2).

2. City Agreements and Approvals

"City Agreements and Approvals" shall mean those certain agreements between Participant and City, concerning, among other things, any required building permits and other approvals by City for the development of the Private Development on the Site.

Any default by Participant of the City Agreements and Approvals, including but not limited to any and all applicable City ordinances, not cured within any applicable cure period shall constitute a default under this Agreement with the Agency reserving any of its rights and remedies under this Agreement concerning default.

III. IMPROVEMENT OF THE SITE AND AGENCY'S PARTICIPATION

A. Development Design

Participant agrees that the Private Development will be in full compliance with the applicable provisions of the Urban Renewal Plan and the City Agreements and Approvals.

B. Cost of Construction

The cost of the Private Development and the Agency Funded Improvements, defined below, shall be borne by the Participant except as otherwise set forth herein.

C. Agency, City, and Other Governmental Agency Permits

Participant has or shall, at Participant's own expense, secure or cause to be secured any and all permits or approvals which may be required by Agency, City, or any other governmental agency relative to construction and operation of the Private Development and the Agency Funded Public Improvements.

D. Agency Funded Public Improvements

The Agency Funded Public Improvements are directly related to public infrastructure and are: (a) critical to the development and/or redevelopment of the Site, (b) provide a higher quality of development that should assist Agency in achieving redevelopment of other properties adjacent to the Site and meeting the objectives of the Urban Renewal Plan concerning the Agency Funded Public Improvements; (c) are public infrastructure improvements that were not completed as contemplated under the Urban Renewal Plan. Because of the Private Development, which achieves several of the broad objectives contained within the

Urban Renewal Plan, Agency finds that a portion of the public improvements related to the Private Development of the Site may be reimbursed by the Agency. Agency finds that the Agency Funded Public Improvements are in the best public interest and provide for enhanced development of the Site within the Project Area.

In consideration of the terms of this Agreement and subject to certain conditions as contained in this Agreement, Agency agrees to pay the costs of certain approved Agency Funded Public Improvements, inclusive of design, project management and engineering costs, as verified by the Agency. Approved Agency Funded Public Improvements shall include those improvements listed on Attachment 3.

E. Agency Review of Construction Documents

Upon Agency's request, Agency shall have the right and the opportunity to review Participant's construction plans, budgets, and bids for the Agency Funded Public Improvements (collectively the "Agency Funded Public Improvement Construction Documents"). Participant will utilize commercially reasonable contracting, budgeting, and bidding practices to ensure that the Agency Funded Public Improvements are constructed consistent with the Agency Funded Public Improvement Construction Documents and are undertaken in a reasonable manner. For purposes of this Section and Section F, below, Participant shall be presumed to have utilized commercially reasonable contracting, budgeting and bidding practices if (1) Participant's general contractor solicits or solicited competitive bids for the Agency Funded Public Improvements pursuant to Title 67, Chapter 28, Idaho Code, as amended, (2) the work is performed by Idaho public works licensed contractors, (3) and such work is not performed by an affiliate or subsidiary of Participant.

F. Reimbursement Obligation

1. Amount of Reimbursement

In consideration of Participant's construction of the Agency Funded Public Improvements, Agency, subject to the terms of this Agreement, agrees to reimburse Participant an amount equal to the Actual Eligible Costs, as defined below, of the Agency Funded Public Improvements, not to exceed Four Hundred Twenty Thousand and 00/100 dollars (\$420,000.00), with no interest accruing on the Reimbursement Obligation (defined below).

2. Notification, Inspection, Approval

Upon completion of construction of the Agency Funded Public Improvements and on not less than a quarterly basis during construction, Participant shall notify Agency in writing to request a meeting with the Agency to

determine if the completed Agency Funded Public Improvements meet the requirements of this Agreement (the "Notification of Completion"). Agency shall provide Participant with written confirmation in a form generally consistent with the Confirmation of Agency Reimbursement form attached hereto as Attachment 4 that the completed Agency Funded Public Improvements are eligible for reimbursement as follows:

(a) With respect to each Notification of Completion, Participant is responsible for submitting detailed schedule of values, invoices and receipts for work performed as part of the Project, in a form deemed acceptable by the Agency (the "Cost Documentation") which will permit Agency to determine the Actual Eligible Costs, which shall be the actual costs to construct the Agency Funded Public Improvements, including costs incurred prior to the Effective Date of this Agreement, as approved by the Agency. Cost Documentation shall include the following:

- i. An accounting of the costs associated with the completed Agency Funded Public Improvements and evidence of payment of such costs by Participant. Participant shall include a schedule of values that includes line items for the Agency Funded Public Improvements for reimbursement so they are identifiable separate from other line items related to the Private Development, invoices from Participant's design professionals, general contractor, subcontractor(s), and material suppliers for each type of eligible cost item, which shall specify quantities and unit costs of installed materials.
- ii. Explanation of any significant deviation between the initial cost estimates in Attachment 3 and the actual costs in the Cost Documentation.
- iii. Evidence the Agency Funded Public Improvements are located in a public utility easement.
- iv. Additional documentation or clarification as requested by the Agency Administrator.

(b) The Agency shall have the right to review the Cost Documentation, to inspect the completed Agency Funded Public Improvements, and to obtain independent verification that the quantities of work claimed and the costs associated therewith are accurate, commercially reasonable, and appropriate for the completed Agency Funded Public Improvements and consistent with the cost estimates provided by Participant to Agency prior to construction,

and meet objectives of Title 67, Chapter 28, Idaho Code. The Agency's approval shall not be unreasonably delayed or withheld.

(c) Within thirty (30) days of Agency's receipt of the Cost Documentation, the Agency shall notify Participant in writing of Agency's acceptance or rejection of the Cost Documentation and Agency's determination of the Actual Eligible Costs to be reimbursed, memorialized in a confirmation form consistent with the Confirmation of Agency Reimbursement form set forth in **Attachment 4**, to be executed by the Participant and the Agency. Agency shall, in its discretion determine the Actual Eligible Costs following its review of the Cost Documentation, verification of the commercial reasonableness of the costs and expenses contained in such Cost Documentation, and comparison of the amounts in the Cost Documentation to the amounts in the Agency Funded Public Improvement Construction Documents. In no event shall the total for all Actual Eligible Costs exceed the amount allowed by Section II.F(1).

If Participant disagrees with Agency's calculation of the Actual Eligible Costs, Participant must respond to Agency in writing within three (3) business days explaining why Participant believes Agency's calculation was in error and providing any evidence to support any such contentions Participant wants Agency to consider. Agency shall respond to Participant within three (3) business days with a revised amount for the Actual Eligible Costs or notifying Participant Agency will not revise the initial amount calculated. At that point, the determination of the Actual Eligible Costs will be final.

Agency's determination of the Actual Eligible Costs is within its sole discretion.

(d) As the Agency Funded Public Improvements associated with the Project are necessary to support development and/or redevelopment, it is anticipated the Agency Funded Public Improvements will be completed in/or around the same time. While there may be more than one Notification of Completion Participant and Agency will enter into one Confirmation of Agency Reimbursement concerning all Agency Funded Public Improvements in a form consistent with **Attachment 4**.

3. Allocation of Costs

Agency and Participant agree Participant shall be able to allocate expenses among the various items listed on Attachment 3 so long as the total amount of those items shall not exceed Four Hundred Twenty Thousand and 00/100 Dollars

(\$420,000.00). Participant shall notify Agency of the allocation of costs among the items listed on Attachment 3.

4. Reimbursement

Participant shall initially pay for all of the costs of construction for the Agency Funded Public Improvements associated with the Project. By approval of this Agreement by Agency's Board of Commissioners, Agency has authorized reimbursement for the Actual Eligible Costs of the Agency Funded Public Improvements (the "Reimbursement Obligation") as set forth in Section F, Section G and the other provisions of this Agreement.

G. Reimbursement Procedure

1. Agency's Reimbursement Obligation shall not commence until the acceptance of the improvements required to be constructed as described in the City Agreements and Approvals by the appropriate utility and/or the City. For purposes of this Agreement, the Agency intends to reimburse Participant for the Actual Eligible Costs from existing, unpledged revenue allocation proceeds from the Project Area. Participant shall complete the Agency Funded Public Improvements on or before August 31, 2021. If Participant fails to complete the Agency Funded Public Improvements on or before August 31, 2021, the Agency will have the right to terminate this Agreement by providing Participant ten (10) days' written notice of termination.

2. Agency shall have no obligation to make payments to the Participant for taxes collected and paid to Agency beyond the term described herein and as may be limited by this Agreement.

3. All payment due hereunder shall be paid to the Participant, and future owners of units created on the Site as part of the Project shall have no claim or entitlement to such payments as a result of such ownership.

4. Non-general Obligation

As provided by Idaho Code Section 50-2910, the obligations of Agency hereunder shall not constitute a general obligation or debt of the Agency, the State of Idaho, or any of its political subdivisions, or give rise to a charge against their general credit or taxing powers to be payable out of any funds or properties other than the monies deposited in the special fund or funds provided for herein and

pledged hereby to the payment of principal and interest on this Reimbursement Obligation.

H. Taxes

Participant shall pay, when due, all real estate and personal property taxes and assessments assessed and levied on Participant's ownership interest of the Site. This provision or covenant shall run with the land and be binding upon Participant's successors. Except as set forth herein, nothing herein contained shall be deemed to prohibit Participant from contesting the validity or amounts of any tax, assessment, encumbrance, or lien or to limit the remedies available to Participant with respect thereto; provided, such contest does not subject the Site or any portion thereof to forfeiture or sale.

Participant recognizes Agency has no authority or involvement in the assessment, tax, or collection process for ad valorem taxes, including real property and personal property taxes.

Participant shall not apply for or otherwise request any exemption or reduction in property taxes on the Site pursuant to Idaho Code §§ 63-602NN, 63-4404, 63-602II, or Idaho Code §§ 63-606A or 63-602W, or similar exemptions, during the term of this Agreement and the Urban Renewal Plan.

I. Liens/Payment of General Contractor

Participant hereby certifies that as of the Effective Date no mechanic's or materialman's liens have been placed on the Site related to work performed on the Agency Funded Public Improvements and/or the Private Development, as defined above, and that the general contractor and all subcontractors have been or will be paid in full for all work performed on the Site and/or the Project Area. In the event any mechanic's or materialman's liens are placed on the Site and/or the Project Area, Participant agrees Agency may suspend any payments required under this Agreement until any liens or claims related to the Project and made by any contractor, subcontractor, or material supplier that performed work on the Agency Funded Public Improvements and/or the Private Development have been satisfied.

Agency and Participant acknowledge the materialman's lien placed on the Site prior to the Effective Date by _____, dated _____, recorded as Instrument No. _____, on _____ (the "Lien"). Participant is working to resolve the Lien and the existence of the Lien does not impact the terms of this Agreement. The Agency is not responsible for payment of the Lien and is under no obligation to reimburse Participant for costs

incurred beyond the Agency Funded Public Improvements in the do not exceed amount of \$420,000.00.

J. Agency Contribution Assignable

Agency and Participant agree that Agency's obligations run only to Participant or its assignee and that Agency is under no obligation to grant any additional consideration or greater participation than set forth herein. Participant shall have the absolute right to assign its right to receive any payments to its lender, its successor, or other entity designated by Participant.

K. Indemnification

Participant shall indemnify and hold Agency and its respective commissioners, officers, agents, consultants and employees (collectively referred to in this Section K as "Agency") harmless from and against all liabilities, obligations, damages, penalties, claims, costs, charges, and expenses, including reasonable architect, design and attorney fees (collectively referred to in this Section K as "Claim"), which may be imposed upon or incurred by or asserted against Agency and for which Agency may be legally liable under applicable law (excluding any liability or obligation Agency assumes by contract) by reason of any of the following occurrences, provided Participant shall have no obligation to indemnify and hold Agency harmless from and against any Claim to the extent it arises from the negligence or willful act or omission of Agency or Agency's contractors and associated subcontractors:

1. Any work done in, on, or about the Site or Project Area, including the Agency Funded Public Improvements, or work related to the Agency Funded Public Improvements; or
2. Any use, nonuse, possession, occupation, condition, operation, maintenance, or management of the Site or any part thereof, including the Project Area; or
3. Any negligent or intentional wrongful act or omission on the part of Participant or any of its agents, contractors, servants, employees, subtenants, operators, licensees, or invitees; or
4. Any accident, injury, or damage to any person or property occurring in, on, or about the Site, or Project Area, or any part thereof, during construction; or

5. Any failure on the part of Participant to perform or comply with any of the terms, provisions, covenants, and conditions contained in this Agreement to be performed or complied with on its part.

6. Funding, by Agency, of the Agency Funded Public Improvements.

In case any such Claim is brought against Agency, Participant, upon written notice from Agency, shall, at Participant's expense, resist or defend such Claim.

Participant shall also indemnify and hold harmless and defend Agency and its commissioners, officers, agents, consultants and employees from and against any and all claims or causes of action asserted by entities or individuals that are not a party to this Agreement regarding the validity or legality of this Agreement and the reimbursement to Participant of the costs of the Agency Funded Public Improvements by Agency (collectively referred to in this Section as "legality claim"). Upon the final decision of a court of competent jurisdiction that is not appealed or not appealable regarding the legality claim determining that the reimbursement to Participant by Agency of the costs of the Agency Funded Public Improvements is unlawful or invalid, the Agency shall have no further obligation or liability to reimburse or make payments to Participant for the costs associated with the Agency Funded Public Improvements and Participant shall solely bear the responsibility for such costs. Upon the final decision of a court of competent jurisdiction that is not appealed or not appealable regarding the legality claim determining that the reimbursement to Participant by Agency of the costs of the Agency Funded Public Improvements is unlawful or invalid, then Participant, in Agency's sole discretion, may be required to return any funds paid by Agency to Participant for the Agency Funded Public Improvements within ninety (90) days of written request from Agency to Participant.

If a legality claim is made, then Agency and Participant shall jointly defend against said claim. Participant has the discretion to hire its own legal counsel with Participant reimbursing the Agency for its reasonable fees and costs, including without limitation, attorney and expert witness fees and costs.

If a claim, other than a legality claim, is brought against Agency or its respective commissioners, officers, agents, consultants and employees by reason of any such claim, Participant, upon written notice from Agency shall, at Participant's expense, bear the costs and expense of defending Agency against such action or proceedings by counsel selected by Agency.

L. Insurance

Participant shall, or through its contractor constructing the Agency Funded Public Improvements, shall, at Participant's sole cost, obtain and maintain in force

for the duration of the Agreement (including the warranty period) insurance of the following types, with limits not less than those set forth below, and in a form acceptable to Agency:

1. Commercial General Liability Insurance (“Occurrence Form”) with a minimum combined single limit liability of \$1,000,000 each occurrence for bodily injury and property damage, with a minimum limit of liability of \$1,000,000 each person for personal and advertising injury liability. Such policy shall have a general aggregate limit of not less than \$2,000,000, which general aggregate limit will be provided on a per project basis. The policy shall be endorsed to name Agency, including its respective affiliates, and City as additional insureds.
2. Workers’ Compensation Insurance, if Participant has employees, including occupational illness or disease coverage, in accordance with the laws of the nation, state, territory, or province having jurisdiction over Participant’s employees, and Employer’s Liability Insurance. If Participant has employees, Participant shall not utilize occupational accident or health insurance policies, or the equivalent, in lieu of mandatory Workers’ Compensation Insurance or otherwise attempt to opt out of the statutory Workers’ Compensation system.
3. Automobile Liability Insurance covering use of all owned, non-owned, and hired automobiles with a minimum combined single limit of liability for bodily injury and property damage of \$1,000,000 per occurrence. This policy shall be endorsed to name Agency, including its respective affiliates, directors, and employees, as additional insureds.
4. All insurance provided by Participant under this Agreement shall include a waiver of subrogation by the insurers in favor of Agency. Participant hereby releases Agency, including its respective affiliates, directors, and employees, for losses or claims for bodily injury or property damage covered by Participant’s insurance or other insured claims arising out of Participant’s performance under this Agreement or construction of the Project.
5. Certificates of insurance, reasonably satisfactory in form to Agency (ACORD form or equivalent), shall be supplied to Agency evidencing that the insurance required above is in force, and that notice will be given to Agency prior to any cancellation of the policies in accordance with the policies. Participant shall also provide, with its certificate of insurance, executed copies of the additional insured endorsements and dedicated limits endorsements required in this Agreement. At Agency’s request, Participant

shall provide a certified copy of each insurance policy required under this Agreement.

6. Except as otherwise stated above, the obligations set forth in this Section shall remain in effect only until the date City accepts the dedication of the Agency Funded Public Improvements.

7. All policies of insurance required by this Agreement shall be issued by insurance companies qualified to do business in the State of Idaho.

8. The foregoing insurance coverage shall be primary and noncontributing with respect to any other insurance or self-insurance that may be maintained by Agency. Participant's General and Automobile Liability Insurance policies shall contain a Cross-Liability or Severability of Interest clause. The fact that Participant has obtained the insurance required in this Section shall in no manner lessen or affect Participant's other obligations or liabilities set forth in the Agreement.

M. Warranty

Participant warrants that the materials and workmanship employed in the construction of the Agency Funded Public Improvements shall be good quality and shall conform to generally accepted standards within the construction industry and agrees to repair any non-conforming improvements during the warranty period upon receipt of notice from Agency of such non-conforming improvements. Such warranty and repair obligation shall extend for a period of one (1) year after acceptance of the Agency Funded Public Improvements by the City and/or other appropriate entity or utility. Provided, nothing herein shall limit the time within which Agency may bring an action against Participant on account of Participant's failure to otherwise construct such improvements in accordance with this Agreement.

N. Maintenance

Participant recognizes Agency has no specific authority to accept maintenance responsibility of the Agency Funded Public Improvements. Participant anticipates that the City and or various public utilities may accept ownership and maintenance obligations of some or all of the Agency Funded Public Improvements; however, such acceptance is not a condition precedent to the obligations of the Parties hereto.

IV. USE AND MAINTENANCE OF THE SITE AND ADJACENT AREA

A. Use of the Site

Participant agrees and covenants to comply with all other provisions and conditions of the Urban Renewal Plan for the period of time the Urban Renewal Plan is in force and effect.

B. Effect and Duration of Covenants

Covenants contained in this Agreement shall remain in effect until sooner of December 31, 2030, or the date on which the Urban Renewal Plan terminates, whichever is sooner. The covenants established in this Agreement shall, without regard to technical classification and designation, be binding on the part of the Participant and any successors and assigns to the Site, or any part thereof, for the benefit of and in favor of Agency, its successors and assigns.

C. Local, State and Federal Laws

Participant covenants that it will carry out the construction of the Agency Funded Public Improvements in conformity with all applicable laws, including all applicable federal and state labor standards and anti-discrimination laws.

V. DEFAULTS, DISPUTE RESOLUTION, REMEDIES, AND TERMINATION

A. Defaults in General

Neither Party shall be deemed to be in default of this Agreement except upon the expiration of forty-five (45) days from receipt of written notice from the other Party specifying the particulars in which such Party has failed to perform its obligations under this Agreement unless such Party, prior to expiration of said forty-five (45) day period, has rectified the particulars specified in said notice of default, provided that in the case where rectifying the matters specified in the notice of default requires more than forty-five (45) days, such notified Party shall not be in default so long as they commence prior to the expiration of the forty-five (45) days and diligently pursue actions needed to rectify such matters. In the event of a default, the nondefaulting Party may do the following:

1. The nondefaulting Party may terminate this Agreement upon written notice to the defaulting Party and recover from the defaulting Party all direct damages incurred by the nondefaulting Party.
2. The nondefaulting Party may seek specific performance of this Agreement which can be specifically performed, and, in addition, recover all

damages incurred by the nondefaulting Party. The Parties declare it to be their intent that this Agreement requiring certain actions be taken for which there are not adequate legal remedies may be specifically enforced.

3. The nondefaulting Party may perform or pay any obligation or encumbrance necessary to cure the default and offset the cost thereof from monies otherwise due the defaulting Party or recover said monies from the defaulting Party.

4. The nondefaulting Party may pursue all other remedies available at law, it being the intent of the Parties that remedies be cumulative and liberally enforced so as to adequately and completely compensate the nondefaulting Party.

5. In the event Participant defaults under this Agreement, Agency (the nondefaulting Party) shall have the right to suspend or terminate its payment under this Agreement, as more specifically defined in this Agreement, for so long as the default continues and if not cured, Agency's obligation for payment shall be deemed extinguished. In addition, if Agency funds shall have been paid, Agency may seek reimbursement of any amounts paid to Participant up to the amount of damages incurred by Agency for Participant's default.

Any default by Participant under the approved building permit or other City Agreements and Approvals shall be deemed a default under this Agreement.

B. Dispute Resolution

In the event that a dispute arises between Agency and Participant regarding the application or interpretation of any provision of this Agreement, the aggrieved party shall promptly notify the other party to this Agreement of the dispute within ten (10) days after such dispute arises. If the Parties shall have failed to resolve the dispute within thirty (30) days after delivery of such notice, the Parties agree to first endeavor to settle the dispute in an amicable manner by mediation or other process of structured negotiation under the auspices of a nationally or regionally recognized organization providing such services in the Northwestern States or otherwise, as the Parties may mutually agree before resorting to litigation. Should the Parties be unable to resolve the dispute to their mutual satisfaction within thirty (30) days after such completion of mediation or other process of structured negotiation, each Party shall have the right to pursue any rights or remedies it may have at law or in equity.

C. Legal Actions

In addition to any other rights or remedies, any Party may institute legal action to cure, correct, or remedy any default; to recover damages for any default; or to obtain any other remedy consistent with the purpose of this Agreement. The nondefaulting Party may also, at its option, cure the default and sue to collect reasonable attorney's fees and costs incurred by virtue of curing or correcting the Party's breach.

The laws of the State of Idaho shall govern the interpretation and enforcement of this Agreement.

D. Rights and Remedies Are Cumulative

Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise by any Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by the other Party.

VI. GENERAL PROVISIONS

A. Notices, Demands, and Communications Between the Parties

Formal notices, demands, and communications between Agency and Participant shall be sufficiently given if dispatched by registered or certified mail, postage prepaid, return receipt requested, to the principal offices of Agency and Participant as set forth in this Agreement. Such written notices, demands, and communications may be sent in the same manner to such other addresses as either party may from time to time designate by mail.

B. Conflicts of Interest

No member, official, or employee of Agency shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official, or employee participate in any decision relating to this Agreement which affects his/her personal interests or the interests of any corporation, partnership, or association in which he/she is directly or indirectly interested.

Participant warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement.

C. Non-liability of Agency Officials and Employees

No member, official, or employee of Agency shall be personally liable to Participant in the event of any default or breach by Agency or for any amount which

may become due to Participant or on any obligations under the terms of this Agreement.

D. Successors and Assigns

This Agreement shall, except as otherwise provided herein, be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

E. Attorney Fees and Costs

In the event that either party to this Agreement shall enforce any of the provisions hereof in any action at law or in equity, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expenses, including reasonable attorney fees incurred therein by the prevailing party, and such may be included to the judgment entered in such action.

F. Severability

If any provisions of this Agreement shall for any reason be held to be illegal or invalid, such illegality or invalidity shall not affect any other provisions of this Agreement, and this Agreement shall be construed and enforced as if such illegal or invalid provisions had not been contained herein.

G. Headings

The section headings contained herein are for convenience and reference and are not intended to define or limit the scope of any provision of this Agreement.

H. Counterparts

This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute one and the same instrument.

I. Forced Delay; Extension of Times of Performance

In addition to the specific provisions of this Agreement, performance by any Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, litigation, unusually severe weather, acts of another party, environmental analysis or removal of hazardous or toxic substances, acts or the failure to act of any public or governmental agency or entity (except that acts or the failure to act of Agency

shall not excuse performance by Agency), or any other causes beyond the control or without the fault of the Party claiming an extension of time to perform. An extension of time for any such cause shall only be for the period of the forced delay, which period shall commence to run from the time of the commencement of the cause. Times of performance under this Agreement may also be extended in writing by Agency and Participant.

J. Inspection of Books and Records

Agency has the right, upon not less than seventy-two (72) hours' notice, at all reasonable times to inspect the books and records of Participant pertaining to the Agency Funded Public Improvements.

K. Attachments and Exhibits Made a Part

All attachments and exhibits which are attached to this Owner Participation Agreement are made a part hereof by this reference.

VII. AMENDMENTS TO THIS AGREEMENT

Agency and Participant agree to mutually consider reasonable requests for amendments to this Agreement and any attachments hereto which may be made by any of the Parties hereto, lending institutions, bond counsel, financial consultants, or underwriters to Agency, provided said requests are consistent with this Agreement and would not alter the basic business purposes included herein or therein. Any such amendments shall be in writing and agreed to by the Parties.

VIII. ENTIRE AGREEMENT, WAIVERS, AND AMENDMENTS

This Agreement, including Attachments 1 through 4, inclusive, incorporated herein by reference, constitutes the entire understanding and agreement of the Parties.

This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter thereof.

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of Agency and Participant, and all amendments hereto must be in writing and signed by the appropriate authorities of Agency and Participant.

[signatures on following page]

IN WITNESS WHEREOF, the Parties hereto have signed this Agreement the day and year below written to be effective the day and year above written.

**POCATELLO URBAN RENEWAL AGENCY, A/K/A
THE POCATELLO DEVELOPMENT AUTHORITY**

By: _____

Scott Smith, Chair

Date: _____

ATTEST:

By: _____

_____,
Secretary

**PARTICIPANT
PORTNEUF CAPITAL, LLC.**

By: _____

It's Manager, _____

Date: _____

ACKNOWLEDGMENTS

STATE OF IDAHO)
) ss.
County of Power)

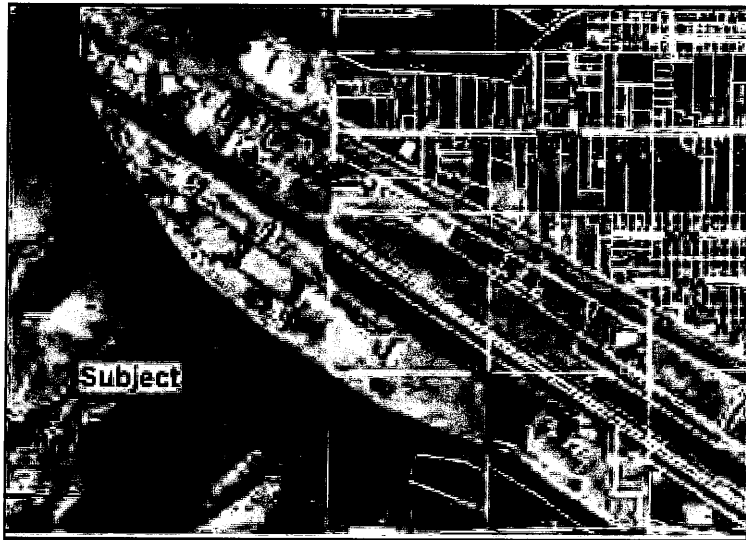
On this ____ day of _____, 2020, before me,
_____, the undersigned notary public in and for said county
and state, personally appeared Scott Smith, known or identified to me to be the
Chair of the Pocatello Urban Renewal Agency, the public body corporate and politic,
that executed the within instrument, and known to me to be the person that
executed the within instrument on behalf of said Agency and acknowledged to me
that such Agency executed the same for the purposes herein contained.

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

Notary Public for Idaho
Commission Expires _____

Attachment 1

Map of the Site



Attachment 2

Legal Description

Parcel 1:

A PARCEL OF LAND LOCATED IN THE EAST 1/2 OF SECTION 17, AND IN THE WEST 1/2 OF THE WEST 1/2 OF SECTION 16, T6S,R34E, B.M., BANNOCK COUNTY, IDAHO, SAID PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS (ALL ANGLE POINTS BEING MARKED BY A 1/2-INCH DIAMETER REBAR WITH A YELLOW PLASTIC CAP STAMPED "PE/LS 4440", UNLESS OTHERWISE NOTED):

COMMENCING AT THE WEST 1/4 CORNER OF SAID SECTION 16, SAID CORNER BEING MARKED BY A FOUND 5/8 -INCH DIAMETER REBAR WITH NO MARKINGS, SAID REBAR BEING REFERENCED BY A BANNOCK COUNTY BRASS CAP MONUMENT 25 FEET EAST OF THE CORNER;

THENCE S0°11'07"W ALONG THE WEST LINE OF SECTION 16, 280.55 FEET TO A POINT ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE OREGON SHORT LINE RAILROAD (NOW OPERATING AS THE UNION PACIFIC RAILROAD), SAID POINT BEING 50 FEET DISTANT, MEASURED AT RIGHT ANGLES, FROM THE CENTERLINE OF THE NO. 1 MAINLINE TRACK (FORMERLY THE WEST BOUND MAINLINE), AND SAID POINT BEING MARKED BY A SET 5/8-INCH REBAR WITH AN ALUMINUM CAP STAMPED "PLS 8075", SAID POINT BEING THE TRUE POINT OF BEGINNING;

THENCE N56°36'03"W ALONG THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE OREGON SHORT LINE RAILROAD, 2557.86 FEET TO AN ANGLE POINT ON THE NORTHEASTERLY DEED LINE DESCRIBED IN CORPORATION WARRANTY DEED INSTRUMENT NO. 96009187;

THENCE SOUTHEASTERLY ALONG THE SAID NORTHEASTERLY DEED LINE THE FOLLOWING 10 COURSES AND DISTANCES:

S21°52'28"E, 267.87 FEET TO AN ANGLE POINT; THENCE S30°43'41"E, 1457.94 FEET TO AN ANGLE POINT; THENCE S40°27'08"E, 201.74 FEET TO AN ANGLE POINT;

THENCE S54°06'17"E, 336.24 FEET TO AN ANGLE POINT; THENCE S43°50'53"E, 313.03 FEET TO AN ANGLE POINT; THENCE S55°07'18"E, 664.68 FEET TO AN ANGLE POINT; THENCE S42°27'08"E, 177.06 FEET TO AN ANGLE POINT; THENCE S59°48'13"E, 280.11 FEET TO AN ANGLE POINT; THENCE S71°50'27"E, 699.97 FEET TO AN ANGLE POINT; THENCE S72°36'36"E, 428.65 FEET TO AN ANGLE POINT ON THE WEST 1/16 LINE OF SECTION 16; THENCE N0°03'36"E ALONG THE WEST 1/16 LINE OF SECTION 16, 653.00 FEET TO THE SOUTHWEST 1/16 CORNER OF SAID SECTION 16, SAID CORNER BEING MARKED BY A 6-INCH DIAMETER STEEL FENCE CORNER POST;

THENCE S89°05'05"W ALONG the SOUTH 1/16 LINE OF SECTION 16, 43.11 FEET TO A POINT ON the SOUTHWESTERLY DEED LINE DESCRIBED IN INSTRUMENT NO. 27678, SAID POINT BEING MARKED BY A SET 5/8-INCH DIAMETER REBAR WITH AN ALUMINUM CAP STAMPED "PLS 8075";

THENCE N56°36'03"W ALONG SAID SOUTHWESTERLY DEED LINE, 1519.62 FEET TO A POINT ON the WEST DEED DESCRIBED IN SAID INSTRUMENT NO. 27678, SAID POINT ALSO BEING ON the WEST LINE OF SECTION 16, AND SAID POINT BEING MARKED BY A SET 5/8-INCH DIAMETER REBAR WITH AN ALUMINUM CAP STAMPED "PLS 8075";

THENCE N 0°11'17" E ALONG THE WEST LINE OF SAID SECTION 16, 179.29 FEET TO THE POINT OF BEGINNING.

Parcel 2:

A TRIANGULAR-SHAPED PARCEL OF LAND LOCATED IN the NORTHEAST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 16,

T6S,R34E, B.M., BANNOCK COUNTY, IDAHO, SAID PARCEL BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST 1/16 CORNER OF SAID SECTION 16, SAID CORNER BEING MARKED BY A 6-INCH DIAMETER STEEL FENCE CORNER POST;

THENCE N0°41'13"E ALONG THE WEST 1/16 LINE OF SECTION 16, 149.39 FEET TO A POINT ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE OREGON SHORT LINE RAILROAD (NOW OPERATING AS THE UNION PACIFIC RAILROAD), SAID POINT BEING 50 FEET DISTANT, MEASURED AT RIGHT ANGLES, FROM the CENTERLINE OF THE NO. 1 MAINLINE TRACK (FORMERLY THE WEST BOUND MAINLINE), AND SAID POINT BEING MARKED BY A SET 5/8-INCH REBAR WITH AN ALUMINUM CAP STAMPED "PLS 8075";

THENCE S56°36'03"E ALONG THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF the OREGON SHORT LINE RAILROAD, 265.12 FEET TO A POINT ON the SOUTH 1/16 LINE OF SAID SECTION 16, SAID POINT ALSO BEING ON THE NORTH DEED LINE OF CORPORATE WARRANTY DEED INSTRUMENT NO. 892995, AND SAID POINT BEING MARKED BY A FOUND BANNOCK COUNTY BRASS CAP MONUMENT;

THENCE S 89°06'59" W ALONG THE SOUTH 1/16 LINE OF SAID SECTION 16, 223.15 FEET TO THE TRUE POINT OF BEGINNING.

See Exhibit "A" (Record of Survey Map)

Also retaining therefrom an easement for a water line, more particularly described as:

A 30 FOOT WIDE STRIP OF LAND LOCATED IN THE SOUTHWEST 1/4 OF SECTION 16 AND IN THE SOUTHEAST 1/4 OF SECTION 17, TOWNSHIP 6 SOUTH, RANGE 34 EAST, BOISE MERIDIAN, BANNOCK COUNTY, IDAHO, SAID STRIP BEING 15 FEET WIDE ON EACH SIDE OF THE FOLLOWING DESCRIBED CENTERLINE:

COMMENCING AT THE WEST 1/4 CORNER OF SECTION 16, TOWNSHIP 6 SOUTH, RANGE 34 EAST, SAID CORNER MARKED BY A 5/8" DIA. REBAR, BEING REFERENCED BY A BANNOCK COUNTY BRASS CAP MONUMENT 25 FEET EAST OF SAID 1/4 CORNER; THENCE SOUTH 00°11'07" EAST A DISTANCE OF 280.55 FEET TO A POINT ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE UNION PACIFIC RAILROAD AS DEPICTED ON THE RECORD OF SURVEY MAP RECORDED IN BANNOCK COUNTY UNDER INSTRUMENT NO. 20707393, AND BEING DESCRIBED IN PARCEL 1 OF WARRANTY DEED INSTRUMENT NO. 20705326 OF SAID COUNTY RECORDS; THENCE NORTH 56°36'03" WEST ALONG SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE UNION PACIFIC RAILROAD A DISTANCE OF 21.00 FEET, TO A POINT ON THE CENTERLINE BEING DESCRIBED THE TRUE POINT OF BEGINNING; THENCE LEAVING SAID SOUTHWESTERLY RIGHT-OF-WAY LINE, SOUTH 17°04'00" WEST A DISTANCE OF 78.20 FEET; THENCE SOUTH 05°26'47" WEST A DISTANCE OF 141.43 FEET; THENCE SOUTH 52°39'19" EAST A DISTANCE OF 152.37 FEET; THENCE SOUTH 56°11'41" EAST A DISTANCE OF 363.17 FEET; THENCE SOUTH 32°10'36" WEST A DISTANCE OF 488.74 FEET; THENCE SOUTH 35°23'12" WEST A DISTANCE OF 145.76 FEET, TO THE TERMINUS OF THE CENTERLINE BEING DESCRIBED.

CONTAINS 0.94 ACRES MORE OR LESS

See Exhibit "B" (Display Map)

Also retaining therefrom a Right-of-Way, Slope, and Utility easement, more particularly described as follows:

A PARCEL OF LAND LOCATED IN THE SOUTHWEST 1/4 OF SECTION 16, THE SOUTHEAST 1/4 AND THE NORTHEAST 1/4 OF SECTION 17, TOWNSHIP 6 SOUTH, RANGE 34 EAST, BANNOCK COUNTY, IDAHO; DESCRIBED AS FOLLOWS:

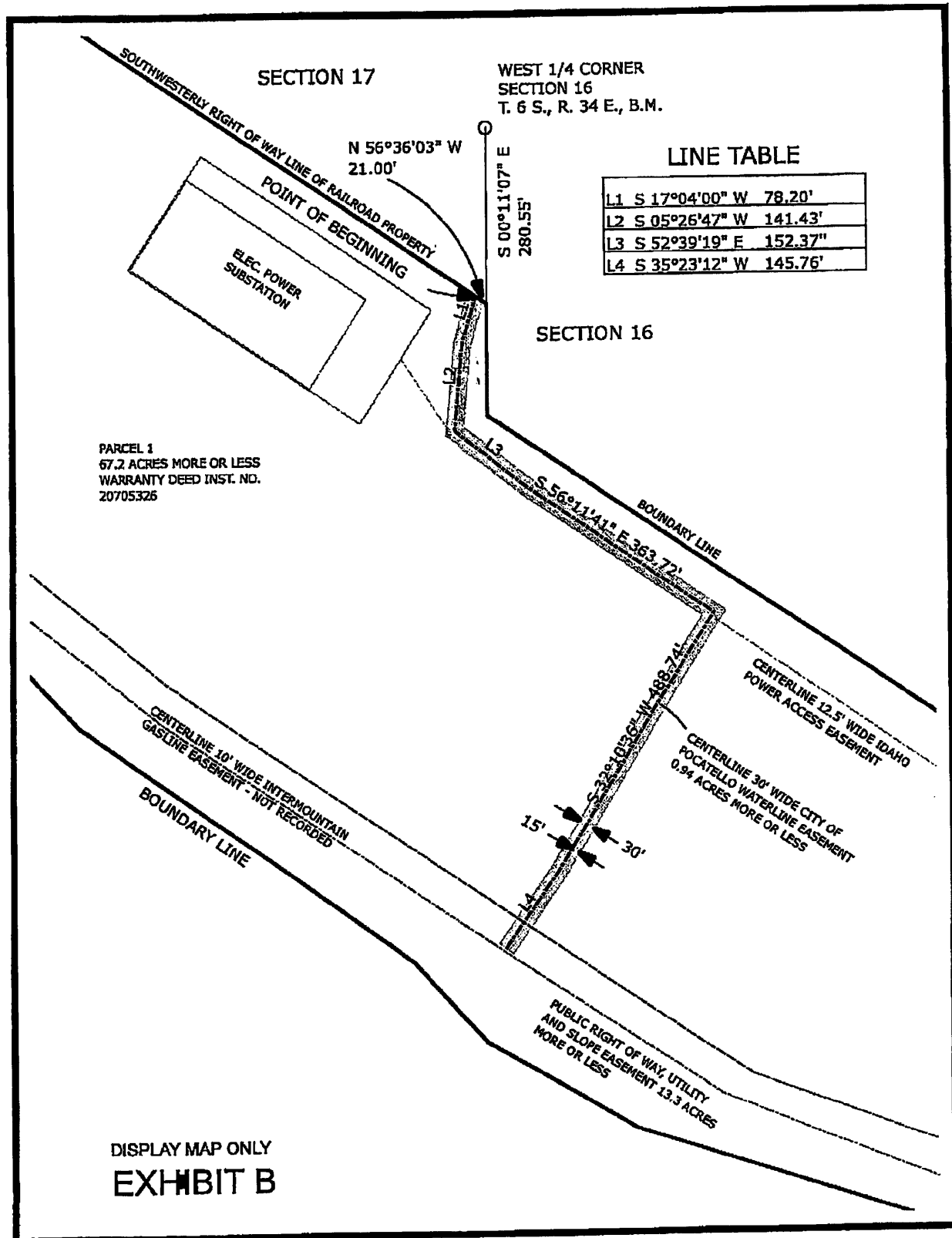
COMMENCING AT THE WEST 1/4 CORNER OF SECTION 16, TOWNSHIP 6 SOUTH, RANGE 34 EAST, SAID CORNER MARKED BY A 5/8" DIA. REBAR, BEING REFERENCED BY A BANNOCK COUNTY BRASS CAP MONUMENT 25 FEET EAST OF SAID 1/4 CORNER; THENCE SOUTH 00°11'07" EAST A DISTANCE OF 280.55 FEET TO A POINT ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE UNION PACIFIC RAILROAD AS DEPICTED ON THE RECORD OF SURVEY MAP RECORDED IN BANNOCK COUNTY UNDER INSTRUMENT NO. 20707393, AND BEING DESCRIBED IN PARCEL 1 OF WARRANTY DEED INSTRUMENT NO. 20705326 OF SAID COUNTY RECORDS; THENCE NORTH 56°36'03" WEST ALONG SOUTHWESTERLY RIGHT-OF-WAY LINE OF THE UNION PACIFIC RAILROAD A DISTANCE OF 2197.86 FEET, TO A POINT WHICH BEARS SOUTH 56°36'03" EAST A DISTANCE OF 360.00 FEET FROM THE MOST NORTHWEST CORNER OF SAID PARCEL 1, THE TRUE POINT OF BEGINNING; THENCE LEAVING SAID SOUTHWESTERLY RIGHT-OF-WAY LINE, SOUTH 33°23'57" WEST A DISTANCE OF 109.23 FEET; THENCE SOUTH 29°31'12" EAST A DISTANCE OF 813.32 FEET; THENCE SOUTH 35°11'19" EAST A DISTANCE OF 660.34 FEET; THENCE SOUTH 50°56'53" EAST A DISTANCE 754.39 FEET; THENCE SOUTH 56°27'03" EAST A DISTANCE OF 1146.46 FEET; THENCE SOUTH 69°53'01" EAST A DISTANCE OF 940.39 FEET TO A POINT ON THE EAST BOUNDARY LINE OF SAID PARCEL 1, DESCRIBED IN SAID DEED INSTRUMENT NO. 20705326; THENCE SOUTH 00°03'36" WEST ALONG SAID EAST BOUNDARY LINE A DISTANCE OF 107.04 FEET, TO THE SOUTHEAST CORNER OF SAID PARCEL 1; THENCE FOLLOWING THE SOUTHERLY AND SOUTHWESTERLY BOUNDARY LINE OF PARCEL 1 FOR THE NEXT FOLLOWING TEN (10) COURSES;

1. NORTH 72°36'26" WEST, 428.64 FEET;
2. NORTH 71°50'27" WEST, 699.97 FEET;
3. NORTH 59°48'13" WEST, 280.11 FEET;
4. NORTH 42°27'08" WEST, 177.06 FEET;
5. NORTH 55°07'18" WEST, 664.68 FEET;
6. NORTH 43°50'53" WEST, 313.03 FEET;
7. NORTH 54°06'17" WEST, 336.24 FEET;
8. NORTH 40°27'08" WEST, 201.74 FEET;
9. NORTH 30°43'41" WEST, 1457.94 FEET;
10. NORTH 21°52'28" WEST, 267.87 FEET TO THE NORTHWEST CORNER OF SAID PARCEL 1 WHICH POINT ALSO BEING ON THE SOUTHWESTERLY OF THE UNION PACIFIC RAILROAD RIGHT-OF-WAY LINE; THENCE FOLLOWING SAID SOUTHWESTERLY RIGHT-OF-WAY LINE SOUTH 56°36'03" EAST A DISTANCE OF 360.00 FEET, TO THE POINT OF BEGINNING.

AREA OF THE ABOVE DESCRIBED PARCEL OF LAND CONTAINS 13.30 ACRES MORE OR LESS

See Exhibit "C" (Display Map)

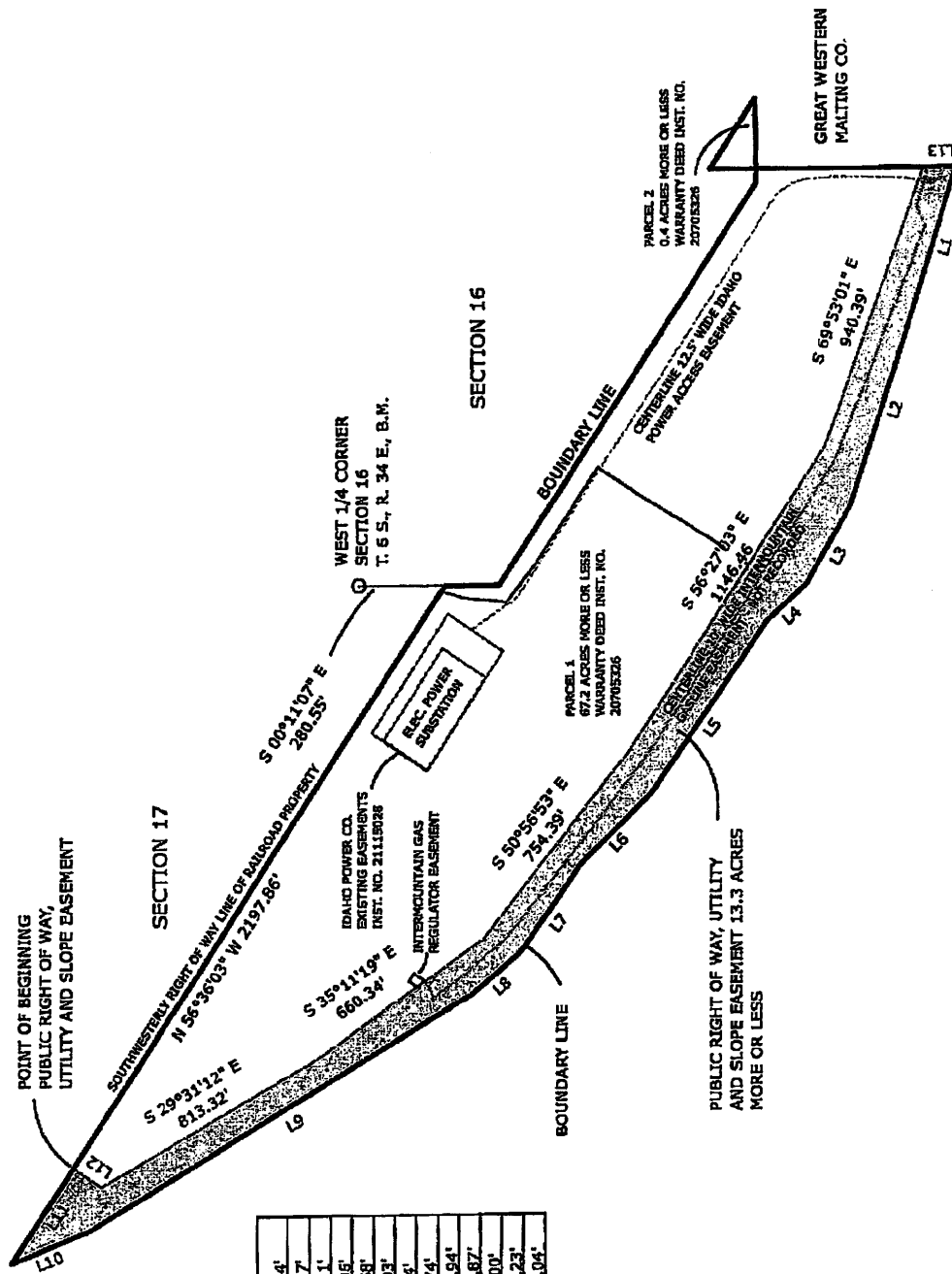
EXHIBIT B



30 FOOT WIDE WATERLINE EASEMENT
LOCATED IN PARCEL OF OF DEED INSTRUMENT NO. 20705326



EXHIBIT C



LINE TABLE

L1	N 72°36'16" W	428.64'
L2	N 71°50'27" W	699.97'
L3	N 59°48'13" W	280.11'
L4	N 42°27'08" W	177.05'
L5	N 55°07'18" W	564.68'
L6	N 43°50'53" W	313.03'
L7	N 54°06'17" W	336.24'
L8	N 40°27'08" W	201.74'
L9	N 30°43'31" W	5457.94'
L10	N 21°52'58" W	262.87'
L11	S 58°26'03" E	360.00'
L12	S 33°23'57" W	109.23'
L13	S 00°03'36" W	107.04'

DISPLAY MAP ONLY
EXHIBIT C



PUBLIC RIGHT OF WAY, UTILITY AND SLOPE EASEMENT
LOCATED IN PARCEL 1 OF WARRANTY DEED INSTRUMENT NO. 20705326

GREAT WESTERN
MALTING CO.

PARCEL 2
0.4 ACRES MORE OR LESS
WARRANTY DEED INST. NO.
20705326

PARCEL 1
67.2 ACRES MORE OR LESS
WARRANTY DEED INST. NO.
20705326

WEST 1/4 CORNER
SECTION 16
T. 6 S., R. 34 E., B.M.

IDAHO POWER CO.
EXISTING EASEMENTS
INST. NO. 21118028

MOUNTAIN GAS
REGULATOR EASEMENT

REC. POWER
SUBSTATION

CENTERLINE 12.5' WIDE IDAHO
POWER ACCESS EASEMENT

S 69°53'01" E
940.39'

S 56°27'03" E
1146.26'

S 50°55'53" E
754.39'

S 00°21'07" E
260.55'

S 29°31'12" E
813.32'

N 56°36'03" W
2197.86'

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Attachment 3

Agency Funded Public Improvements

The Agency Funded Public Improvements include utility work within the public utility easement and does not include improvements from the easement to the private buildings.

Item	Description	Estimated Cost
Public Utility – Power – Idaho Power	Within easements as may be provided to Idaho Power Company, 3 transformer stations, 1 stepdown transformer station, disconnect switches inside of each transformer station, and wire from current electrical infrastructure to each transformer station	\$315,000
Public Utility – Natural Gas – Intermountain Gas Co.	Within the easement as may be provided to Intermountain Gas company, 1 regulator control box with sufficient pipe from main	\$20,000
Public Utility – Fiber Optics – Direct Communications	Within the easement, fiber optic infrastructure extension including railroad permit to run cable under tracks	\$85,000
TOTAL		\$420,000.00

Attachment 4

Confirmation of Agency Reimbursement No.

4816-8487-5711, v. 5

CONFIRMATION OF AGENCY REIMBURSEMENT NO. _____

This Confirmation of Agency Reimbursement (“Confirmation”) is entered into between the Pocatello Urban Renewal Agency, commonly known as the Pocatello Development Authority, an independent public body, corporate and politic (hereinafter “Agency”), organized pursuant to the Idaho Urban Renewal Law of 1965, Title 50, Chapter 20, Idaho Code, as amended (hereinafter the “Law”), and undertaking projects under the authority of the Local Economic Development Act, Title 50, Chapter 29, Idaho Code, as amended (hereinafter the “Act”), and Portneuf Development, LLC, an Idaho limited liability company authorized to do business in the State of Idaho (hereinafter “Participant”). The Effective Date of this Confirmation is the date last signed by the parties.

WITNESSETH:

1. Agency Contribution

Agency has, pursuant to the procedures set forth in the Owner Participation Agreement by and between the Agency and Participant with an effective date of _____ (the “OPA”), determined the Actual Eligible Costs for those certain Agency Funded Public Improvements as those terms are defined in the OPA and as specifically identified below, shall be _____ and ___/100 dollars (\$ _____) (the “Agency Reimbursement”) for the [identify Agency Funded Public Improvements subject to reimbursement in this Confirmation].

2. Payment Terms.

Agency agrees to reimburse Participant for the amount of the Agency Reimbursement, without interest from the Effective Date of this Confirmation pursuant to the Reimbursement Procedure set forth in the OPA.

Participant acknowledges that the Agency Reimbursement may not be paid in full if the revenue allocation proceeds available for reimbursement under the Urban Renewal Plan and pursuant to the OPA, are less than the Agency Reimbursement.

If the Agency Reimbursement is not fully reimbursed by December 31, 2030, or the date upon with the Urban Renewal Plan and Project Area terminates, whichever is earlier, the Agency will not be obligated to make any additional payments.

To the extent there is more than one Confirmation of Agency Reimbursement between the parties and pursuant to the OPA, then payment will be applied to the Confirmation with the earliest Effective Date first, until paid in full, or until December 31, 2030, or upon termination of the Urban Renewal Plan, whichever occurs first.

3. Limitation on Making Payments

It is the intention of the parties that Participant shall only be paid from the existing revenue allocation proceeds. If, for any reason, the revenue allocation proceeds are reduced, curtailed or limited in any way legislative enactments, initiative referendum, judicial decree, or other, the Agency shall have no obligation to pay the Agency Reimbursement to Participant as described in this Confirmation from other sources or monies which Agency has or might hereinafter received.

4. Except as expressly modified above, the terms and conditions of the OPA are still binding on Agency and Participant as set forth in such OPA.

IN WITNESS WHEREOF, the Parties hereto have signed this Agreement the day and year below written to be effective the day and year above written.

AGENCY

**POCATELLO URBAN RENEWAL AGENCY, A/K/A
THE POCATELLO DEVELOPMENT AUTHORITY**

By: _____
_____, Chair

Date: _____

ATTEST:

By: _____
_____,
Secretary

PARTICIPANT

PORTNEUF DEVELOPMENT LLC

By: _____

Date: _____

AGENDA ITEM

NO. 7

Anderson, Carl

From: Kenneth Brown <kb@lionchase.com>
Sent: Wednesday, June 17, 2020 8:57 AM
To: Anderson, Carl; ec@frigitekip.com
Subject: Re: PDA Regular Agenda June 17, 2020

Carl,

As discussed, pull all three invoices from consideration for payment this cycle. Also, for administrative purposes, I am requesting that my signature is on all invoices that are submitted moving forward.

We will revise the invoices accordingly and they will be resubmitted.

Sincerely,

kb

On 6/12/20 6:17 PM, Anderson, Carl wrote:

Hello,

I hope this email finds you well. Copied below is the link to the agenda for next week's regular PDA meeting. The meeting is scheduled for Wednesday June 17, 2020, at 11am.

Agenda: <http://pda.pocatello.us/agendas/06172020.pdf>

Be advised that this meeting is scheduled to be held in person, in Council Chambers. Council Chambers have been rearranged to allow for proper social distancing. City Offices are still closed to public access, however, applicants may attend. DUE to the COVID-19 pandemic guidelines, no on-site public access is permitted for this meeting. Also be advised that the full regular Pocatello Development Authority Meeting will be live-streamed at: <http://streaming.pocatello.us/> If there are members of your applicant team that wish to attend in person please let me know how many to expect as space is somewhat limited.

I've attached the conference call information:

Conference Call number: 646-364-1250

Participant code: 7531472

The City's IT department has asked that we pass along the following message:

"Because of the broad nature of the microphone arrangement, it is important to be more aware of making small noises. In particular we'd like to remind people not to have side conversations, and to be aware of 'nervous habit' noises such as tapping the table, clicking pens, or shuffling

papers. Additionally we would like to remind people to project their voices and speak towards the microphones, even if they are talking to the person sitting closest to themselves.”

Thank you for your time and please do not hesitate to give me a call should you have any questions.

CARL ANDERSON | CITY OF POCATELLO

Senior Planner | Planning & Development Services

911 N 7th Avenue | PO Box 4169 | Pocatello ID 83205-4169

Office 208-234-6278 | canderson@pocatello.us

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Kenneth Brown
Chairman and CEO
Lionchase North America
1300 I Street, NW
Washington, D.C. 20005
www.lionchase.com
kb@lionchase.com
202-437-7435
202-400-2277

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Pocatello Development Authority

City of Pocatello
911 North 7th Avenue
Pocatello, Idaho 83201

An urban renewal agency for the City of Pocatello, Idaho

TO: Pocatello Development Authority, Board of Commissioners
FROM: Carl Anderson, Interim Executive Director
Merril Quayle, Public Works Development Engineer
DATE: June 17, 2020
SUBJECT: Frigitek, LLC – Issuance of Funds

BACKGROUND: As part of the Owner Participation Agreement with Frigitek LLC, the Board approved the TIF reimbursement request of \$4,578,117 which includes \$500,000 from existing district funds with the remainder as funds are available and sufficient increment is generated. Eligible costs include improvements outlined in the plan and approved OPA, associated with the development of the cold storage facility within the Airport TIF District.

To date, a total of \$114,900 has been approved by the Board for reimbursement on projects including site surveying and construction management services. June 17, 2020 reimbursement request include:

- 7a. KBCm Group - Pay application #3: \$68,182.50
- 7b. KBCm Group - Pay application #4: \$77,714.80
- 7c. Ryan Invoice No. 380568: \$35,000.00

June 17, 2020 request Total: \$180,897.30
Total to Date: \$295,797.30

SUMMARY: No code-related permits or inspections were required as the work performed is primarily pre-construction. The work has been completed to the extent of the invoices included within attachment a and b. The work completed attachments a and b includes site civil engineering, geotechnical engineering and construction management services. It is staff's determination that the reimbursement request is appropriate for payment for items 7a and 7b.

In review of the work described on page 2 of the invoice, staff finds that the invoice located in attachment (c) is not eligible for reimbursement as it is not an eligible cost identified in either the Airport TIF plan or attachment 3 of the approved Owner Participation Agreement.

The applicable Agency Funded Public Improvements include the following:

Item	Estimated Cost
01-05500 – Civil Engineering	\$109,000
01-10160- Construction Manager	\$111,800
01-18000- Contingency	\$555,919

Upon approval, payment should be made to **Frigitek Industrial Parks**.

Attachment 4

CONFIRMATION OF AGENCY REIMBURSEMENT NO. _____

This Confirmation of Agency Reimbursement ("Confirmation") is entered into between the Pocatello Urban Renewal Agency, commonly known as the Pocatello Development Authority, an independent public body, corporate and politic (hereinafter "Agency"), organized pursuant to the Idaho Urban Renewal Law of 1965, Title 50, Chapter 20, Idaho Code, as amended (hereinafter the "Law"), and undertaking projects under the authority of the Local Economic Development Act, Title 50, Chapter 29, Idaho Code, as amended (hereinafter the "Act"), and Frigitek Industrial Parks, Inc., a Texas corporation authorized to do business in the State of Idaho (hereinafter "Participant"). The Effective Date of this Confirmation is the date last signed by the parties.

WITNESSETH:

1. Agency Contribution

Agency has, pursuant to the procedures set forth in the Owner Participation Agreement by and between the Agency and Participant with an effective date of _____ (the "OPA"), determined the Actual Eligible Costs for those certain Agency Funded Public Improvements as those terms are defined in the OPA and as specifically identified below, shall be _____ and ___/100 dollars (\$ _____) (the "Agency Reimbursement") for the [identify Agency Funded Public Improvements subject to reimbursement in this Confirmation].

2. Payment Terms.

Agency agrees to reimburse Participant for the amount of the Agency Reimbursement, without interest from the Effective Date of this Confirmation pursuant to the Reimbursement Procedure set forth in the OPA.

Participant acknowledges that the Agency Reimbursement may not be paid in full if the revenue allocation proceeds available for reimbursement under the Urban Renewal Plan and pursuant to the OPA, are less than the Agency Reimbursement.

If the Agency Reimbursement is not fully reimbursed by December 31, 2033, the Agency will not be obligated to make any additional payments.

To the extent there is more than one Confirmation of Agency Reimbursement between the parties and pursuant to the OPA, then payment will be applied to the Confirmation with the earliest Effective Date first, until paid in full, or until December 31, 2033, or upon termination of the Urban Renewal Plan, whichever occurs first.

3. **Limitation on Making Payments**

It is the intention of the parties that Participant shall only be paid from the revenue allocation proceeds, if any, which are allocated to Agency as a direct result of the Private Development, as defined in the OPA, constructed by the Participant or others on or related to the Site. If, for any reason, the revenue allocation proceeds anticipated to be received by Agency as a direct result of the Private Development in the Project Area are reduced, curtailed or limited in any way by market conditions, actions by Participant, legislative enactments, initiative referendum, judicial decree, or other, the Agency shall have no obligation to pay the Agency Reimbursement to Participant as described in this Confirmation from other sources or monies which Agency has or might hereinafter received.

4. Except as expressly modified above, the terms and conditions of the OPA are still binding on Agency and Participant as set forth in such OPA.

IN WITNESS WHEREOF, the Parties hereto have signed this Agreement the day and year below written to be effective the day and year above written.

AGENCY
POCATELLO URBAN RENEWAL AGENCY, A/KA
THE POCATELLO DEVELOPMENT AUTHORITY

By: _____
_____, Chair

Date: _____

ATTEST:

By: _____
_____,

Secretary

PARTICIPANT
FRIGITEK INDUSTRIAL PARKS, INC.

By: _____
Gerald Dicker, President

Date: _____

Agency funded public improvements

Owner Participation Agreement - (attachment 3)

Attachment 3

Agency Funded Public Improvements

Item	Estimated Cost
01-05500 - Civil Engineering	\$109,000
01-10160 - Construction Manager	\$111,800
01-15526 - Traffic Control	\$12,000
01-17113 - Mobilization/Demobilization	\$204,269
01-18000 - Contingency	\$555,919
02-05400 - Aggregate Subbase	\$375,055
02-21419 - Water Main Piping	\$277,860
02-21420 - Water Main Valves	\$36,000
02-21421 - Hydrants	\$72,000
02-21422 - Sewer Piping	\$39,600
02-21423 - Sewer Concrete Manholes	\$25,000
02-21424 - Sanitary Sewer Lift Station	\$850,000
02-21425 - Sewer Cleanout	\$17,200
02-23150 - Engineered Fill	\$122,780
02-24500 - Railroad Construction	\$1,044,214
02-25150 - Asphalt Paving	\$363,625
02-29000 - Landscaping	\$75,150
02-31500 - Excavation	\$62,773
02-37000 - Erosion and Sedimentation Control	\$35,000
02-77000 - Curb and Gutters	\$71,550
01-10400 - Staging Area	\$2,000
02-20505 - Street Demolition	\$18,375
02-23100 - Clear and Grub	\$46,420
10-10460 - Traffic Signage	\$2,500
16-20050 - Street Lighting	\$66,000
TOTAL	\$4,578,117

**Pages 6-11 of the
Airport TIF Plan**

II. AIRPORT URBAN RENEWAL AREA DESCRIPTION

The Urban Renewal Area and Revenue Allocation District are identified with identical boundaries. The area is legally described in **Attachment 1**.

III. PROJECT PLAN

A project list is outlined below. Elements of the list will be funded on a "pay-as-you go" or on a "reimbursement to developer" basis. This list is the immediate project list for the revenues available. If additional revenues become available, other site work may be pursued or the Development Authority may expedite payment of funds in anticipation of an early closing of the district. Table 1 lists the immediate project needs with estimated costs. This plan and the Revenue Allocation provision will terminate December 31, 2033.

TABLE 1. Project Costs

<i>GENERAL PROJECT LIST</i>	COST
Development Master Plan Creation	\$ 50,000
Surveying and Platting Work	\$ 30,000
Landscaping	\$ 0
Franchise Utility Upgrades (sites 'A' and 'B')	\$ 515,000
General Project List Sub-Total	\$ 595,000
<i>PROJECT LIST - Project Site 'A' (Fortress and Bell Streets)</i>	COST
Site Utilities: Water, Sewer, Storm Water Systems	\$ 256,700
Roadway Construction/Improvements - Turning Radli (gravel)	\$ 12,500
Rail Spur Rehabilitation/loading-unloading crane/hoist	\$ 0
Construction Engineering/Surveying/Management Services/Contingencies	\$ 110,000
Project Financing Charges	\$ 212,432
Project List - Project Site 'A' Sub-Total	\$ 591,632
<i>PROJECT LIST - Project Site 'B' (Boeing Street)</i>	COST
Site Utilities: Water, Sewer, and Storm Water Systems	\$ 720,400
Roadway Construction/Improvements	\$ 12,500
Rail Spur Rehabilitation/Extension	\$ 365,000
Construction Engineering/Surveying/Management Services/Contingencies	\$ 219,000
Project Financing Charges	\$ 737,743
Project List - Project Site 'B' Sub-Total	\$2,054,643
<i>PROJECT LIST - Project Site 'C' (Westside Industrial Park)</i>	COST
Site Utilities: Water, Sewer, and Storm Water Systems	\$ 0
Water Tank	\$1,500,000
Franchise Utility Upgrades	\$ 0

Construction Engineering/Surveying/Management Services/Contingencies	\$ 300,000
Project List – Project Site ‘C’ Sub-Total	\$1,800,000
<i>ALL TOTAL</i>	\$5,041,275
PDA Administrative Costs	\$ 0
<i>FINAL TOTAL</i>	\$5,041,275

Project Descriptions:

- **Master Planning:** This would include the hiring of professional planning and engineering services to plan the entire 589 acres so that utilities are provided adequately for full build-out, that areas for development are properly identified, and that proposed uses are compatible with one another.
- **Surveying and Platting:** Hiring an engineering firm to survey and plat an approximate 589 acre area of land in order to create parcels for marketing purposes.
- **Site Utilities: Water line and Water System Upgrades—**Install main water and sewer lines for fire and industrial water service. Install a 1,000,000 gallon storage tank and additional pump station(s) to accommodate fire water service requirements.
- **Site Utilities: Storm Water Upgrades –** Enhancements to storm water retention/detention capacity.
- **Landscaping—**Design and implement a landscaping plan for the area installing needed trees, grass and plants to beautify the area and to comply with City codes.
- **Roadway Improvements—**Widen roadways where needed and improve and/or expand roadway system and to accommodate future developments in the area. Reinforce roadway at rail spur intersections. Install curb and gutter and intersection radii and other necessary improvements to enhance access and transportation to the site.
- **Rail Spur Rehabilitation/Extension –** Upgrade rail spur system to accommodate industrial expansion in the area including the loading and off-loading of material.
- **Franchise Utility Upgrade--** Utility upgrades required to facilitate full development of sites within this area.
- **Contingency costs--**Additional cost were calculated for work related to increase in costs of the work and other administrative expenses associated with the project.
- **PDA Administrative Costs –** Eligible costs for reimbursement to the PDA for management, legal, financial and other oversight responsibilities of the district formed and projects undertaken.
- **Other--**Any costs or tasks related to, construction or reconstruction of roads, extensions of water, sewer, or storm water lines, street lighting, public landscaping, location of electrical transformers, construction of fire lanes or provision of fire flow, construction of wells, location of railroad spurs, switches, or signals within the project area, demolition or clean up of sub-standard buildings or other “horizontal” debris, management of property acquired by or in control of the agency, disposition of property for public or private uses in accordance with the Plan, including sale of property at fair value but below market value, assembly of adequate sites for development, any construction including foundations, platforms, and other structural forms, issuance of bonds, notes or other obligations to finance all or any part of the projects, and all other actions as necessary under State Law to accomplish this Plan, funded through Tax Increment Financing. Any additional costs related to any of the prioritized or alternative projects which the PDA and Council propose to be used to complete or enhance a project may also be used.

Table 2 outlines the total project costs and the projected revenue for the proposed revenue allocation district.

TABLE 2. Project Costs and Revenues

ITEM	AMOUNT	TOTAL
COSTS		
General Site Costs	\$ 595,000	
Site 'A' Costs	\$ 379,200	
Site 'B' Costs	\$1,316,900	
Site 'C' Costs	\$2,700,000	
PDA Administrative Costs	\$ 0	
Total Costs		\$5,041,275
REVENUES		
Revenue Allocation Proceeds	\$5,047,574	
Ending District Balance		\$ 6,299

IV. ECONOMIC FEASIBILITY STUDY

The following tables provide a breakdown of base-assessment valuations for the proposed revenue allocation district for the Pocatello Regional Airport Urban Renewal Area/Revenue Allocation District. These base valuation amounts were provided by the Power County Assessor's office. An analysis of the tax levy rates applied in calculating tax collection for the Pocatello Airport Revenue Allocation District is described below. The 2009 tax levies are used for each of the taxing jurisdictions as supplied by the Power County Assessor's office.

<u>Taxing Jurisdictions</u>	<u>Tax levy</u>
City of Pocatello	.009577781
Power County	.004321735
School District #381	.004300170
Power County Highway District	.002876996
A.F. Library	.000600302
County Hospital	.000951690
Ambulance	.000258694
East Po. Co. Fire	.000557434
Mosquito Abatement	.000368596
Total	.019513228

TABLE 3.

Taxing Entity	¹ Tax Levy	Valuation	Revenue
City of Pocatello	.0095777810	\$995,883	\$ 9,538
Power County	.0043217350	\$995,883	\$ 4,304
School District #381	.0043001700	\$995,883	\$ 4,282
County Highway District	.0028769960	\$995,883	\$ 2,865

¹ 2009 levy rate obtained from Power County

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County Hospital	.000951690	\$995,883	\$ 948
Ambulance	.000258694	\$995,883	\$ 258
American Falls Library	.000600302	\$995,883	\$ 598
East Po. Co. Fire	.000557434	\$995,883	\$ 555
PO Mosquito Abate	.000368596	\$995,883	\$ 367
Total	.026537970	\$995,883	\$26,429

Table 3. shows the amount of revenue that the taxing jurisdictions will continue to be allocated based on the base year values. Numbers have been rounded to the nearest dollar which may account for discrepancies.

Table 4. provides an analysis of the total tax increment financing value within the Pocatello Regional Airport Revenue Allocation District. The base value is not added into these numbers. Therefore, the entire revenue stream shown here will be allocated to the Development Authority.

Year	Estimated TIF Tax Value	Tax Levy Rate	Tax Revenue to PDA	Cumulative Tax Revenue to PDA
2010	\$0	.019513228	\$0	\$0
2011	\$0	.019513228	\$0	\$0
2012	\$0	.019513228	\$0	\$0
2013	\$5,000,000	.019513228	\$97,566	\$97,566
2014	\$4,910,000	.019513228	\$95,810	\$193,376
2015	\$14,822,700	.019513228	\$289,239	\$482,615
2016	\$14,672,700	.019513228	\$286,312	\$768,927
2017	\$14,442,519	.019513228	\$281,820	\$1,050,747
2018	\$14,219,243	.019513228	\$277,463	\$1,328,210
2019	\$14,002,666	.019513228	\$273,237	\$1,601,447
2020	\$13,792,586	.019513228	\$269,138	\$1,870,585
2021	\$13,588,808	.019513228	\$265,162	\$2,135,746
2022	\$13,391,144	.019513228	\$261,305	\$2,397,051
2023	\$13,199,410	.019513228	\$257,563	\$2,654,614
2024	\$13,013,428	.019513228	\$253,934	\$2,908,548
2025	\$12,833,025	.019513228	\$250,414	\$3,158,962
2026	\$12,658,034	.019513228	\$246,999	\$3,405,961
2027	\$12,488,293	.019513228	\$243,687	\$3,649,648
2028	\$12,323,644	.019513228	\$240,474	\$3,890,122
2029	\$12,163,935	.019513228	\$237,358	\$4,127,480
2030	\$12,009,017	.019513228	\$234,335	\$4,361,815
2031	\$11,858,746	.019513228	\$231,402	\$4,593,217
2032	\$11,712,984	.019513228	\$228,558	\$4,821,775
2033	\$11,571,594	.019513228	\$225,799	\$5,047,574
Total				\$5,047,574

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Estimated taxable values were provided by the Petersen Inc. (\$5,000,000) and Frazier (\$10,000,000); companies locating at the Airport. Petersen will occupy their building in early 2011. Frazier will occupy their building in 2013. Increment revenue was delayed one year in the schedule to reflect possible delays and when the value may actually be placed on the tax rolls of the county.

The estimated value of the building for Petersen is \$2,000,000. The estimated value of the building for Frazier is \$5,000,000. The combined \$7,000,000 building value is not depreciated for the life of the district. Equipment values are estimated at \$3,000,000 for Petersen Inc. and \$5,000,000 for Frazier. This combined total of \$8,000,000 is depreciated over the life of the district. The depreciated rate is an estimated 3% to mirror Hoku Scientific's depreciation schedule on equipment.

The total dollar amount that may be collected by the PDA over the 24-year life of the district is approximately \$5,047,574. This amount will be used to finance public improvement projects within the Pocatello Regional Airport Urban Renewal Area.

V. CONFORMANCE WITH STATE LAW

Redevelopment activities for the Pocatello Regional Airport Urban Renewal Area and Revenue Allocation District are governed by two applicable sections of Idaho Code: the Idaho Urban Renewal Law (Chapter 20, Title 50, Idaho Code) and the Idaho Local Economic Development Act (Chapter 29, Title 50, Idaho Code).

The Idaho Legislature passed the Urban Renewal Law in 1965. Under this law, a Mayor and Council can declare areas as deteriorating, and declare that the rehabilitation, conservation, and redevelopment of such areas is in the interest of the public's health, safety, morals or welfare (Idaho Code 50-2008). The Urban Renewal Law also states that an area of a city that "constitutes an economic and social liability imposing onerous municipal burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, aggravates traffic problems and substantially impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities..." may be designated an urban renewal area.

The Idaho Legislature passed the Local Economic Development Act in 1988. This act states: "An authorized municipality is hereby authorized and empowered to adopt, at any time, a revenue allocation financing provision, as described in this chapter, as part of an urban renewal plan...A revenue allocation financing provision may be adopted either at the time of the original adoption of an urban renewal plan or the creation by ordinance of a competitively disadvantaged border community area, or thereafter, as a modification of an urban renewal plan or the ordinance creating the competitively disadvantaged border community area." (Idaho Code 50-2904)

In addition to this, Idaho Code 50-2906 states: "The local governing body of an authorized municipality must enact an ordinance in accordance with Chapter 9, Title 50, Idaho Code, and Section 50-2008, Idaho Code. To modify an existing urban renewal plan, to add or change a revenue allocation, an authorized municipality must enact an ordinance...and conduct a public hearing." (Idaho Code 50-2906) This part of the Idaho Code specifically implies that a local municipality must enact an ordinance before redevelopment can take place.

The City of Pocatello's Pocatello Regional Airport Urban Renewal Area and Revenue Allocation District Plan proposed within this document follows the guidelines prescribed within Idaho Code for the development of Urban Renewal Areas and Revenue Allocation Districts.

VI. PLAN DURATION

The plan shall be in effect and enforceable for a period of time necessary to finance all designated improvements and all debt obligations which the PDA may incur in connection with such improvements, over a twenty (24) year time period (2010-2033).

VII. AMENDMENT PROCEDURES

The plan may be amended by the PDA after all notice and public hearing requirements as set forth in Idaho Code have been met, and upon formal approval by the Pocatello City Council.

VIII. SEVERABILITY

If any part of the plan is declared contrary to Idaho Code, and any provision or application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of any remaining provisions of the Plan.

IX. CONCLUSION

The Pocatello Regional Airport Urban Renewal Area and Revenue Allocation District Plan is designed to ameliorate deteriorating conditions which are causing economic under-development of the area and substantially impairing the sound growth of Pocatello.

Implementation of the plan will provide the infrastructure capacity necessary to foster sound growth of the airport and increase the tax base and tax revenues, encourage economic stability of the community, and improve the health, safety, and welfare of the community in this area.

The Pocatello Development Authority recommends that the City cooperate and assist in carrying out the purposes of this Plan. It is expected that the City of Pocatello will assist efforts to ensure that the projects as set forth and financed under this plan are accomplished.

AGENDA ITEM

NO. 7a

KBCMGroup
YOUR VISION. OUR EXPERTISE.

8901 Tehama Ridge Pkwy
Suite 127140
Ft. Worth, TX 76177

Frigitek Industrial Parks

2020-102 TIF Improvements

Pay Application #3

(877) KBCM Group (office), (866) 275-1880 (fax), www.kbcmgroup.com

Pay Application Summary

1. **Report of Rejected Invoices:** Invoices rejected from contractor's billing
2. **Application for Payment:** Complete pay application in AIA form
3. **Subcontractor/Vendor Backup Invoices:** Each invoice is approved and stamped with the area and cost code
4. **Approved Change Orders:** Any approved change orders for the current pay period
5. **Commitment Report:** Report with committed cost to date
6. **Cost Report:** Snapshot of current job cost
7. **Cash Flow:** Estimate of cash flow projected month of month for the course of construction
8. **Lien Waiver Report:** Current lien waiver report and release from vendors for all payment against contracts with value of \$10,000 or more.

TO OWNER/CLIENT:

City of Pocatello
911 N 7th Avenue
Pocatello, Idaho 83201

PROJECT:

TIF Improvements
1950 Airport Way
Pocatello, Idaho 83204

APPLICATION NO: 3

INVOICE NO: 3

PERIOD: 03/26/20 - 04/25/20

PROJECT NO: 2020-102

CONTRACT DATE:

FROM CONTRACTOR:

Frigitek Industrial Parks, Inc
6565 N MacArthur Blvd, Suite 225
Dallas, Texas 75039

VIA ARCHITECT/ENGINEER:

Jake Ferrell (ASM Engineering Consultants)
202 E. Rhonda Ave.
Andover, Kansas 67002

CONTRACT FOR: TIF Improvements Prime Contract

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract. Continuation Sheet is attached.

1. Original Contract Sum	\$4,578,117.00
2. Net change by change orders	\$0.00
3. Contract Sum to date (Line 1 ± 2)	\$4,578,117.00
4. Total completed and stored to date (Column G on detail sheet)	\$183,082.51
5. Retainage:	
a. 0.00% of completed work	\$0.00
b. 0.00% of stored material	\$0.00
Total retainage (Line 5a + 5b or total in column I of detail sheet)	\$0.00
6. Total earned less retainage (Line 4 less Line 5 Total)	\$183,082.51
7. Less previous certificates for payment (Line 6 from prior certificate)	\$114,900.01
8. Current payment due:	\$68,182.50
9. Balance to finish, including retainage (Line 3 less Line 6)	\$4,395,034.49

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner/Client:	\$0.00	\$0.00
Total approved this month:	\$0.00	\$0.00
Totals:	\$0.00	\$0.00
Net change by change orders:	\$0.00	

The undersigned certifies that to the best of the Contractor's knowledge, information and belief, the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work which previous Certificates for payment were issued and payments received from the Owner/Client, and that current payments shown herein is now due.

CONTRACTOR: Frigitek Industrial Parks, Inc

By: 

Date: 6/10/20

State of:

County of:

Subscribed and sworn to before

me this _____ day of _____

Notary Public:

My commission expires: _____

ARCHITECT'S/ENGINEER'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on the on-site observations and the data comprising this application, the Architect/Engineer certifies to the Owner/Client that to the best of the Architect's/Engineer's knowledge, information and belief that Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED: \$68,182.50

(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to confirm the amount certified.)

ARCHITECT/ENGINEER:

By: _____ Date: _____

This certificate is not negotiable. The amount certified is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to the rights of the Owner/Client or Contractor under this Contract.

Document SUMMARY SHEET, APPLICATION AND CERTIFICATE FOR PAYMENT, containing Contractor's signed Certification is attached.
Use Column I on Contracts where variable retainage for line items apply.

APPLICATION NUMBER: 3
APPLICATION DATE: 4/25/2020
PERIOD: 03/26/20 - 04/25/20

Contract Lines

A ITEM NO.	B COST CODE	C DESCRIPTION OF WORK	D SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H BALANCE TO FINISH (C - G)	I RETAINAGE
				D FROM PREVIOUS APPLICATION (D + E)	E THIS PERIOD		% (G / C)			
1	01-01 30 11 - Civil Engineer	Civil Engineer	\$83,150.00	\$24,900.00	\$19,382.50	\$0.00	\$44,282.50	53.26%	\$38,867.50	\$0.00
2	01-01 30 15 - Geotechnical Engineering	Geotechnical Engineering	\$3,800.00	\$0.00	\$3,800.00	\$0.00	\$3,800.00	100.00%	\$0.00	\$0.00
3	01-01 31 05 - Construction Management Over Site Delivery	Construction Management Over Site Delivery	\$90,000.00	\$33,246.76	\$33,116.88	\$0.00	\$66,363.64	73.74%	\$23,636.36	\$0.00
4	01-01 31 06 - Project Management	Project Management	\$80,000.00	\$27,984.72	\$3,652.60	\$0.00	\$31,637.32	39.55%	\$48,362.68	\$0.00
5	01-01 31 08 - Project Controls	Project Controls	\$50,000.00	\$12,660.16	\$2,629.87	\$0.00	\$15,290.03	30.58%	\$34,709.97	\$0.00
6	01-01 31 11 - Project Modeling	Project Modeling	\$20,000.00	\$9,941.13	\$5,600.65	\$0.00	\$15,541.78	77.71%	\$4,458.22	\$0.00
7	01-01 31 12 - Master Execution Plan	Master Execution Plan	\$10,000.00	\$3,369.50	\$0.00	\$0.00	\$3,369.50	33.70%	\$6,630.50	\$0.00
8	01-01 31 13 - Project Coordination	Project Coordination	\$50,000.00	\$2,797.74	\$0.00	\$0.00	\$2,797.74	5.60%	\$47,202.26	\$0.00
9	01-01 55 26 - Traffic Control	Traffic Control	\$13,800.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$13,800.00	\$0.00
10	01-01 55 29 - Staging Areas	Staging Areas	\$2,300.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$2,300.00	\$0.00
11	01-01 57 13 - Temporary Erosion and Sediment Control	Temporary Erosion and Sediment Control	\$40,250.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$40,250.00	\$0.00
12	01-01 71 13 - Mobilization	Mobilization	\$10,062.94	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$10,062.94	\$0.00
13	10-10 14 53 - Traffic Signage	Traffic Signage	\$2,875.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$2,875.00	\$0.00
14	26-26 56 13 - Lighting Poles and Standards	Lighting Poles and Standards	\$75,900.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$75,900.00	\$0.00
15	32-32 92 19 - Seeding	Seeding	\$51,923.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$51,923.00	\$0.00
16	32-32 94 19 - Landscape Surfacing	Landscape Surfacing	\$34,500.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$34,500.00	\$0.00
17	01-01 41 23 - Fees	Fees	\$50,000.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$50,000.00	\$0.00
18	01-01 71 13 - Mobilization	Mobilization	\$58,827.04	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$58,827.04	\$0.00
19	33-33 05 61 - Concrete Manholes	Concrete Manholes	\$28,750.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$28,750.00	\$0.00
20	33-33 05 71 - Cleanouts	Cleanouts	\$19,780.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$19,780.00	\$0.00
21	33-33 14 16 - Site Water Utility Distribution Piping	Site Water Utility Distribution Piping	\$299,539.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$299,539.00	\$0.00
22	33-33 14 19 - Valves and Hydrants for Water Utility Service	Valves and Hydrants for Water Utility Service	\$104,200.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$104,200.00	\$0.00

A ITEM NO.	B COST CODE	C DESCRIPTION OF WORK	D SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H BALANCE TO FINISH (C - G)	I RETAINAGE
				FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		% (G / C)			
23	33-33 31 00 - Sanitary Sewerage Piping	Sanitary Sewerage Piping	\$45,540.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$45,540.00	\$0.00
24	33-33 32 13 - Packaged Wastewater Pumping Stations	Packaged Wastewater Pumping Stations	\$977,500.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$977,500.00	\$0.00
25	01-01 71 13 - Mobilization	Mobilization	\$44,153.65	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$44,153.65	\$0.00
26	02-02 41 00 - Demolition	Demolition	\$21,131.25	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$21,131.25	\$0.00
27	31-31 11 00 - Clearing and Grubbing	Clearing and Grubbing	\$8,050.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$8,050.00	\$0.00
28	31-31 24 13 - Roadway Embankments	Roadway Embankments	\$31,846.95	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$31,846.95	\$0.00
29	32-32 01 13 - Flexible Paving Surface Treatment	Flexible Paving Surface Treatment	\$305,571.75	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$305,571.75	\$0.00
30	32-32 11 16.16 - Aggregate Subbase Courses	Aggregate Subbase Courses	\$95,565.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$95,565.00	\$0.00
31	32-32 11 23 - Aggregate Base Courses	Aggregate Base Courses	\$305,048.25	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$305,048.25	\$0.00
32	32-32 12 16 - Asphalt Paving	Asphalt Paving	\$75,647.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$75,647.00	\$0.00
33	32-32 16 13 - Curbs and Gutters	Curbs and Gutters	\$82,282.50	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$82,282.50	\$0.00
34	01-01 71 13 - Mobilization	Mobilization	\$23,374.85	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$23,374.85	\$0.00
35	31-31 11 00 - Clearing and Grubbing	Clearing and Grubbing	\$35,333.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$35,333.00	\$0.00
36	31-31 23 16 - Excavation	Excavation	\$40,342.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$40,342.00	\$0.00
37	31-31 23 23 - Fill	Fill	\$141,197.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$141,197.00	\$0.00
38	34-34 11 26 - Ballasted Track Rail	Ballasted Track Rail	\$997,746.82	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$997,746.82	\$0.00
39	34-34 11 26.16 - Track Rail Subballast	Track Rail Subballast	\$168,130.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$168,130.00	\$0.00
TOTALS:			\$4,578,117.00	\$114,900.01	\$68,182.50	\$0.00	\$183,082.51	4.00%	\$4,395,034.49	\$0.00

Grand Totals

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H BALANCE TO FINISH (C - G)	I RETAINAGE	
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		% (G / C)				
GRAND TOTALS:			\$4,578,117.00	\$114,900.01	\$68,182.50	\$0.00	\$183,082.51	4.00%	\$4,395,034.49	\$0.00

KBCm Group, LLC
 8901 Tehama Ridge Pkwy, Ste
 127140
 Ft Worth, TX 76177 US
 sblankenfeld@kbcgroup.com
 www.kbcgroup.com

Invoice 20001-103



BILL TO

Elden Charles
 Frigatek Industrial Parks, Inc
 6565 N MacArthur Blvd Suite 225
 Dallas, Texas 75039
 United States

DATE
 03/01/2020

PLEASE PAY
\$45,000.00

DUE DATE
 03/01/2020

DESCRIPTION

DESCRIPTION	QTY	RATE	AMOUNT
CM:Construction Management Services Construction management services project delivery 3/1/2020 - 3/31/2020	1	45,000.00	45,000.00
PO 2020-101-002 Construction management services			

TOTAL DUE **\$45,000.00**

THANK YOU.

ENTERED AS JOB COST		
Date:	3/2/2020 12:21:29 PM	
By:	Skyler_KBCM	<input checked="" type="checkbox"/> APPROVED
PO/SC:	2020-101-002	<input type="checkbox"/> REVISE
Job:	Pocatello Cold Storage	<input type="checkbox"/> REJECTED

POCATELLO 2020-101		
Pay Application: 3		
SUB JOB	COST CODE	TOTAL
SITE	01 31 05	33,116.88
SITE	01 31 06	3,652.60
SITE	01 31 08	2,629.87
SITE	01 31 13	5,600.65
Skyler_KBCM 03/02/2020 12:21:14 PM		

Time Sheet/Recap

Company: KBCm Group
 Project: 2020 - 101 Pocatello Cold Storage
 Period: 3/1/2020 - 3/30/2020

Printed May 20, 2020 at 7:49 AM

EF	Class	Name	Cost Code	Rate	Hrs	OT Rate	OT Hrs	Per Diem	Total	Discount Adjustment	Revised Total	Invoice
5042	Project Executive	1.1. Outline Owner's Expectations & Vision for the Project	01 31 05 - Construction Management Over Site Delivery	160	2				320	-	320	20001-103
		1.2. Map Elements of the Project (Site, Logistics, Process Etc.)										
5042	Project Executive	1.3. Map Resources, Constraints & Boundaries	01 31 05 - Construction Management Over Site Delivery	160	3				480	-	480	20001-103
		1.4. Map Time Constraints										
		1.5. Map Time Over Cost Graph										
		1.6. Identify Municipality Requirements										
		1.7. Identification of PFD & or P&ID Process										
		2.1. Map Land Closure, Owner Stewardship Requirements										
		2.2. Creation of Time Scaled Parameters										
		2.3. Creation of Resources & Budgetary Parameters										
		2.4. Creation of Design Parameters										
		2.5. Creation of Municipality Interface, Requirements & Milestones										
		2.6. Creation of Procurement Plan (Long Leads)										
		2.7. Identification of Site Logistical Plan										
		2.7.1. Delivery Sequence & Laydown Requirements Identified										
		2.7.2. Site Security Requirements Identified										
		2.7.3. Off Site & Traffic Control Responsibilities Identified										
		2.7.4. Rail Spur & Stack Up Requirements										
		2.9.1. Testing										
		2.9.2. Certification										
		2.9.3. QA/QC Process										
		2.10. Safety Assessment, Observation & Reporting Plan										
		2.10.1. Safety Assessment, Agency Interaction Plan										
		3.1.1. Review & Refine Startup Check-list										
		3.1.2. Identify All Stake Holders & Team Members										
		3.1.2.1. Creation of Project Communication Plan										
		3.1.2.2. Mapping of Project Reporting Plan										
		3.1.3. Creation of Site Safety Plan										
		3.1.3.1. Aid Stations, Safety Protocols, & Emergency Action Plan										
		3.1.3.2. Site Evacuation & Marshaling Area Identified										
		3.1.3.3. Safe Area Emergency Master Plan										
5018	Project Coordinator	3.1.3.4. Vendor Safety Plan Management	01 31 13 - Project Coordination	110	7				770	-	770	20001-103
5081	Senior Project Manager	3.1.4. Construction Administration Plan	01 31 05 - Construction Management Over Site Delivery	150	10				1,500	-	1,500	20001-103
5037	Project Controller	3.1.4.1. Financial Management	01 31 08 - Project Controls	150	8				1,200	-	1,200	20001-103
		3.1.4.2. Project Payment Process										
		3.1.4.3. Change Management										
		3.1.4.4. Punch-list / Phased Turn Over Plan(s) if Applicable										
		3.2.1. Design Disciplines Outlined										
		3.2.1.1. PFD / P&IDs										
		3.2.1.2. 3D / BIM										
		3.2.1.3. Engineering										
		3.2.1.4. Utilities										
		3.2.1.5. Gas and Electrical Generation										
		3.2.1.6. Rail PFD / P&IDs Delivery Identified										
		3.2.1.8. Civil Earth and Roads										
		3.2.1.9. Structural										
		3.2.1.10. Architectural										
5042	Project Executive	3.2.2. Design Delivery Progress & Reporting	01 31 05 - Construction Management Over Site Delivery	160	25				4,000	-	4,000	20001-103

5081	Senior Project Manager	3.2.3. Integration of Design Delivery into Master Schedule	01 31 05 - Construction Management Over Site Delivery	150	20	3,000	-	3,000	20001-103
5081	Senior Project Manager	3.3.1. SOW & RFP Bid Packages	01 31 06 - Project Management	150	25	3,750	-	3,750	20001-103
5022	Procurement Manager	3.3.2. Procurement Schedule	01 31 05 - Construction Management Over Site Delivery	130	6	780	-	780	20001-103
5042	Project Executive	3.3.3. Contract Instruments	01 31 05 - Construction Management Over Site Delivery	160	4	640	-	640	20001-103
		3.3.4. Submittal Schedules							
5003	Project Administration	3.4. Construction Delivery	01 31 13 - Project Coordination	80	10	800	-	800	20001-103
5081	Senior Project Manager	3.4.1. Project Administration	01 31 05 - Construction Management Over Site Delivery	150	25	3,750	-	3,750	20001-103
5018	Project Coordinator	3.4.1.1. Progress Meetings	01 31 13 - Project Coordination	110	10	1,100	-	1,100	20001-103
5018	Project Coordinator	3.4.1.2. RFI & Issue Reporting Process	01 31 13 - Project Coordination	110	5	550	-	550	20001-103
5018	Project Coordinator	3.4.1.3. Progress Reporting Sequence & Format	01 31 13 - Project Coordination	110	5	550	-	550	20001-103
5081	Senior Project Manager	3.4.1.5. Mapping, Photo & Drone Reporting							
5081	Senior Project Manager	3.4.2. Contract Administration	01 31 05 - Construction Management Over Site Delivery	150	6	900	-	900	20001-103
5081	Senior Project Manager	3.4.2.1. Creation of Specific SOW Packages	01 31 05 - Construction Management Over Site Delivery	150	25	3,750	-	3,750	20001-103
		3.4.2.2. Creation of Safety & Municipal Requirements Packages							
		3.4.2.3. Creation of Insurance Minimum Standards Packages							
5018	Project Coordinator	3.4.2.4. Communication Plan Requirements for each Trade/SOW	01 31 13 - Project Coordination	110	9	990	-	990	20001-103
5081	Senior Project Manager	3.4.3. Scheduling	01 31 05 - Construction Management Over Site Delivery	150	18	2,400	-	2,400	20001-103
		3.4.3.1. Creation of Driving Master Schedule							
		3.4.3.4. Creation of SIS / Reporting Sequence & Content							
5037	Project Controller	3.4.4. Financial Documentation	01 31 08 - Project Controls	150	4	600	-	600	20001-103
5037	Project Controller	3.4.4.1. Application for Payment Sequence, Format & Submission.	01 31 08 - Project Controls	150	6	900	-	900	20001-103
		3.4.4.2. Creation Payment Requirements & Sequence							
		3.4.4.3. Creation of Financial Reporting Sequence & Content							
		3.4.5. Site Management							
5042	Project Executive	3.4.5.1. Creation of QAQC Plan	01 31 05 - Construction Management Over Site Delivery	160	15	2,400	-	2,400	20001-103
5018	Project Coordinator	3.4.5.2. Creation of Housekeeping Plan	01 31 13 - Project Coordination	110	11	1,210	-	1,210	20001-103
		3.4.5.3. Temporary Utilities & Site Access Plan							
5018	Project Coordinator	3.4.5.4. Site Security Plan	01 31 13 - Project Coordination	110	3	330	-	330	20001-103
5042	Project Executive	3.4.5.5. Vendor Management	01 31 05 - Construction Management Over Site Delivery	160	63	10,080	-	10,080	20001-103
		3.4.5.7.1. SWPPP							
		3.4.5.7.2. Permitting and Inspections							
		3.4.5.8.1. Equipment & Light Traffic Interface Protocol's							
		3.4.5.9. Cranes							
		3.4.5.9.1. Location & Lifting Plans							
		3.4.5.9.2. Laydown & Offload Plan							
		3.4.6. Off Site Management							
		3.4.6.2. Site Access Plan							
		3.4.6.3. Water & Utility Implementation Plan							
		4.1. Define Punch List Format							
		4.2. Create Operational Integration, Startup & Turnover Plan							
		4.2.1. Create Operations Training & Instructions Format & Criteria							
		4.2.2. Create Operations Turn-over Plan *(to Name Plate)							
		4.3. Create Demobilization Plan							
		4.3.1. Demobilization Schedule							
		4.3.2. Identify Material Overages & Surplus Dispersal Plan							
		4.4. Create Documents Close-out Management Plan							
		4.4.1. Outline Warranties, OEM Data Sheets & BOM Criteria							
		4.4.3. Create "As Built" Document(s) Criteria							
0001	Adjustment	Rate Adjustment for Billing Agreement \$45,000 per period						(1,200)	20001-103
Total				318		46,200		45,000	

Xcell Engineering, LLC

260 Laurel Lane
Chubbuck ID, 83202
208-237-5900

Invoice

ENTERED AS JOB COST 

Date: 5/13/2020 10:25:07 AM
 By: Skyler_KBCM APPROVED
 PO/SC: PO 2020-101-003 REVISE
 Job: POCATELLO REJECTED

Date	Invoice #
3/20/2020	2126

Bill To

Frigitek Industrial Parks, Inc
 6565 N MacArthur Blvd Suite 225
 Dallas, TX 75039

POCATELLO 2020-101 

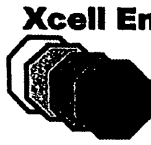
Pay Application: NA

SUB JOB	COST CODE	TOTAL
SITE	01 30 15	3,800.00

Skyler_KBCM 05/13/2020 10:23:02 AM

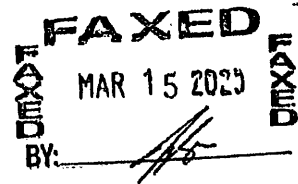
P.O. No.	Terms	Project
P20416	Due on receipt	

Quantity	Description	Rate	Amount
1	Engineering/GE Evaluation FRIGITEK INDUSTRIAL PARK/Pocatello Airport	3,800.00	3,800.00
Total			\$3,800.00



Xcell Engineering, LLC

260 Laurel Lane
Chubbuck, ID 83202
Phone (208) 237-5900
Fax (208) 237-5925
E-mail: paul@xcelleng.com



March 15, 2020
P20416

Mr. Scott Thompson
Frigitetek Industrial Parks, Inc.
6565 N. MacArthur Blvd Suite 225
Dallas, TX 75039

RE: **GEOTECHNICAL REPORT**
Frigitetek Industrial Park
Pocatello Airport
Pocatello, ID

Scott:

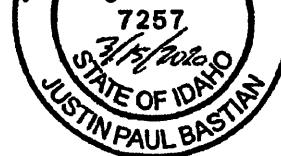
Xcell Engineering has performed the authorized geotechnical evaluation for the proposed industrial Park in Pocatello, Idaho. This evaluation was performed to assess the subsurface soil and groundwater conditions at the proposed site to depths of 12 feet or less. Geotechnical information in this report will be used to assist project planning, design and construction.

This report summarizes the results of our field evaluation, provides laboratory test results and presents our geotechnical findings and opinions. Specific geotechnical information is included in this report for soil and groundwater characteristics encountered during our field exploration. The report provides information based solely on our understanding of the project concept. If project plans are modified we recommend additional specific geotechnical evaluation be performed. Site dewatering during and post construction may be a significant component of design and construction for the project. Individual portions of this report cannot be relied upon without the supporting text throughout the report.

It has been our experience that maintaining geotechnical design continuity through all phases of the project reduces the potential for soil-engineering related errors during design and construction and contributes to overall project success and economy. We appreciate the opportunity to work with you on this project. Please contact our office if you have questions or comments.

Sincerely,
Xcell Engineering, LLC

J. Paul Bastian, PE
Project Engineer



Building on Excellence

Committed Costs

Printed June 9, 2020 at 10:58 AM
 Frigitek Industrial Parks
 Pocatello, ID
 United States

Export Date 6/9/2020

Project	Number	Title	Vendor	Status	Executed	Sum of Total With Approved Change Orders	Sum of Invoices	Sum of Pending Change Orders	Sum of Total Payments	Sum of Total Remaining
2020-102 TIF Improvements	PO-2020-102-001	Site Civil Engineering TIF	ASM Engineering Consultants	Approved	Yes	76,997.30	76,997.30	-	-	76,997.30
	PO-2020-102-002	Construction Management Delivery and Over Site	KBCm Group - Construction Management	Approved	Yes	180,000.00	180,000.00	-	-	180,000.00
	PO-2020-102-003	Geotechnical Engineering	Xcell Engineering	Approved	Yes	3,800.00	3,800.00	-	-	3,800.00

Cost Report

2020-102 TIF Improvements
KBCM Group Cost Report

Printed June 9, 2020 at 10:59 AM
Frigatek Industrial Parks
Pocatello, ID
United States

Export Date: 6/9/2020

Sub Job	Cost Code	Sum of Original Budget Amount	Sum of Approved COs	Sum of Revised Budget	Sum of Committed Costs	Sum of Direct Costs	Sum of Job to Date Costs	Sum of Forecast To Complete	Sum of Projected over Under
1 STREETS									
	01-01 71 13 - Mobilization	44,153.65	-	44,153.65	-	-	-	44,153.65	-
	02-02 41 00 - Demolition	21,131.25	-	21,131.25	-	-	-	21,131.25	-
	31-31 11 00 - Clearing and Grubbing	8,050.00	-	8,050.00	-	-	-	8,050.00	-
	31-31 24 13 - Roadway Embankments	31,846.95	-	31,846.95	-	-	-	31,846.95	-
	32-32 01 13 - Flexible Paving Surface Treatment	305,571.75	-	305,571.75	-	-	-	305,571.75	-
	32-32 11 16 16 - Aggregate Subbase Courses	95,565.00	-	95,565.00	-	-	-	95,565.00	-
	32-32 11 23 - Aggregate Base Courses	305,048.25	-	305,048.25	-	-	-	305,048.25	-
	32-32 12 16 - Asphalt Paving	75,647.00	-	75,647.00	-	-	-	75,647.00	-
	32-32 16 13 - Curbs and Gutters	82,282.50	-	82,282.50	-	-	-	82,282.50	-
1 STREETS Total		969,296.35	-	969,296.35	-	-	-	969,296.35	-
2 UTILITIES									
	01-01 41 23 - Fees	50,000.00	-	50,000.00	-	-	-	50,000.00	-
	01-01 71 13 - Mobilization	58,827.04	-	58,827.04	-	-	-	58,827.04	-
	33-33 05 61 - Concrete Manholes	28,750.00	-	28,750.00	-	-	-	28,750.00	-
	33-33 05 71 - Cleanouts	19,780.00	-	19,780.00	-	-	-	19,780.00	-
	33-33 14 16 - Site Water Utility Distribution Piping	299,539.00	-	299,539.00	-	-	-	299,539.00	-
	33-33 14 19 - Valves and Hydrants for Water Utility Service	104,200.00	-	104,200.00	-	-	-	104,200.00	-
	33-33 31 00 - Sanitary Sewerage Piping	45,540.00	-	45,540.00	-	-	-	45,540.00	-
	33-33 32 13 - Packaged Wastewater Pumping Station	977,500.00	-	977,500.00	-	-	-	977,500.00	-
2 UTILITIES Total		1,584,136.04	-	1,584,136.04	-	-	-	1,584,136.04	-
3 RAILROAD									
	01-01 71 13 - Mobilization	23,374.85	-	23,374.85	-	-	-	23,374.85	-
	31-31 11 00 - Clearing and Grubbing	35,333.00	-	35,333.00	-	-	-	35,333.00	-
	31-31 23 15 - Excavation	40,342.00	-	40,342.00	-	-	-	40,342.00	-
	31-31 23 23 - Fill	141,197.00	-	141,197.00	-	-	-	141,197.00	-
	34-34 11 26 - Ballast Track Rail	997,746.82	-	997,746.82	-	-	-	997,746.82	-
	34-34 11 26 15 - Track Rail Subballast	168,130.00	-	168,130.00	-	-	-	168,130.00	-
3 RAILROAD Total		1,406,123.67	-	1,406,123.67	-	-	-	1,406,123.67	-
4 SITE GENERAL									
	01-01 30 11 - Civil Engineer	83,150.00	-	83,150.00	76,997.30	-	76,997.30	6,152.70	-
	01-01 30 15 - Geotechnical Engineering	3,800.00	-	3,800.00	3,800.00	-	3,800.00	-	-
	01-01 31 05 - Construction Management Over Site Delivery	90,000.00	-	90,000.00	89,523.98	-	89,523.98	476.02	-
	01-01 31 06 - Project Management	80,000.00	-	80,000.00	39,794.42	-	39,794.42	40,205.58	-
	01-01 31 08 - Project Controls	50,000.00	-	50,000.00	19,077.26	-	19,077.26	30,922.74	-
	01-01 31 11 - Project Modeling	20,000.00	-	20,000.00	19,836.46	-	19,836.46	163.54	-
	01-01 31 12 - Master Execution Plan	10,000.00	-	10,000.00	3,369.50	-	3,369.50	6,630.50	-
	01-01 31 13 - Project Coordination	50,000.00	-	50,000.00	8,398.38	-	8,398.38	41,601.62	-
	01-01 55 26 - Traffic Control	13,800.00	-	13,800.00	-	-	-	13,800.00	-
	01-01 55 29 - Staging Areas	2,300.00	-	2,300.00	-	-	-	2,300.00	-
	01-01 57 13 - Temporary Erosion and Sediment Control	40,250.00	-	40,250.00	-	-	-	40,250.00	-
	01-01 71 13 - Mobilization	10,062.94	-	10,062.94	-	-	-	10,062.94	-
	10-10 14 53 - Traffic Signage	2,875.00	-	2,875.00	-	-	-	2,875.00	-
	26-26 56 13 - Lighting Poles and Standards	75,900.00	-	75,900.00	-	-	-	75,900.00	-
	32-32 92 19 - Seeding	51,923.00	-	51,923.00	-	-	-	51,923.00	-
	32-32 94 19 - Landscape Surfacing	34,500.00	-	34,500.00	-	-	-	34,500.00	-
4 SITE GENERAL Total		618,560.94	-	618,560.94	260,797.30	-	260,797.30	357,763.64	-
Grand Total		4,578,117.00	-	4,578,117.00	260,797.30	-	260,797.30	4,317,319.70	-

Billing List



Project: Cold Storage Facility
 Frigitek Industrial Parks
 Pay Application # 3
 Period: 12/26/2019 - 01/25/2020

Invoices

Invoice #	Vendor	Scope Billed	Amount Billed	Amount Approved	Variance	Check #	Total	Remit Name	Address
ASM 16-2640	ASM Engineering	Civil Engineering	19,382.50	19,382.50	-		19,382.50	ASM Engineering Consultants	P.O. Box 452, Andover, KS 67002
KBCm_20001-	KBCm Group	Construction Management	45,000.00	45,000.00	-		45,000.00	KBCm Group, LLC	8901 Tehama Ridge Pkwy, Ft. Worth, TX 76177
Xcell_2126	Xcell Engineering	Geotechnical Report	3,800.00	3,800.00	-		3,800.00	Xcell Engineering, LLC	260 Laurel Lane Chubbuck, ID 83202
Total			68,182.50	68,182.50	-		68,182.50		

Lien Waiver Report

Printed June 9, 2020 at 11:12 AM

Export Date 6/5/2020

Project	Vendor	Invoices to Date	Payments to Date	Amount Billed for Selected Period	Waivers Collected for Selected Period	Current Pay App Period
2020-102 TIF Improvements	Xcell Engineering	3,800.00	-	3,800.00	-	4
	ASM Engineering Consultants	44,282.50	-	19,382.50	-	4
	KBCm Group - Construction Management	135,000.00	-	45,000.00	-	4

Outstanding Waiver Amount

-

Risk Level

HIGH RISK

MODERATE RISK

LOW RISK

AGENDA ITEM
NO. 7b



YOUR VISION. OUR EXPERTISE.

8901 Tehama Ridge Pkwy

Suite 127140

Ft. Worth, TX 76177

Frigitek Industrial Parks

2020-102 TIF Improvements

Pay Application #4

(877) KBCM Group (office), (866) 275-1880 (fax), www.kbcmgroup.com

Pay Application Summary

1. **Report of Rejected Invoices:** Invoices rejected from contractor's billing
2. **Application for Payment:** Complete pay application in AIA form
3. **Subcontractor/Vendor Backup Invoices:** Each invoice is approved and stamped with the area and cost code
4. **Approved Change Orders:** Any approved change orders for the current pay period
5. **Commitment Report:** Report with committed cost to date
6. **Cost Report:** Snapshot of current job cost
7. **Cash Flow:** Estimate of cash flow projected month of month for the course of construction
8. **Lien Waiver Report:** Current lien waiver report and release from vendors for all payment against contracts with value of \$10,000 or more.

TO OWNER/CLIENT:

City of Pocatello
911 N 7th Avenue
Pocatello, Idaho 83201

PROJECT:

TIF Improvements
1950 Airport Way
Pocatello, Idaho 83204

APPLICATION NO: 4

INVOICE NO: 4

PERIOD: 04/26/20 - 05/25/20

PROJECT NO: 2020-102

CONTRACT DATE:

FROM CONTRACTOR:

Frigitek Industrial Parks, Inc
6565 N MacArthur Blvd, Suite 225
Dallas, Texas 75039

VIA ARCHITECT/ENGINEER:

Jake Ferrell (ASM Engineering Consultants)
202 E. Rhonda Ave.
Andover, Kansas 67002

CONTRACT FOR: TIF Improvements Prime Contract

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract. Continuation Sheet is attached.

1. Original Contract Sum	\$4,578,117.00
2. Net change by change orders	\$0.00
3. Contract Sum to date (Line 1 ± 2)	\$4,578,117.00
4. Total completed and stored to date (Column G on detail sheet)	\$260,797.31
5. Retainage:	
a. 0.00% of completed work	\$0.00
b. 0.00% of stored material	\$0.00
Total retainage (Line 5a + 5b or total in column I of detail sheet)	\$0.00
6. Total earned less retainage (Line 4 less Line 5 Total)	\$260,797.31
7. Less previous certificates for payment (Line 6 from prior certificate)	\$183,082.51
8. Current payment due:	\$77,714.80
9. Balance to finish, including retainage (Line 3 less Line 6)	\$4,317,319.69

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner/Client:	\$0.00	\$0.00
Total approved this month:	\$0.00	\$0.00
Totals:	\$0.00	\$0.00
Net change by change orders:	\$0.00	

The undersigned certifies that to the best of the Contractor's knowledge, information and belief, the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work which previous Certificates for payment were issued and payments received from the Owner/Client, and that current payments shown herein is now due.

CONTRACTOR: Frigitek Industrial Parks, Inc

By:  Date: 6/10/20

State of:
County of:
Subscribed and sworn to before
me this _____ day of _____
Notary Public:
My commission expires: _____

ARCHITECT'S/ENGINEER'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on the on-site observations and the data comprising this application, the Architect/Engineer certifies to the Owner/Client that to the best of the Architect's/Engineer's knowledge, information and belief that Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED: **\$77,714.80**

(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to confirm the amount certified.)

ARCHITECT/ENGINEER:

By: _____ Date: _____

This certificate is not negotiable. The amount certified is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to the rights of the Owner/Client or Contractor under this Contract.

Document SUMMARY SHEET, APPLICATION AND CERTIFICATE FOR PAYMENT, containing Contractor's signed Certification is attached.
 Use Column I on Contracts where variable retainage for line items apply.

APPLICATION NUMBER: 4
 APPLICATION DATE: 5/25/2020
 PERIOD: 04/26/20 - 05/25/20

Contract Lines

A ITEM NO.	B COST CODE	C DESCRIPTION OF WORK	D SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H BALANCE TO FINISH (C - G)	I RETAINAGE
				FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		% (G / C)			
1	01-01 30 11 - Civil Engineer	Civil Engineer	\$83,150.00	\$44,282.50	\$32,714.80	\$0.00	\$76,997.30	92.60%	\$6,152.70	\$0.00
2	01-01 30 15 - Geotechnical Engineering	Geotechnical Engineering	\$3,800.00	\$3,800.00	\$0.00	\$0.00	\$3,800.00	100.00%	\$0.00	\$0.00
3	01-01 31 05 - Construction Management Over Site Delivery	Construction Management Over Site Delivery	\$90,000.00	\$66,363.64	\$23,160.34	\$0.00	\$89,523.98	99.47%	\$476.02	\$0.00
4	01-01 31 06 - Project Management	Project Management	\$80,000.00	\$31,637.32	\$8,157.10	\$0.00	\$39,794.42	49.74%	\$40,205.58	\$0.00
5	01-01 31 08 - Project Controls	Project Controls	\$50,000.00	\$15,290.03	\$9,224.34	\$0.00	\$24,514.37	49.03%	\$25,485.63	\$0.00
6	01-01 31 11 - Project Modeling	Project Modeling	\$20,000.00	\$15,541.78	\$4,458.22	\$0.00	\$20,000.00	100.00%	\$0.00	\$0.00
7	01-01 31 12 - Master Execution Plan	Master Execution Plan	\$10,000.00	\$3,369.50	\$0.00	\$0.00	\$3,369.50	33.70%	\$6,630.50	\$0.00
8	01-01 31 13 - Project Coordination	Project Coordination	\$50,000.00	\$2,797.74	\$0.00	\$0.00	\$2,797.74	5.60%	\$47,202.26	\$0.00
9	01-01 55 26 - Traffic Control	Traffic Control	\$13,800.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$13,800.00	\$0.00
10	01-01 55 29 - Staging Areas	Staging Areas	\$2,300.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$2,300.00	\$0.00
11	01-01 57 13 - Temporary Erosion and Sediment Control	Temporary Erosion and Sediment Control	\$40,250.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$40,250.00	\$0.00
12	01-01 71 13 - Mobilization	Mobilization	\$10,062.94	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$10,062.94	\$0.00
13	10-10 14 53 - Traffic Signage	Traffic Signage	\$2,875.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$2,875.00	\$0.00
14	26-26 56 13 - Lighting Poles and Standards	Lighting Poles and Standards	\$75,900.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$75,900.00	\$0.00
15	32-32 92 19 - Seeding	Seeding	\$51,923.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$51,923.00	\$0.00
16	32-32 94 19 - Landscape Surfacing	Landscape Surfacing	\$34,500.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$34,500.00	\$0.00
17	01-01 41 23 - Fees	Fees	\$50,000.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$50,000.00	\$0.00
18	01-01 71 13 - Mobilization	Mobilization	\$58,827.04	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$58,827.04	\$0.00
19	33-33 05 61 - Concrete Manholes	Concrete Manholes	\$28,750.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$28,750.00	\$0.00
20	33-33 05 71 - Cleanouts	Cleanouts	\$19,780.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$19,780.00	\$0.00
21	33-33 14 16 - Site Water Utility Distribution Piping	Site Water Utility Distribution Piping	\$299,539.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$299,539.00	\$0.00
22	33-33 14 19 - Valves and Hydrants for Water Utility Service	Valves and Hydrants for Water Utility Service	\$104,200.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$104,200.00	\$0.00

A ITEM NO.	B COST CODE	C DESCRIPTION OF WORK	D SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H % (G / C)	I BALANCE TO FINISH (C - G)	J RETAINAGE
				FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		TOTAL COMPLETED AND STORED TO DATE (D + E + F)	% (G / C)			
23	33-33 31 00 - Sanitary Sewerage Piping	Sanitary Sewerage Piping	\$45,540.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$45,540.00	\$0.00	
24	33-33 32 13 - Packaged Wastewater Pumping Stations	Packaged Wastewater Pumping Stations	\$977,500.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$977,500.00	\$0.00	
25	01-01 71 13 - Mobilization	Mobilization	\$44,153.65	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$44,153.65	\$0.00	
26	02-02 41 00 - Demolition	Demolition	\$21,131.25	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$21,131.25	\$0.00	
27	31-31 11 00 - Clearing and Grubbing	Clearing and Grubbing	\$8,050.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$8,050.00	\$0.00	
28	31-31 24 13 - Roadway Embankments	Roadway Embankments	\$31,846.95	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$31,846.95	\$0.00	
29	32-32 01 13 - Flexible Paving Surface Treatment	Flexible Paving Surface Treatment	\$305,571.75	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$305,571.75	\$0.00	
30	32-32 11 16.16 - Aggregate Subbase Courses	Aggregate Subbase Courses	\$95,565.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$95,565.00	\$0.00	
31	32-32 11 23 - Aggregate Base Courses	Aggregate Base Courses	\$305,048.25	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$305,048.25	\$0.00	
32	32-32 12 16 - Asphalt Paving	Asphalt Paving	\$75,647.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$75,647.00	\$0.00	
33	32-32 16 13 - Curbs and Gutters	Curbs and Gutters	\$82,282.50	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$82,282.50	\$0.00	
34	01-01 71 13 - Mobilization	Mobilization	\$23,374.85	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$23,374.85	\$0.00	
35	31-31 11 00 - Clearing and Grubbing	Clearing and Grubbing	\$35,333.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$35,333.00	\$0.00	
36	31-31 23 16 - Excavation	Excavation	\$40,342.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$40,342.00	\$0.00	
37	31-31 23 23 - Fill	Fill	\$141,197.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$141,197.00	\$0.00	
38	34-34 11 26 - Ballasted Track Rail	Ballasted Track Rail	\$997,746.82	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$997,746.82	\$0.00	
39	34-34 11 26.16 - Track Rail Subballast	Track Rail Subballast	\$168,130.00	\$0.00	\$0.00	\$0.00	\$0.00	0.00%	\$168,130.00	\$0.00	
TOTALS:			\$4,578,117.00	\$183,082.51	\$77,714.80	\$0.00	\$260,797.31	5.70%	\$4,317,319.69	\$0.00	

Grand Totals

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE	E WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D + E + F)		H % (G / C)	I BALANCE TO FINISH (C - G)	J RETAINAGE
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD		TOTAL COMPLETED AND STORED TO DATE (D + E + F)	% (G / C)			
GRAND TOTALS:		\$4,578,117.00	\$183,082.51	\$77,714.80	\$0.00	\$260,797.31	5.70%	\$4,317,319.69	\$0.00	

KBCm Group, LLC
 8901 Tehama Ridge Pkwy, Ste
 127140
 Ft Worth, TX 76177 US
 sblankenfeld@kbcmgroup.com
 www.kbcmgroup.com

Invoice 20001-104



BILL TO

Elden Charles
 Frigitek Industrial Parks, Inc
 6565 N MacArthur Blvd Suite 225
 Dallas, Texas 75039
 United States

DATE
04/01/2020

PLEASE PAY
\$45,000.00

DUE DATE
04/01/2020

DESCRIPTION

QTY

RATE

AMOUNT

CM:Construction Management Services
 Construction management services monthly billing 4/1/2020 - 4/30/2020

1 45,000.00

45,000.00

POCATELLO 2020-102 YOUR VISION. OUR EXPERTISE.

Pay Application: 3

SUB JOB	COST CODE	TOTAL
SITE	01 31 05	23,160.34
SITE	01 31 06	8,157.10
SITE	01 31 08	3,787.22
SITE	01 31 11	9,895.34

Skyler_KBCM 05/20/2020 7:51:16 AM

TOTAL DUE

\$45,000.00

THANK YOU.

ENTERED AS JOB COST YOUR VISION. OUR EXPERTISE.

Date: 5/20/2020 7:54:07 AM

By: Skyler_KBCM **APPROVED**

PO/SC: PO 2020-102-002 **REVISE**

Job: TIF Improvements **REJECTED**

Time Sheet/Recap

Company: KBCm Group
 Project: 2020 - 101 Pocatello Cold Storage
 Period: 4/1/2020 - 4/30/2020

Printed May 20, 2020 at 7:49 AM

Emp	Class	Name	Cost Code	Rate	Hrs	OT Rate	OT Hrs	Per Diem	Total	Discount Adjustment	Revised Total	Invoice
5042	Project Executive	1.1. Outline Owner's Expectations & Vision for the Project	01 31 05 - Construction Management Over Site Delivery	160	1				160	-	160	20001-103
		1.2. Map Elements of the Project (Site, Logistics, Process Etc.)										
5042	Project Executive	1.3. Map Resources, Constraints & Boundaries	01 31 05 - Construction Management Over Site Delivery	160	1				160	-	160	20001-103
		1.4. Map Time Constraints										
		1.5. Map Time Over Cost Graph										
5042	Project Executive	1.6. Identify Municipality Requirements	01 31 11 - Project Modeling	160	3				480	-	480	20001-103
		1.7. Identification of PFD & or P&ID Process										
		2.1. Map Land Closure, Owner Stewardship Requirements										
		2.2. Creation of Time Scaled Parameters										
5037	Project Controller	2.3. Creation of Resources & Budgetary Parameters	01 31 11 - Project Modeling	150	27				4,050	-	4,050	20001-103
		2.4. Creation of Design Parameters										
5042	Project Executive	2.5. Municipality Interface, Requirements & Milestones	01 31 05 - Construction Management Over Site Delivery	160	2				320	-	320	20001-103
		2.6. Creation of Procurement Plan (Long Leads)										
5042	Project Executive	2.7. Identification of Site Logistical Plan	01 31 11 - Project Modeling	160	4				640	-	640	20001-103
5042	Project Executive	2.7.1. Delivery Sequence & Laydown Requirements Identified	01 31 11 - Project Modeling	160	4				640	-	640	20001-103
		2.7.2. Site Security Requirements Identified										
		2.7.3. Off Site & Traffic Control Responsibilities Identified										
		2.7.4. Rail Spur & Stack Up Requirements										
		2.9.1. Testing										
		2.9.2. Certification										
		2.9.3. QA/QC Process										
5016	Project Coordinator	2.10. Safety Assessment, Observation & Reporting Plan	01 31 11 - Project Modeling	110	2				220	-	220	20001-103
		2.10.1. Safety Assessment, Agency Interaction Plan										
		3.1.1. Review & Refine Startup Check-list										
		3.1.2. Identify All Stake Holders & Team Members										
		3.1.2.1. Creation of Project Communication Plan										
5037	Project Controller	3.1.2.2. Mapping of Project Reporting Plan	01 31 11 - Project Modeling	150	16				2,400	-	2,400	20001-103
		3.1.3. Creation of Site Safety Plan										
		3.1.3.1. Aid Stations, Safety Protocols, & Emergency Action Plan										
		3.1.3.2. Site Evacuation & Marshaling Area Identified										
		3.1.3.3. Safe Area Emergency Master Plan										
5081	Senior Project Manager	3.1.3.4. Vendor Safety Plan Management	01 31 06 - Project Management	150	26				3,900	-	3,900	20001-103
5081	Senior Project Manager	3.1.4. Construction Administration	01 31 05 - Construction Management Over Site Delivery	150	18				2,700	-	2,700	20001-103
5037	Project Controller	3.1.4.1. Financial Management	01 31 08 - Project Controls	150	8				1,200	-	1,200	20001-103
		3.1.4.2. Project Payment Process										
		3.1.4.3. Change Management										
		3.1.4.4. Punch-list / Phased Turn Over Plan(s) if Applicable										
		3.2.1. Design Disciplines Outlined										
		3.2.1.1. PFD / P&IDs										
		3.2.1.2. 3D / BIM										
		3.2.1.3. Engineering										
		3.2.1.4. Utilities										
		3.2.1.5. Gas and Electrical Generation										
		3.2.1.6. Rail PFD / P&IDs Delivery Identified										
		3.2.1.8. Civil Earth and Roads										
		3.2.1.9. Structural										
		3.2.1.10. Architectural										
5042	Project Executive	3.2.2. Design Delivery Progress & Reporting	01 31 11 - Project Modeling	160	11				1,760	-	1,760	20001-103

5081	Senior Project Manager	3.2.3. Integration of Design Delivery into Master Schedule	01 31 06 - Project Management	150	4	600	-	600	20001-103
5081	Senior Project Manager	3.3.1. SOW & RFP Bid Packages	01 31 06 - Project Management	150	8	1,200	-	1,200	20001-103
5022	Procurement Manager	3.3.2. Procurement Schedule	01 31 05 - Construction Management Over Site Delivery	130	6	780	-	780	20001-103
5042	Project Executive	3.3.3. Contract Instruments	01 31 05 - Construction Management Over Site Delivery	160	2	320	-	320	20001-103
		3.3.4. Submittal Schedules							
		3.4. Construction Delivery							
5037	Project Controller	3.4.1. Project Administration	01 31 06 - Project Management	150	18	2,700	-	2,700	20001-103
5081	Senior Project Manager	3.4.1.1. Progress Meetings	01 31 05 - Construction Management Over Site Delivery	150	15	2,250	-	2,250	20001-103
5018	Project Coordinator	3.4.1.2. RFI & Issue Reporting Process	01 31 05 - Construction Management Over Site Delivery	110	31	3,410	-	3,410	20001-103
5018	Project Coordinator	3.4.1.3. Progress Reporting Sequence & Format	01 31 05 - Construction Management Over Site Delivery	110	12	1,320	-	1,320	20001-103
		3.4.1.5. Mapping, Photo & Drone Reporting							
5081	Senior Project Manager	3.4.2. Contract Administration	01 31 08 - Project Controls	150	1	150	-	150	20001-103
5081	Senior Project Manager	3.4.2.1. Developing Specific SOW Packages	01 31 05 - Construction Management Over Site Delivery	150	37	5,550	-	5,550	20001-103
		3.4.2.2. Creation of Safety & Municipal Requirements Packages							
		3.4.2.3. Creation of Insurance Minimum Standards Packages							
5018	Project Coordinator	3.4.2.4. Communication Plan Requirements for each Trade/SOW	01 31 13 - Project Coordination	110		-	-	-	20001-103
5081	Senior Project Manager	3.4.3. Scheduling	01 31 08 - Project Controls	150	6	900	-	900	20001-103
		3.4.3.1. Creation of Driving Master Schedule							
		3.4.3.4. Creation of SIS / Reporting Sequence & Content							
5037	Project Controller	3.4.4. Financial Documentation	01 31 08 - Project Controls	150	5	750	-	750	20001-103
5037	Project Controller	3.4.4.1. Application for Payment Sequence, Format & Submission.	01 31 08 - Project Controls	150	6	900	-	900	20001-103
		3.4.4.2. Creation Payment Requirements & Sequence							
		3.4.4.3. Creation of Financial Reporting Sequence & Content							
		3.4.5. Site Management							
5042	Project Executive	3.4.5.1. Creation of QAQC Plan	01 31 05 - Construction Management Over Site Delivery	160		-	-	-	20001-103
5018	Project Coordinator	3.4.5.2. Creation of Housekeeping Plan	01 31 13 - Project Coordination	110		-	-	-	20001-103
		3.4.5.3. Temporary Utilities & Site Access Plan							
5018	Project Coordinator	3.4.5.4. Site Security Plan	01 31 13 - Project Coordination	110		-	-	-	20001-103
5042	Project Executive	3.4.5.5. Vendor Management	01 31 05 - Construction Management Over Site Delivery	160	43	6,880	-	6,880	20001-103
		3.4.5.7.1. SWPP							
		3.4.5.7.2. Permitting and Inspections							
		3.4.5.8.1. Equipment & Light Traffic Interface Protocol's							
		3.4.5.9. Cranes							
		3.4.5.9.1. Location & Lifting Plans							
		3.4.5.9.2. Laydown & Offload Plan							
		3.4.6. Off Site Management							
		3.4.6.2. Site Access Plan							
		3.4.6.3. Water & Utility Implementation Plan							
		4.1. Define Punch List Format							
		4.2. Create Operational Integration, Startup & Turnover Plan							
		4.2.1. Create Operations Training & Instructions Format & Criteria							
		4.2.2. Create Operations Turn-over Plan *(to Name Plate)							
		4.3. Create Demobilization Plan							
		4.3.1. Demobilization Schedule							
		4.3.2. Identify Material Overages & Surplus Dispersal Plan							
		4.4. Create Documents Close-out Management Plan							
		4.4.1. Outline Warranties, OEM Data Sheets & BOM Criteria							
		4.4.3. Create "As Built" Document(s) Criteria							
0001	Adjustment	Rate Adjustment for Billing Agreement \$45,000 per period						(1,340)	(1,340) 20001-104
Total				317		-	-	46,340	(1,340) 45,000



ENTERED AS JOB COST **KBCmGroup**
 Date: 5/13/2020 10:30:38 AM
 By: Skyler_KBCM APPROVED
 PO/SC: PO 2020-101-001 REVISE
 Job: POCATELLO REJECTED
 Commitment Change Order 002

POCATELLO 2020-102		
Pay Application: 4		
SUB JOB	COST CODE	TOTAL
SITE	01 30 11	32,714.80
Skyler_KBCM 05/19/2020 4:13:49 PM		

Date 04/15/2020
 Project Pocatello Cold Storage Streets & Utilities (2322 R-2)

Frigitek Industrial Parks
 6565 N MacArthur Blvd.
 Suite 225
 Dallas, TX 75039
 Skyler Blankenfeld

CCO #002 PO 2020-101-001
 CCO #002 PO 2020-101-001

INVOICE -Hourly Not To Exceed

Description	Contract Amount	Prior Billed	Total Billed	Current Billed
SITE VISITS	2,650.00	0.00	0.00	0.00
STREET DESIGN SURVEY	8,000.00	0.00	8,236.80	8,236.80
INDUSTRIAL PARK TRUCK ROUTE STREET DESIGN	18,200.00	0.00	8,025.00	8,025.00
RAILROAD CONSTRUCTION DESIGN	13,200.00	0.00	4,539.00	4,539.00
FIRE & DOMESTIC WATER SERVICE DESIGN	9,100.00	0.00	7,768.00	7,768.00
SEWER LINE DESIGN	4,900.00	0.00	2,298.00	2,298.00
STORMWATER PERMITTING	2,200.00	0.00	1,848.00	1,848.00
Total	58,250.00	0.00	32,714.80	32,714.80

PROFESSIONAL FEES

	Hours	Billed Amount
Principal Engineer	2.00	340.00
Project Engineer	109.50	16,644.00
Project Designer	17.00	2,244.00
Designer	50.00	5,250.00
Professional Fees subtotal	178.50	24,478.00

CONSULTANT

	Billed Amount
Survey Consultant	8,236.80
Consultant subtotal	8,236.80

Invoice total **32,714.80**

Thank you for your business

Committed Costs

Printed June 9, 2020 at 11:12 AM
 Frigitek Industrial Parks
 Pocatello, ID
 United States

Export Date 6/9/2020

Project	Number	Title	Vendor	Status	Executed	Sum of Total With Approved Change Orders	Sum of Invoices	Sum of Pending Change Orders	Sum of Total Payments	Sum of Total Remaining
2020-102 TIF Improvements	PO-2020-102-001	Site Civil Engineering TIF	ASM Engineering Consultants	Approved	Yes	76,997.30	76,997.30	-	-	76,997.30
	PO-2020-102-002	Construction Management Delivery and Over Site	KBCm Group - Construction Management	Approved	Yes	180,000.00	180,000.00	-	-	180,000.00
	PO-2020-102-003	Geotechnical Engineering	Xcell Engineering	Approved	Yes	3,800.00	3,800.00	-	-	3,800.00

Cost Report

2020-102 TIF Improvements
K3Cm Group Cost Report

Printed June 9, 2020 at 11:12 AM
Frigitek Industrial Parks
Pocatello, ID
United States

Export Date: 6/9/2020

Sub Job	Cost Code	Sum of Original Budget Amount	Sum of Approved COs	Sum of Revised Budget	Sum of Committed Costs	Sum of Direct Costs	Sum of Job to Date Costs	Sum of Forecast To Complete	Sum of Projected over Under
1. STREETS									
	01-01 71 13 - Mobilization	44,153.65	-	44,153.65	-	-	-	44,153.65	-
	02-02 41 00 - Demolition	21,131.25	-	21,131.25	-	-	-	21,131.25	-
	31-31 11 00 - Clearing and Grubbing	8,050.00	-	8,050.00	-	-	-	8,050.00	-
	31-31 24 13 - Roadway Embankments	31,846.95	-	31,846.95	-	-	-	31,846.95	-
	32-32 01 13 - Flexible Paving Surface Treatment	305,571.75	-	305,571.75	-	-	-	305,571.75	-
	32-32 11 16.16 - Aggregate Subbase Courses	95,565.00	-	95,565.00	-	-	-	95,565.00	-
	32-32 11 23 - Aggregate Base Courses	305,048.25	-	305,048.25	-	-	-	305,048.25	-
	32-32 12 16 - Asphalt Paving	75,647.00	-	75,647.00	-	-	-	75,647.00	-
	32-32 16 13 - Curbs and Gutters	82,282.50	-	82,282.50	-	-	-	82,282.50	-
1. STREETS Total		969,296.35	-	969,296.35	-	-	-	969,296.35	-
2. UTILITIES									
	01-01 41 23 - Fees	50,000.00	-	50,000.00	-	-	-	50,000.00	-
	01-01 71 13 - Mobilization	58,827.04	-	58,827.04	-	-	-	58,827.04	-
	33-33 05 61 - Concrete Manholes	28,750.00	-	28,750.00	-	-	-	28,750.00	-
	33-33 05 71 - Cleanouts	19,780.00	-	19,780.00	-	-	-	19,780.00	-
	33-33 14 16 - Site Water Utility Distribution Piping	299,539.00	-	299,539.00	-	-	-	299,539.00	-
	33-33 14 19 - Valves and Hydrants for Water Utility Service	104,200.00	-	104,200.00	-	-	-	104,200.00	-
	33-33 31 00 - Sanitary Sewerage Piping	45,540.00	-	45,540.00	-	-	-	45,540.00	-
	33-33 32 13 - Packaged Wastewater Pumping Stations	977,500.00	-	977,500.00	-	-	-	977,500.00	-
2. UTILITIES Total		1,584,196.04	-	1,584,196.04	-	-	-	1,584,196.04	-
ROAD									
	01-01 71 13 - Mobilization	23,374.85	-	23,374.85	-	-	-	23,374.85	-
	31-31 11 00 - Clearing and Grubbing	35,333.00	-	35,333.00	-	-	-	35,333.00	-
	31-31 23 16 - Excavation	40,342.00	-	40,342.00	-	-	-	40,342.00	-
	31-31 23 23 - Fill	141,197.00	-	141,197.00	-	-	-	141,197.00	-
	34-34 11 26 - Ballasted Track Rail	997,746.82	-	997,746.82	-	-	-	997,746.82	-
	34-34 11 26.16 - Track Rail Subballast	168,130.00	-	168,130.00	-	-	-	168,130.00	-
3. RAILROAD Total		1,406,123.67	-	1,406,123.67	-	-	-	1,406,123.67	-
4. SITE GENERAL									
	01-01 30 11 - Civil Engineer	83,150.00	-	83,150.00	76,997.30	-	76,997.30	6,152.70	-
	01-01 30 15 - Geotechnical Engineering	3,800.00	-	3,800.00	3,800.00	-	3,800.00	-	-
	01-01 31 05 - Construction Management Over Site Delivery	90,000.00	-	90,000.00	89,523.98	-	89,523.98	476.02	-
	01-01 31 06 - Project Management	80,000.00	-	80,000.00	39,794.42	-	39,794.42	40,205.58	-
	01-01 31 08 - Project Controls	50,000.00	-	50,000.00	19,077.26	-	19,077.26	30,922.74	-
	01-01 31 11 - Project Modeling	20,000.00	-	20,000.00	19,836.46	-	19,836.46	163.54	-
	01-01 31 12 - Master Execution Plan	10,000.00	-	10,000.00	3,369.50	-	3,369.50	6,630.50	-
	01-01 31 13 - Project Coordination	50,000.00	-	50,000.00	8,398.38	-	8,398.38	41,601.62	-
	01-01 55 26 - Traffic Control	13,800.00	-	13,800.00	-	-	-	13,800.00	-
	01-01 55 29 - Staging Areas	2,300.00	-	2,300.00	-	-	-	2,300.00	-
	01-01 57 13 - Temporary Erosion and Sediment Control	40,250.00	-	40,250.00	-	-	-	40,250.00	-
	01-01 71 13 - Mobilization	10,062.94	-	10,062.94	-	-	-	10,062.94	-
	10-10 14 53 - Traffic Signage	2,875.00	-	2,875.00	-	-	-	2,875.00	-
	26-26 56 13 - Lighting Poles and Standards	75,900.00	-	75,900.00	-	-	-	75,900.00	-
	32-32 92 19 - Seeding	51,923.00	-	51,923.00	-	-	-	51,923.00	-
	32-32 94 19 - Landscape Surfacing	34,500.00	-	34,500.00	-	-	-	34,500.00	-
4. SITE GENERAL Total		618,560.94	-	618,560.94	260,797.30	-	260,797.30	357,763.64	-
Grand Total		4,578,117.00	-	4,578,117.00	260,797.30	-	260,797.30	4,317,319.70	-

Billing List



Project: Cold Storage Facility
 Frigitek Industrial Parks
 Pay Application # 3
 Period: 12/26/2019 - 01/25/2020

Invoices

Invoice #	Vendor	Scope Billed	Amount Billed	Amount Approved	Variance	Check #	Total	Remit Name	Address
ASM 16-2641	ASM Engineers	Civil Engineering	32,714.80	32,714.80	-		32,714.80	ASM Engineering Consultants	PO Box 452, Andover, KS 67002
KBCm 20001-104	KBCm Group	Construction Management	45,000.00	45,000.00	-		45,000.00	KBCm Group, LLC	8901 Tehama Ridge Pkwy, Ft. Worth, TX 76177
					-		-		
Total			77,714.80	77,714.80	-		77,714.80		

AGENDA ITEM

NO. 7c



Three Galleria Tower
13155 Noel Road, Suite 100
Dallas, TX 75240

Main 972.934.0022
Fax 972.960.0613

www.ryan.com

May 19, 2020

Elden Charles
Executive Vice President
Frigitek Industrial Parks, Inc.
6565 N. MacArthur Boulevard
Suite 225
Irving, TX 75035

Invoice No. 380568

Payment Terms: Net 30

Engagement No. 462475200.001

Federal ID No. 75-2411641

For Services Rendered:

Progress billing for professional services of infrastructure design and project management rendered between August 7, 2019 and May 15, 2020, in connection with the Pocatello, Idaho Tax Increment Financing Business Incentives Consulting of Frigitek Industrial Parks, Inc. as per letter agreement dated June 12, 2019.

Fixed Fee:	\$	35,000.00
Total Invoice Due (see attached):	\$	<u>35,000.00</u>

Ryan's preferred method of payment is EFT.
Please remit payment to: Bank of America
Account: 488038499373 ACH Routing:
111000025
Wire Routing: 0260-0959-3 SWIFT:
BOFAUS3N Remittance Advices:
remit@ryan.com
If paying by check, please remit to:
Ryan, LLC, P.O. Box 848351, Dallas, TX 75284-8351

Late fees applied on past due balances

Share your experience with us at
<http://ryanlistens.com/>

Frigitek Industrial Parks, Inc.
Pocatello, Idaho
Project Management
Tax Increment Financing Agreement

Work performed for Pocatello, Idaho Tax Increment Financing Project for Project Management included:

- Preparation of application documentation;
- Calls with Pocatello Development Agency to discuss/review application;
- Travel to and participation in meeting with Pocatello Development Agency;
- Review and comment of Pocatello Development Agency agreement;
- Discussions/introductions with private placement financiers;
- Participation in virtual Pocatello Development Agency meeting to amend agreement

Josh Jenks, Consultant:	Hours: 20.00
Matt Lowell, Director:	Hours: 66.50
Allea Newbold, Principal:	Hours: 44.00
Conner Ruyak, Senior Associate Consultant:	Hours: 20.50

Total Fixed Fee Invoice:	\$75,000.00
Current Progress Invoice:	<u>(\$35,000.00)</u>
Total Remaining to be Invoiced:	\$40,000.00

Total Current Amount Due:	\$35,000.00
----------------------------------	--------------------

AGENDA ITEM

NO. 8

Anderson, Carl

From: Tanner Hernandez <sold@primetimeauctions.com>
Sent: Monday, June 8, 2020 8:02 AM
To: Anderson, Carl
Subject: June PDA Meeting Agenda - S 5th S Pocatello
Attachments: 05-20-84 Maverik 5th Ave Letter.pdf; KMST LLC v County of Ada.pdf; Lochsa Falls LLC v State.pdf; Maverik Site-0199_Various Turning Movement Exhibits_050720(1).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

PDA / Carl Anderson please add this to the upcoming PDA Meeting.

Maverik and Prime Time Auctions are requesting the following:

For the PDA to fund as much as it can of the Stop Light at Exit 67 as it can from funds it currently has for community improvement.

Prime Time / Mavrik will get a loan to fund much of the other improvements down S 5th up to \$200,000, then being reimbursed by the new tif district.

See attached supporting documents:

TIF proposal infrastructure improvements:

- 1 Telephone Poles Removed along S 5th underground 4 in front of 3380 - 3200 S 5th Centurylink: \$24,287. Sparklight / Cableone: \$2,153.
 - 2 Sidewalk from 3400 - 3200 S 5th - 750 ft \$6,000
 - 3 Sidewalk around Velton Culdesac - 300 ft \$2,500
 - 4 Telephone Poles Removed go Underground
3150 - 3020 S 5th 820 ft \$40,000 - \$100,000 waiting on details from centurylink
 - 5 Sidewalk 3150 - 3020 S 5th 820 ft \$6,600
 - 6 Other potential Sidewalks on Swisher St, Utility Improvements \$10,000
- Subtotal - \$91,545 - \$151,545

By estimates provided by City Staff - additional TIF funds could generate anywhere from \$293,000 - \$570,520 over a 20 year term or \$14,662 - \$28,526 per year. This situation fits the criteria for the TIF and is sure to be successful in rejuvenating the area.

----- Forwarded message -----

From: Corey Krantz <Corey.Krantz@itd.idaho.gov>
Date: Tue, May 19, 2020 at 2:53 PM
Subject: RE: [EXTERNAL] Update and Timing S 5th Pocatello
To: Doug Meldrum <Doug.Meldrum@maverik.com>, Todd Hubbard <Todd.Hubbard@itd.idaho.gov>
Cc: Tanner Hernandez <sold@primetimeauctions.com>, Joe Tonumaipca <Joe.Tonumaipca@maverik.com>

Mr. Meldrum,

Here is the ITD reply for your permit.

Corey A. Krantz, P.E.

Idaho Transportation Department

District 5 Traffic & Materials Engineering Mgr

208-239-3372 (office) 208-201-3372 (Cell)

----- Forwarded message -----

From: **TJ Budge** <tj@racineolson.com>

Date: Wed, Feb 26, 2020 at 10:11 AM

Subject: RE: Pocatello Maverik TIS Update

To: Tanner Hernandez <sold@primetimeauctions.com>

(Hi Tanner – As we discussed by phone today, ITD does have authority under Idaho law to require Maverik to mPreview attachment *KMST LLC v County of Ada.pdf* ake improvements, including the installation of traffic signals, as a condition of developing the property.)

IDAPA 39.03.42.700.03. However, the Idaho Supreme Court has ruled that demands by ITD “must meet a test of reasonableness and be rationally related to the cost of enforcing the regulations at hand.” *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 241 (2009). In other words, “there must be a rough proportionality between the condition imposed and the projected impact of the proposed development.” *KMST, LLC v. County of Ada*, 138 Idaho 577, 581 (2003) (citing *Dolan v. City of Tigard*, 513 U.S. 374 (1994)).

The traffic study states that a signal is warranted at the intersection of the southbound I-15 ramp and South 5th Avenue based on current peak hour traffic volumes, irrespective of whether Maverik constructs a gas station. As such, in my opinion it is not reasonable for ITD to require Maverik to pay the full cost of installing a traffic signal. It would be bad policy indeed to encourage government entities responsible for traffic safety to delay needed traffic controls out of hope that the cost may be passed off to some future developer. Because a traffic signal is currently warranted, ITD should be responsible to pay all or at least a significant portion of the cost. If Maverik is to pay any part of the cost, I would argue that it should be no greater than the proportionate increase in traffic that will result from development of the gas station. For example, if the gas station will increase traffic by 10% then Maverik should bear no more than 10% of the cost of the traffic signal.

Let me know if you have any further questions.

Best,

T.J. Budge

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | www.racineolson.com

The amount of taxable development proposed in the defined area;

\$4 to \$9 Million depending on area included and if infrastructure is provided for growth

The timing of the proposed taxable development;
2020 - 21

The kind of development
Infrastructure, Traffic, Pedestrian Improvements, Beautification

The estimated amount of tax revenue to be generated
\$300,000 - \$900,000 in 10 to 20 years, \$20,000 - \$35,000 per year.

The projects proposed, including location and estimated cost
Preliminary Maps and Estimates provided.

This area fits the requirements for this type of assistance.

Serves all the citizens of our community

Blighted area and in need of the improvements for Safety, Functionality and Beautification

Combination of Bonded, Unbonded and Grants.



**Your Safety • Your Mobility
Your Economic Opportunity**

IDAHO TRANSPORTATION DEPARTMENT
5151 South 5th Ave. • Pocatello, ID 83204-2202
(208) 239-3300 • itd.idaho.gov

May 19, 2020

Doug Meldrum
Maverik
185 South State Street
Salt Lake City, UT
84111

Mr. Meldrum,

The Idaho Transportation Department (ITD) has reviewed the Access Encroachment Permit and the accompanying Traffic Impact Study (TIS) for the Maverik fuel station planned at South 5th Avenue, Pocatello, Idaho near the Interstate 15 (I-15), Interchange 67 southbound (SB) off ramp. The development is planned to have a gas station with a convenience store, 27 fueling stations, of which, 7 are high speed commercial truck fueling stations, and a commercial vehicle scale.

The TIS recommended 2 mitigation items: A traffic signal and a right turn deceleration lane for Accesses 1 and 2. The TIS based all the traffic impacts upon the premise that a signal is installed at the South 5th Avenue/I-15 SB off ramp.

ITD is willing to permit the below noted accesses if Maverik installs all the items recommended in the Traffic Impact Study section titled SUMMARY OF KEY FINDINGS/RECOMMENDATIONS:

1. Access 1 is approximately 185 feet from the SB Off ramp. It is limited to Right-In, Right-Out due to ITD full access control along centerline of South 5th Avenue.
2. Access 2 is approximately 400 feet from the SB Off ramp. It is limited to Right-In, Right-Out, Left-In (¾ Approach) due to ITD full access control along centerline of South 5th Avenue.
3. Access 3 is approximately 900 feet from the SB Off ramp. It is a full-movement access. Accessed via an easement across other property.

The permit will require Maverik to install the below recommended items noted in the Traffic Impact Study, including but not limited to:

1. Install Signal.
 - a. Intersection is almost at Signal Warrant 2, Four-Hour Vehicular Volume. (Warrant 3, Peak Hour is wrong warrant to use.) These are warranted per the TIS for the new facility.
 - b. Design and Install Signal to ITD standards. TIS based Level of Service on Signal installation.
 - c. Signal Poles and signal head, foundations, conduits and wiring, signal cabinet with battery backup and controller, vehicle detection system, emergency pre-emption system, CCTV, junction boxes, signs, power service meter, etc.
-



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5151 South 5th Ave. • Pocatello, ID 83204-2202
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- d. Remove conflicting signage.
- e. Install all necessary pavement markings.
- f. Connect signal to ITD Fiber optic system, need 300 feet of conduit, 2000 feet of fiber, junction boxes, splice box, and splices. Utilize 1400 feet of existing fiber conduit.
- g. All installed Materials shall comply ITD construction standards.
- h. Produce an Interchange Modification Report for FHWA approval.
- i. Assess impacts of Access 3 to the Southbound On Ramp.

2. Acceleration/Deceleration Lane along 5th Avenue.

- a. These are warranted based on Right-Turn Lane Warrant in the ITD Traffic Manual as per the TIS.
 - b. Install right-turn deceleration lanes at Access 1 and Access 2 as a continuous auxiliary lane from the Southbound I-15 Off Ramp, with a radius that accommodates trucks maneuvering from the I-15 southbound off ramp into a newly built acceleration/deceleration lane without encroaching into any other lanes. The lane will extend past the Access 2 furthest west and have a tapered transition back to two lanes, or as approved by ITD.
 - c. ITD does not believe that adding on lane on 5th Avenue will require an Interchange Modification Report even as we are tying into the interchange ramp with the new radius and asphalt.
 - d. Perform an ITD Materials Phase III/V pavement investigation for the addition of the acceleration/deceleration lane.
 - e. Install new curb, gutter, sidewalk affiliated along the Maverik Property as will be required by the City of Pocatello to the ITD Standards.
 - f. Require an engineering study and review of the stop bar/crosswalk placement, which includes evaluation of a pedestrian refuge island between the right and through/left lanes of the I-15 southbound off ramp and pedestrian crossing warning system such as a remotely activated Rectangular Rapid Flashing Beacon.
 - g. Adjust the storm water pipes, inlets, drains that will be affected by any and all roadway modifications.
 - h. Relocate any and all roadway illumination affected by any and all roadway modifications. Install new conduits, wiring, foundations, and relocate existing luminaires to new foundations. Remove existing foundations.
 - i. Remove and relocate any conflicting signage to ITD current signing and sign installation standards. Reuse existing signs.
 - j. Install Right Turn Arrows and Right Lane Must Turn Right signs.
 - k. Long Line Pavement Markings could be done by ITD.
 - l. All installed Materials shall comply ITD construction standards.
 - m. Use the truck turning template radii that allow truck movements into Maverik approaches without encroaching into any other lane than the one they are in.
 - n. Dedicate the new acceleration/deceleration lane, curb, gutter, sidewalk as public right of way. This would then be maintained in accordance with the State/Local Agreement with City of Pocatello.
-



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Your Economic Opportunity**

IDAHO TRANSPORTATION DEPARTMENT
5151 South 5th Ave. • Pocatello, ID 83204-2202
(208) 239-3300 • itd.idaho.gov

ITD looks forward to continuing to work through this with you,

Sincerely,

Corey A. Krantz Digitally signed by Corey A. Krantz
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Corey A. Krantz, P.E.
District 5 Traffic & Materials Engineering Mgr

KeyCite Yellow Flag - Negative Treatment
Distinguished by State ex rel. Winder v. Canyon Vista Family Ltd.
Partnership, Idaho, March 17, 2010

138 Idaho 577
Supreme Court of Idaho,
Boise, February 2003 Term.

KMST, LLC., an Idaho limited liability
company, Plaintiff–Appellant,
v.
COUNTY OF ADA, a political subdivision
of the State of Idaho, Defendant,
and
Ada County Highway District, a
body politic corporate of the State
of Idaho, Defendant–Respondent.

No. 28055.

|
April 2, 2003.

Synopsis

Developer brought action against county and highway district to protest requirement that it construct a public street and pay impact fees, alleging that the requirement was an unconstitutional taking. The District Court, Fourth Judicial District, Ada County, Michael R. McLaughlin, J., granted county's motion for summary judgment and following trial entered judgment for district. Developer appealed judgment for district. The Supreme Court, Eismann, J., held that: (1) district did not have final authority to impose requirement that developer dedicate street, and thus requirement did not constitute taking by district; (2) developer voluntarily decided to dedicate road; and (3) developer waived issue of whether impact fee assessment was a taking by failing to exhaust administrative remedies.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (12)

[1] Eminent Domain

☞ Nature and grounds in general

A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of just compensation, may bring an action for inverse condemnation. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

2 Cases that cite this headnote

[2] Eminent Domain

☞ Nature and grounds in general

A property owner cannot maintain an inverse condemnation action unless there has actually been a taking of his or her property. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

1 Cases that cite this headnote

[3] Eminent Domain

☞ Questions for jury

The determination of whether or not there has been a taking is a matter of law to be resolved by the trial court. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

[4] Eminent Domain

☞ Appeal and error

Because the determination of whether or not there has been a taking is a question of law, the Supreme Court exercises free review over the trial court's decision on that issue. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

[5] Eminent Domain

☞ Appeal and error

Although the Supreme Court is free to draw its own conclusions from the facts when reviewing an inverse condemnation decision, it will not disturb the trial court's findings of fact that are supported by substantial and competent evidence. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

3 Cases that cite this headnote

[6] **Appeal and Error**

⊖ Credibility and Number of Witnesses

Appeal and Error

⊖ Inferences and Conclusions Drawn from Evidence

Appeal and Error

⊖ Manifest weight; manifestly contrary

It is the province of the trial court to determine the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence.

12 Cases that cite this headnote

[7] **Eminent Domain**

⊖ Exactions and conditions

Highway district did not have final authority to impose requirement that developer construct and dedicate street and thus requirement did not constitute a taking of developer's property; county commissioners had final authority to approve or reject proposed development, and district did not obtain jurisdiction over street until developer deeded street to district. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14; I.C. §§ 40-1310, 40-1406, 67-6501 et seq.

3 Cases that cite this headnote

[8] **Eminent Domain**

⊖ Exactions and conditions

Requirement that developer construct and dedicate street did not constitute a taking of developer's property, as developer voluntarily decided to dedicate road in order to speed approval of development; developer stated in application that it would build public road and stated that new road would provide for better traffic circulation. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14.

5 Cases that cite this headnote

[9] **Eminent Domain**

⊖ Conditions precedent to action; ripeness

Developer failed to exhaust administrative remedies and therefore waived issue of whether

highway district's impact fee assessment of \$99,127, which was calculated based on fee schedules in ordinance, was a taking of developer's property; developer did not request an individual assessment of the amount of its impact fees, did not appeal the calculation of the fees, and it did not pay the fees assessed under protest, but rather simply paid the impact fees in the amount initially calculated. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 14; I.C. § 67-8212(1).

4 Cases that cite this headnote

[10] **Administrative Law and Procedure**

⊖ Exhaustion of Administrative Remedies

As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts.

4 Cases that cite this headnote

[11] **Eminent Domain**

⊖ Appeal and error

Developer failed to specify in opening brief as to how highway district failed to comply with rule for awarding costs and thus waived issue on appeal. Rules Civ.Proc., Rule 54(d)(5).

[12] **Costs**

⊖ Nature and form of judgment, action, or proceedings for review

Developer's appeal in inverse condemnation action against highway district involved legal issues which were matters of first impression in state and thus appeal was not brought or pursued frivolously, unreasonably, or without foundation so as to entitle highway district to award of attorney fees. I.C. § 12-121.

2 Cases that cite this headnote

Attorneys and Law Firms

**57 *578 Davison, Cople, Cople & Cople, Boise, for appellant. Heather A. Cunningham argued.

Holland & Hart, Boise, for respondent. Steven C. Bowman argued.

Opinion

EISMANN, Justice.

This is an appeal alleging that the requirements that a developer construct a public street and pay impact fees constituted an unconstitutional taking of the developer's property. The district court entered judgment for the respondent, holding that the requirement to construct a street was not an unconstitutional taking and that the impact fees were properly calculated. We affirm the judgment of the district court on different grounds, holding that there was no taking with regard to the dedication of the street and that the appellant failed to exhaust administrative remedies with respect to its challenge to the amount of the impact fees.

I. FACTS AND PROCEDURAL HISTORY

The plaintiff-appellant KMST, LLC, is a partnership comprised of Doug Kowallis, John Mackey, Scott Stewart, and Tom Trent. In December 1996, KMST became interested in purchasing a five-acre parcel of real property located on the north side of Overland Road approximately one-fourth mile east of Maple Grove Road. KMST desired to develop the property into a commercial retail center, which would require a zoning change from rural transitional to high-density commercial. In January 1997, KMST met with Ada County officials to discuss its desire to rezone the property and to inquire into the requirements of the county comprehensive plan. On January 30, 1997, KMST entered into an option to purchase the property.

KMST desired to construct a 45,180-square-foot retail shopping center on the property. On May 19, 1997, KMST commenced the process to have the property rezoned and its proposed development approved. It submitted an application to the Ada County Planning and Zoning Commission to begin the process for obtaining a zoning change and county approval of the proposed development. It also submitted a land use application to the Ada County Highway District (ACHD). The ACHD is responsible for all streets and

roadways within the county highway system, which includes city **58 *579 streets within the county. IDAHO CODE § 40-1406 (2002).

Before submitting its land use application to the ACHD, some of the KMST partners met twice with Larry Sale, the supervisor of the ACHD's Development Services Division, in order to determine what would be the ACHD staff recommendations regarding the proposed development. The Development Services Division functions similarly to a city planning and zoning department. It reviews applications for land development that are submitted to it by one of the six cities within Ada County and makes recommendations regarding those applications to the Ada County Board of Commissioners or the ACHD Board of Commissioners. The staff of the Development Services Division is also available to meet with developers before they submit their applications in order to answer questions and inform them of what the staff recommendations will likely be regarding the various aspects of the proposed developments. If a developer disagrees with a staff recommendation, the developer can appeal that recommendation to the ACHD Commissioners.

When the KMST partners met with Mr. Sale, he informed them that he would recommend that KMST be required to construct a street along the east side of its property and dedicate that street to the public. In its application submitted to the ACHD on May 19, 1997, KMST stated that it would construct a public street along the east side of the property and that such street would be the primary access to the property.

On June 18, 1997, the ACHD Commissioners met to consider the KMST application. Prior to that meeting, the ACHD staff had submitted written recommendations that included site-specific requirements regarding the proposed new street and adjoining sidewalk. Chris Korte, who had significant experience in processing development applications and obtaining approvals from government agencies, represented KMST at the hearing. Mr. Korte requested two amendments to the staff recommendations: one to the width of the street KMST would construct and one to the location of the sidewalk to be constructed along that street. The ACHD Commissioners approved KMST's application with both of those requested amendments. During his presentation, Mr. Korte also stated that KMST could develop the project without building the street, but he did not request that the site-specific requirement regarding the street be deleted.

After public hearings before the Ada County Planning and Zoning Commission and the Ada County Board of Commissioners, the County Commissioners approved KMST's proposed development and requested zoning change on August 13, 1997. The minutes of the public hearing before the County Commissioners reflect that Mr. Korte asked that KMST not be required to construct the street. The minutes state:

C. Korte further stated the Ada County Highway District had decided to extend a street to Overland Road that is not needed for this development. Until the conditions of approval are established, the applicant must receive approval from the Ada County Highway District as a condition of filing the final development plan and obtaining the rezone. The Highway District established as a condition, that the applicant pay to put that road through. C. Korte requested the Board make a condition of approval that the applicant not be required to extend the road, as it is not needed for their development.

The record does not reflect that the County Commissioners responded to that request, but they approved the proposed development without deleting the requirement that KMST construct the public street. The county's approval included, as standard conditions, that prior to the approval of the final development plan, KMST must submit written approval from various agencies including the ACHD.

On August 29, 1997, KMST purchased the real property. Almost one year later on August 28, 1998, the County Commissioners approved the final development plan. On September 29, 1998, KMST conveyed the street to ACHD by warranty deed. It also paid impact fees to ACHD in the sum of \$99,127.

****59 *580** On August 12, 1999, after it had completed construction of its shopping center and the public street, KMST filed this action against Ada County and the ACHD alleging five causes of action: (1) a claim under 42 U.S.C.

§ 1983 for depriving KMST of property and property rights without just compensation while acting under color of state law; (2) a claim that the conditions and exactions imposed by Ada County and the ACHD were arbitrary, capricious and unreasonable and an abuse of governmental power; (3) a claim that Ada County and the ACHD violated KMST's right to procedural due process; (4) a claim that Ada County and the ACHD denied KMST the equal protection of the law; and (5) a claim for inverse condemnation alleging that by requiring construction of the public street and imposing excessive impact fees Ada County and the ACHD took KMST's property without due process of law in violation of the federal and state constitutions. Both defendants filed answers denying the material allegations in the complaint.

On August 11, 2000, KMST moved for partial summary judgment seeking a ruling that pursuant to Idaho Code § 67-6521(2)(b) it was not required to exhaust its administrative remedies before bringing this action. On August 28, 2000, Ada County and the ACHD filed motions for partial summary judgment seeking the dismissal of all of KMST's claims, except the inverse condemnation claim, on the grounds that KMST had failed to exhaust its administrative remedies and that the federal claims were not ripe for review. The motions were argued to the district court, and on October 24, 2000, it issued a memorandum decision and order dismissing all of KMST's claims except its claim for inverse condemnation.

On August 31, 2000, KMST again moved for partial summary judgment seeking a ruling that Ada County and the ACHD had taken its property by requiring that it construct the public street and by requiring it to pay unreasonable and excessive impact fees. Ada County and the ACHD both moved for summary judgment seeking a dismissal of KMST's remaining claim. The motions were argued to the district court, and on December 1, 2000, it issued its memorandum decision and order. It dismissed the claim against Ada County regarding the construction of the public street on the ground that the ACHD had complete jurisdiction over the public streets and public rights-of-way throughout Ada County and therefore the Ada County Commissioners lacked the authority to alter or amend conditions placed upon developers by the ACHD. The court reasoned that the County Commissioners did nothing more than require that KMST obtain the approval of the ACHD. The district court dismissed the claim against Ada County regarding the impact fees on the ground that Ada County had no role in calculating the fees or in requiring that they be paid.

With respect to the claim against the ACHD that the construction and dedication of the street and the impact fees constituted a taking of property without just compensation, the district court held that there were factual issues that must be resolved at trial. That claim was later tried to the district court. On November 2001, the district court issued its findings of fact, conclusions of law, and judgment in favor of the ACHD. KMST then filed this appeal.

II. ISSUES ON APPEAL

- A. Did the district court err in finding that there had been no unconstitutional taking of KMST's property by the ACHD?
- B. Did the district court err in awarding costs to the ACHD?
- C. Is either party entitled to an award of attorney fees on appeal?

III. ANALYSIS

A. Did the District Court Err in Finding that There Had Been No Unconstitutional Taking of KMST's Property by the ACHD?

The Takings Clause of the Fifth Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), provides: "[N]or shall private property be taken for public use, without just compensation." **60 *581 Article 1, § 14, of the Constitution of the State of Idaho provides: "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

[1] [2] [3] [4] [5] [6] A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of just compensation, may bring an action for inverse condemnation. *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987). The property owner cannot maintain an inverse condemnation action unless there has actually been a taking of his or her property. *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002). The determination of whether or not there has been a taking is a matter of law to be resolved by the

trial court. *Id.* Because that determination is a question of law, this Court exercises free review over the trial court's decision on that issue. *Id.* Although we are free to draw our own conclusions from the facts, we will not disturb the trial court's findings of fact that are supported by substantial and competent evidence. *International Ass'n of Firefighters, Local No. 672 v. City of Boise City*, 136 Idaho 162, 30 P.3d 940 (2001). It is the province of the trial court to determine the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Id.*

1. Did the ACHD requirement that KMST construct and dedicate the street constitute a taking? KMST alleges that the requirement imposed by the ACHD that it construct and dedicate the street constituted a taking of its property without just compensation. The district court analyzed that issue under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In *Nollan*, the Supreme Court held that there must be a nexus between a legitimate state interest and the condition imposed by the governmental entity when approving the development. That condition must serve the same governmental purpose as the restriction or limitation on development. In *Dolan*, the Supreme Court held that there must be a rough proportionality between the condition imposed and the projected impact of the proposed development. The governmental agency must make an individualized determination that the required dedication of property to public use is related both in nature and extent to the impact of the proposed development. The court concluded that the ACHD had shown there was an essential nexus between its legitimate interests and the construction and dedication of the street; that the ACHD made an individualized determination, prior to the imposition of the condition, that the impacts caused by the KMST development could not be mitigated through impact fees alone; and that the requirement that KMST construct the public street was roughly proportional to the impact of KMST's proposed development. KMST challenges all of those conclusions on appeal. We affirm the judgment dismissing KMST's claim against the ACHD, but for reasons different than those of the district court.

[7] The requirement that KMST construct and dedicate the street, stated by the ACHD as a condition of its approval of the development, did not constitute a taking of KMST's

property. The ACHD did not have final authority to impose that condition. In *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the United States Supreme Court held that a developer had no claim that a planning commission's application of the zoning laws and regulations to the developer's property amounted to a taking because the developer had not yet obtained a final decision on that issue from the governmental entity charged with implementing those laws and regulations. In that case, the planning commission had held that the proposed development did not comply with the zoning ordinance and subdivision regulations. Another governmental board had the power to grant variances from the zoning ordinance, and the commission had the power to grant variances from the regulations. Because the developer had not sought variances from either body, the Supreme Court held that ****61 *582** there was no final decision upon which a taking claim could be based.

The ACHD had exclusive general supervision and jurisdiction over all highways and public rights-of-way within its highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within its highway system. IDAHO CODE §§ 40-1406 & 40-1310 (2002). The ACHD did not obtain jurisdiction over the street constructed by KMST until September 29, 1998, when KMST deeded it to the ACHD. The ACHD had no final authority to approve or reject KMST's proposed development. That authority was vested in the Ada County Commissioners under the Local Land Use Planning Act, IDAHO CODE §§ 67-6501 *et seq.* (2001). Although the Ada County Commissioners could certainly require approval of other governmental entities regarding the proposed development, including the ACHD, the Commissioners had the final authority to approve or reject KMST's proposed development and to decide what conditions, if any, to impose when granting approval. In fact, KMST's representative Mr. Korte asked the County Commissioners to delete the condition that it construct the public road, and the Commissioners declined to do so. Because the condition imposed by the ACHD was not a final decision of the governmental entity that had authority to approve the development, it did not constitute a taking of KMST's property. KMST has not appealed the judgment dismissing its claim against Ada County, and therefore we do not address the issue of whether the conduct of the Ada County Commissioners constituted a taking.

[8] Even assuming that the ACHD had final authority to approve some aspect of KMST's proposed development, there

was no taking under the facts of this case. In the initial land use application that it submitted to the ACHD, KMST stated that it would build the public road. It stated in its application as follows:

The property fronts on Overland Road which is a fully improved 5 lane arterial street. The development of the site will also start the construction of a road from Overland to Hackamore Drive to the north. This will connect the subject site with the Century Landmark Center to the north. Thus, the property will be on the corner of two public roads. (See MAP 2) The primary access to the property will be from the new side street. Only one access point is proposed on Overland Road. (See MAP 3)

In its application, KMST also stated that the new street "will limit curb cuts on Overland Road and provide for a better circulation pattern within and adjacent to the project."

Although Mr. Sale had informed KMST that he would recommend that requirement as a condition of approval, he did not have the authority to impose that condition. He could only recommend it, and staff recommendations could be appealed to the ACHD Commission. The district court found "that as a general matter developers do not include conditions in development applications if they disagree with the conditions." The district court also found, "KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property." KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed the approval of its development. Having done so, it cannot now claim that its property was "taken."¹

[9] **2. Did the imposition of the impact fees constitute a taking?** Pursuant to the Idaho Development Impact Fee Act, IDAHO CODE §§ 67-8201 *et seq.* (2001), the ACHD imposed an impact fee upon KMST totaling \$99,127. KMST argues that the fee constituted an unconstitutional monetary taking because it was excessive in amount. It contends that when calculating the amount of ****62 *583** the fee,

the ACHD used outdated fee tables, failed to give KMST any credit for the \$99,530 it incurred in designing and constructing the public street, and failed to consider the extent to which the street benefited the ACHD's highway system. According to KMST, the impact fees would total \$40,701 if they were calculated using the most recent fee tables from the Institute of Transportation Engineers Trip Generation Manual. KMST argues that the district court erred in failing to apply the standards announced by the United States Supreme

Court in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), when determining the constitutionality of the amount of the impact fees.

The Idaho Development Impact Fee Act provides: "A governmental entity which adopts a development impact fee ordinance shall provide for administrative appeals by the developer or fee payer from any discretionary action or inaction by or on behalf of the governmental entity." IDAHO CODE § 67-8212(1) (2001). Pursuant to the authority granted by the Impact Fee Act, the ACHD adopted the "Ada County Highway District Road Impact Fee Ordinance." The Ordinance includes a fee schedule for calculating the amount of the impact fees, and it provides for offsets to those fees for the present value of any construction of, or dedication of land for, a system improvement. A system improvement would include the construction of a new street, along with the associated curbs, gutters, sidewalks, and traffic signals, but would not include the construction of a street or a right-of-way dedication for direct access to and/or within the proposed project or development. If a developer believes that his or her proposed development is unique in its traffic impacts and that these impacts are substantially less than would be indicated by using the fee schedule, the developer may request an individual assessment of the impact fees by a professional approved by the ACHD. If the developer does not accept the findings of the individual assessment, the ACHD Commission resolves the issue. The Ordinance contains procedures for an administrative appeal to the ACHD Commission of any discretionary action or inaction by the ACHD staff charged with administering the Ordinance. It also provides that the developer can pay the impact fees under protest without being estopped from exercising the right of appeal or from receiving a refund of any amount deemed to have been illegally collected.

In this case, the ACHD staff calculated the impact fees for KMST's development based upon the fee schedules in the Ordinance. KMST did not request an individual assessment of the amount of its impact fees; it did not appeal the calculation of the fees; and it did not pay the fees assessed under protest. It simply paid the impact fees in the amount initially calculated. Having done so, it cannot now claim that the amount of the impact fees constituted an unconstitutional taking of its property.

[10] As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. *Arnzen v. State*, 123 Idaho 899, 854 P.2d 242 (1993). We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority. *Id.* Neither of those exceptions applies in this case. KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so. The Ordinance provided administrative procedures for addressing all three of the claimed errors in calculating the impact fees. In fact, KMST argues in its opening brief, "It is undisputed that had they [KMST] asked for one [an individual assessment], they would have gotten an impact fee reduction."

The district court addressed KMST's claim that the impact fees were incorrectly calculated because it accepted KMST's argument that Idaho Code § 67-6521(b)² exempted it from being required to exhaust its administrative **63 *584 remedies before challenging the calculation in court. By its terms, that statute has no application to the impact fees imposed in this case. It only applies if the basis of the inverse condemnation claim is "that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed 'necessary to complete the development of the material resources of the state,' or necessary for other public uses."

B. Did the District Court Err in Awarding Costs to the ACHD?

[11] KMST argues the district court erred in awarding costs to the ACHD because it failed to comply with Rule 54(d)(5) of the Idaho Rules of Civil Procedure.³ In its opening brief, KMST did not specify in what manner the ACHD failed to comply with the rule, however. It merely stated:

ACHD failed to comply with this rule when seeking post-trial costs. The trial court determined that ACHD had substantially complied with the requirements of I.R.C.P. 54(d)(5). The issue for the appellate court is therefore whether strict compliance or substantial compliance with the rule is required in order to recover costs, and whether ACHD met the requirements.

Because KMST did not support this assignment of error with argument specifying in what manner the ACHD allegedly failed to comply with Rule 54(d)(5), we will not consider this assignment of error. *State v. Zichko*, 129 Idaho 259, 923 P.2d 966 (1996).

C. Is Either Party Entitled to an Award of Attorney Fees on Appeal?

[12] Both parties seek an award of attorney fees on appeal. Because KMST was not the prevailing party on appeal, it is not entitled to an award of attorney fees.

The ACHD seeks an award of attorney fees under Idaho Code § 12-121. Under that statute, attorney fees will be awarded to the prevailing party on appeal when this Court

is left with the abiding belief that the appeal was brought or pursued frivolously, **64 *585 unreasonably or without foundation. *King v. King*, 137 Idaho 438, 50 P.3d 453 (2002). Because there were legal issues involved in the appeal that were matters of first impression in Idaho, we do not find that the appeal was brought or pursued frivolously, unreasonably or without foundation.

IV. CONCLUSION

We uphold the judgment of the district court dismissing KMST's claim for inverse condemnation. We award costs, but not attorney fees, on appeal to the ACHD.

Justices SCHROEDER, WALTERS, KIDWELL and Justice Pro Tem MELANSON concur.

All Citations

138 Idaho 577, 67 P.3d 56

Footnotes

1 We are not holding that there was no taking simply because KMST built the public street before challenging that requirement in court. We are holding that there was no taking because KMST itself proposed that it would construct and dedicate the street as part of its development. We express no opinion as to whether a developer who contends that a condition of approval amounts to an unconstitutional taking of property must litigate that issue before proceeding with the development.

2 The statute provides as follows:

67-6521. Actions by affected persons.—(1)(a) As used herein, an affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.

(b) Any affected person may at any time prior to final action on a permit required or authorized under this chapter, if no hearing has been held on the application, petition the commission or governing board in writing to hold a hearing pursuant to section 67-6512, Idaho Code; provided, however, that if twenty (20) affected persons petition for a hearing, the hearing shall be held.

(c) After a hearing, the commission or governing board may:

(i) Grant or deny a permit; or

(ii) Delay such a decision for a definite period of time for further study or hearing. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation or decision must be made.

(d) An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

(2) (a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

(b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

3 That rule provides as follows:

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment. Such memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to file such memorandum of costs within the period prescribed by this rule shall be a waiver of the right of costs. A memorandum of costs prematurely filed shall be considered as timely.

KeyCite Yellow Flag - Negative Treatment
Distinguished by State ex rel. Winder v. Canyon Vista Family Ltd.
Partnership, Idaho, March 17, 2010

147 Idaho 232
Supreme Court of Idaho.
Boise, May 2008 Term.

LOCHSA FALLS, L.L.C., an Idaho limited
liability company, Plaintiff–Appellant,
v.
STATE of Idaho, Idaho Transportation
Board, Defendant–Respondent.

No. 34039.

April 7, 2009.

Rehearing Denied May 21, 2009.

Synopsis

Background: Subdivision developer filed suit against Idaho Transportation Department (ITD) seeking reimbursement of costs it incurred in constructing traffic signal, as required by temporary encroachment permit ITD had issued to it. ITD filed motion for summary judgment. The District Court, Ada County, [■] 2007 WL 5273975, Michael R. McLaughlin, J., granted motion and dismissed complaint due to developer's failure to exhaust administrative remedies. Developer appealed.

Holdings: The Supreme Court, Horton, J., held that:

[1] judicial review of ITD's action on encroachment permit granted to developer was governed by Administrative Procedure Act (APA);

[2] developer was not required to exhaust administrative remedies before filing suit against ITD;

[3] costs incurred by developer to construct traffic signal did not constitute an impermissible tax;

[4] ITD was not entitled to appellate attorney fees and costs; and

[5] developer was not entitled to appellate attorney fees and costs.

Vacated and remanded.

J. Jones, J., concurred in part and dissented in part, with opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (29)

[1] **Appeal and Error**

⊖ Review using standard applied below

In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment.

[2] **Appeal and Error**

⊖ Summary Judgment

Upon review of a grant of summary judgment, the Supreme Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party.

[3] **Judgment**

⊖ Existence or non-existence of fact issue

Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[4] **Judgment**

⊖ Existence or non-existence of fact issue

If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied.

[5] **Appeal and Error**

⊖ Statutory or legislative law

Appeal and Error

⊖ Administrative law; regulations

The constitutionality of a statute or administrative regulation is a question of law over which Supreme Court exercises free review.

2 Cases that cite this headnote

[6] **Administrative Law and Procedure**

⊖ Presumptions and burden of proof

Constitutional Law

⊖ Presumptions and Construction as to Constitutionality

Constitutional Law

⊖ Burden of Proof

There is a presumption in favor of the constitutionality of a challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers.

[7] **Constitutional Law**

⊖ Presumptions and Construction as to Constitutionality

An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality.

1 Cases that cite this headnote

[8] **Constitutional Law**

⊖ Clearly, positively, or unmistakably unconstitutional

The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

[9] **Administrative Law and Procedure**

⊖ Exhaustion of Administrative Remedies

Where an administrative remedy is provided by statute, relief must be sought from the

administrative body and this remedy exhausted before the courts will act.

[10] **Administrative Law and Procedure**

⊖ Exhaustion of Administrative Remedies

As a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts.

3 Cases that cite this headnote

[11] **Administrative Law and Procedure**

⊖ Exceptions

Two exceptions to general rule requiring exhausting of administrative remedies are when the interests of justice so require, and when the administrative agency acted outside its authority.

4 Cases that cite this headnote

[12] **Administrative Law and Procedure**

⊖ Exhaustion of Administrative Remedies

Administrative Procedure Act (APA) requires an exhaustion of the full gamut of administrative remedies before judicial review may be sought. West's I.C.A. § 67-5271.

1 Cases that cite this headnote

[13] **States**

⊖ Executive departments, boards, or other bodies

Idaho Transportation Department (ITD) is an agency, for purposes of the Administrative Procedure Act (APA). West's I.C.A. §§ 40-501, 67-5201(2).

1 Cases that cite this headnote

[14] **Administrative Law and Procedure**

⊖ Contested or noncontested case

Whether or not an administrative agency decision determines legal rights, duties, privileges, immunities or other legal interests such that it is a contested case under the

Administrative Procedure Act (APA) requires a two-step analysis as to whether (1) the legislature granted the agency the authority to determine the particular issue, and (2) the agency decision on the issue determines the legal rights, duties, privileges, immunities, or other legal interests of one or more persons. West's I.C.A. §§ 67-5201(12), 67-5240.

[15] Highways

⇒ Right of access

Judicial review of Idaho Transportation Department (ITD) action on encroachment permit granted to subdivision developer was governed by Administrative Procedure Act (APA), for purposes of determining whether developer was required to exhaust its administrative remedies in connection with its dispute with ITD over payment for construction of traffic signal required by encroachment permit; power to impose certain conditions upon encroachment permit application, including construction of traffic signals, was within scope of legislature's grant of authority to ITD to regulate safe use of and access to controlled access highways, and ITD's approval or denial of such application determined legal rights and interests of property owner in accessing their property from state highway. West's I.C.A. §§ 67-5201(12), 67-5240.

3 Cases that cite this headnote

[16] Administrative Law and Procedure

⇒ Nature and purpose

Doctrine of exhaustion of administrative remedies serves important policy considerations, including providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body; consistent with these principles, courts infer that statutory administrative remedies

implemented by the legislature are intended to be exclusive.

[17] Highways

⇒ Right of access

Subdivision developer was not required to exhaust administrative remedies before filing suit against Idaho Transportation Department (ITD) and its board seeking reimbursement for expenses its incurred in constructing traffic signal as required by temporary encroachment permit granted to developer, absent availability of such remedies; developer installed traffic signal as required by permit, but ITD never conducted final inspection and approved construction, nor did ITD formally deny permit or disapprove of construction, and, while administrative rules provided internal mechanism for appeal from denial of encroachment permit, rules provided no mechanism whereby applicant, whose permit application had been approved subject to imposition of additional requirements, could challenge those conditions. West's I.C.A. § 67-5271; IDAPA 39.03.42.003.

3 Cases that cite this headnote

[18] Administrative Law and Procedure

⇒ Opportunity for adequate relief

While pursuit of statutory administrative remedies is a condition precedent to judicial review under the Administrative Procedure Act (APA), failure to exhaust administrative remedies is not a bar to litigation when there are no remedies to exhaust. West's I.C.A. § 67-5271.

5 Cases that cite this headnote

[19] Constitutional Law

⇒ Facial invalidity

Constitutional Law

⇒ Invalidity as applied

A party may challenge a statute as unconstitutional "on its face" or "as applied" to the party's conduct.

1 Cases that cite this headnote

[20] Constitutional Law

⊖ Questions of law or fact

A facial constitutional challenge to a statute or rule is purely a question of law.

1 Cases that cite this headnote

[21] Administrative Law and Procedure

⊖ Facial invalidity

Administrative Law and Procedure

⊖ Invalidity as applied

Constitutional Law

⊖ Facial invalidity

Generally, a facial constitutional challenge to a statute or rule is mutually exclusive from an as applied challenge.

1 Cases that cite this headnote

[22] Constitutional Law

⊖ Facial invalidity

For a facial constitutional challenge to a statute to succeed, the party must demonstrate that the law is unconstitutional in all of its applications; in other words, the challenger must establish that no set of circumstances exists under which the law would be valid.

2 Cases that cite this headnote

[23] Constitutional Law

⊖ Invalidity as applied

To prove a statute is unconstitutional "as applied," the party must only show that, as applied to defendant's conduct, the statute is unconstitutional.

1 Cases that cite this headnote

[24] Highways

⊖ Right of access

Costs incurred by subdivision developer to construct traffic signal, as required by temporary encroachment permit that had been granted to

developer by Idaho Transportation Department (ITD), did not constitute an impermissible tax, but were permissible fees imposed for purpose of regulating safe use of and access to state highways at the development; costs that developer incurred were only those costs that developer itself proposed were necessary to safely connect its development to highway, and which were outlined in transportation impact study (TIS) that developer prepared and submitted to ITD, and ITD received only the \$100 application fee developer was required to pay. IDAPA 39.03.42.700.03.e.

3 Cases that cite this headnote

[25] Highways

⊖ Authority and Powers

Municipal Corporations

⊖ Power and Duty to Tax in General

State agencies and municipalities that are statutorily empowered to carry out police powers, such as Idaho Transportation Department (ITD), have the discretion to impose regulatory fees in accomplishing their directives; however, this authority does not impart the ability to tax.

[26] Appeal and Error

⊖ Issues not addressed below in general

Remand was required in subdivision developer's appeal of dismissal of its suit against Idaho Transportation Department (ITD) seeking reimbursement of costs it incurred in constructing traffic signal as required by temporary encroachment permit that ITD had granted to it, for trial court to determine whether imposition of condition that developer construct signal in order to be granted permit was reasonable, as trial court had not considered entirety of developer's complaints and factual allegations when it dismissed complaint solely for developer's failure to exhaust administrative remedies.

2 Cases that cite this headnote

[27] Licenses

Reasonableness of fees

Fees imposed by administrative agencies and municipalities as regulations under police powers must meet a test of reasonableness and be rationally related to the cost of enforcing the regulations at hand.

[28] States

Costs

Idaho Transportation Department (ITD) was not entitled to appellate attorney fees and costs in connection with subdivision developer's appeal of dismissal of its suit against ITD seeking reimbursement of costs it incurred in constructing traffic signal, as ITD was not prevailing party, given Supreme Court's decision vacating trial court's order granting ITD summary judgment and dismissing subdivision's complaint. West's I.C.A. § 12-117.

[29] States

Costs

Subdivision developer was not entitled to appellate attorney fees and costs in connection with its appeal of dismissal of its suit against Idaho Transportation Department (ITD) for failure to exhaust administrative remedies, though developer was prevailing party on appeal, as ITD did not act without a reasonable basis in fact or law, in that parties were typically required to exhaust administrative remedies before pursuing judicial review in actions under the Administrative Procedure Act (APA), as would have been case for developer, except for procedural void in administrative rules pertaining to conditions imposed in connection with encroachment permit applications. West's I.C.A. § 12-117.

2 Cases that cite this headnote

Attorneys and Law Firms

**966 Wilson & McColl, Boise, for appellant. Lisa Rasmussen argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent. Steven Parry argued.

Opinion

HORTON, Justice.

*235 This is an appeal by Lochsa Falls, L.L.C. (Lochsa Falls), a developer, from an order of the district court dismissing its complaint against the Idaho Transportation Department (ITD) and the Board of ITD for failure to exhaust administrative remedies. Because we find that no administrative remedies were available in the instant case, we vacate the judgment dismissing Lochsa Falls' complaint and remand for further proceedings consistent with this opinion. We decline to award attorney fees on appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lochsa Falls is the developer of a 254 acre subdivision located along U.S. Highway 20/26 (Chinden Boulevard) between Linder and Ten Mile roads, in Meridian, Idaho. The development includes approximately 740 residential lots. The development, according to Lochsa Falls' traffic consultant, Washington Infrastructure Services, is estimated to generate 12,480 vehicle trips per day, with 1,396 trips during the peak hour.

In January of 2003, Lochsa Falls presented a preliminary plat of the entire subdivision to the City of Meridian (the City) for approval. The City approved the preliminary plat. In order to accommodate the significant increase in traffic at the time of build out, the plat called for an internal collector street to intersect with Chinden Boulevard.¹

Because Chinden Boulevard is designated as a controlled-access highway, ITD required that Lochsa Falls obtain an encroachment permit. As part of the application process, Lochsa Falls was required to submit a Transportation Impact Study (TIS). Lochsa Falls' traffic consultant recommended that a traffic signal be installed at one of the two approaches to Chinden Boulevard. During the encroachment permit application process, the location of the recommended traffic

signal was modified by ITD's Chief Engineer. With the exception of the change in the location of the traffic signal, Lochsa Falls' application was approved as submitted and ITD's Chief Engineer issued a temporary encroachment permit on November 19, 2006. That permit states: "This permit **SHALL BE VOID** if all work is not completed and the Department has not made final inspection and approval within one year of the issuance date," and "Permit will be considered *Temporary* until final inspection and approval by a Department Representative." (emphasis in original).

Lochsa Falls' TIS estimated construction costs for the signal and approach at approximately \$180,000. Accordingly, the encroachment permit included *inter alia* the conditions that "Developer shall design and construct a signal prior" and that "[a] Performance Bond or a Certificate of Deposit in the amount of \$180,000.000, shall be provided by the developer for the signal, prior to *236 **967 any work being done on the highway right of way."²

After a subdivision receives preliminary plat approval from the City, the developer has the option of constructing the subdivision in phases. Lochsa Falls elected to construct the subdivision in twelve phases. Lochsa Falls obtained construction plan approval and final plat approval for all twelve phases from the City. After all phases of the subdivision were under construction or complete, including completion of all roadways, and all lots in the subdivision had been sold except for the 116 lots contained in Phase 12, the City informed Lochsa Falls that building permits would not be issued until Lochsa Falls complied with ITD's requirement that the signal be paid for by Lochsa Falls.

Under these circumstances, Lochsa Falls believed that it had no option but to agree to pay the cost of the installation of the signal. Thus, in March 2005, Lochsa Falls submitted to ITD's District Office a letter of credit to cover construction costs. The letter of credit was accompanied by a cover letter from Brian F. McColl, Lochsa Falls' attorney, which stated, in part, that filing the "letter of credit does not constitute a waiver of ... Lochsa's rights to question the District's authority to require Lochsa Falls to pay for the traffic signal in question."³ This was the first indication from Lochsa Falls to ITD that it objected to paying for the cost of the construction of the signal.

After the new road intersecting Chinden Boulevard was built and the traffic signal was installed but not operational, Lochsa Falls initiated this litigation on August 30, 2006, seeking to

have ITD reimburse it for expenses it incurred in constructing the traffic signal. ITD has never accepted nor approved of any portion of the permitted work, including the traffic signal. On the other hand, ITD never formally denied the permit nor disapproved of the construction.

Lochsa Falls presented three causes of action before the district court arguing that the requirement it construct the traffic signal was: (1) a disguised and unconstitutional tax, (2) a taking without just compensation, and (3) a violation of substantive due process and equal protection of the law. In response, ITD filed a motion for summary judgment requesting that the district court dismiss Lochsa Falls' complaint without prejudice for, *inter alia*, failure to exhaust administrative remedies.

The district court dismissed Lochsa Falls' complaint without prejudice for failure to exhaust administrative remedies. The district court further found that the fee was reasonably imposed pursuant to valid police power, was rationally related to public safety, and was not an unconstitutional tax. The district court did not address Lochsa Falls' second and third causes of action in its decision. Lochsa Falls appeals from the district court's dismissal of its complaint.

II. STANDARD OF REVIEW

[1] [2] [3] [4] [5] [6] [7] [8] [9] This appeal is from: (1) an order of summary judgment, (2) arising under the Idaho Administrative Procedures Act (APA), (3) which raises constitutional questions. This Court was recently faced with a similar situation in *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) wherein we explained the appropriate standard of review:

In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. Upon review, the Court must liberally construe facts in the existing record in favor of the nonmoving party, and draw all reasonable inferences from the record in favor of the nonmoving party. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if *237 **968 any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. If there are conflicting inferences contained

To “[d]esignate state highways, or parts of them, as controlled-access facilities and regulate, restrict or prohibit access to those highways to serve the traffic for which the facility is intended.” I.C. § 40–310(9).

To “[p]roscribe rules and regulations affecting state highways ... and enforce compliance with those rules and regulations.” I.C. § 40–312(1).

To “regulate or prohibit the use of any controlled-access highway by any class or kind of traffic which is found to be incompatible with the normal and safe movement of traffic.” I.C. § 49–202(23).

Clearly, the legislature has empowered ITD and its Board to make rules and regulations controlling rights of access to and the safe use of state highways. Furthermore, as to traffic signals in particular, the legislature has specifically empowered ITD and its Board to:

[E]rect and maintain traffic-control devices on controlled-access highways on which any prohibitions are applicable.

I.C. § 49–202(24).

Furnish, erect and maintain, whenever necessary for public safety and convenience, suitable signs, markers, signals and other devices to control, guide and warn pedestrians and vehicular traffic entering or traveling upon the state highway system. I.C. § 40–313(1).

Pursuant to its grant of authority under I.C. §§ 40–310(9), 40–311(1), 40–312(3), 40–313(2), and 49–202(19), (23) and (28), 49–221, and 67–5203, the Board of ITD promulgated the “Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way.” IDAPA 39.03.42 *et seq.* These administrative rules provide that, in order “[t]o help preserve the highways as constructed and provide responsible growth where allowed, any individual, business, or other entity planning to add, modify, relocate, maintain, or remove an encroachment on the State highway ... shall obtain a permit ...” IDAPA 39.03.42.200.01. These rules require that any new encroachment to a controlled state highway must comply with the safety specification and standards specified by ITD and that an application may be denied if it does not. IDAPA 39.03.42.300.06; 39.03.42.300.09.

The rules lay out the costs an applicant can expect to bear. Under the rules, a permit application fee is required “based

on [ITD's] cost to produce the permit and administer the program.” IDAPA 39.03.42.700.01. The application fee for a major development the size and type of Lochsa Falls is \$100.⁴ IDAPA 39.03.42.700.02. An application for a major development like Lochsa Falls must also be accompanied by a full TIS provided and paid for by the developer. IDAPA 39.03.42.301.01.a. The rules provide that:

A TIS shall document the extent of the impact of the proposed development on the State Highway System, including additional trips, resulting level of service during AM and PM peaks, and the need for auxiliary lanes or other special capacity or safety features. Any required changes in traffic control, land use, access, pedestrian, or bicycle usage shall also be addressed.

IDAPA 39.03.42.301.01.c. ITD reviews the TIS and makes the final decision regarding any requirements. IDAPA 39.03.42.301.02.

Additionally, the rules provide that an applicant “shall pay for any changes or adjustments of highway features or fixtures brought about by actions, operations or requirements caused by the applicant” and that “[ITD] may require payment of costs associated with ... [c]onstruction of highway modifications or improvements, including but not limited to signals....” IDAPA 39.03.42.200.06; 39.03.42.700.03.e. The rules also provide that, at the discretion of ITD, *239 **970 the applicant may be required to secure a performance bond to guarantee completion of the work in accordance with requirements of the permit. IDAPA 39.03.42.700.03.d.

In appreciation of the specific IDAPA rules and provisions of the Idaho Code as set forth above, we conclude that the power to impose certain specific conditions upon an application for an encroachment permit, including, but not limited to, provision of bonds and construction of traffic signals, is within the scope of the legislature's grant of authority to ITD to regulate the safe use of and access to controlled access highways.

Having so concluded, we must next consider the second part of the test, that is, whether the agency decision on the issue determines “the legal rights, duties, privileges, immunities, or other legal interests” of the party. *Westway*, 139 Idaho at 112, 73 P.3d at 726. Because the ITD's denial or approval of an encroachment permit application determines the legal rights and interests of a property owner in accessing their property from a state highway, it falls within the definition of an order.

Thus, judicial review of ITD's action on an encroachment permit application is governed by the APA.

2. The applicable rules do not provide for an appeal of conditions imposed in connection with an encroachment permit.

[16] Typically, exhaustion of administrative remedies is a prerequisite to seeking judicial review under the APA:

The doctrine of exhaustion serves important policy considerations, including "providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative process established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body." Consistent with these principles, courts infer that statutory administrative remedies implemented by the Legislature are intended to be exclusive.

Park v. Banbury, 143 Idaho 576, 579, 149 P.3d 851, 853–854 (2006) (quoting *Regan*, 140 Idaho at 724, 100 P.3d at 618, internal citations omitted).

[17] The IDAPA rules provide an internal mechanism for an appeal from the denial of an encroachment permit. This internal appeals process is outlined in IDAPA 39.03.42.003. This process commences when the applicant notifies the local ITD District Traffic office of the appeal in written form within thirty days after receipt of notification of the denial. IDAPA 39.03.42.003.01. In the initial appeal process, the District office has 14 working days to review the appeal. IDAPA 39.03.42.003.03. If the District office does not overturn the initial denial, the appeal is then forwarded to the State Traffic Engineer who also has 14 working days to review the appeal. *Id.* The State Traffic Engineer is required to prepare the appeal for review by the ITD's Chief Engineer. The Chief Engineer is also granted 14 working days to review the appeal. *Id.* The appellant must then be notified within seven working days of the Chief Engineer's decision on the matter. *Id.* If the Chief Engineer affirms the denial of the application, a secondary appeals process begins. If within thirty days, the appellant then notifies ITD's legal section, the legal section will then initiate an appeal in accordance with the APA and IDAPA 04.11.01. IDAPA 39.03.42.003.04.

The Right-Of-Way Encroachment Application and Permit issued to Lochsa Falls stated that the "[p]ermit will be

considered *Temporary* until final inspection and approval by a Department Representative." (emphasis in original). Although Lochsa Falls installed the traffic light, ITD never conducted a final inspection and approved the construction. Nonetheless, the application was never formally denied nor formally approved. For that reason, Lochsa Falls argues that it was not required to follow the multi-tiered internal administrative appeals process set forth in the IDAPA rules before seeking judicial review. We agree.

[18] While "[p]ursuit of statutory administrative remedies is a condition precedent to judicial review" under the APA,

Park, 143 Idaho at 578, 149 P.3d at 853, failure to exhaust administrative remedies is not a bar to litigation when there are no remedies to *240 **971 exhaust. In *James v. Dep't of Transp.*, 125 Idaho 892, 876 P.2d 590 (1994), this Court held that a terminated employee was not required to exhaust administrative remedies when a statute and the department's grievance procedures did not entitle him to grieve his termination. 125 Idaho at 895, 876 P.2d at 593. This Court did apply the rule requiring exhaustion of administrative remedies as to the one component of James's claim for breach of contract for which there was an administrative remedy. *Id.* The clear holding in *James* is that this Court will not bar litigation for failure to exhaust administrative remedies when no remedy is available.

Turning to the present action, the administrative rules provide a process whereby a denial of a permit application can be appealed internally within ITD. However, those rules provide no mechanism whereby an applicant, whose permit application has been *approved* subject to the imposition of additional requirements, can challenge those conditions. In the absence of an administrative remedy, we conclude that the district court erred in dismissing Lochsa Falls' complaint for failure to exhaust administrative remedies. Thus, we vacate the district court's order dismissing Lochsa Falls' complaint without prejudice for failure to exhaust administrative remedies and remand for proceedings consistent with this opinion.⁵

B. Lochsa Falls' Constitutional Claims

Lochsa Falls presented three causes of action before the district court. The complaint stated that the requirement that Lochsa Falls construct a traffic signal was: (1) a disguised and unconstitutional tax, (2) a taking without just compensation, and (3) a violation of substantive due process and equal protection of the law. Lochsa Falls contends that the rules

allowing ITD to impose conditions upon a permit application are unconstitutional on their face since ITD was palpably without jurisdiction to impose taxes or impact fees. Despite having determined that Lochsa Falls' complaint should be dismissed for failure to exhaust administrative remedies, the district court addressed Lochsa Falls' first constitutional challenge and held that the fee was reasonably imposed pursuant to valid police power, was rationally related to public safety, and was not an unconstitutional tax. The district court did not consider Lochsa Falls' second and third causes of action in its decision. Accordingly, we will address the sole constitutional question addressed by the district court, that is, whether the requirement that Lochsa Falls construct the traffic signal was a disguised tax.

This court has held that administrative remedies must generally be exhausted before a district court has jurisdiction to decide constitutional issues. *American Falls*, 143 Idaho at 871, 154 P.3d at 442. However, because we conclude that the IDAPA rules do not provide any mechanism whereby Lochsa Falls could have internally challenged the conditions placed upon the issuance of its temporary encroachment permit, the exhaustion doctrine does not bar consideration of Lochsa Falls' constitutional challenge.

[19] [20] [21] [22] [23] Constitutional challenges come in two forms "facial" and "as applied":

A party may challenge a statute as unconstitutional "on its face" or "as applied" to the party's conduct. ■ *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). A facial challenge to a statute or rule is "purely a question of law." *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). Generally, a facial challenge is mutually exclusive from an as applied challenge. ■ *Korsen*, 138 Idaho at 712, 69 P.3d at 132. For a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in all of its applications. *Id.* In other words, "the challenger must establish that no set of circumstances exists under which the *241 **972 [law] would be valid." *Id.* In contrast, to prove a statute is unconstitutional "as applied", the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional.

■ *Korsen*, 138 Idaho at 712, 69 P.3d at 132.

American Falls, 143 Idaho at 870-71, 154 P.3d at 441-442.

[24] On appeal, Lochsa Falls asks this Court to consider whether the district court correctly found that ITD and its Board had authority to require Lochsa Falls to construct the traffic signal at its own cost. Lochsa Falls terms its constitutional challenge as "facial." Despite its attempt to style its appeal as such, the reality is that Lochsa Falls' challenge is "as applied." Lochsa Falls has not demonstrated that, under no set of circumstances, the encroachment permit application rules and process could be constitutionally valid. Rather, Lochsa Falls is specifically challenging that the rules are unconstitutional *as applied to it*. The IDAPA rules provide that the Department *may* require payment of the costs associated with "[c]onstruction of highway modifications or improvements, including but not limited to signals...." IDAPA 39.03.42.700.03.e (emphasis added).

[25] As was discussed above, ITD is statutorily imbued with the police power to regulate the safe use of and access to state highways. Certainly, Lochsa Falls had no right of access to Chinden Boulevard; rather, any access is in the nature of a privilege extended by ITD. Entities such as state agencies and municipalities that are statutorily empowered to carry out police powers, such as ITD, have the discretion to impose regulatory fees in accomplishing their directives. *Brewster v. City of Pocatello*, 115 Idaho 502, 504-05, 768 P.2d 765, 767-68 (1988). However, this authority does not impart the ability to tax. *Id.* We have previously distinguished between taxes and fees by noting that fees are for the purpose of regulation whereas taxes are solely for purposes of raising revenue. *Id.*

The costs that Lochsa Falls incurred in the instant case were only those costs that Lochsa Falls itself proposed were necessary to safely connect its development to Chinden Boulevard, and which were outlined in the TIS that Lochsa Falls prepared and submitted to ITD. Moreover, ITD received only the \$100 application fee Lochsa Falls was required to pay. Therefore, we conclude the fees that Lochsa Falls complains of were for the purpose of regulating the safe use of and access to state highways at its development and were not a tax solely for the purpose of raising revenue.

[26] [27] However, even fees imposed as regulations under police powers must meet a test of reasonableness and be rationally related to the cost of enforcing the regulations at hand. *BHA Investments, Inc. v. State*, 138 Idaho 348, 353, 63 P.3d 474, 479 (2003). Whether such a requirement is reasonable or rationally related to the impact of a particular development on the safety of the travelling public requires

a case-by-case analysis. As the district court stated in its memorandum decision, it did not consider the entirety of Lochsa Falls' complaints and factual allegations when it dismissed the complaint solely on procedural grounds:

Although Plaintiff raises constitutional challenges before this Court, Plaintiff also acknowledged at oral argument that Plaintiff has other complaints regarding the permit fee imposed by the ITD. Among those being that Lochsa Falls should not be required to bear the cost for a traffic signal that is benefiting other developers in the immediate area. This argument, along with Plaintiff's other complaints should be channeled through the administrative appeals process prior to seeking any form of relief in this Court.

Although we conclude that, generally speaking, it is not an impermissible tax for the ITD to impose the condition of erecting a traffic signal as a requirement for a developer seeking to be granted an encroachment permit to a controlled access highway, we express no opinion as to whether the imposition of the condition was reasonable in light of Lochsa Falls' individual application. The determination of reasonableness must be made by the district court on remand.

Because the district court did not consider Lochsa Falls' second and third causes of actions on takings and due process/equal *242 **973 protection, respectively, we do not address those issues for the first time on appeal and reserve them for the district court's consideration on remand with the benefit of the parties' opportunity to further present their arguments and develop the factual record.

C. Attorney Fees and Costs on Appeal

[28] [29] Both parties request attorney fees and costs on appeal pursuant to I.C. § 12-117. That statute provides in part:

Unless otherwise provided by statute, in any administrative ... proceeding involving as adverse parties a state agency ... and a person, the court

shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

We decline to award fees to either party. Because we vacate the district court's order granting ITD summary judgment and dismissing Lochsa Falls' complaint it cannot be said that ITD is the prevailing party. Thus, ITD is not entitled to fees of costs. Although Lochsa Falls is the prevailing party on appeal, we cannot find that ITD acted without a reasonable basis in fact or law. Parties are typically required to exhaust administrative remedies before pursuing judicial review in actions under the APA, as would be the case here if it were not for a procedural void in the IDAPA rules pertaining to conditions imposed in connection with encroachment permit applications.

IV. CONCLUSION

We vacate the district court's judgment dismissing Lochsa Falls' complaint without prejudice for failure to exhaust administrative remedies. We remand this matter to the district court for proceedings consistent with this opinion. Costs to appellant.

Chief Justice EISMANN, Justice BURDICK and Justice Pro Tem TROUT CONCUR.

J. JONES, J., concurring in part and dissenting in part.
I concur in the Court's opinion, except that I would award attorney fees to ITD. In my estimation, Lochsa Falls' claims contain little substance. While the Court was technically correct in remanding the constitutional claims (only because the district court did not consider them), they appear to have less merit than the issues that were decided by this Court. Lochsa Falls did brief and argue its takings claim but failed to put forth a convincing argument that a compensable taking had occurred. This Justice was left with the abiding feeling that Lochsa Falls benefitted much more than the State from the transaction at issue.

While Lochsa Falls portrays itself as having been put upon by being required to signalize an intersection for the benefit of the State and the motoring public, the reality is otherwise. The salient facts are that Lochsa Falls wished to develop a parcel of property located along a limited access highway, its traffic consultant recommended and it requested a signalized intersection to provide subdivision access to and from the highway, it was advised it could have the signalized intersection if it would pay for the same, it raised no protest to this routine requirement, and having gotten the benefit it sought Lochsa Falls now wishes to have ITD foot the bill.

This case could appropriately be analyzed in a contractual context. Lochsa Falls requests that ITD grant it the right to have a signalized intersection to benefit its subdivision. ITD agrees, provided that Lochsa Falls pays for signalizing the intersection. Lochsa Falls accepts the proposal without protest and proceeds to perform the signalizing work. Upon completion of the work, Lochsa Falls unilaterally changes its mind and decides it needs to be paid for the signalizing, but expresses no intention of giving up the valuable benefit it has derived from the deal. Lochsa Falls got what it bargained for but does not wish to honor its undertaking to bear the cost of such benefit. Had Lochsa Falls objected to the requirement that it pay for signalizing the intersection, it could simply have said “thanks, but no thanks” and done without a signal. One suspects there is *243 **974 not the slightest chance it would have done so, as the increase in the value of its lots would substantially outweigh the cost of the traffic signal.

Lochsa Falls portrays the signalized intersection as an improvement to the highway, benefitting the traveling public. In its brief, Lochsa Falls asserts “had [the Legislature] wanted developers to pay for the costs to improve highways,” it could have granted ITD the power to assess impact fees. Lochsa Falls continues, stating that ITD “has decided that developers should pay for the privilege of having a state highway with a traffic signal about their property, while the other traveling public who pass through and benefit from the signal and state

highway do not have to pay for the traffic signal.” From ITD’s standpoint, adding additional traffic signals to a well-used limited access highway does not necessarily improve the highway system but, rather, may slow the passage of traffic along that highway system. As ITD notes in its brief, “[n]either ITD nor the state highway system receive any benefit from the new intersection. The capacity of the U.S. highway did not increase, nor are there any improvements to the state highway.” Neither is the traveling public benefitted by an additional stoplight, as the traveling public would likely prefer not to have to stop for the signal or to deal with the additional traffic coming onto the highway.

Lochsa Falls did correctly state that it is a “privilege” for a developer to have its property abutted by a state highway with a traffic signal. The fact is that a signalized intersection is a great benefit to the abutting property, substantially increasing its value. More signalized intersections are requested than are granted. Lochsa Falls should be pleased that it was able to obtain one for the benefit of its property and its prospective lot buyers. It essentially obtained a franchise to stop the flow of traffic to allow its lot buyers to have access to and from the highway. Rather than being heavily burdened, it has been highly benefitted. And, the benefit becomes a vested property interest. As ITD points out in its brief, “[w]hen a permittee completes the requirements for an encroachment permit, then under the ITD rule, it receives a deeded right of access.” See, IDAPA 39.03.42.300.04. In other words, when the traffic signal and new intersection are accepted by ITD and the permitting process has been completed, Lochsa Falls will get a deeded property right to the access.

Because Lochsa Falls has brought and appealed claims without a reasonable basis in fact or law, I would award ITD attorney fees under Idaho Code § 12–117.

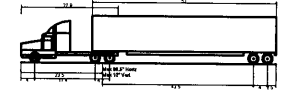
All Citations

147 Idaho 232, 207 P.3d 963

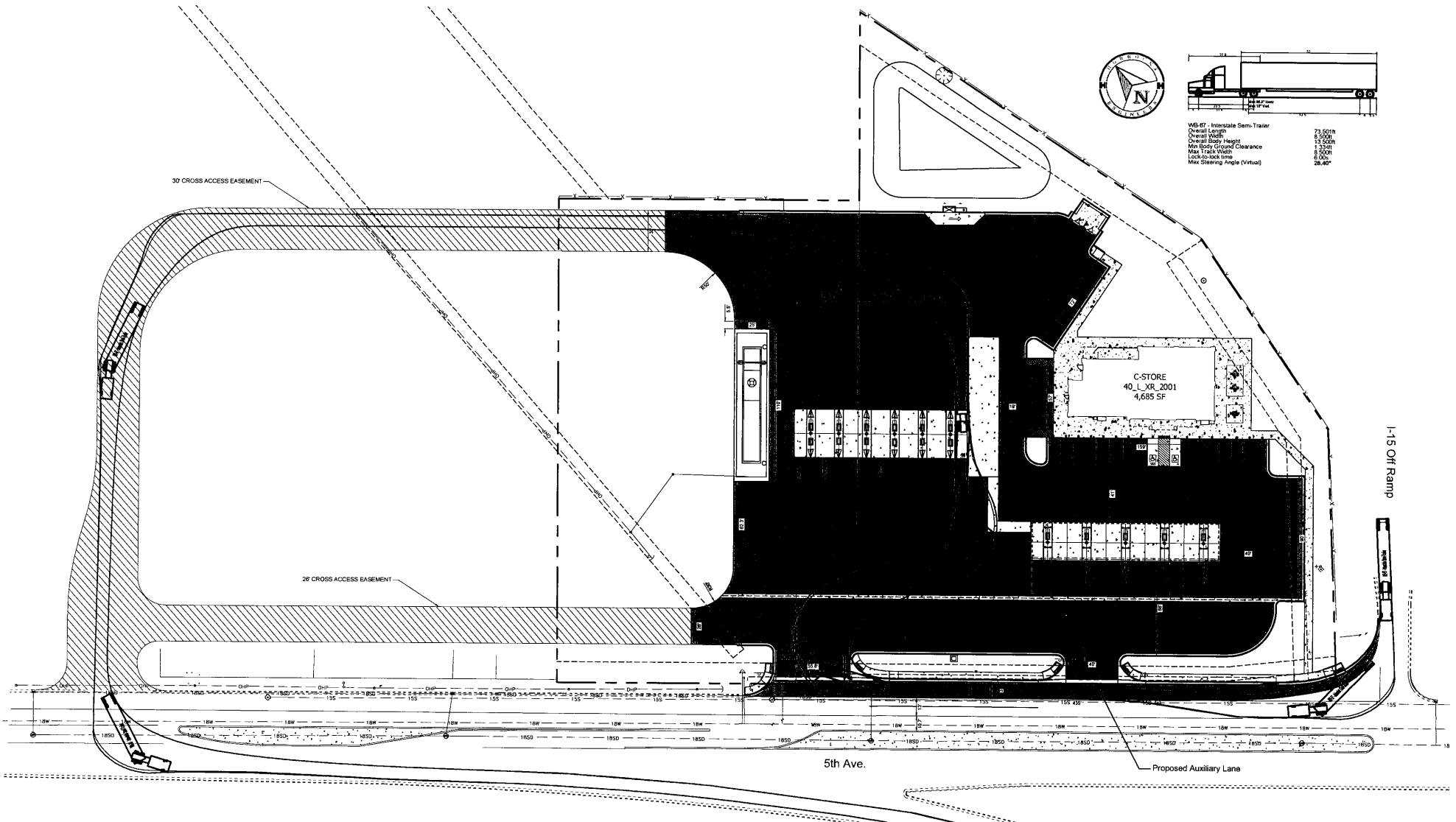
Footnotes

- 1 Lochsa Falls also has access to Ada County Highway District streets, which are not at issue in this appeal.
- 2 In light of this condition contained in the November 19, 2004 encroachment permit, Lochsa Falls’ assertion that Lochsa Falls “was not notified that it would be required to install and pay for a traffic signal until February 24, 2005” is somewhat puzzling. Nevertheless, the discrepant dates are not material to our analysis.

- 3 Because Lochsa Falls's complaint was dismissed on procedural grounds, the issue of waiver was not addressed below. This issue may be considered on remand.
- 4 Lochsa Falls does not challenge ITD's authority to require the \$100 application fee.
- 5 The fact that the permit was never formally approved or denied does, however, raise questions beyond a consideration of whether Lochsa Falls failed to exhaust administrative remedies. The temporary encroachment permit issued to Lochsa Falls stated: "This permit **SHALL BE VOID** if all work is not completed and ITD has not made final inspection and approval within one year of the issuance date." (emphasis in original). We note that by operation of IDAPA 39.03.42.200 and 39.03.42.201 and the passage of time, the encroachment permit in question is void, triggering a requirement for a new permit application. IDAPA 39.03.42.201.03.



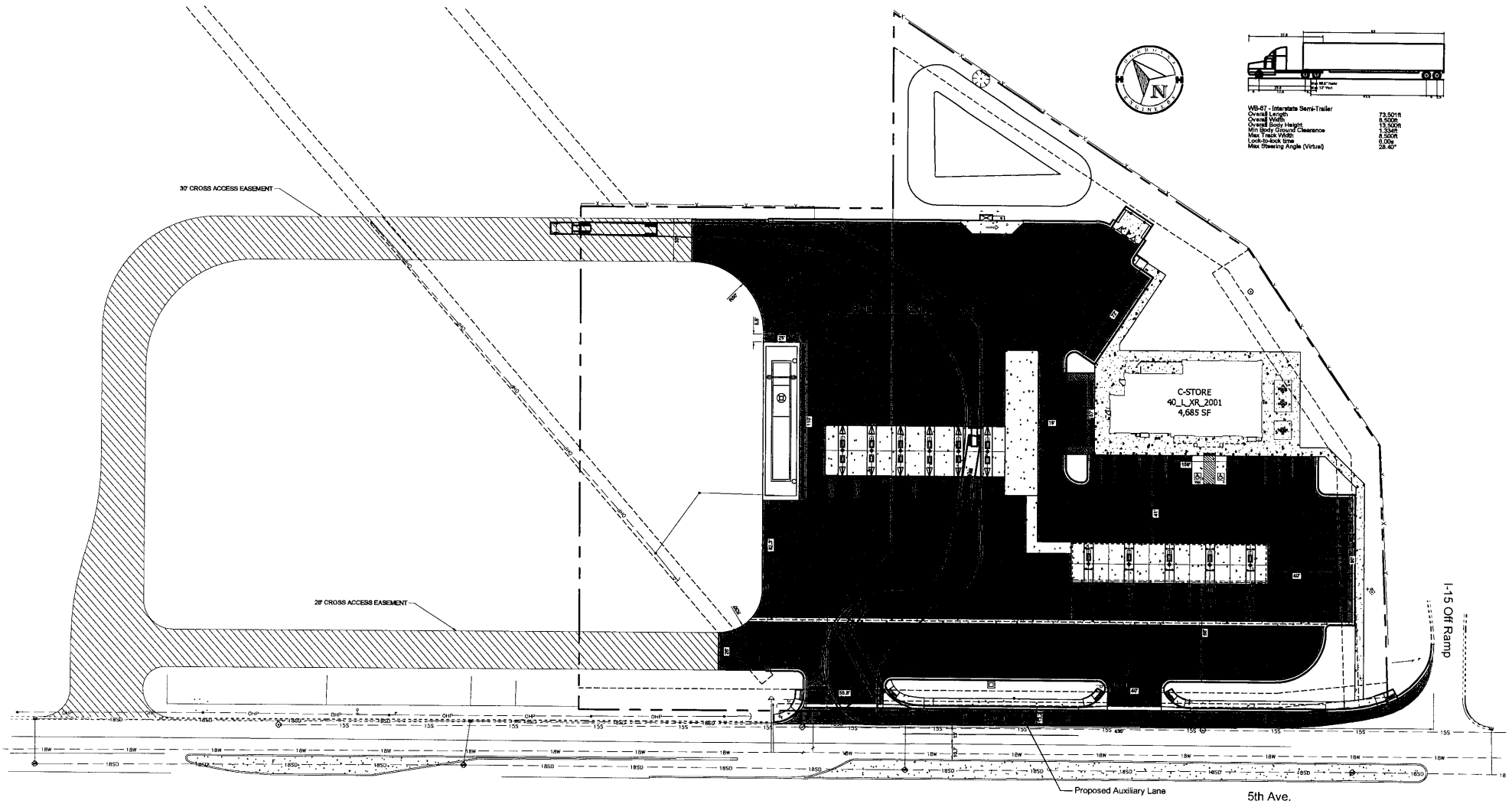
WB-67 - Interstate Semi-Trailer
Overall Length 73.50ft
Overall Width 8.50ft
Overall Body Height 13.50ft
Min Body Ground Clearance 8.33ft
Max Track Width 8.20ft
Lock-to-lock time 8.00s
Max Steering Angle (Virtual) 28.4°



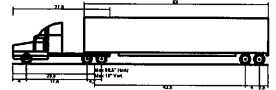
Mavenik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/06/2020



WB-07 - Interstate Semi-Trailer	73.50ft
Overall Length	8.50ft
Overall Width	11.50ft
Overall Body Height	1.33ft
Min Body Ground Clearance	8.50ft
Max Trail Width	9.00ft
Lock-to-lock time	28.40"
Max Steering Angle (Virtual)	



Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



WB-67 - Interstate Semi-Trailer	73,000#
Overall Length	73,000#
Overall Width	13,000#
Overall Height	13,300#
Min Body Ground Clearance	1,330#
Max Track Width	8,500#
Lock-to-Lock Time	6.0s
Max Steering Angle (Virtual)	26.0°

30' CROSS ACCESS EASEMENT

20' CROSS ACCESS EASEMENT

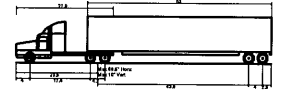
C-STORE
40_LXR_2001
4,685 SF

I-15 Off Ramp

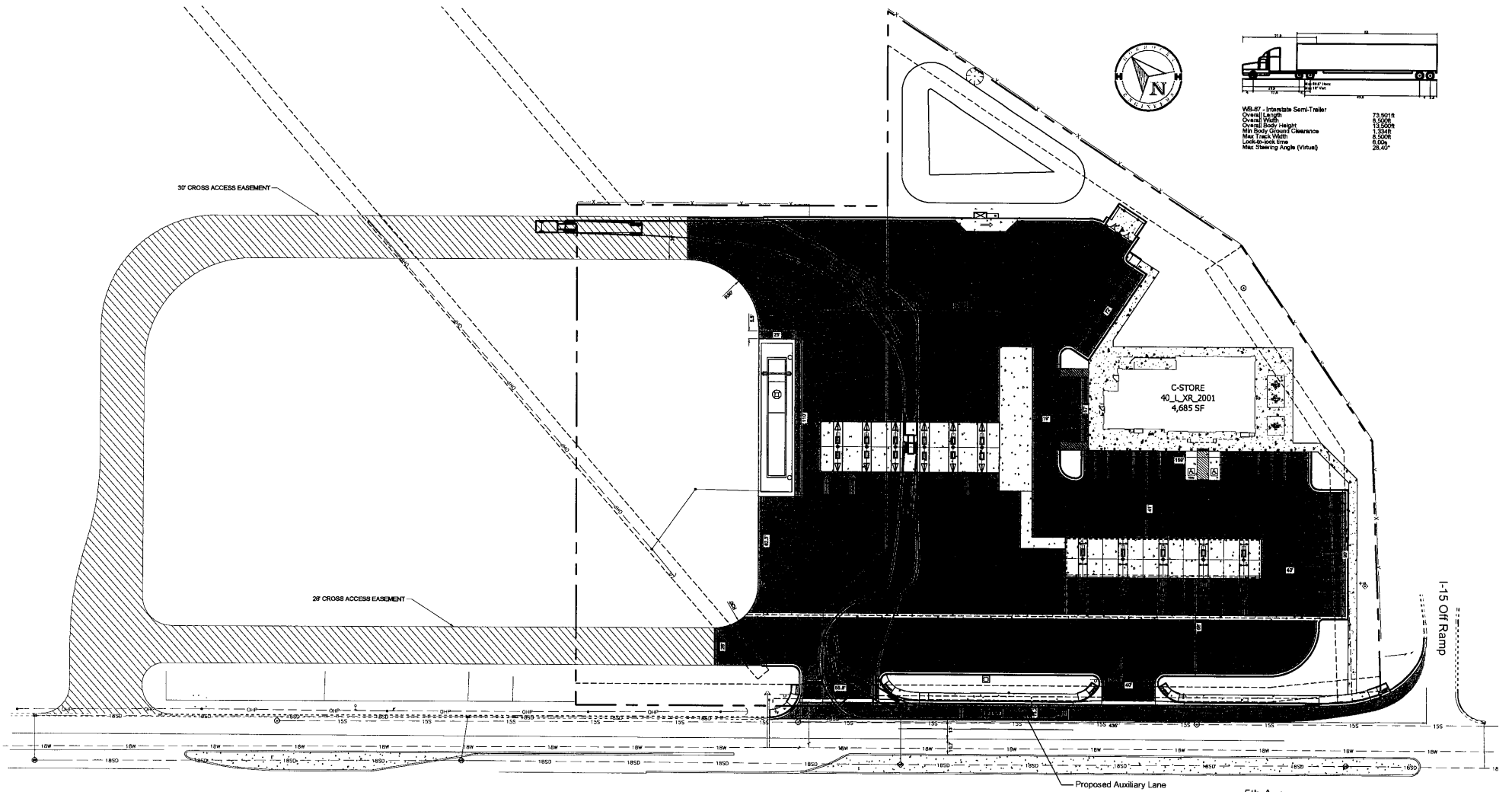
Proposed Auxiliary Lane

5th Ave.

Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020

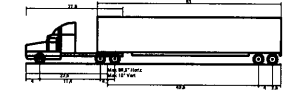


WB-67 Intermodal Semi-Trailer
Overall Length 73,501R
Overall Width 8,500R
Overall Body Height 13,500R
Min Body Ground Clearance 1,350R
Max Track Width 8,500R
Lock-to-lock time 6,50s
Max Steering Angle (Virtual) 28,40°

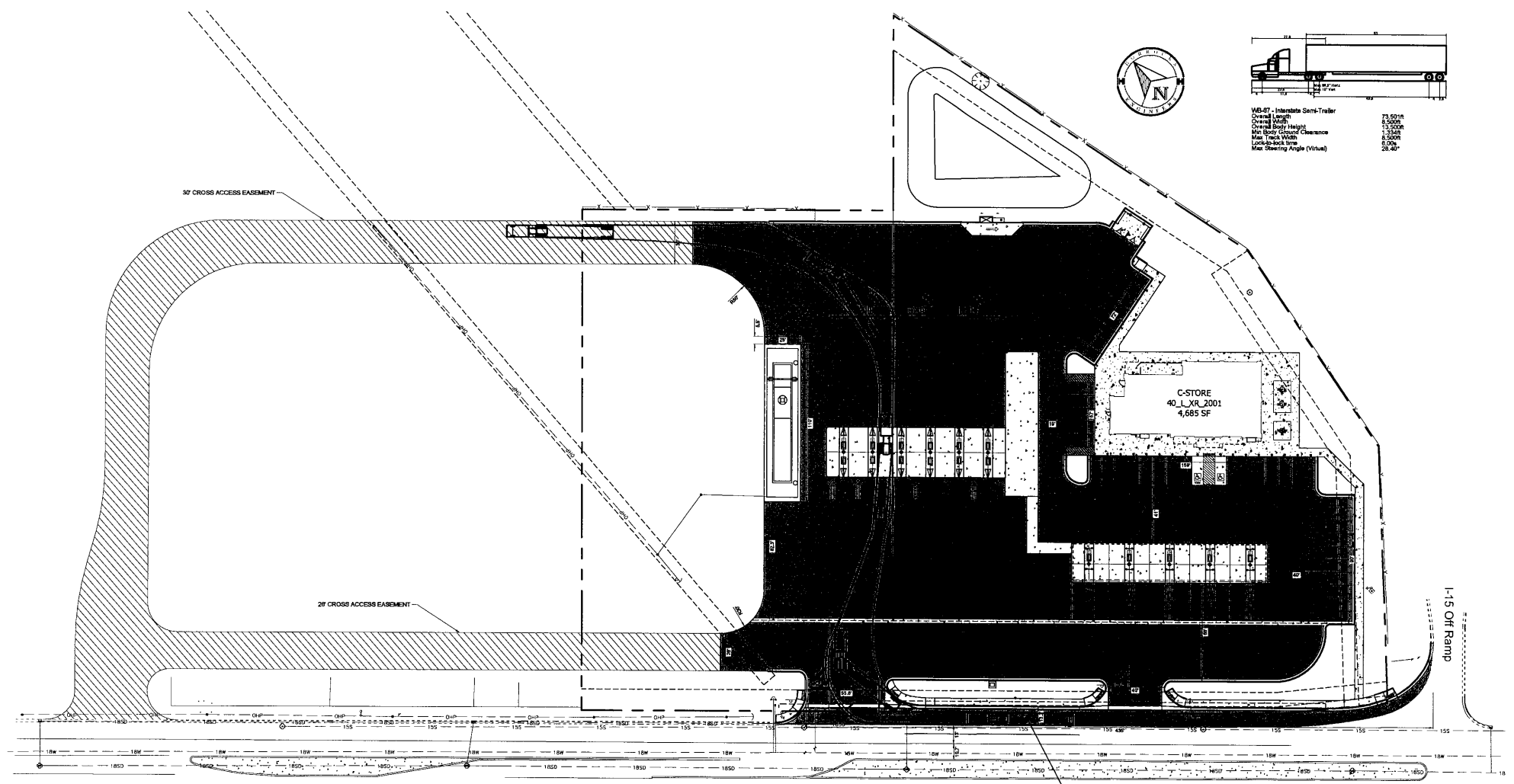


5th Ave.

Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



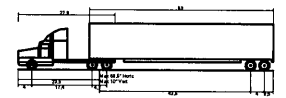
WB-67 Interstate Semi-Trailer	75.00ft
Overall Length	75.00ft
Overall Body Height	11.50ft
Min Body Ground Clearance	1.33ft
Max Truck Width	8.50ft
Lock-to-lock Turn	5.00ft
Max Steering Angle (Virtual)	28.40°



Proposed Auxiliary Lane

5th Ave.

Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



WB-67 - Intermediate Semi-Trailer
Overall Length 73.50ft
Overall Width 8.500ft
Overall Body Height 13.500ft
Min Body Ground Clearance 1.354ft
Max Track Width 8.500ft
Lock-to-lock time 9.00s
Max Steering Angle (Virtual) 28.67°

30' CROSS ACCESS EASEMENT

20' CROSS ACCESS EASEMENT

C-STORE
40_L_XR_2001
4,685 SF

1-15' Off Ramp

Proposed Auxiliary Lane

5th Ave.

Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



WB-67 - Interstate Semi-Trailer	75,000 LB
Overall Length	65,000
Overall Width	11,000
Overall Height	13,500
Min Body Ground Clearance	1,934
Max Track Width	8,500
Lock-to-Lock Time	8.0s
Max Steering Angle (Virtual)	28.0°

37' CROSS ACCESS EASEMENT

27' CROSS ACCESS EASEMENT

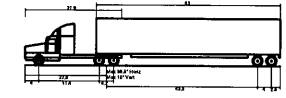
C-STORE
40_XR_2001
4,685 SF

1:15 Off Ramp

Proposed Auxiliary Lane

5th Ave.

Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



WB-67 - Interstate Semi-Trailer	73,500#
Overall Length	6,500#
Overall Body Height	1,350#
Min Body Ground Clearance	6,200#
Max Trail Width	8,000#
Lock-to-lock line	6,000#
Max Steering Angle (Virtual)	28.40°

37' CROSS ACCESS EASEMENT

21' CROSS ACCESS EASEMENT

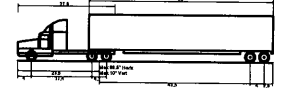
C-STORE
40_L_XR_2001
4,685 SF

1-15' Off Ramp

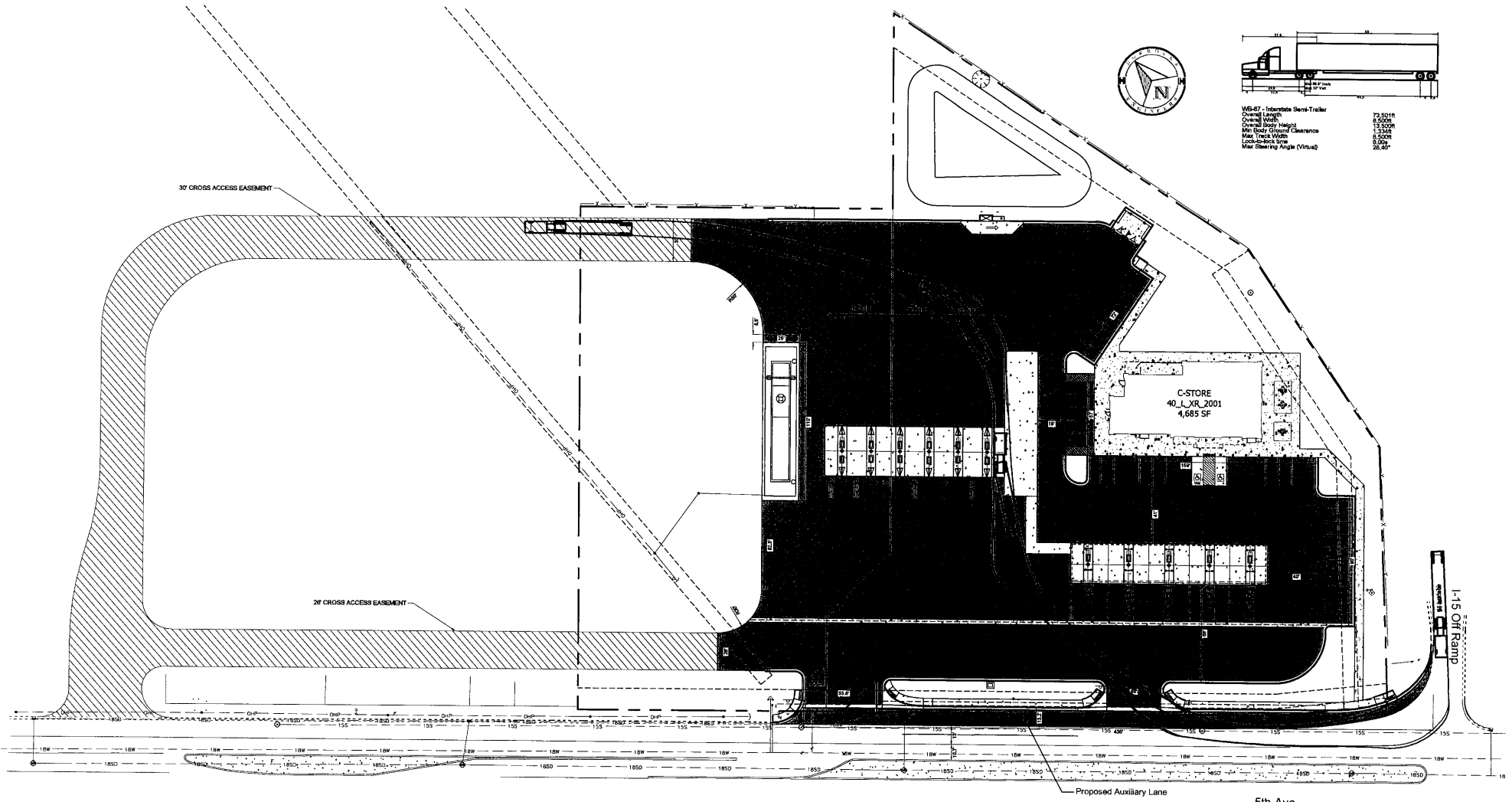
Proposed Auxiliary Lane

5th Ave.

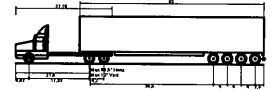
Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



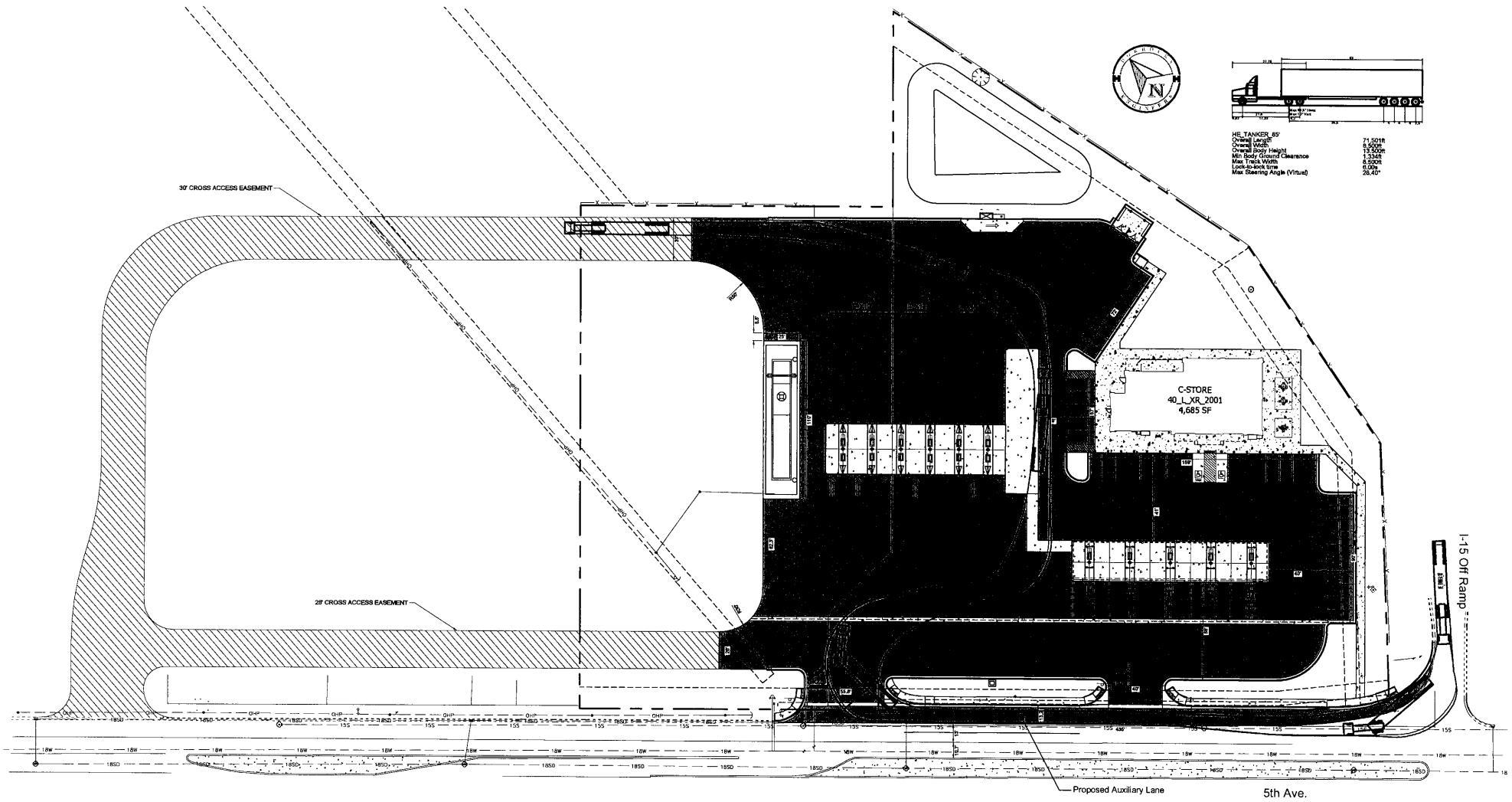
WB-67 Interstate Semi-Trailer	
Overall Length	73.50ft
Overall Width	8.50ft
Overall Body Height	13.50ft
Min Body Ground Clearance	1.35ft
Max Track Width	8.50ft
Low-Back Line	8.00ft
Max Steering Angle (Virtual)	26.40°



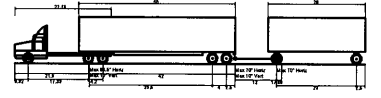
Maverik Site-0199
Pocatello, ID
WB-67 Trailer Exhibit
5/07/2020



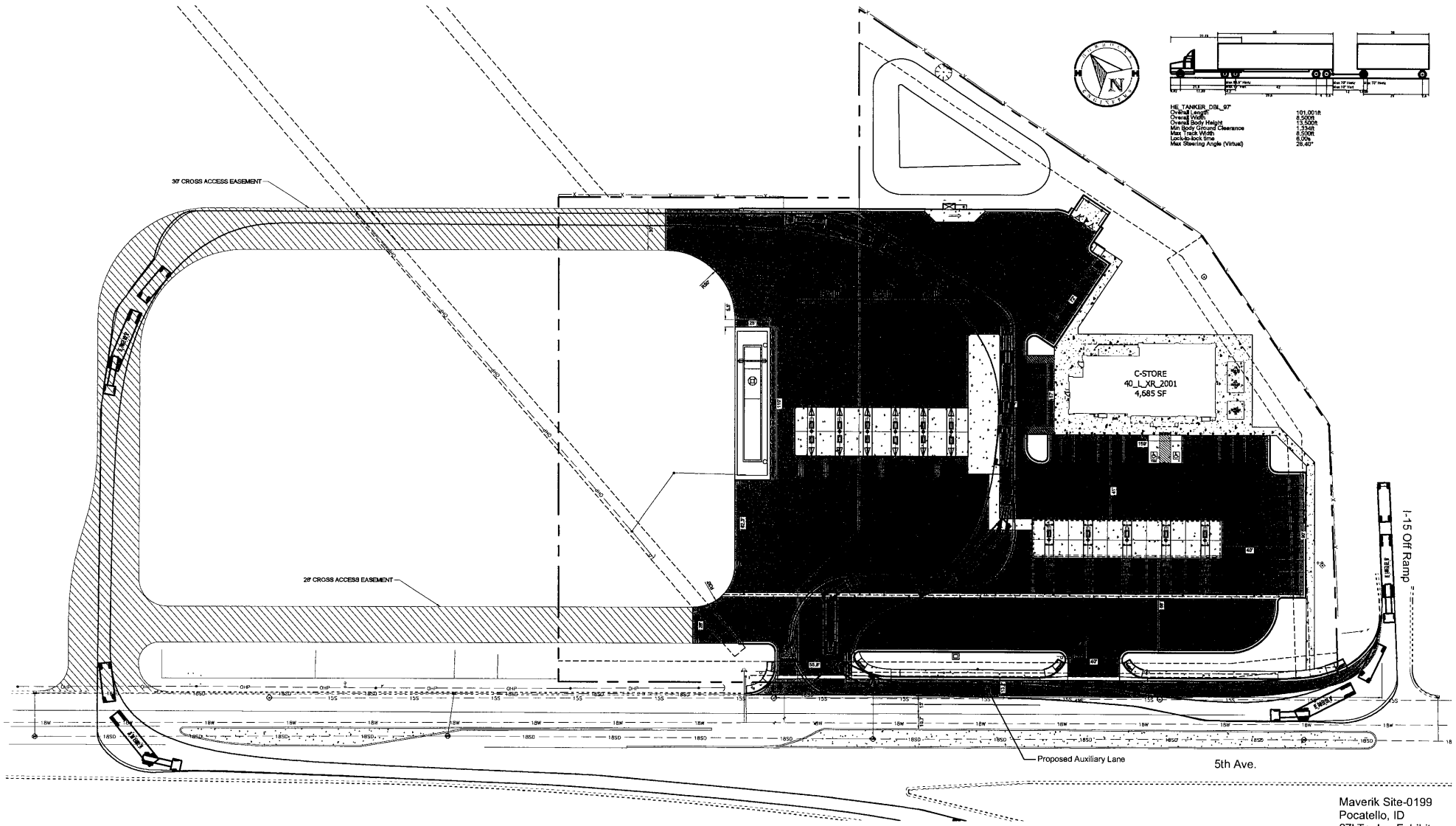
85' TANKER, 85'
 Overall Length 71.501ft
 Overall Height 8.500ft
 Overall Body Height 13.500ft
 Min. Body Ground Clearance 1.334ft
 Max. Track Width 8.500ft
 Lock-to-lock time 6.00s
 Max. Steering Angle (Virtual) 26.40°



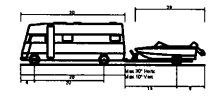
Maverik Site-0199
 Pocatello, ID
 85' Tanker Exhibit
 5/07/2020



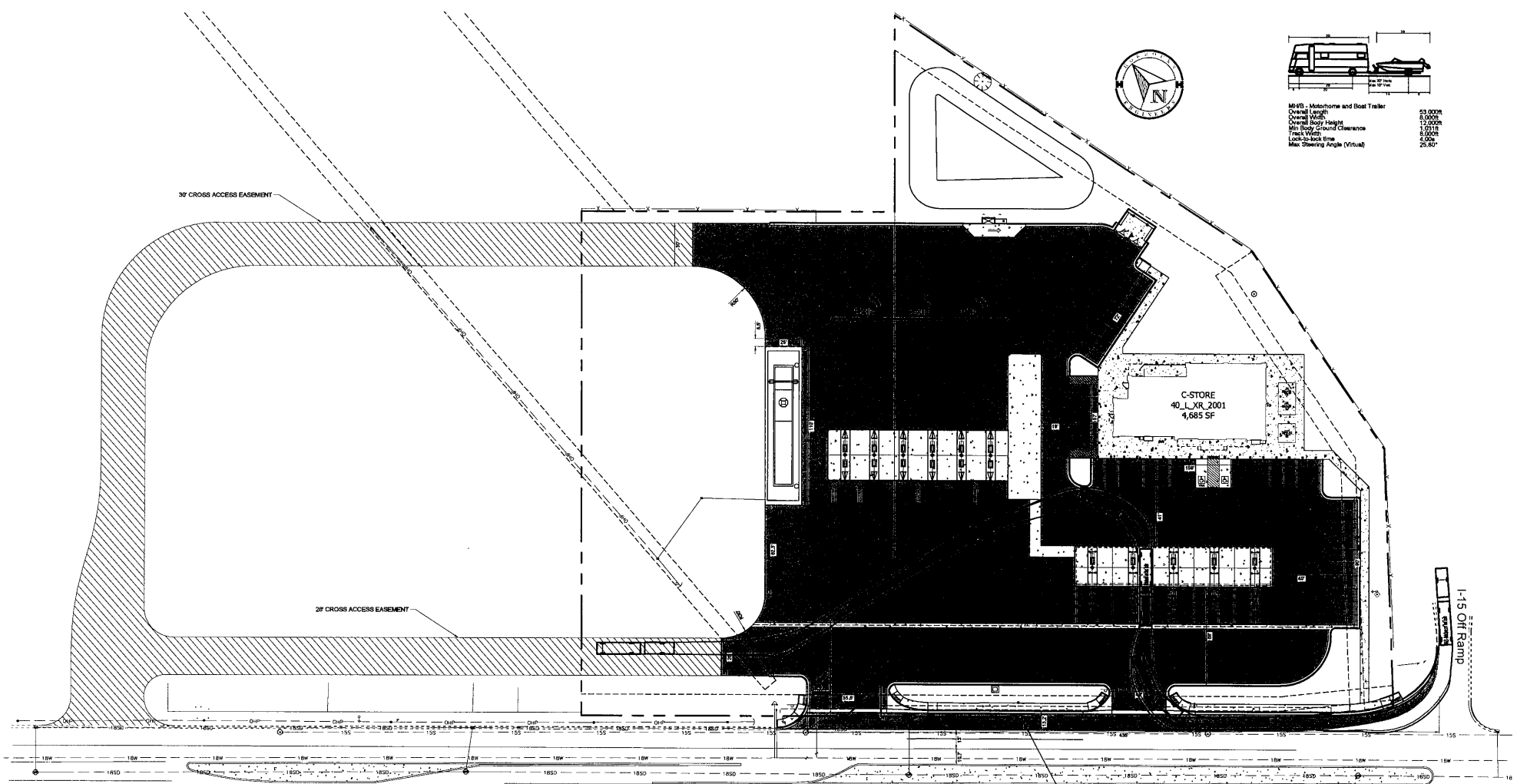
97' TANKER DBL_07
Overall Length 101.001ft
Overall Height 8.500ft
Overall Body Height 13.500ft
Max Body Ground Clearance 13.500ft
Max Track Width 8.500ft
Lockback time 6.00m
Max Steering Angle (Virtual) 28.40°



Maverik Site-0199
Pocatello, ID
97' Tanker Exhibit
5/07/2020



40'43" Motorhome and Boat Trailer	53,000#
Overall Length	41,000"
Overall Width	11,000"
Overall Height	11,000"
Min. 50% Ground Clearance	1,000"
Truck Weight	8,000"
Lock-to-lock time	6.5m
Max. Stowing Angle (Virtual)	25.80°



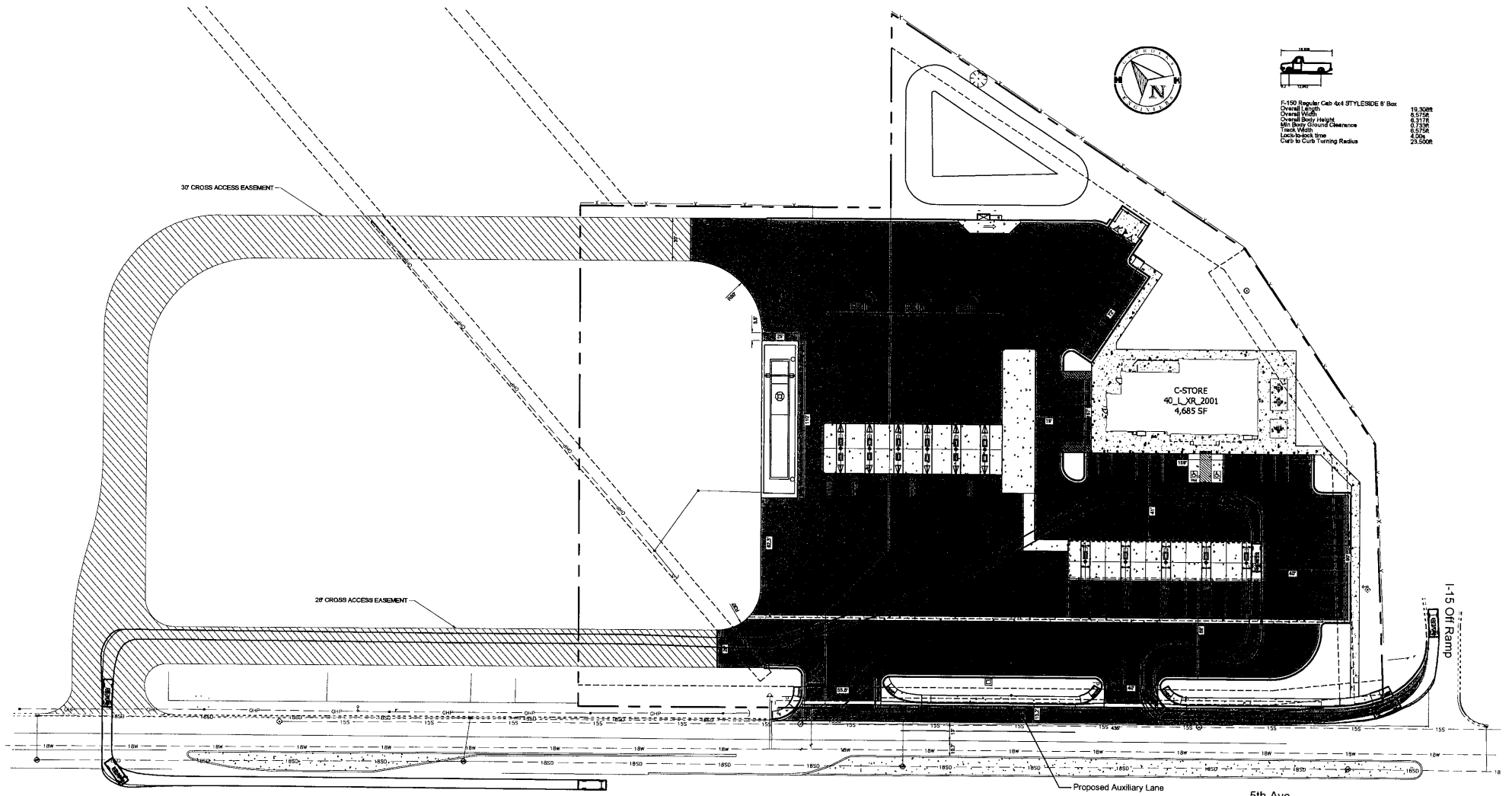
Proposed Auxiliary Lane

5th Ave.

Mavenk Site-0199
Pocatello, ID
Motorhome with Trailer Exhibit
5/07/2020



F-150 Regular Cab 4x4 STYLESIDE 8' Box	19,300#
Overall Length	8,175"
Overall Width	6,975"
Overall Body Height	6,275"
Min. Body Ground Clearance	6,275"
Track Width	6,575"
Lock-to-lock time	4.0s
Curb to Curb Turning Radius	23,500'



Maverik Site-0199
Pocatello, ID
Pick-up Truck Exhibit
5/07/2020