

REPORT TO CITY COUNCIL

DATE: FEBRUARY 14, 2024

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: NATHAN HAMBURGER, CITY MANAGER

BY: JESSICA FORTE, DIRECTOR OF PUBLIC WORKS/CITY ENGINEER

SUBJECT: REQUEST APPROVAL AND AUTHORIZATION TO EXECUTE AGREEMENT RELATED TO LADYFACE GREENWAY PROJECT

The City of Agoura Hills (City) is currently out to bid for construction of the Ladyface Greenway Project (Project). This report requests approval and authorization from the City Council to execute a Right of Entry Agreement (ROE) that provides the construction access area and enhanced connectivity between the Project and the Whizin Market Square (Whizin) property.

The Project consists of constructing a new greenway, approximately 1.3 acres in size, over an existing rectangular concrete-lined runoff channel that is owned and maintained by the Los Angeles County Flood Control District (LACFCD). The Project lies between the City's most used commercial center, the Whizin Market Square, to the north and Agoura Road to the south, between Cornell Road and approximately 700 feet to the east of Cornell Road. Additionally, the Project includes construction work within adjacent roadways of Agoura Road, Cornell Road, and the intersection of Agoura Road/Cornell Road for utility undergrounding and drainage improvements.

During design of the Project, staff coordinated with adjoining property owners to improve and develop cohesiveness between the aesthetic features of the Project area, Agoura Road and the Agoura Village Specific Plan Area. Staff discussions with Whizin began in 2019, regarding that portion of the property, between the Project area and the east buildings, shown in Exhibit A of the attached ROE.

The ROE is a result of multiple discussions with Whizin and agreement on compensation to finalize the ROE between both parties. The consideration amount of the ROE was part of the determination of just compensation process through a voluntary negotiation process.

The ROE allows the City to access that portion of the Whizin property, shown in the attachment, to aid in construction of the project for an 18-month term to use the area. The area will be fenced to secure the site, enclosing both the project site and subject property.

The proposed agreement has been reviewed by the City Attorney and approved to form.

FISCAL IMPACT

The agreement includes a one-time payment of \$140,000 to Whizin Market, LLC, using funds allocated by the Los Angeles Metropolitan Transportation Authority Measure R and M Funding Agreement for the project. This money becomes payable after execution of a construction contract for the Project.

RECOMMENDATION

Staff respectfully recommends the City Council approve the Right of Entry and Access Agreement with Whizin Market, LLC, and authorize the City Manager to sign the agreement on behalf of the City Council and staff to execute the agreement as necessary.

Attachment: Right-of-Entry and Access Agreement

**RIGHT OF ENTRY AND ACCESS AGREEMENT FOR
CONSTRUCTION OF IMPROVEMENTS
(WHIZIN MARKET SQUARE)**

This Right of Entry and Access Agreement for Construction of Improvements ("**Construction Right of Entry**") is made this 1st day of February, 2024, by and between **WHIZIN MARKET, LLC**, a Delaware limited liability company (the "**Owner**"), and **THE CITY OF AGOURA HILLS** ("**City**"), with reference to the following facts:

RECITALS

A. The Owner is the fee owner of the real property commonly known as "Whizin Market Square," addressed at 28914 Roadside Drive, Agoura Hills, California 91301 and identified as Los Angeles County Tax Assessor's Parcel Nos. 2061-007-021, 2061-007-052, 2061-007-051, 2061-007-041 and 2061-007-05 ("**Owner's Property**").

B. The City is constructing certain public greenway improvements, which include covering existing concrete channel, retaining walls, landscape and irrigation, decorative hardscape, site drainage, utility undergrounding, and green street improvements (collectively referred to herein as the "**Proposed Project Improvements**"), on the Los Angeles County Flood Control District (LACFCD) property for the Cheseboro Creek concrete rectangular channel, adjacent to Agoura Road, between Cornell Road and the Owner's Property (such area on which the improvements will be constructed to be referred to herein as the "**Project Area**") to create the Ladyface Greenway Project ("**Proposed Project**").

C. The City and the City's agents, employees, contractors, representatives and other designees (referred to below collectively as "**City's Designees**") need to enter onto and across the Owner's Property to access the Project Area to construct the Proposed Project (such area on the Owner's Property to be used by the City and the City's Designees to access the Project Area to be referred to herein as the "**Access Area**"). The Access Area to be accessed and utilized in connection with the construction of the Proposed Project on the Project Area is described on Exhibit "A" hereto and incorporated herein by this reference.

D. Following voluntary negotiations between the Owner and City concerning just compensation, both parties agreed to the total monetary consideration amount of One Hundred Forty Thousand Dollars (\$140,000) (the "**Access Fee**") for the use of the Access Area (as provided herein), with payment to be tendered to Owner after the City's execution of construction contract for the Proposed Project (but prior to any entry onto the Access Area by the City or the City's Designees).

E. Subject to the covenants and conditions set forth below, the parties desire to enter into this Construction Right of Entry to provide the City and City's Designees with access to, from and onto the Access Area to construct the Proposed Project on the Project Area.

NOW, THEREFORE, in consideration of the completion of the Proposed Project, this Construction Right of Entry, the sum agreed to be paid herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Owner hereby grants a right of entry to the City and the City's Designees for the purposes of access to, from and onto the Access Area, as shown and described in Exhibit "A", for construction activity, use, and construction of Proposed Project on the Project Area, subject to the City's compliance with the terms, conditions and restrictions set forth in this Construction Right of Entry including, without limitation, the timely payment to Owner of the Access Fee as provided in Recital D above.

2. Owner hereby agrees and acknowledges that the access to the Access Area for construction-related activities for the Proposed Project Improvements may include, tests, surveys and work of professional engineers, architects and soils experts and this Construction Right of Entry authorizes any such work necessary to construct the Proposed Project.

3. Owner hereby agrees and acknowledges that use of the Access Area described in Exhibit "A" for the purposes of access, construction activity use, and construction of Proposed Project on the Project Area requires an application for and the maintenance of a Temporary Use Permit and Owner's approval herein authorizes the City and City's Designees to apply for and operate said Temporary Use Permit.

4. In performing the construction of Proposed Project Improvements on the Project Area, the City and City's Designees: (a) shall use their best efforts to minimize any adverse impacts to the Owner's Property including, without limitation, noise, dust and vibrations; (b) agree that the construction-related activities by the City and the City's Designees hereunder shall be done (i) only in the Access Area, (ii) in a safe and professional manner, (iii) so as not to create any dangerous or hazardous condition on the Owner's Property, (iv) in compliance with all applicable laws, (v) only after obtaining all permits required to be obtained with respect to such improvements, and (vi) at the City's sole cost and expense; and (c) shall not bring any hazardous, toxic or contaminated materials or substances on the Access Area or any other part of the Owner's Property, including, without limitation, any toxic or hazardous substance, material or waste or any pollutant or contaminant or infectious, explosive or radioactive material regulated now or in the future under any federal, state or local laws, ordinances, codes, statutes, regulations, administrative rules, policies and orders. In connection with their obligations under Section 9 below, the City and the City's Designees will remove any and all trash and/or debris placed on the Access Area (or any other portion of the Owner's Property) in connection with the completion of the Proposed Project Improvements within five (5) days after the date that the City and City's Designees complete the construction of the above Proposed Project Improvements.

5. The Commencement Date of this Construction Right of Entry will be three (3) business days after the date on which City provides written notice to Owner

that the City's Designees will commence the construction of the Proposed Project, which notice shall be provided no later than June 3, 2024. Accordingly, City and City's Designees will have the right of access to and from the Access Area beginning three (3) business days after the date on which City provides written notice to Owner of the commencement of the Proposed Project. The City anticipates that it will complete the Proposed Project within eighteen (18) months of the Commencement Date of this Construction Right of Entry. Accordingly, this Construction Right of Entry will expire and terminate by its own terms upon (i) the written notice to Owner of completion of the Proposed Project, or (ii) eighteen (18) months after the Commencement Date, whichever occurs sooner; provided, however, if any of the City's Designees need to access the Access Area following the expiration of this Construction Right of Entry in connection with the construction of the Proposed Project Improvements on the Project Area, Owner agrees that, subject to Owner and any applicable City Designee entering into a definitive written agreement regarding the terms of such entry (including the payment of an access fee equal to \$8,000 per month), such City Designees may have access to the Access Area on a month to month basis for up to an additional six (6) month period.

6. The City's Designees will perform the construction-related activities on the Access Area during regular business hours (7:00 a.m. to 5:00 p.m.) on Monday through Friday. The City and the City's Designees will not perform any construction work on Saturdays, Sundays or City holidays.

7. Owner reserves the right for it and/or its agents, consultants, employees and agents to be present for observation during the construction activities described herein, provided Owner does not interfere with the City and the City's Designees.

8. The City and the City's Designees will use all good faith, reasonable efforts to avoid any adverse, permanent damage to the Owner's Property.

9. Following completion of the Proposed Project Improvements, the City and the City's Designees will be responsible for returning the Access Area to as close to possible to its original condition as of the Commencement Date.

10. Owner does not hereby convey to the City or the City's Designees any right, title or interest in or to the Owner's Property, but merely grants the specific rights and privileges hereinabove set forth.

11. All notices and demands will be given in writing by certified mail, postage prepaid, and return receipt requested, by reputable overnight carrier service or by personal delivery. Notices will be considered given upon the earlier of (a) personal delivery, (b) two (2) business days following deposit in the United States mail, postage prepaid, certified or registered, return receipt requested, or (c) one (1) business day following deposit with an overnight carrier service. Notices will be addressed as provided below for the respective party; provided that if any party gives notice in writing

of a change of name or address, notices to such party will thereafter be given as demanded in that notice:

Property Owner: Whizin Market, LLC
16633 Ventura Boulevard, Suite 730
Encino, California 91436
Attn: William P. Tucker

City: City of Agoura Hills
30001 Ladyface Court
Agoura Hills, CA 91301
Attn: Public Works Director/City Engineer

12. This Construction Right of Entry will be construed and interpreted under, and governed and enforced according to the laws of the State of California without regard to choice of law principles.

13. This Construction Right of Entry will be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties hereto. Owner warrants that Owner will provide notice of this Construction Right of Entry to Owner's successors and assigns.

14. If either party hereto incurs attorneys' fees in order to enforce, defend or interpret any of the terms, provisions or conditions of this Construction Right of Entry or because of a breach of this Construction Right of Entry by the other party, the prevailing party, whether by suit, negotiation, arbitration or settlement will be entitled to recover reasonable attorneys' fees from the other party.

15. This Construction Right of Entry contains the entire agreement between Owner and the City with respect to the subject matter hereof, and there are no other terms, conditions, promises, undertakings, statements or representations, express or implied, concerning the subject matter of this Construction Right of Entry. The terms of this Construction Right of Entry may not be amended, waived or terminated orally, but only by an instrument in writing signed by Owner and the City. If any part, term or provision of this Construction Right of Entry is held by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining portions or provisions will not be affected, and the rights and obligations of the parties will be construed and enforced as if this Construction Right of Entry did not contain the particular part, term or provision held to be invalid.

16. The City and the City's Designees will indemnify, defend and hold the Owner and its members, managers, principals, employees and lenders (if any) harmless from (a) any and all liability for bodily injury, death and property damage arising out of or in any way connected with their entry on and use of the Access Area and/or the Owner's Property (as permitted herein) for the construction of the Proposed Project Improvements discussed above, and (b) against all mechanics', materialmen's or other liens resulting from the conduct of the City and/or the City's Designees upon the Access

Area and/or the Owner's Property. In addition, the City will reimburse the Owner for all costs, expenses and loss, including reasonable attorney's fees, incurred by it in consequence of any claims, demands and causes of action which may be made or brought against Owner arising out of the City and the City's Designees entry on and use of the Access Area for their construction of the Proposed Project Improvements described above on the Project Area.

17. During any period of time when the City or City's Designees are on the Access Area pursuant to this Construction Right of Entry, the City and City's Designees entering thereon shall procure and pay the premium for commercial general liability insurance with limits not less than Two Million and No/100 Dollars (\$2,000,000.00) with respect to death or injuries to any one person, Two Million and No/100 Dollars (\$2,000,000.00) with respect to any one accident, and Two Million and No/100 Dollars (\$2,000,000.00) with respect to property damage to protect the Owner and its members, managers, principals, employees and lenders (if any) against liability for such injury to persons and such damage upon the Access Area and the activities of or on behalf of City on or about the Access Area. Such insurance shall be written on an occurrence basis, and shall name or include by endorsement Owner and its members, managers, principals, employees and lenders (if any) as an additional insured. Certificates evidencing such insurance shall initially be provided to Owner prior to the commencement of the Proposed Project Improvements and, thereafter, no less than once any twelve (12) month period or within ten (10) business days of Owner's written request therefor. Such commercial general liability insurance shall be primary and non-contributory with any insurance carried by Owner; provided, however, the insurance required hereunder shall not be deemed to be a cap of the City's liability under this Construction Right of Entry.

18. This Construction Right of Entry may be signed in any number of counterparts, each of which, when executed and delivered, will be deemed an original, and all of which, when taken together, will be deemed to be the same instrument. This Construction Right of Entry may be executed by electronic signature via DocuSign process, in which case the electronic signature shall be deemed an original, and shall have the same legal force as an original. Either party delivering an executed counterpart of this Construction Right of Entry by email shall provide a manually executed counterpart of this Construction Right of Entry to each party.


[remainder of page intentionally left blank; signatures on next page]

IN WITNESS WHEREOF, this Construction Right of Entry is effective on the day and year first written above.

OWNER:

WHIZIN MARKET, LLC,
A Delaware limited liability company

By: Whizin Market Square Member, LLC,
a California limited liability company,
Its: Sole Member

By: 
Name: William P. Tucker
Title: Manager

Dated: 2/1/24

CITY:

CITY OF AGOURA HILLS

By: _____
Name: _____
Its: _____

Dated: _____


AGOURA HILLS LADYFACE GREENWAY PROJECT

EXHIBIT A – ACCESS AREA

LEGEND:

 LADYFACE GREENWAY PROJECT SITE

ROE ACCESS AREA SHALL BE FENCED WITH AN INTEGRAL SCREEN. COORDINATE WITH CITY SCREEN SELECTION AND TYPE.

 CONSTRUCTION ACCESS AND USE FOR THE FIRST 15 MONTHS OF CONSTRUCTION RIGHT OF ENTRY

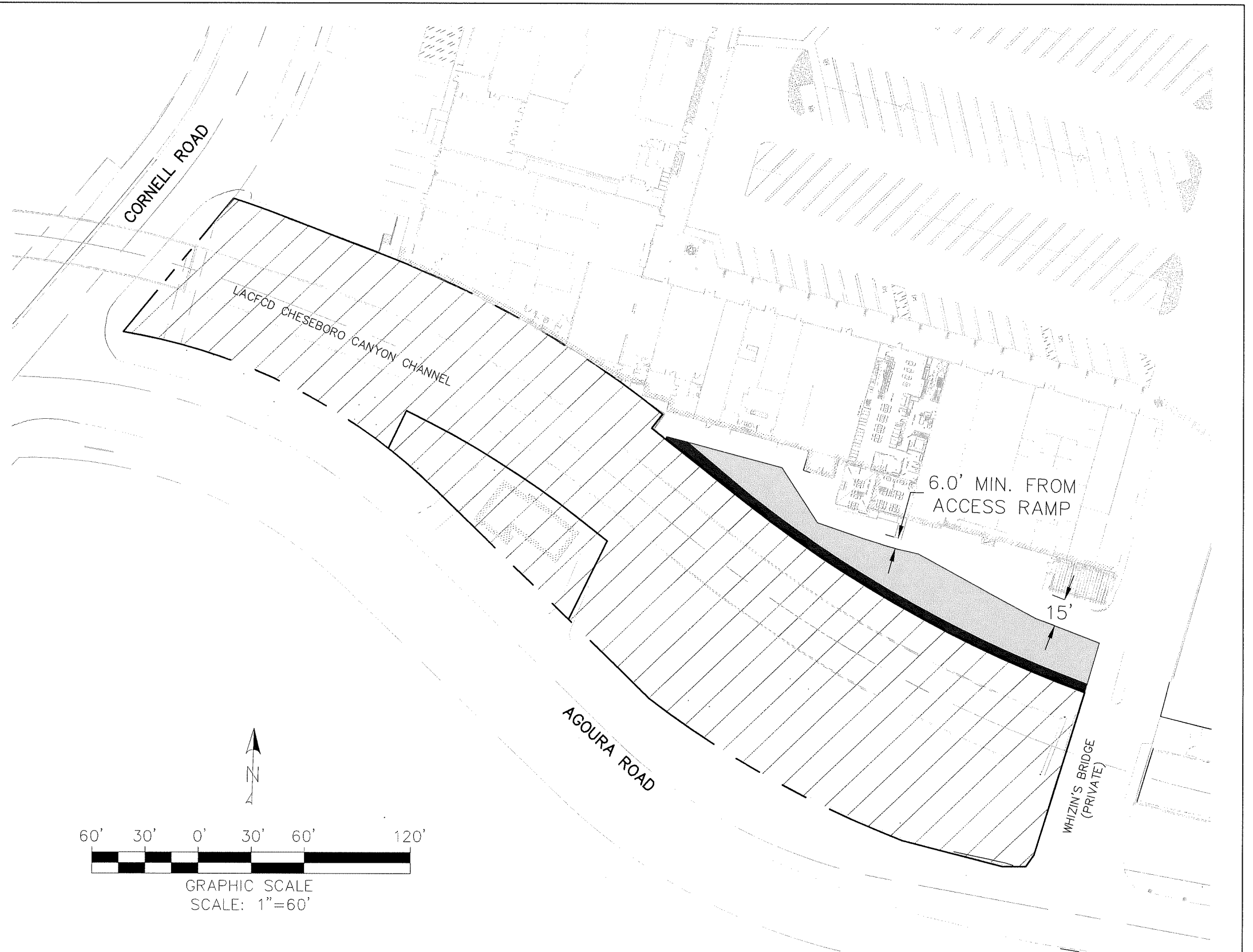
FENCING SHALL BE SET BACK A MINIMUM OF 12-FT FROM BUILDING TO ALLOW UNINTERRUPTED EGRESS FROM SOUTH EXITS OF BUILDING TO DRIVEWAY.

FENCED CONSTRUCTION ACCESS AREA SHALL BE PROVIDED WITH LACFD APPROVED KEY BOX / KNOX BOX.

 CONSTRUCTION ACCESS AND USE FOR LAST 3 MONTHS OF CONSTRUCTION RIGHT OF ENTRY.

FENCING SHALL BE SET BACK A MINIMUM OF 5-FT FROM PROPERTY LINE.

CONFIRM WITH LACFD ANY FIRE DEPARTMENT ACCESS REQUIREMENTS



PREPARED BY: m6 CONSULTING, INC.
4165 E THOUSAND OAKS BLVD, STE
355 WESTLAKE VILLAGE, CA 91362



PREPARED FOR: CITY OF AGOURA HILLS
30001 LADYFACE COURT
AGOORA HILLS, CA 91301

CITY OF AGOURA HILLS
LADYFACE GREENWAY PROJECT

EXHIBIT A
SHEET 1 OF 1