

Staff Summary Report



Council Meeting Date: 09/11/2008

Agenda Item Number: _____

SUBJECT: Request approval of this resolution authorizing the granting of a "License Agreement" for use of right of way located at McAllister Avenue north of Apache Boulevard to Sundt Construction Company.

DOCUMENT NAME: 20080911PWCH08 LICENSE AGREEMENT (0505)
RESOLUTION NO. 2008.81

SUPPORTING DOCS: Yes

COMMENTS: This License Agreement will be administered and appropriate fees charged by the Department of Public Works to Sundt Construction Company for the use of 12,943 square feet of right of way on McAllister Avenue. This site will be used for a temporary operations site for a defined period from October 1, 2008 to October 30, 2010.

PREPARED BY: Larry Shobe, Engineering Services Administrator (x8417)

REVIEWED BY: Andy Goh, Deputy PW Manager/City Engineer (x8896)

APPROVED BY: Glenn Kephart, Public Works Manager (x8205)

LEGAL REVIEW AS TO FORM: Cynthia McCoy, Assistant City Attorney (x2187)

FISCAL NOTE: N/A

RECOMMENDATION: Adopt Resolution No. 2008.81 and authorize the Mayor to execute any necessary documents.

RESOLUTION NO. 2008.81

A RESOLUTION BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE GRANTING OF A LICENSE FOR THE SHORT TERM USE OF CITY PROPERTY FOR A TEMPORARY OPERATIONS SITE ON MCALLISTER AVENUE SOUTH OF UNIVERSITY DRIVE.

WHEREAS, it has been determined to be in the best interest of the City of Tempe to regulate the private use of City owned properties within its borders; and

WHEREAS, the City of Tempe wishes to grant a License Agreement as described in Exhibit "A" attached hereto, to Sundt Construction Company for the short term use of City owned property on McAllister Avenue south of University Drive.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, MARICOPA COUNTY, ARIZONA, AS FOLLOWS

Section 1. That the City of Tempe does hereby authorize the granting of a license to Sundt Construction Company to use the property described on, and in the form attached hereto as, Exhibit "A".

Section 2. The Manager or his designee is authorized to execute any documents that may be necessary to carry out the provisions of this Resolution, including without limitation the License.

Resolution No. 2008.81
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PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE,
ARIZONA this _____ day of September, 2008.

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

LICENSE AGREEMENT

This License Agreement (“**Agreement**”) is executed as of October 1, 2008 (“**Agreement Date**”), by and between the City of Tempe, an Arizona municipal corporation (“**City**”), and Sundt Construction Inc. (“**Sundt**” or “**Licensee**”).

BACKGROUND

- A. As of the Agreement Date, City is the owner of the real property (“**City Property**”) that is legally described on the attached Exhibit “A”.
- B. As of the Agreement Date, Sundt has contracted with Arizona State University to construct building improvements.
- C. In connection with its contract to construct facilities for Arizona State University, Sundt has requested that the City grant to Sundt and its employees, agents, suppliers and sub-contractors (the “**Sundt Parties**”) the use of a portion of McAllister Avenue described in attachment Exhibit “A” for a temporary operations site.
- D. The City is agreeable to granting a license for the use of the described City Property for a temporary operations site upon the terms and conditions that are set forth in this Agreement.

AGREEMENTS

For valuable (\$15,000.00 per year or \$30,000.00 total), consideration, the receipt and sufficiency of which are acknowledged, Sundt and the City (the “**Parties**”) agree as follows.

1. License Matters

- a. Grant of License. The City grants to Sundt a temporary, non-exclusive license (“**License**”) over the City Property for the purpose of construction operations by Sundt and the Sundt Parties in connection with the ASU Project.
- b. Term. The License shall commence on the Agreement Date and if not sooner terminated, shall automatically terminate on October 30, 2010.
- c. Indemnity. To the fullest extent permitted by law, Sundt shall defend, indemnify and hold harmless the City, its agents, officers, officials, employees and volunteers (collectively, the “**Indemnified Parties**”) for, from and against all claims, damages, losses and expenses, including but not limited to, reasonable attorney's fees, court costs, and the costs of appellate proceedings (collectively, the “**Indemnified Losses**”), arising from or related to the negligent acts or omissions of the Sundt Parties or any other person (not the City) for whose negligent acts, errors, mistakes, omissions, work, services, or professional services Sundt may be legally liable on or about the City Property. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of indemnity in this paragraph. This indemnity shall survive the termination of this Agreement.
- c. No Liens. Sundt shall not permit any liens to attach to the City Property as a result of the acts or omission of any of the Sundt Parties, and if any such liens do attach,

Sundt shall immediately cause them to be released or bonded over to the reasonable satisfaction of the City.

d. Insurance. During the term of the License, Sundt shall maintain in full force and effect policies of general liability and automobile liability insurance in amounts not to exceed \$5,000,000. All such policies shall name the City as additional insured and shall state that they may not be cancelled prior to expiration without 30 days prior written notice to the City. Sundt shall coordinate the level of coverage with the City's Risk Manager.

e. Restoration. Upon the termination of this License, Sundt shall promptly remove all of its equipment, supplies, and material from the City Property and shall restore the City Property to the condition in which it existed as of the Agreement Date. In addition, Sundt shall mill and overlay at the end of use, the entire width of the street for the described 411' of length. Sundt shall also maintain roadway drainage during their occupancy of the street.

2. Representations, Warranties and Covenants of Mercury.

a. During the term of this Agreement, Sundt shall not cause or permit the Sundt Parties to cause any generation, production, location, transportation, storage, treatment, discharge, disposal, or release upon or under the City Property of any substance regulated under any local, state or federal environmental protection law or regulation.

b. City shall at all times have access to the City Property.

c. Sundt shall comply with, conform to and obey, and cause each of the Sundt Parties to comply with, conform to and obey all laws, ordinances, rules, regulations and all other legal requirements applicable to them, including, without limitation, laws and regulations relating to occupational safety and health and environmental protection, and all orders, writs, judgments, injunctions, decrees or awards of any court or governmental authority with jurisdiction over Sundt or the City Property. Sundt shall obtain promptly and keep in full force and effect all licenses, permits, authorizations, registrations, rights and franchises necessary to its business and the performance of this Agreement.

d. Sundt shall at all times minimize the risk of loss, theft or damage by vandalism, sabotage or other means to any property. Sundt shall promptly take all reasonable precautions which are necessary and adequate against any conditions which involve a risk of a loss, theft or damage to materials and other property at the City Property. Sundt shall bear and be liable for all loss or damage of any kind which may happen to its property and that of the Sundt Parties. City shall not be responsible for any damage done to any property of Sundt or the Sundt Parties while located at the City Property. Sundt shall at all times be responsible for the conduct and discipline of its employees, subcontractors and other persons.

3. Default; Remedies. It is a default if either party fails to perform its obligations under this Agreement and such failure is not cured within ten (10) days after written notice from the non-defaulting party. The non-defaulting party shall be entitled to full and adequate relief by all available legal and equitable remedies, including, without limitation, specific performance. In addition, the City shall have the right to terminate this Agreement and the License immediately.

4. Governing Law. This Agreement shall be interpreted according to, and governed by, the procedural and substantive laws of the State of Arizona. The Parties irrevocably consent to jurisdiction and venue in the State of Arizona and agree that they will not attempt to remove or transfer any action properly commenced in the State of Arizona. The successful party in any court action brought to enforce or interpret any provision of this Agreement will be entitled to recover its reasonable attorney's fees and court costs from the unsuccessful party.

5. Notices. All notices or other communications required or permitted to be provided pursuant to this Agreement shall be in writing and shall be hand delivered, sent by United States Postal Service, postage prepaid, by a nationally recognized courier service. All notices shall be deemed to have been given when delivered if hand delivered, when received if sent by courier, or forty-eight (48) hours following deposit in the United States Postal Service. Notices shall be addressed as follows:

If to Sundt: Ryan Abbott
SUNDT CONSTRUCTION INC.
2620 S. 55th Street
Tempe, AZ 85282

with copy to:

If to City: City Manager
City of Tempe
31 East Fifth Street
Tempe, AZ 85251
Fax: 480-350-8930

with copy to: City Attorney
City of Tempe
21 East Sixth Street
Tempe AZ 85251
Fax: 480-350-8645

6. Entire Agreement. This Agreement, together with its Exhibits, is the entire agreement of the Parties and supersedes any and all prior oral or written agreements or understandings between the Parties pertaining to the subject matter of this Agreement. The Parties have made no representations, warranties, or inducements, express or implied, other than as set forth in this Agreement.

7. Invalidity. Every term of this Agreement shall be enforceable to the fullest extent permitted by law. If any term of this Agreement is determined to be to any extent unenforceable, that provision will be deemed modified in the most minimal manner so as to make it enforceable, and the remainder of this Agreement shall not be affected.

8. Time of the Essence. Time is of the essence of all provisions of this Agreement in which time is a relevant factor.

9. General Provisions. Each person executing this Agreement personally represents that he or she has the full legal right to do so in the capacity indicated. No waiver of any term of this Agreement shall be deemed to be a continuing waiver of that term or a waiver of any other term of this Agreement.

This Agreement may be signed in one or more counterparts, whether by original, copy, or telecopy signature, each of which together will form one binding agreement of the Parties.

Executed as of the Agreement Date.

Sundt Construction Inc.

By: _____
Its: _____

“CITY”

The City of Tempe, an Arizona municipal corporation

By: _____
Its: _____

Approved as to form:

City Attorney

LIST OF EXHIBITS

Exhibit “A” Legal Description of City Property

EXHIBIT A

McAllister Avenue

Partial closure for use during construction of ASU ISTB IV

A portion of public right-of-way along McAllister Avenue defined as the east 31.50 feet starting at 1,229.88 feet South of E. University Dr. and continuing 410.92' to the South.

NOTE: THIS IS NOT A FORMAL LEGAL DESCRIPTION. FOR USE IN OBTAINING CONSTRUCTION USE PERMITS/AGREEMENTS ONLY.