RESOLUTION NO. 120 19

A RESOLUTION AUTHORIZING THE OFFICE OF THE MAYOR TO ENTER INTO AN AGREEMENT WITH THE STATE OF HAWAI'I DEPARTMENT OF TRANSPORTATION PURSUANT TO HRS 46-7, FOR THE ACCEPTANCE OF THE SUGAR ACCESS SOFTWARE LICENSE TO THE COUNTY OF HAWAI'I DEPARTMENT OF PLANNING, PUBLIC WORKS AND MASS TRANSIT.

WHEREAS, The County of Hawai'i (hereinafter "County") is required by the Moving Ahead for Progress in the 21st Century Act (hereinafter "MAP-21") to use performance-based measures in order to receive federal funding from the Federal Highway Administration (hereinafter "FHWA") and Federal Transit Authority (hereinafter "FTA") for transportation projects; and

WHEREAS, The State of Hawai'i Department of Transportation (hereinafter "HDOT") is working to develop performance based measures to assist in the selection and prioritization of transportation projects that utilize federal funds available through the FHWA and the FTA; and

WHEREAS, HDOT has purchased the Sugar Access Software to help quantify the scoring of performance measures for transportation projects; and

WHEREAS, HDOT will distribute two licenses to the County for use by the County Department of Planning, Public Works and Mass Transit Agency to assist in meeting MAP-21 requirements; and

WHEREAS, Hawai'i Revised Statutes, Section 46-7, requires that county departments obtain the consent of the council to enter into agreements with the federal or state governments respecting action to be taken pursuant to any of the powers granted by law to furnish, expend, and receive any funds or other assistance in connection with projects being or to be undertaken pursuant to those powers; now, therefore,

BE IT RESOLVED BY THE COUNCIL OF THE COUNTY OF HAWAI'I in accordance with section 46-7, Hawai'i Revised Statutes, that the Mayor of the County of Hawai'i is authorized to execute, on behalf of the County, a Memorandum of Agreement attached hereto and incorporated herein by reference as Exhibit "A," and related End License User Agreement to enable the County to receive the software license.

BE IT FINALLY RESOLVED that the County Clerk of the County of Hawai'i shall transmit copies of this resolution of the Office of the Mayor, to the Department of Planning, the Department of Public Works, and the Mass Transit Agency.

Dated at Kona, Hawai'i, this 8th day of May, 2019.

INTRODUCED BY:



 COUNCIL MEMBER, COUNTY OF HAWAI'I

COUNTY COUNCIL
 County of Hawai'i
 Hilo, Hawai'i

ROLL CALL VOTE

	AYES	NOES	ABS	EX
CHUNG	X			
DAVID	X			
EOFF	X			
KANEALI'I-KLEINFELDER	X			
KIERKIEWICZ	X			
LEE LOY	X			
POINDEXTER	X			
RICHARDS	X			
VILLEGAS	X			
	9	0	0	0

I hereby certify that the foregoing RESOLUTION was by the vote indicated to the right hereof adopted by the COUNCIL of the County of Hawai'i on May 8, 2019.

ATTEST:

 COUNTY CLERK
 CHAIRPERSON & PRESIDING OFFICER

Reference: C-211/PWMTIC-6

RESOLUTION NO. **120 19**

Exhibit "A"

**MEMORANDUM OF AGREEMENT
PERTAINING TO MULTI-MODAL ACCESSIBILITY SOFTWARE**

This Memorandum of Agreement (hereinafter referred to as "MOA") is entered into on this _____ day of _____, 2019 by and between Department of Transportation, State of Hawaii (hereinafter referred to as "HDOT"), and the County of Hawaii, (hereinafter referred to as "County").

The purpose of this MOA is to describe the permitted usage of Sugar Access software (hereinafter referred to as "Software"), which is produced by Citilabs Inc.

Background

HDOT in cooperation with the County, City and County of Honolulu, Oahu Metropolitan Planning Organization (MPO), Maui Metropolitan Planning Organization, County of Kauai, and County of Maui are working to develop performance measures to assist in the selection and prioritization of transportation projects that would utilize federal funds available through the Federal Highway Administration and the Federal Transit Administration. Performance measures are required by federal legislation, including The Moving Ahead for Progress in the 21st Century Act (MAP-21), which was signed in Year 2012, and subsequently supporting The Fixing America's Surface Transportation (FAST) Act, which was signed in Year 2015.

Accessibility is one of the performance measures identified by HDOT and cooperating agencies; the Software would help in quantifying the scoring of transportation projects for accessibility of multi-modal systems. The Software is an ArcGIS extension which would aid in the assessment of highway projects with transit, bicycle and pedestrian benefits as well as evaluation of access to various land uses, including jobs and necessities, such as groceries, schools, banks, health care and other services.

PERMITTED SOFTWARE USES

The Permitted Software Uses with this MOA are listed below.

- 1) HDOT has purchased the Software and will distribute two licenses to the County for use by the County Department of Planning, the County Department of Public Works and the County Mass Transit Agency.
- 2) As an end user of the Software, the County must execute and comply with the attached End User License Agreement (hereinafter referred to as "EULA") as well as its Appendix 1 regarding HERE data (collectively "Software Agreement"), all of which are incorporated herein by reference and made a part of this MOA. The County shall sign the Software Agreement and deliver an executed copy to HDOT. HDOT will forward the executed Software Agreement to Citilabs Inc.
- 3) The Software is an add-on extension to and compatible with ArcGIS, Version 9.3 and higher. The County shall be responsible to acquire and install the ArcGIS program with appropriate ESRI license(s) and compatibility with the Software onto County computers at no cost to HDOT. Furthermore HDOT shall not be responsible for acquiring or providing technical support for ArcGIS.
- 4) The County may install the Software on any computer that already has an ESRI-licensed ArcGIS program as the Software requires ArcGIS program to run. However, the number of Software active users at any time shall not exceed the HDOT designated number of licenses for the County.

- 5) If the Software is to be installed on a larger quantity of County computers than the HDOT designated quantity of two licenses, then the licenses should be set up on a County server so that individuals may check out a license when starting a session that utilizes the Software, then check the license back in when the session is finished so that no more than two individuals can access the Software at the same time.
- 6) Data sharing between HDOT and the County shall be encouraged and periodic exchange of data and electronic files between HDOT and the County shall be mutually determined.
- 7) The County may utilize the Software for its own internal purposes beyond scoring for the accessibility performance measure. However, access to the Software shall not be given to third parties, such as consultants. The County shall not assign any of the rights or obligations hereunder, whether by operation of law or otherwise, without prior written consent of the State.
- 8) This MOA may be amended or terminated at any time by written consent of the parties of this agreement.
- 9) If there is a conflict between the MOA and the Software Agreement, the Software Agreement shall govern and control.
- 10) The MOA shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.
- 11) In the event that any provisions of this MOA are declared invalid and unenforceable by a court, such invalidation or unenforceability shall not affect the validity or enforceability or the remaining terms of this MOA.
- 12) The County and State agree that no party shall be deemed to be the drafter of this MOA and that in the event that this MOA is ever construed by a court of law, such court shall not construe this MOA or any provisions of this MOA against any party as the drafter.
- 13) The failure of the State to insist upon strict compliance with any term, provision, or condition of this MOA shall not constitute or be deemed to constitute a waiver of relinquishment of the State's right to enforce the same in accordance of this MOA.
- 14) This MOA shall be governed and construed in accordance with the laws of the State of Hawaii.
- 15) This MOA constitutes the entire agreement of the parties with respect to the matters set forth herein, and, except as specifically provided otherwise herein, there are no agreements, understandings, warranties, or representations between parties except as set forth herein. This MOA cannot be modified except by an instrument, in writing, signed by each of the parties.
- 16) Disclaimer: HDOT does not make warranties of any kind, implied, expressed or statutory, of fitness for a particular purpose of the Software or data or analytical results produced by the Software. Interpretation of analytical results, conclusions drawn, and agency actions undertaken through the use of the Software are the responsibility of the user.
- 17) Disclaimer: HDOT makes no claims, promises or guarantees about the accuracy, completeness or adequacy of the Software and expressly disclaims liability for errors and omissions of the Software, data and analytical results. No liability of any kind is transferred to users of the Software external to

HDOT. If any organization has concerns about possible damage that may have been caused by the Software, the HDOT should be informed in writing and HDOT will forward the documentation to Citilabs Inc.

- 18) This MOA may be executed in two or more counterparts, and when all counterparts have been executed, each counterpart shall be considered an original but when assembled shall constitute one and the same instrument, and shall have the same force and effect as though all the signatories had executed a single instrument. Any unexecuted duplicate pages may be omitted from the assembled original document.

IN WITNESS WHEREOF, the undersigned have executed these presents as of the day and year first written above.

APPROVED BY STATE:

RECOMMEND APPROVAL BY COUNTY:

 By: Jade T. Butay
 Title: Director of Transportation
 State of Hawaii

 By: Michael Yee
 Title: Director of Department of Planning
 County of Hawaii

Date: _____

Date: _____

 By: David Yamamoto
 Title: Chief Engineer
 Department of Public Works
 County of Hawaii

Date: _____

 By: Brenda Carreira
 Title: Administrator, Mass Transit Agency
 County of Hawaii

Date: _____

APPROVED BY COUNTY:

By: Harry Kim
Title: Mayor
County of Hawaii

Date: _____

APPROVED AS TO FORM

By: Deputy Attorney General
Title: For Department of Transportation
State of Hawaii

Date: _____

APPROVED AS TO FORM AND LEGALITY

By: County Attorney
Title: For County of Hawaii

Date: _____

End User License Agreement

Sugar Platform

THIS END USER LICENSE AGREEMENT ("AGREEMENT") GOVERNS USERS OF OUR SERVICES.

This Agreement shall become effective as of the date of the last party to sign below.

1. DEFINITIONS

"Data" means all electronic data or information submitted by You to the Services.

"Hawaii DOT Agreement" means the End User License Agreement entered into as of August 16, 2018 between Citilabs Inc. and the State of Hawaii, Department of Transportation.

"Non-Citilabs Applications" means software applications not owned by Citilabs Inc.

"Services" means the Citilabs cloud-based Sugar services. "Services" exclude Non-Citilabs Applications.

"Sugar Platform" means the Citilabs transportation and urban planning modeling application that allows users to calculate, map, and analyze transportation systems.

"Users" means those (i) who are authorized by You to use the Services, (ii) who are each using the Services, (iii) and who have been supplied User identifications and passwords.

"We," "Us" or "Our" means the Citilabs Inc.

"You" or "Your" means the County of Hawaii Planning Department, the County of Hawaii Department of Public Works and the County of Hawaii Mass Transit Agency.

2. USE OF THE SERVICES

2.1. License Grant. Subject to the terms and conditions contained in this Agreement, We hereby grant to You, during the term of this Agreement, a limited, non-exclusive, non-transferable license for Your Users to use the Services for you and your users' internal purposes.

2.2. Your Responsibilities. You shall (i) be responsible for You and Your Users' compliance with this Agreement, (ii) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify Us promptly of any such unauthorized access or use, and (iii) use the Services only in accordance with applicable laws and government regulations. You shall not (a) make the Services available to anyone other than Users, (b) sell, resell, rent or lease the Services, (c) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the Services to store or transmit viruses, worms, time bombs, Trojan horses or other harmful or malicious code, files, scripts, agents or programs, (e) interfere with or disrupt the integrity or performance of the Services or third-party data contained therein, or (f) attempt to gain unauthorized access to the Services or their related systems or networks.

2.3. Usage Limitations. Services are subject to limits on disk storage space. You may not have more than the number of Users specified by Hawaii DOT.

3. NON-CITILABS PROVIDERS

3.1 Acquisition of Non-Citilabs Products and Services. Users must obtain a license for ArcGIS from Esri in order to use the Services. Users must also agree with the terms of the EULA attached as Appendix 1 in order to lawfully use certain data provided with the Services that is owned by HERE. We or third parties may from time to time make available to You other third-party products, data, content or services, including but not limited to Non-Citilabs Applications and implementation, data, customization and other consulting services. Any acquisition by You of such Non-Citilabs products or services, and any exchange of data between You and any Non-Citilabs provider, is solely between You and the applicable Non-Citilabs provider. We do not warrant or support Non-Citilabs products or services.

3.2. Non-Citilabs Applications and Your Data. If You install or enable Non-Citilabs Applications for use with Services, You acknowledge that We may allow providers of those Non-Citilabs Applications to access Your Data as required for the interoperation of such Non-Citilabs Applications with the Services. We shall not be responsible for any disclosure, modification or deletion of Your Data resulting from any such access by Non-Citilabs Application providers. The Services shall allow You to restrict such access by restricting Users from installing or enabling such Non-Citilabs Applications for use with the Services.

4. PROPRIETARY RIGHTS

4.1. Reservation of Rights in Services. Subject to the limited rights expressly granted hereunder, We reserve all rights, title and interest in and to the Services and the Sugar Platform application, including all related intellectual property rights. No rights are granted to You hereunder other than as expressly set forth herein.

4.2. Restrictions. You shall not (i) share Your login name or password with anyone other than Users or permit any third party to access the Services, (ii) create derivative works based on the Services or Sugar Platform, (iii) copy, frame or mirror any part or content of the Services, (iv) reverse engineer the Services or Sugar Platform to discover the source code form of the software, or (v) access the Services or Sugar Platform in order to (a) build a competitive product or service, or (b) copy any features, functions or graphics of the Services or Sugar Platform.

5. LIMITATION OF LIABILITY

WE DO NOT MAKE ANY WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, AND WE SPECIFICALLY DISCLAIM AND EXCLUDE ALL WARRANTIES, WHETHER STATUTORY, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

IN NO EVENT SHALL WE HAVE ANY LIABILITY TO YOU FOR ANY DIRECT, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT WE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND NOTWITHSTANDING ANY FAILURE OF THE ESSENTIAL PURPOSE OF THIS AGREEMENT OR ANY LIMITED REMEDY HEREUNDER.

6. TERM AND TERMINATION

6.1. Term of Agreement. This Agreement commences on the full execution of the Agreement (date of last signature) and terminates upon the termination or expiration of the Hawaii DOT Agreement.

During the term of this Agreement, the State of Hawaii, Department of Transportation will make available to You a file of Your Data in their native format.

6.2. Surviving Provisions. The termination or expiration of this Agreement for any reason shall not affect a party's rights or obligations that expressly or by their nature continue and survive (including, without limitation, the provisions concerning ownership and limitation of liability).

7. GOVERNING LAW AND JURISDICTION

7.1. Agreement to Governing Law and Jurisdiction. This Agreement and all matters arising out of or relating to this Agreement, shall be governed by the laws of the State of Hawaii without reference to any conflict of laws principles that would require the application of the laws of any other jurisdiction, and both parties consent to the exclusive jurisdiction of the state and federal courts located in the State of Hawaii with respect to any legal proceeding arising out of or related to this Agreement.

8. GENERAL PROVISIONS

8.1. Waiver. No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right.

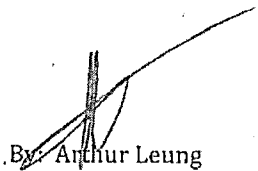
8.2. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

8.3. Assignment. We will not assign any of the rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of You (not to be unreasonably withheld). This Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates shown below.

APPROVED BY:

CITILABS, INC.



By: Arthur Leung

Title: Chief Financial Officer

Date: 3/1/19

RECOMMEND APPROVAL BY COUNTY:

County of Hawaii
Department of Planning
"USER"

By: Michael Yee

Title: Director

Date:

County of Hawaii
Department of Public Works
"USER"

By: David Yamamoto

Title: Chief Engineer

Date:

County of Hawaii
Mass Transit Agency
"USER"

By: Brenda Carreira

Title: Administrator

Date:

APPROVED BY COUNTY:

County of Hawaii
"USER"

By: Harry Kim

Title: Mayor

Date:

APPENDIX 1

HERE EULA

END-USER TERMS

The data ("Data") is provided for you and your users' personal, internal use only and not for resale. It is protected by copyright, and is subject to the following terms and conditions which are agreed to by you, on the one hand, and Citilabs, Inc. ("Citilabs") and its licensors (including their licensors and suppliers) on the other hand.

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Terms and Conditions

You and Your Users' Personal / Internal Business Use Only. You agree to use this Data together with Sugar Access solely for the personal purposes or internal business purposes for which you and your users' were licensed, and not for service bureau, time-sharing or other similar purposes. Accordingly, but subject to the restrictions set forth in the following paragraphs, you agree not to otherwise reproduce, copy, modify, decompile, disassemble or reverse engineer any portion of this Data, and may not transfer or distribute it in any form, for any purpose, except to the extent permitted by mandatory laws.

Restrictions. Except where you have been specifically licensed to do so by Citilabs and without limiting the preceding paragraph, you may not (a) use this Data with any products, systems, or applications installed or otherwise connected to or in communication with vehicles, capable of vehicle navigation, positioning, dispatch, real time route guidance, fleet management or similar applications; or (b) with or in communication with any positioning devices or any mobile or wireless-connected electronic or computer devices, including without limitation cellular phones, palmtop and handheld computers, pagers, and personal digital assistants or PDAs.

Warning. The Data may contain inaccurate or incomplete information due to the passage of time, changing circumstances, sources used and the nature of collecting comprehensive geographic data, any of which may lead to incorrect results.

No Warranty. This Data is provided to you "as is," and you agree to use it at your own risk. Citilabs and its licensors (and their licensors and suppliers) make no guarantees, representations or warranties of any kind, express or implied, arising by law or otherwise, including but not limited to, content, quality, accuracy, completeness, effectiveness, reliability, fitness for a particular purpose, usefulness, use or results to be obtained from this Data, or that the Data or server will be uninterrupted or error-free.

Export Control. You and CITILABS shall not export from anywhere any part of the Data or any direct product thereof except in compliance with, and with all licenses and approvals required under, applicable export laws, rules and regulations, including but not limited to the laws, rules and regulations administered by the Office of Foreign Assets Control of the U.S. Department of Commerce and the Bureau of Industry and Security of the U.S. Department of Commerce. To the extent that any such export laws, rules or regulations

prohibit HERE from complying with any of its obligations hereunder to deliver or distribute Data, such failure shall be excused and shall not constitute a breach of this Agreement.

Entire Agreement. These terms and conditions constitute the entire agreement between CITILABS (and its licensors, including their licensors and suppliers) and you pertaining to the subject matter hereof, and supersedes in their entirety any and all written or oral agreements previously existing between us with respect to such subject matter.

Government End Users. If the Data is being acquired by or on behalf of the United States government or any other entity seeking or applying rights similar to those customarily claimed by the United States government, the Data is a "commercial item" as that term is defined at 48 C.F.R. ("FAR") 2.101, is licensed in accordance with these End-User Terms, and each copy of Data delivered or otherwise furnished shall be marked and embedded as appropriate with the following "Notice of Use," and shall be treated in accordance with such Notice:

NOTICE OF USE

CONTRACTOR (MANUFACTURER/ SUPPLIER) NAME: HERE
CONTRACTOR (MANUFACTURER/SUPPLIER) ADDRESS:
c/o Nokia, 425 West Randolph Street, Chicago, Illinois 60606

This Data is a commercial item as defined in FAR 2.101 and is subject to these End-User Terms under which this Data was provided.

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