UO, Approval of License Agreement for (gift of) North Autzen Landscape, Exiting and Accessibility Improvements

The University of Oregon (UO) seeks OUS Finance and Administration Committee approval to enter into a License Agreement (Agreement) with Phit Too, LLC (Phit Too), permitting the construction of improvements to real property with a value in excess of $5 million. The improvements are enhanced landscape, exiting and accessibility improvements to the north side of Autzen Stadium (Project). Phit Too will pay for the construction of the Project and will donate it to the UO as gifts-in-kind. The Agreement will commence on February 1, 2013, and end on October 1, 2013, or when the Projects are completed, whichever is earlier.

As currently envisioned, the North Autzen project is designed to make improvements to the stadium that will:

- Provide improved access to the north side of the stadium and greatly enhance the post-game egress on the north side by constructing better access ramps and additional stairways resulting in overall better safety for all;
- Improve the overall fan experience by providing enhanced landscaping on the north berm that will greatly improve the visual look and feel of the venue; and
- Provide improved ADA access to the north side of the stadium

The project consists of the removal of existing ramps on the North face of the stadium berm, re-grading of a portion of the berm and replacement with a series of ramps that meet current ADA requirements. In addition, a series of stairs and paths will be added to facilitate the safe and efficient movement of fans and patrons up and down the North berm. Additionally, this project will enhance the berm landscaping with the addition of numerous native Northwest plants and trees, greatly improving the aesthetics of the North Face of Autzen Stadium.

Exhibit A to the proposed License Agreement shows the location of the North Autzen Project Area. UO and Phit Too are in the final stages of negotiating the language and expect the final agreement to have very few, if any, changes.

The Agreement obligates Phit Too to be responsible for obtaining any and all permits and licenses and may use only contractors and subcontractors that are properly licensed in Oregon. Phit Too must ensure that its contractor and subcontractors and suppliers of all tiers pay reasonable, competitive, and prevailing wages as required by law. Phit Too is also obligated to require its contractor to use good faith efforts in the solicitation of minority, women, and emerging small businesses for the Project and maintain records of such efforts and document actual use of such firms. Phit Too will require its contractor to competitively bid most of the work, including substantially all earthwork, utilities, sitework and landscape, and concrete.

The UO retains responsibility for conducting an environmental assessment and any required archaeological review and ensuring that any easements or utilities do not adversely affect the Projects. Subject to the requirements of the State Board of Higher Education, Phit Too may
propose to name the Project, and the UO may not unreasonably object to Phit Too’s proposals. Board rules allow the president to name buildings, except that approval of the Chancellor is required to name a building after a living person if that person contributes a substantial share of the cost of construction or if other unusually meritorious reasons exist.

The Agreement requires that no later than April 15, 2013, the parties shall meet to discuss reaching a firm agreement on how the landscape maintenance of the Improvements will be addressed for at least three (3) years after completion. If the parties fail to reach such an agreement on all issues by May 15, 2013, this Agreement, in the sole discretion of Phit Too, may be suspended until such time as such issues are resolved or terminated by Phit Too. In the event of such suspension or termination, the UO will reimburse Phit Too for direct costs up to $25,000 incurred as of the date of such suspension or termination unless Phit Too waives such in writing.

This Agreement has been reviewed by OUS Deputy Legal Counsel Cindy Starke and no legal issues were noted. The attached License Agreement is not effective unless and until approved by the OUS Finance and Administration Committee.

Applicable Board rules are as follows:

580-060-0050 Transfers of Interests in Real Property

(3)(a) Improvements to Board-Owned Property: The Institution President or designee will obtain prior approval of the Finance and Administration Committee of the Board for agreements permitting the construction on or renovation to Board-owned property if such improvements exceed $5 million during the term of the agreement. To obtain approval from the Finance and Administration Committee of the Board, the Institution must specify where funding for operations and maintenance will come from.

(b) If the Institution permits construction on or renovation to Board-owned property, the Institution must approve all plans and specifications prior to the commencement of work and obtain record drawings upon termination of the agreement or completion of the work, whichever first occurs.

STAFF RECOMMENDATION TO THE BOARD
Staff recommends the Board authorize the University of Oregon to enter into a License Agreement with Phit Too, LLC, permitting the construction of improvements to real property with a value in excess of $5 million, consistent with the terms and conditions described above and in the attached license agreement.

(Committee action required.)
License Agreement

This Agreement is entered into by the State Board of Higher Education on behalf of the University of Oregon (Licensor) and PHIT TOO, LLC (Licensee).

WHEREAS, Licensor is the owner of the property on the University of Oregon (U of O) campus in Eugene, Oregon, shown on Exhibit A (Premises); and

WHEREAS, Licensee wishes to secure from Licensor and Licensor is willing to grant to Licensee a license to use the those portions of the Premises so identified on Exhibit A for the Autzen Stadium Landscape, Exiting and Accessibility Improvements (hereinafter "the Improvements") that will be given to the Licensor as gifts-in-kind primarily for the benefit of the Licensor in general and particularly to benefit football fans attending U of O home football games.

WHEREAS, the Landscape, Exiting and Accessibility Improvements may be referred to herein as the "Project."

For good and valuable consideration, the parties agree as follows:

1. Licensor grants to Licensee a non-revocable license (License) to use the Premises designated on Exhibit A. The License will be non-exclusive as to the Premises specified on Exhibit A but Licensor shall have control of the Premises. The License will commence on February 1, 2013. The License will end on that part of the Premises relating to the Improvements on October 1, 2013, or when it is turned over to the Licensor for the benefit of Licensor's Athletic Department (Term), whichever is earlier. The Term may be extended for reasonable cause subject to the approval of both parties, which approval shall not be unreasonably withheld. Licensor grants to Licensee a non-revocable and exclusive right of ingress and egress over and through the Premises and the Licensor's property immediately adjacent to the Premises reasonably necessary for the purposes set forth in this Agreement. Provided, however, nothing in this Agreement shall be construed to prohibit access by Licensor to the Casanova Center, the Moshofsky Center and other areas of Autzen Stadium. This License does not convey an interest in real property, but rather is a privilege granted to Licensee for the purposes stated in this Agreement. It is not the intent of the parties that this License Agreement will result in any property tax liability to Licensee. In the event Licensee is assessed any property tax liability as a result of this License, Licensor will pay all taxes and defend and indemnify Licensee and its representatives from all costs, expenses, and other liabilities arising out of such assessment. Licensee shall pay a license fee of one dollar, which shall be due at the start of the Term.

2. Licensor acknowledges that Licensee intends to design and construct the Landscape, Exiting and Accessibility Improvements on the Premises generally for Licensee and primarily for the benefit of the fans attending Autzen Stadium. The anticipated scope for the Landscape, Exiting and Accessibility Improvements are generally described on Exhibit B. Licensor has reviewed and approved the preliminary design documents for the
Improvements. Licensor agrees the design and construction of the Improvements shall be
done in the sole discretion of Licensee so long as it is generally consistent with Exhibit B.
Any material changes (additive or deductive) to the scope of the Project will be subject to
the approval of the President of the University of Oregon, which consent shall not be
unreasonably withheld. The President of the University of Oregon will have full authority
to agree to any such changes. Licensee must provide Licensor with record drawings upon
termination of this Agreement or completion of the work, whichever occurs first.
Licensee will consider in the design and construction of the Project standards that
support energy efficiency and environmental sustainability where possible, provided,
however, and notwithstanding anything to the contrary in this Agreement, since this is a
private project, Licensee will have no affirmative obligation to incorporate any such
items into the Project including, without limitation, any level of LEED design,
registration, documentation, modeling, construction, evaluation, certification and
commissioning or its equivalent. Subject to the requirements of the State Board of
Higher Education, Licensee may propose to name the Project, and Licensor will not
unreasonably object to Licensee's proposal.

3. Licensor and Licensee understand that Licensee will undertake the design and
construction of the Landscape, Exiting and Accessibility Improvements as a private
project and Licensee will give the Improvements as gifts-in-kind to Licensor upon
completion. Licensor agrees that neither it nor its development office will charge any fee
or administration costs of any kind relating to the funds donated for these gifts. Licensor
shall use best efforts to assist and expedite all permitting processes. Licensee shall keep
the Premises free from any liens arising out of any work performed, materials furnished
or obligations incurred by or for Licensee. Any work performed, materials furnished or
obligations incurred shall be at Licensee's sole request and not at the instance of or as
agent for Licensor. Licensee shall be solely responsible for obtaining any and all permits
and licenses and shall use only contractors and subcontractors that are properly licensed
in Oregon. Licensee shall ensure that its contractor and subcontractors of all tiers pay
reasonable, competitive, and applicable prevailing wages as required by law for the
construction of the Improvements. It is understood that the Improvements are subject to
Oregon’s prevailing wage law, and Licensee shall comply with all applicable prevailing
wage statutes, regulations, and other requirements set forth in Exhibit D and shall
cooperate with Licensor so that Licensor may to meet its obligations under prevailing
wage laws. Licensee will require its contractor to competitively bid most of the work,
including substantially all earthwork, utilities, sitework and landscape, and concrete. The
competitive procurement will include, without limitation, bidding of the intended scope
of work, interviewing selected bidders, negotiating with selected bidders, and awarding to
the bidders, in Licensee’s sole discretion, that are best able to perform the work, based on
price and other relevant factors. The selection will not be based solely on price. Licensee
reserves the right to not competitively procure any aspect of the Project it is not required
to competitively bid. Licensee has the right to purchase directly and as a sole source any
other aspects of the Project. Licensee’s contractor will use good faith efforts in the
solicitation of minority, women, and emerging small businesses for the Project and will
maintain records of such efforts and the actual usage of such businesses. Notwithstanding
anything to the contrary herein, it is agreed that the Project is not and shall not be deemed
a public project or public improvement, and Licensee will not, in any way, be acting as a public agency with respect to the Project or will any provision herein be deemed to result in Licensee acting as a public agency.

4. Licensor will, during the construction of the Improvements, designate, at no cost to Licensee, service vehicle parking spaces for a minimum of twenty (20) vehicles, reasonably acceptable to Licensee, for Licensee's exclusive use plus necessary and reasonable trailer space and laydown areas in a location to be designated in writing by Licensee. Licensor understands that representatives of Licensor use part of the Premises for parking and that it will be necessary for Licensor to make arrangements for alternative parking during the term of this Agreement. Licensor also agrees, at its cost, to provide a minimum of 20 additional parking spaces outside the Premises, but as close to Autzen Stadium north side as reasonably possible, for use by Licensee during the term of this Agreement.

5. Licensee's contractor shall, consistent with the construction, keep the public areas affected by the construction clean and consistent with public use.

6. Licensee is not responsible for the existence of hazardous waste or any archaeological site issues. Licensor will arrange and pay for a Phase I environmental assessment to be conducted if required by the public agencies for permitting purposes. Licensor will also assume responsibility for any archaeological review required and for any costs associated with such review. Licensor is not responsible for any easements and other encumbrances, above or below ground utilities, vaults, etc. (“Encumbrances”) that relate to the Premises and will adversely affect the Project. Licensee, at its sole expense, will take all action necessary to remove or relocate such Encumbrances so that they do not delay or otherwise affect the Project or, in its sole discretion, may elect to terminate the Project. Licensor will, however, reasonably cooperate with Licensee in locating, removing or relocating Encumbrances, including, without limitation, providing “as built” information. In lieu of removal or relocation of Encumbrances, Licensee, at its sole cost, may obtain the necessary consent so that Encumbrances do not delay or otherwise affect the Project. If the Project proceeds based on such consent, the Licensee will be responsible for the repair and maintenance of any utilities and vaults. Licensor has given Licensee ample opportunity to inspect and test the condition of the Premises. Therefore, except as otherwise provided, Licensee accepts its license herein to use the Premises in its "AS-IS" condition with all faults, including both latent and patent defects and Licensor and Licensor's agents are not making, have not made and expressly disclaim any representations or warranties, express or implied, with respect to the Premises. Notwithstanding the non-revocable nature of the License, in the event Licensee subsequently determines that there were latent defects which substantially and materially change the construction anticipated or substantially and materially change the cost of the construction anticipated, Licensee may immediately, upon notice to Licensor, terminate this Agreement. If any such termination is due to hazardous waste or archeological site issues, Licensee will have no responsibility to restore the Premises and Licensor will be responsible for any required restoration of the Premises. If any such termination is due to
Encumbrances, Licensee shall restore the Premises, and Licensor will have no responsibility to restore the Premises.

7. Before Licensor vacates the Premises, Licensor will, upon ten days notice from Licensee, provide access to Licensee for soils, water and related testing. Licensor will totally, at its cost, vacate the Premises within thirty (30) days of receipt of written notice by Licensee and leave the Premises in such condition that it is ready for commencement of construction of the Improvements.

8. Licensee agrees to indemnify and hold harmless Licensor from and against any and all liability, damages, expenses, judgments, proceedings and causes of action based solely on claims by third parties for injury to or death of any person or damage to or destruction of any property and arising out of Licensee's use or occupancy of the Premises, provided, however, such obligation only applies to the extent of any negligent act or omission of Licensee or its employees or authorized agents. Licensee's indemnification obligations under this paragraph shall survive the expiration or termination of this Agreement.

9. Licensee or its contractor shall maintain the insurance specified on Exhibit C on the Improvements until this Agreement is terminated or the Premises are turned over to the Athletic Department of Licensor, whichever is earlier. Licensee or its contractor shall maintain the insurance specified on Exhibit C on the Improvements until this Agreement is terminated or the Premises are turned over to the Athletic Department, whichever is earlier.

10. Licensee may not assign this Agreement or sublicense the whole or any part of the Premises without the prior written approval of Licensor, which approval Licensor may grant or withhold in Licensor's sole and absolute discretion.

11. During the term of this Agreement, all obligations of Licensee under this Agreement and actions taken by Licensee pursuant to this Agreement shall comply with all applicable statutes and other legal requirements of all federal, state, county and municipal authorities having jurisdiction of the Premises.

12. Licensee shall, prior to the date of expiration of the License, remove from the Premises Licensee's personal property not affixed to the Premises. At the end of the Term, Licensor shall have sole responsibility for all maintenance and repair of the Improvements and Licensee is completely released by Licensor for any responsibility under this Agreement, except for Licensee's surviving indemnification obligations under Paragraph 8. At the end of the Term, Licensee shall return the Premises and donate all improvements, as a gift-in-kind, to Licensor, free of all liens and encumbrances created by Licensee. At the end of the Term, Licensor acknowledges that the State of Oregon, for the benefit of the Licensor on behalf of the Athletic Department of the Licensor will have fee title to the Premises and the Athletic Department of the Licensor will have exclusive control, in the sole discretion of the Athletic Department of the Licensor, over the use, staffing and all other operational aspects of the Improvements.
13. No later than April 15, 2013, Licensor and Licensee shall meet to discuss reaching a firm agreement on how the landscape maintenance of the Improvements will be addressed for at least three (3) years after completion. If Licensor and Licensee fail to reach such an agreement on all issues by May 15, 2013, this Agreement, in the sole discretion of Licensee, may be suspended until such time as such issues are resolved or terminated by Licensee. In the event of such suspension or termination, Licensor will reimburse Licensee for direct costs up to $25,000 incurred by Licensee as of the date of such suspension or termination unless Licensee, in its sole discretion, waives such right in writing.

14. Licensor agrees as to Licensee and until the expiration of the License, to waive any and all labor and service fees, interdepartmental charges, mark ups, service charges, etc. for any and all Licensor services related to the Improvements including, without limitation, facility management, IT services, security services, lock shop, etc. Provided, however, Licensee will, in its sole discretion, pay for the actual cost of any materials (but not installation) such as locks required and provided by Licensor or Licensee.

15. Licensee may, at any time and without cause terminate this Agreement and return the Premises to Licensor in substantially the same or better condition than it presently exists as of the date hereof. Notwithstanding the non-revocable nature of the License, in the event of a material breach of this Agreement by Licensee or Licensor, the party not in breach may terminate this Agreement and pursue all remedies available under the law.

16. After obtaining Licensee’s consent, which shall not be unreasonably withheld or delayed, Licensor and Licensor’s agents may enter the Premises to (i) inspect the general condition of the Premises and (ii) perform such duties as Licensor is obligated to perform under applicable law or policy. The University of Oregon Police Department may enter the Premises at all times without Licensee’s consent in order to enforce the laws of the State of Oregon and the rules and regulations of Licensor. In the event of an emergency arising within the Premises which endangers property or persons, the consent requirement is waived by Licensee. All of the provisions contained in this Agreement shall be binding upon and inure to the benefit of the heirs personal representatives, successors and assigns of the parties hereto. The provisions of this Agreement shall be construed as a whole and not strictly for or against any party. The provisions of this Agreement are not intended to create, nor shall they be in any way interpreted or construed to create, a joint venture, partnership, agency, or any other similar relationship between the parties. Failure of Licensor or Licensee to enforce any provision of the Agreement shall not constitute a waiver or relinquishment of the right of performance in the future nor of the right to enforce any other provision of this Agreement. This Agreement may be executed in several counterparts, each of which shall be an original, all of which shall constitute but one and the same instrument.

17. In the event of any dispute arising out of or relating to this Agreement, the prevailing party will be entitled to reasonable attorneys fees at trial and on appeal.

18. Each party represents it has full authority to sign this Agreement.
19. All obligations of Licensor which, by their nature, are continuing, shall survive expiration or termination of this Agreement.

20. This constitutes the entire agreement of the parties, supersedes all prior or contemporaneous oral or written agreements, and shall not be modified except in writing and signed by the parties.

21. Licensor reasonably believes and will use its best efforts to ensure that Licensor will have sufficient funds to perform its duties and obligations under this Agreement. It is Licensor's intention, agreement and obligation to perform its duties and obligations under this Agreement and will use its best efforts to make certain that funds are legally available therefor, and, in that regard, Licensor represents and warrants to Licensee that this Agreement is important to the operation of the Athletic Department. If, despite the above, Licensor is not allotted sufficient funds by appropriation, limitation, grant, or other fund source lawfully available to it for purposes of continuing to perform its duties and obligations under this Agreement, Licensor shall notify Licensee in writing of the unavailability of funds to perform this Agreement. Licensee may elect to authorize and require Licensor to perform, at the Licensee's expense, some or all of Licensor's duties and obligations under this Agreement. In such an event, Licensee reserves its right to recover such expenses from any funds of Licensor that are or become lawfully available, including, without limitation, any general operating funds. In the alternative, Licensee may elect to terminate this Agreement by written notice to Licensor.

22. In the event Licensor fails to perform any of its obligations hereunder, Licensee has all rights and remedies under the law including, without limitation, the right to suspend or terminate this Agreement.

23. This Agreement is subject to the approval of the Oregon State Board of Higher Education prior to February 1, 2013.

LICENSOR
State of Oregon acting through the State Board of Higher Education on behalf of the University of Oregon

_____________________________ _____________________________
Jamie Moffitt Philip H. Knight
Vice President for Finance and Administration

_____________________________ _____________________________
Date Date

LICENSEE – PHIT TOO, LLC

_____________________________ _____________________________
Philip H. Knight
Director

_____________________________ _____________________________
Date Date
Exhibit B

Autzen Stadium- North Side Landscape, Exiting and Accessibility Project

Description:
The North Autzen project is designed to make improvements to the stadium that will:

1- Provide improved access to the north side of the stadium and greatly enhance the post-game egress on the north side by constructing better access ramps and additional stairways resulting in overall better safety for all and shorter egress times.

2- Improve the overall fan experience by providing enhanced landscaping on the north berm that will greatly improve the visual look and feel of the venue.

3- Provide ADA access to the north side of the stadium

The project consists of the removal of existing ramps on the North face of the stadium berm, re-grading of a portion of the berm and replacement with a series of ramps that meet current ADA requirements. In addition, a series of stairs and paths will be added to facilitate the safe and efficient movement of fans and patrons up and down the North berm. Additionally, this project will enhance the berm landscaping with the addition of numerous native Northwest plants and trees, greatly improving the aesthetics of the North Face of Autzen Stadium.
Licensee shall provide and maintain commercial general liability insurance (Occurrence Basis) with broad form coverage endorsement (including broad form property damage endorsement) covering its obligations under this License and insuring it against claims for personal injury, bodily injury or death, and property damage or destruction. Such insurance shall be written with an insurer licensed to do business in the state of Oregon, shall name Licensor as additional insured, and contain a waiver of subrogation endorsement in favor of Licensor. The initial limits of liability of all such insurance shall be not less than $5,000,000 for personal injury or bodily injury or death of any one person, $5,000,000 for personal injury or bodily injury or death of more than one person in one occurrence and $5,000,000 with respect to damage to or destruction of property; or, in lieu of such coverage, a combined single limit (covering personal injury, bodily injury or death and property damage or destruction) with a limit of not less than $10,000,000 per occurrence. Licensee, at Licensee’s sole cost and expense, shall purchase and maintain Causes of Loss-Special Form (formerly “all risk”) Property Insurance insuring one hundred percent (100%) of the replacement cost of the Premises and all furniture, fixtures, and equipment located in the Premises. The insurance shall name Licensor as “insured as its interest may appear,” and contain a waiver of subrogation in favor of Licensor. Licensee, at Licensee’s sole cost and expense, shall carry Workers’ Compensation Insurance as required by Oregon law. No “alternative” forms of workers’ compensation self insurance coverage will be allowed. Licensee, at Licensee’s sole cost and expense, shall carry Commercial Business Automobile Liability Insurance (Occurrence Basis) with a $1,000,000 combined single limit coverage and shall name Licensor as additional insured. Such insurance shall be endorsed with a waiver of subrogation endorsement in favor of Licensor and include coverage for owned, hired and non-owned vehicles. All policies of insurance required hereunder shall provide that the insurance represented by the certificates shall not be cancelled, materially changed or nonrenewed without the giving of thirty (30) days’ prior written notice to the holders of the insurance and the holders of the certificates. If Licensee shall fail to obtain any policy of insurance required hereunder, Licensor may obtain the same and keep the insurance in effect, and Licensee shall pay Licensor the cost thereof plus a ten percent (10%) service charge to cover Licensor’s administration costs within ten (10) days after receipt of an invoice. No policy (with the exception of earthquake and flood) will contain a deductible or self-insured retention in excess of $25,000 without Licensor’s prior written approval. If requested by Licensor, Licensee will promptly deliver to Licensor a certified copy of any certificate of insurance and insurance policies required by this License. The insurance carried by Licensee hereunder shall be primary and not contributory with any other insurance which is maintained by Licensor. All insurance which Licensee is required to maintain hereunder may be provided under a blanket policy provided such policy otherwise complies with the requirements of this License and is endorsed with an Aggregate Limits of Insurance (Per Location) endorsement.

The insurance required of Licensee above may be provided by Licensee or its contractor.
Exhibit D

PREVAILING WAGE RATES

for

Public Works Contracts in Oregon

STATE OF OREGON
1859

OREGON BUREAU OF LABOR AND INDUSTRIES

BOLI

Brad Avakian
Commissioner
Bureau of Labor and Industries

Effective: January 1, 2013
Exhibit D

Link to current Prevailing Wage Rates as of January 14, 2013

http://www.oregon.gov/bol/WHD/PWIR/Pages/January_2013_index.aspx