



## City of Ketchum

October 19, 2020

Mayor Bradshaw and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Bradshaw and City Councilors:

### **Recommendation To Approve Encroachment Agreement 20548 with Jack Bariteau Jr. for 391 First Avenue**

#### Recommendation and Summary

Staff is recommending the council approve Encroachment Agreement 20548 and adopt the following motion:

I move to authorize the Mayor to approve the Encroachment Agreement 20548 with Jack Bariteau Jr. for the project located at 391 First Avenue.

The reasons for the recommendation are as follows:

- The improvements were discussed and reviewed as part of the development agreement approved for the proposed project at 391 First Avenue.
- The project has submitted for a building permit, and prior to issuance of the permit, the encroachment agreement must be approved by City Council.
- The property owner is responsible for installation, maintenance and repair of the improvements including the snow melt system in the public sidewalks and alley.

#### Introduction and History

As part of the new development under construction at 391 First Avenue (1<sup>st</sup> Avenue and 4<sup>th</sup> Street), the owner is proposing installation of a snow melt system in the sidewalks on 4<sup>th</sup> Street and First Avenue around the property and in front of the property at 331 First Avenue. The City has agreed to fund design and installation of the pavers and snow melt in front of 331 First Avenue to ensure continuity along the First Avenue block. With this project, and the project located at 311 First Avenue, the entire block will consist of pavers and snow melt.

Additional improvements are proposed along 4<sup>th</sup> Street and First Avenue consisting of planters, irrigation, and trees. This agreement also includes installation of pavement with snow melt in the remaining portion of the public alley adjoining 191 Sun Valley Road and 311 First Avenue. The agreement obligates the owner of 391 First Avenue to maintain and repair all the permitted improvements. In the event the snow melt system is not functioning, the owner will be responsible for snow removal. The obligations are documented in the encroachment agreement.

The agreement also permits the owner to construct improvements in the alley behind 391 First Avenue and 160 4<sup>th</sup> Street until such time as the alley vacation is recorded. After the alley is vacated, the improvements are no longer in city right of way and become private improvements. Under the development agreement conditions of approval, the alley is not vacated until the project is completed.

### Analysis

As conditioned, the proposed improvements will be in working order during the winter. The system will limit the accumulation of snow and ice on the sidewalks and remaining portion of the public alley.

### Sustainability

The project developer indicates installation of snow melt is more sustainable than plowing and hauling the snow to another location. Others believe installation of snow melt is not a sustainable approach because of the use of natural gas and greenhouse gas emissions. The decision to allow snow melt in the sidewalk and alley is a Council decision.

### Financial Impact

There is a financial impact in that the city has agreed to fund the portion of the pavers and snow melt in front of 331 First Avenue. The agreement sets forth the terms of the funding. Funding for this improvement will come from the FY 21 capital improvement budget.

### Attachments:

Encroachment Agreement 20548

**WHEN RECORDED, PLEASE RETURN TO:**

**OFFICE OF THE CITY ATTORNEY  
CITY OF KETCHUM  
POST OFFICE BOX 2315  
KETCHUM, IDAHO 83340**

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**RIGHT-OF-WAY ENCROACHMENT AGREEMENT 20548**

THIS AGREEMENT, made and entered into this \_\_\_ day of \_\_\_\_\_, by and between CITY OF KETCHUM, IDAHO, a municipal corporation ("Ketchum"), whose address is Post Office Box 2315, Ketchum, Idaho and JACK E BARITEAU JR., as Trustee of THE JACK E. BARITEAU JR., SEPARATE PROPERTY TRUST, dated October 2, 1996 and Main Drive Properties, LLC, a Tennessee limited liability company, (collectively referred to as "Owner"), whose address is Post Office Box 84, Sun Valley, Idaho 83353.

*RECITALS*

WHEREAS, Owner is the owner of real property described as 391 First Avenue North, Lots 1 and 2 of RE-DIVISION OF LOTS 1 & 2, Block 57, ORIGINAL KETCHUM TOWNSITE, according to the official plat thereof, record as Instrument No. 191607, records of Blaine County, Idaho ("Subject Property"), located within the City of Ketchum, State of Idaho; and as shown on Exhibit "A" attached hereto as Lot 1B after the Subject Property is replatted and,

WHEREAS, Owner wishes to construct a snow melt system under sidewalk pavers, planters, drainage, irrigation, trees, and all related and approved improvements within the City of Ketchum rights-of-way directly adjacent and abutting to Owner's property on First Avenue North and on Fourth Street as shown on Exhibit A: and,

WHEREAS, Until such time as the alley abutting properties identified as Owner's Property; and 160 West Fourth Street is vacated, Ketchum permits the installation of retaining walls, a public stairwell and public utilities and as shown in Exhibit "A" . After the alley is vacated, such improvements will be owned and maintained by the Owner; and,

WHEREAS, Owner wishes to install a snow melt system and plant mix pavement in the public right of way alley adjacent to 311 First Avenue; 331 First Avenue; and 171 West Sun Valley Road as shown in Exhibit "A" attached hereto and incorporated herein (collectively referred to as the "Improvements"); and,

WHEREAS Ketchum finds that said Improvements will not impede the use of said public right-of-way at this time and approves of the use of said public right-of-way subject to the terms and provisions of this Agreement;

NOW, THEREFORE, in contemplation of the above stated facts and objectives, it is hereby agreed as follows:

## *TERMS AND CONDITIONS*

1. Ketchum shall permit Owner to install and maintain the Improvements identified in Exhibit "A" within the public rights-of-way of First Avenue North and Fourth Street located directly adjacent to the real properties located at 391 and 331 First Avenue North in Ketchum Idaho,. Improvements include a snow melt system under sidewalk pavers, planters, drainage, irrigation, and trees. Ketchum permits improvements for so long as Owner maintains said Improvements in a good repair and in a safe manner, and unless and until Ketchum in good faith requires the removal of all or some part of the Improvements to complete necessary modifications to the public right of way.

2. Ketchum shall permit Owner to install and maintain the Improvements identified in Exhibit "A" within the public alley right-of-way that is directly adjacent to ; the east side of 171 West Sun Valley Road and the west side of 311 First Avenue North and 331 First Avenue North in Ketchum Idaho. Improvements consist of snow melt and plant mix pavement. Ketchum permits improvements for so long as Owner maintains said Improvements in a good repair and in a safe manner, and unless and until Ketchum in good faith requires the removal of all or some part of the Improvements to complete necessary modifications to the public right-of-way.

3. Until such time as the alley is vacated, Ketchum hereby permits Owner to excavate the public alley right-of-way directly behind and adjacent to Owner's east property line and up to the west property line of 160 West Fourth Street and complete the alley right-of-way improvements as shown on Exhibit "A" attached hereto. Once the alley vacation is final, Owner shall assume ownership and responsibility for all improvements in the vacated alley.

4. Owner shall pay for the cost of all of right of way improvements as shown on Exhibit "A" at its sole expense, with the exception that Ketchum shall reimburse Owner for all design and construction costs of the sidewalk, snow melt system, curb and gutter and other improvements required by Ketchum that begins at the property line separating 391 and 331 First Avenue North and ends at the property line separating 331 and 311 First Avenue North. Owner shall provide Ketchum a written estimate of such costs prior to commencing work. Owner and Ketchum shall mutually agree to the estimated costs. Reimbursement of these costs shall be made within ninety (90) days of receipt of Owner's written demand by Ketchum. Owner shall provide a complete accounting of all costs of this work to Ketchum with Owner's written notice.

5. The removal of all Owner improvements if so directed by Ketchum shall be at the sole expense of the Owner unless otherwise necessitated by the future development and or redevelopment of the properties located at 331 First Avenue North and 171 West Sun Valley Road. Redevelopment or development of these properties may impact or disturb Owner's original public alley right-of-way improvements and Owner's maintenance responsibilities described below. If, and when an individual property owner of 331 First Avenue North, 160 West Fourth Street and or 171 West Sun Valley Road, has applied for and been granted approval by Ketchum for the development, redevelopment and construction of improvements on such property owner's respective property, Ketchum agrees that as a condition of such future approval, that the applicant shall notify Owner in writing of the need to disturb all or a portion of the public alley improvements made by Owner. Owner and Ketchum agree to cooperate and coordinate with each respective

property owner related to the proposed improvement work that will disturb the improvements in the public alley right-of-way as shown on Exhibit "A" and each respective property owner shall be responsible for reimbursing Owner for any repair or restoration to the public alley right-of-way improvements so as to not interfere or cause Owner to not fulfill its obligations for the operation and maintenance of the public alley improvements as described herein. Ketchum agrees to make this obligation a condition of any future development, redevelopment or improvement approvals granted to the property owners identified by property address herein above.

6. Owner shall be responsible for the following:
  - a. Maintenance, repair and replacement of the snow melt system and all related improvements within the rights-of-way on First Avenue North, Fourth Street and the public alley right-of-way bordering the properties as shown on Exhibit "A" due to failures from installation, use, or other damage to the snow melt system. The Owner shall be responsible for removal of snow on the public sidewalks and alley where the snow melt is located in the event the snow melt system fails to operate or requires repair or replacement. Such maintenance, repair, replacement, and snow removal shall be at Owner's expense and shall be an obligation of Owner or Owner's property manager and occur within 48 hours of notice by Ketchum unless a longer period of time is agreed to by Owner and Ketchum. If the snow melt system is not operating, Owner shall Remove snow from the public right of way within 48 hours of Ketchum requesting removal. .
  - b. Maintenance, repair, and replacement, of the pavers, planters and trees located in the public rights-of-way on First Avenue North and Fourth Street and directly adjacent to 391 First Avenue North and 331 First Avenue North . Such maintenance, repair, and replacement shall be at Owner's expense and occur within 48 hours of notice by Ketchum unless a longer period of time is agreed to by Owner and Ketchum.
  - c. Until the vacation of the public alley right-of-way by Ketchum behind 391 First Avenue North is recorded in Blaine County, Owner shall be responsible for snow removal until such time as the snow melt system is operational in the public alley right-of-way bordered by the properties located at 311 First Avenue North, 331 First Avenue North and 171 West Sun Valley Road. Snow removal requirements may be adjusted during the period of construction with approval by Ketchum. Owner shall maintain access to the Idaho Power temporary sector power box located at the northwest corner of the alley behind 391 First Avenue, including snow removal, until the public alley right-of-way vacation is recorded.

7. In consideration of Ketchum allowing Owner to maintain the Improvements in the public right-of-way, Owner agrees to indemnify and hold harmless Ketchum from and against any and all claims of liability for any injury or damage to any person or property arising from the Improvements constructed, installed and maintained in the public right-of-way unless arising from the willful misconduct or gross negligence of Ketchum. Owner shall further indemnify and hold Ketchum harmless from and against any and all

claims arising from any material breach or default in the performance of any obligation on Owner's part to be performed under this Agreement, or arising from any negligence of Owner or Owner's agents, contractors or employees and from and against all costs, attorney's fees, expenses and liabilities incurred in the defense of any such action or proceeding brought thereon. In the event any action or proceeding is brought against Ketchum by reason of such claim, Owner, upon written notice from Ketchum, shall defend Ketchum at Owner's expense by counsel satisfactory to Ketchum. Owner, as a material part of the consideration to Ketchum, hereby assumes all risk of damages to property or injury to persons in, upon or about the Improvements constructed, installed and maintained in the public right-of-way arising from the construction, installation and maintenance of said Improvements and Owner hereby waives all claims in respect thereof against Ketchum except those arising from the willful misconduct or gross negligence of Ketchum.

8. Ketchum shall not be liable for injury to Owner's business or loss of income therefrom or for damage which may be sustained by the person, goods, wares, merchandise or property of Owner, its tenants, employees, invitees, customers, agents or contractors or any other person in or about the Subject Property caused by or resulting from the Improvements constructed, installed, removed or maintained in the public right-of-way.

9. Owner understands and agrees that by maintaining the Improvements in the public right-of-way pursuant to this Agreement, Owner obtains no claim or interest in said public right-of-way which is adverse to that of Ketchum and that Owner obtains no exclusive right to said public right-of-way nor any other right to use the public right-of-way not specifically described herein.

10. This Agreement shall be a covenant running with the Subject Property and the terms and provisions hereof shall inure to the benefit of and be binding upon the parties and the respective heirs, personal representatives, successors and assigns of the parties hereof.

11. In the event either party hereto retains an attorney to enforce any of the rights, duties and obligations arising out of this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable attorney's fees at the trial and appellate levels and, whether or not litigation is actually instituted.

12. This Agreement shall be governed by, construed, and enforced in accordance with the laws and decisions of the State of Idaho. Venue shall be in the District Court of the fifth Judicial District of the State of Idaho.

13. This Agreement sets forth the entire understanding of the parties hereto and shall not be changed or terminated orally. It is understood and agreed by the parties hereto that there are no verbal promises or implied promises, agreements, stipulations or other representations of any kind or character pertaining to the Improvements maintained in the public right-of-way other than as set forth in this Agreement.

14. No presumption shall exist in favor of or against any party to this Agreement as the result of the drafting and preparation of this document.

15. This Agreement shall be recorded with the Blaine County Recorder by Ketchum.

16. The parties fully understand all of the provisions of this Agreement, and believe them to be fair, just, adequate, and reasonable, and accordingly accept the provisions of this Agreement freely and voluntarily.

OWNER:

CITY OF KETCHUM:

By: \_\_\_\_\_

By: \_\_\_\_\_

Jack Barieau Jr., as trustee of The  
Jack E. Bariteau Jr. Separate Trust  
u/a/d/ October 2, 1996

Neil Bradshaw, Mayor

ATTEST:

\_\_\_\_\_  
Grant Gager  
City Clerk

STATE OF \_\_\_\_\_,        )  
  ) ss.  
County of \_\_\_\_\_.

On this \_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned Notary Public in and for said State, personally appeared \_\_\_\_\_, known to me to be the person who executed the foregoing instrument and acknowledged to me that he executed the same.

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

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
Residing at \_\_\_\_\_  
Commission expires \_\_\_\_\_

STATE OF \_\_\_\_\_,        )  
  ) ss.  
County of \_\_\_\_\_.

STATE OF IDAHO        )  
  ) ss.  
County of Blaine        )

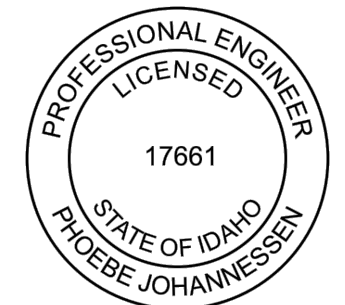
On this \_\_\_\_ day of \_\_\_\_\_, 2020, before me, the undersigned Notary Public in and for said State, personally appeared NEIL BRADSHAW, known or identified to me to be the Mayor of the CITY OF KETCHUM, IDAHO, and the person who executed the foregoing instrument on behalf of said municipal corporation and acknowledged to me that said municipal corporation executed the same.

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

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
Residing at \_\_\_\_\_  
Commission expires \_\_\_\_\_



## EXHIBIT "A"



REVISIONS	DATE	BY
No.	DESCRIPTION	



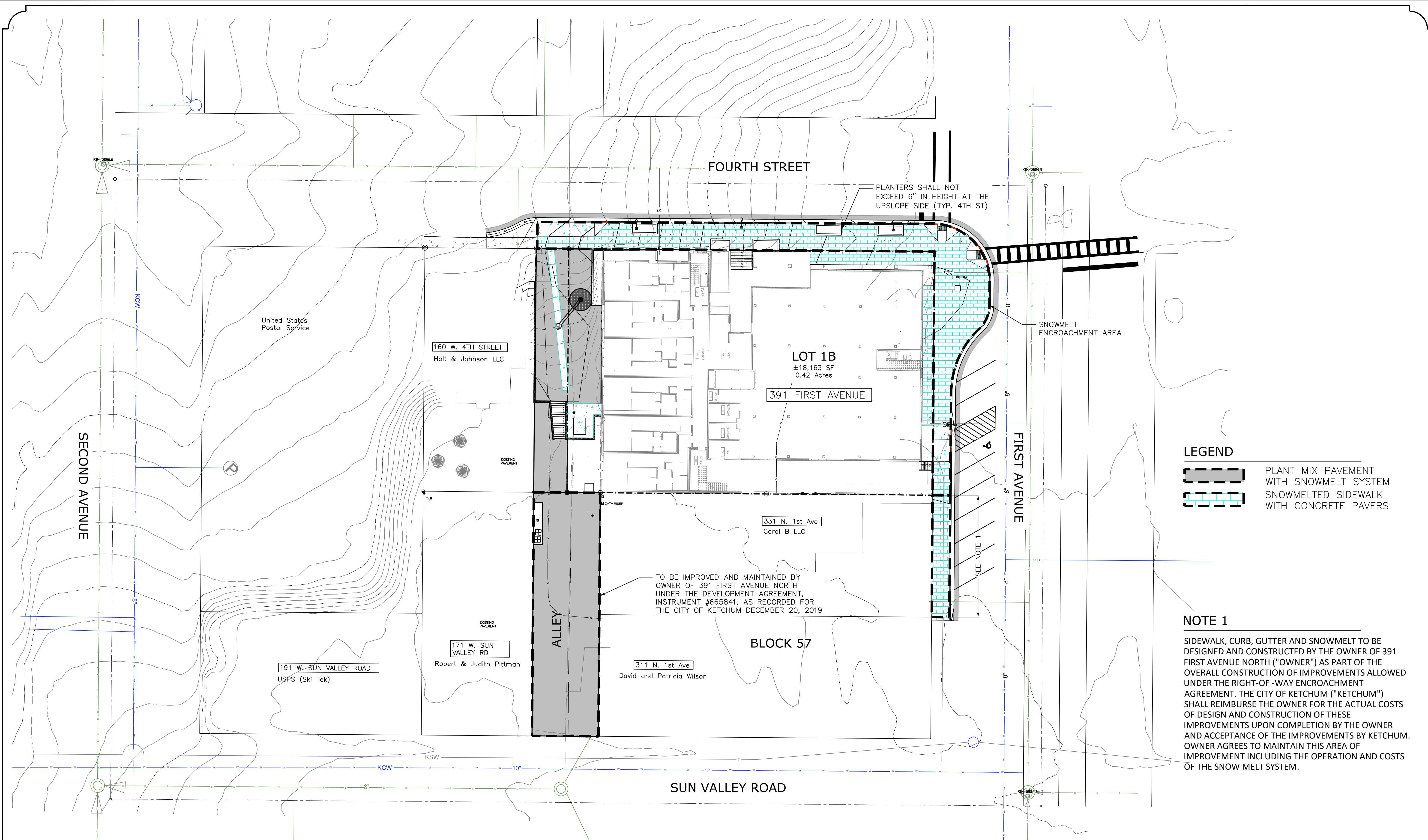
PREPARED BY:  
BENCHMARK ASSOCIATES, P.A.  
P.O. BOX 733 100 BELL DRIVE  
KETCHUM, IDAHO 83340  
(208) 726-9512  
FAX 726-9514  
WEB: WWW.BMA5B.COM  
MAIL: WWW.BMA5B.COM

**ENCROACHMENT AND ALLEY MAINTENANCE**  
KETCHUM BLOCK 57 LOT 1B  
T4N, R17E, SEC 13, B.M., KETCHUM, IDAHO  
PREPARED FOR: JACK BARITEAU

DRAWN BY: PLJ  
DESIGNED BY: PLJ  
CHECKED BY: CPL  
DATE: 10/13/20  
PROJECT NO.: 18114

DRAWING NO.

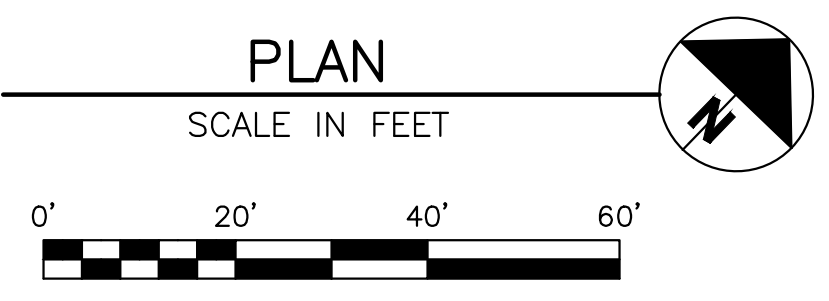
**EXHIBIT A**



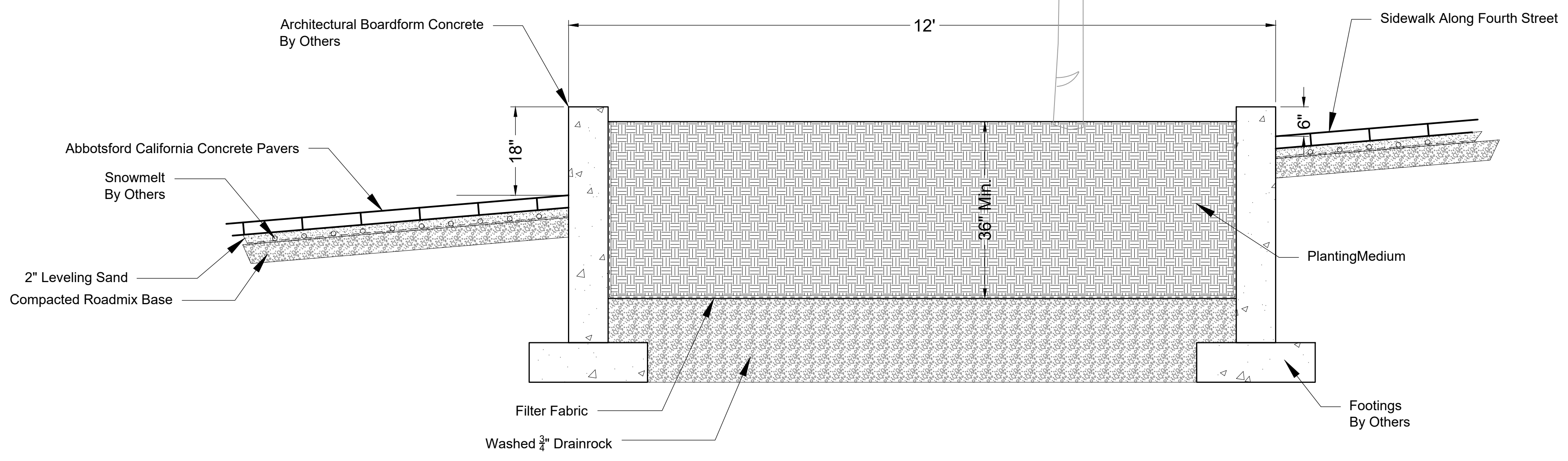
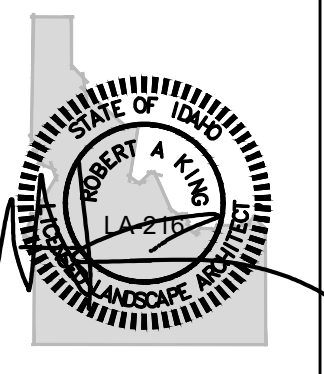
**LEGEND**

- [Hatched pattern] PLANT MIX PAVEMENT WITH SNOWMELT SYSTEM
- [Dashed pattern] SNOWMELTED SIDEWALK WITH CONCRETE PAVERS

**NOTE 1**  
SIDEWALK, CURB, GUTTER AND SNOWMELT TO BE DESIGNED AND CONSTRUCTED BY THE OWNER OF 391 FIRST AVENUE NORTH ("OWNER") AS PART OF THE OVERALL CONSTRUCTION OF IMPROVEMENTS ALLOWED UNDER THE RIGHT-OF-WAY ENCROACHMENT AGREEMENT. THE CITY OF KETCHUM ("KETCHUM") SHALL REIMBURSE THE OWNER FOR THE ACTUAL COSTS OF DESIGN AND CONSTRUCTION OF THESE IMPROVEMENTS UPON COMPLETION BY THE OWNER AND ACCEPTANCE OF THE IMPROVEMENTS BY KETCHUM. OWNER AGREES TO MAINTAIN THIS AREA OF IMPROVEMENT INCLUDING THE OPERATION AND COSTS OF THE SNOW MELT SYSTEM.



C:\BMA\Ketchum\all\block\_57\lot\_1b\_218114.dwg, SET & AT 11/13/20, 10:13:20 AM, 10/13/2020, 3:01:57 PM



FOURTH STREET RAISED PLANTERS — Scale: 3/4" = 1' - 0"  
 TYPICAL CONSTRUCTION