



Interoffice Memorandum

AGENDA ITEM

November 25, 2019

TO: Mayor Jerry L. Demings
AND
Board of County Commissioners

FROM: Jon V. Weiss, P.E., Director
Planning, Environmental and Development
Services Department

A handwritten signature in black ink, appearing to read "J. Weiss", is written over the name "Jon V. Weiss" in the "FROM" field.

**CONTACT PERSON: Scott Skraban, Concurrency Management Official
Concurrency Management Office
407 836-5363**

SUBJECT: December 17, 2019 – Consent Item
School Concurrency Mitigation Agreement OC-18-061
Wetherbee Acres Parcel ID#: 20-24-30-0000-00-004

On September 16, 2008, the Board amended Chapter 30, Orange County Code (“Code”), to include the legislative requirements of school concurrency. The provisions in the Code are based on statutory requirements and on the terms of the First Amended and Restated Interlocal Agreement for Public School Facility Planning and Implementation of School Concurrency entered into by the County, The School Board of Orange County (“School Board”) and municipalities within the County (June 10, 2008, as amended from time to time, “Interlocal Agreement”). Section 30-622 of the Code requires applicants to submit proposed school proportionate share mitigation agreements to the Concurrency Management Official, following negotiation with the School Board and the County Attorney’s Office, for review and recommendation to the Board.

The subject School Concurrency Mitigation Agreement (“Mitigation Agreement”) is among the County, the School Board, and DHIC – South Creek, LLC, a Delaware limited liability company. The project is located on East Wetherbee Road between South Orange Avenue and Boggy Creek Road, just north of Central Florida Greenway (SR 417) in District 4, and consists of 300 multi-family and 70 townhome residential units. The Mitigation Agreement is necessary because the project affects certain area high schools, which currently operate below the adopted level of service standard.

Page Two

December 17, 2019 – Consent Item

School Concurrency Mitigation Agreement OC-18-061

Wetherbee Acres Parcel ID#: 20-24-30-0000-00-004

Pursuant to Section 30-622 of the Code, if there is insufficient available school capacity within a Concurrency Service Area to meet the demand created by the proposed residential development, and the applicant and the School Board have agreed upon mitigation to satisfy the school concurrency requirements for the proposed residential development, then the applicant, School Board, and County must memorialize the terms of the mitigation in an agreement. In accordance with the formula set forth in Section 30-622(4)(b)9 of the Code, the School Board has calculated the proportionate share mitigation payment to be \$742,334.32.

Pursuant to Section 163.3180, Florida Statutes, the applicant is entitled to impact fee credits on a dollar for dollar basis for any proportionate share mitigation paid for the same need. Therefore, the School Board has included provisions in the Mitigation Agreement allowing for a School Impact Fee credit account. The Mitigation Agreement also requires payment of Capacity Reservation Fees prior to issuance of building permits for this project.

The School Board approved this Mitigation Agreement on October 22, 2019.

ACTON REQUESTED: Approval and execution of School Concurrency Mitigation Agreement OC-18-061 Project Name: Wetherbee Acres Parcel ID#: 20-24-30-0000-00-004 by The School Board of Orange County, Florida, Orange County, Florida, and DHIC – South Creek, LLC for a proportionate share mitigation payment in the amount of \$742,334.32. District 4

JVW/SS:rep

Attachments

BCC Mtg. Date: December 17, 2019

After recording return to:

Julie C. Salvo, AICP
Orange County Public Schools
6501 Magic Way, Building 200
Orlando, Florida 32809

-----[SPACE ABOVE THIS LINE FOR RECORDING DATA]-----

**SCHOOL CONCURRENCY
MITIGATION AGREEMENT**

OC-18-061

Project Name: Wetherbee Acres

Parcel ID#: 20-24-30-0000-00-004

THIS SCHOOL CONCURRENCY MITIGATION AGREEMENT (“Agreement”), is entered into by **THE SCHOOL BOARD OF ORANGE COUNTY, FLORIDA** a body corporate and political subdivision of the State of Florida, (“School Board”); **ORANGE COUNTY, FLORIDA**, a charter county and political subdivision of the State of Florida, (“County” or “Applicable Local Government”); and **DHIC – SOUTH CREEK, LLC**, a Delaware limited liability company whose address is 1341 Horton Circle, Arlington, TX 76011 (the “Applicant”), collectively referred to herein as the “Parties.”

RECITALS:

WHEREAS, the School Board, Orange County, and the municipalities within Orange County have entered into that certain “First Amended and Restated Interlocal Agreement For Public School Facility Planning and Implementation of Concurrency” (the “Interlocal Agreement”), and

WHEREAS, pursuant to Section 18.6 of the Interlocal Agreement, an applicant submitting a School Concurrency Determination Application for approval of a Site Plan that will generate additional students in a School Concurrency Service Area in which there is insufficient Available School Capacity to accommodate the anticipated additional students must enter into a Proportionate Share Mitigation Agreement to prevent school overcrowding attributable to the anticipated additional students generated by the Residential Development as specified in the Interlocal Agreement; and

WHEREAS, an Applicant must submit the School Concurrency Determination Application along with a Development Analysis which identifies the proposed location of the Residential Development, the number of Residential Units that will be created, a phasing schedule (if

APPROVED
School Board Meeting: 10/22/19
Agenda Item: 15.01

applicable), a map demonstrating land use and zoning classifications for the Applicant's property, as well as all other information required pursuant to Section 18.5 of the Interlocal Agreement, to the County; and

WHEREAS, Applicant is the fee simple owner, or authorized agent of the owner, of that certain tract of land located in County Commission District 4 in Orange County, Florida, as more particularly described on **Exhibit "A,"** attached hereto and incorporated herein by reference (the "Property"), the location of which is illustrated by a map attached hereto as **Exhibit "B,"** and incorporated herein by reference; and

WHEREAS, the Property is subject to and benefitted by that Amended and Restated Public Education Agreement by and between the School Board of Orange County, Florida, and the Applicant, which was recorded on January 24, 2019, in the Public Records of Orange County, Florida at Document #20190048375 in connection with CDR-17-11-348 and provided Capacity Enhancement Mitigation for 354 multi-family New Units and 71 townhome New Units (CEA #03-012); and

WHEREAS, the Applicant has submitted a School Concurrency Determination Application and Development Analysis to the County (CEL-18-09-072) in connection with a proposal to obtain approval for a preliminary subdivision plan in order to develop 300 multi-family and 70 townhome Residential Units on the Property (the "Project") and the County has forwarded the School Concurrency Determination Application and Development Analysis to the School Board; and

WHEREAS, the School Board has reviewed and evaluated the Applicant's School Concurrency Determination Application and Development Analysis as required by Section 18.6 of the Interlocal Agreement, and has determined that based on the current adopted Level of Service standards for the School Concurrency Service Areas within which the Property is located and the anticipated new School Capacity that will be available in the first three (3) years of the current District Facilities Work Program to serve the proposed Residential Development, there is insufficient Available School Capacity at the high school level to serve the new 300 multi-family and 70 townhome Residential Units within the School Concurrency Service Areas for the Project or within adjacent School Concurrency Service Areas as determined by an Adjacency Review; and

WHEREAS, approving the School Concurrency Determination Application without requiring Proportionate Share Mitigation for the impacts of the proposed new Residential Units will either create or worsen school overcrowding in the applicable School Concurrency Service Areas; and

WHEREAS, the Applicant has agreed to enter into this Agreement with the School Board and County to provide Proportionate Share Mitigation proportionate to the demand for Public School Facilities to be created by the Project, as more particularly set forth herein.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

1. INCORPORATION OF RECITALS. The foregoing recitals are true and correct and are hereby incorporated into this Agreement by reference as if fully set forth herein.

2. DEFINITION OF MATERIAL TERMS. Any capitalized terms used herein but not defined shall have the meaning attributed to such term in the Interlocal Agreement.

3. LEGALLY BINDING COMMITMENT. This Agreement constitutes a legally binding commitment by the Applicant to mitigate for the impacts of the new Residential Units for which the Applicant is seeking approval pursuant to the School Concurrency Determination Application and is intended to satisfy the requirements of Florida law and the Orange County Code.

4. PROPORTIONATE SHARE MITIGATION. The Parties hereby agree that the Applicant shall provide Proportionate Share Mitigation (as hereinafter defined) in order to meet the demand for School Capacity created by the Project and to provide additional capacity for 27.4 high school students, as follows, in accordance with Section 19.2 of the Interlocal Agreement:

Payment in the amount of SEVEN HUNDRED FORTY-TWO THOUSAND THREE HUNDRED THIRTY-FOUR AND 32/100 DOLLARS (\$742,334.32) to cover the Proportionate Share Mitigation associated with providing the necessary capacity to complete the Project (the "Proportionate Share Mitigation") to the School Board. Such payment shall be due and payable prior to the time the plat for the Property is approved and has been calculated in accordance with the formula found in Section 19.2 of the Interlocal Agreement. To the extent the Applicant's proposed Residential Development is subject to a Capacity Enhancement Agreement, any capacity enhancement mitigation paid pursuant to such agreement was applied as a credit to the Proportionate Share Mitigation required for the Project. Such credit was subtracted from the total Proportionate Share Mitigation required pursuant to the Interlocal Agreement and is reflected in the Proportionate Share required in this Section 4.

5. USE OF PROPORTIONATE SHARE MITIGATION. The School Board shall direct the Proportionate Share Mitigation to a School Capacity improvement identified in the capital improvement schedule in the five (5) year district work plan of the School Board's District Facilities Work Program which satisfies the demands from the proposed Residential Development. If such a School Capacity improvement does not exist in the District Facilities Work Program, the School Board may, in its sole discretion, add a School Capacity improvement to its District Facilities Work Program to mitigate the impacts from the Project, as provided in Section 19.6 of the Interlocal Agreement.

6. IMPACT FEE CREDIT. The Proportionate Share Mitigation paid pursuant to this Agreement shall be credited against the School Impact Fee on a dollar for dollar basis at fair market value.

Upon payment of the Proportionate Share Mitigation, the School Board shall notify the County of the amount of the School Impact Fee Credit based upon 93.9 Equivalent Residential Units (as defined in Section 30-622 of the Orange County Code), currently estimated to be FIVE HUNDRED SEVENTY-SIX THOUSAND SEVENTEEN AND 02/100 DOLLARS (\$576,017.02) (the "Impact Fee Credit Amount"), and shall request a School Impact Fee credit account in such amount upon receipt of the Proportionate Share Mitigation. Applicant shall not be entitled to a credit or refund for any portion of the Proportionate Share Mitigation in excess of the Impact Fee Credit Amount.

In the event that the School Impact Fees prepaid by the Applicant exceed the School Impact Fees due pursuant to the School Impact Fee Ordinance, Applicant may request that the excess School Impact Fees be transferred to another project within the same School Concurrency Service Area where the Project is located.

Applicant and School Board hereby agree and acknowledge that Applicant submitted an application for a School Concurrency Mitigation Agreement for the Project in accordance with Sections 18 and 19 of the Interlocal Agreement prior to July 1, 2019, and as such, Applicant, its successors and assigns, hereby expressly waives and relinquishes any and all rights, claims, entitlements, or privileges against School Board or the Applicable Local Government to any credit against impact fees for the payment of the Proportionate Share Mitigation in excess of the Impact Fee Credit Amount as a result of the enactment of any statutory provisions amending Sections 163.3180 or 163.31801, Florida Statutes, on or after July 1, 2019. Applicant represents and warrants that this waiver has been entered into freely and voluntarily by Applicant, without coercion, duress, or undue influence, and with full understanding and awareness of the circumstances, consequences, and ramifications of such waiver. Applicant hereby agrees to indemnify, defend, and hold harmless School Board, the Applicable Local Government, or the School Board's or Applicable Local Government's board members, commission members, employees, and representatives from and against all claims, damages, losses, and expenses, including but not limited to, economic loss, reasonable attorney's fees and expenses, arising out of, in connection with, or as a result of the exercise by Applicant or any individual or entity claiming by, through or under Applicant, of its rights and obligations set forth in this Agreement or related to any claim for impact fee credits for the Proportionate Share Mitigation in excess of the Impact Fee Credit Amount resulting from the enactment of any statutory provisions amending Sections 163.3180 or 163.31801, Florida Statutes, on or after July 1, 2019. Applicant understands and acknowledges that the School Board has bargained for this consideration and both the School Board and Applicable Local Government substantially relied on this section to School Board's detriment in the School Board's approval of this Agreement, and to the Applicable Local Government's detriment in approval of the Project in reliance on the approval of the Agreement. In the event this provision is declared invalid or unenforceable by a court of competent jurisdiction or Applicant otherwise elects to assert any rights to impact fee credits against the Proportionate Share Mitigation in excess of the Impact Fee Credit Amount, in addition to the indemnification rights set forth above, School Board has the right, but not the obligation, to immediately terminate this Agreement, to request that the Applicable Local Government discontinue the issuance of any development permits, certificates of occupancy, or plat approval for the Project or otherwise discontinue the process for any other approvals for the Project, or any other remedy available at law.

7. ISSUANCE OF SCHOOL CONCURRENCY RECOMMENDATION. Upon final execution of this Agreement by all Parties hereto, the School Board shall issue a School Concurrency Recommendation documenting that School Capacity will be available for the Project. This recommendation may be used by the County to issue a Capacity Encumbrance Letter in accordance with Section 18.7 of the Interlocal Agreement.

8. SCHOOL CAPACITY ENCUMBRANCE AND RESERVATION. Within twenty-one (21) days of the Effective Date of this Agreement (as defined in Section 24 below),

and upon payment of any applicable administrative fees, County shall issue to the Applicant a Capacity Encumbrance Letter sufficient to encumber school capacity for the Project.

At such time as Applicant has paid the Proportionate Share Mitigation, prepaid the School Impact Fees further described in Section 6 of this Agreement, and paid the applicable installment(s) of the School Capacity Reservation Fee described in Section 9 below, School Capacity shall be reserved for the total units in the Project as reflected on the application; provided, however, the Applicant shall be required to apply for and obtain a School Capacity Reservation Certificate (“SCRC”) prior to the expiration of the Capacity Encumbrance Letter and provided further if the Applicant fails to make any of the required School Capacity Reservation Fee payments described in Paragraph 9 below or if this Agreement is terminated, such reserved School Capacity shall lapse and be returned to the applicable capacity bank. Applicant may utilize funds available in any School Impact Fee Credit account set up as a result of this Agreement to pay said School Capacity Reservation Fees.

9. CAPACITY RESERVATION FEE. In order to reserve capacity for the total units in the Project and in order to receive a SCRC, prior to expiration of Applicant’s Capacity Encumbrance Letter, Applicant shall be required to pay a School Capacity Reservation Fee for the Project in accordance with Section 30-599 of the Orange County Code which School Capacity Reservation Fee may be paid with any School Impact Fee Credit account set up as a result of this Agreement. As of the date of this Agreement, the total School Capacity Reservation Fees for the Project are estimated to be TWO MILLION TWO HUNDRED SIXTY THOUSAND EIGHT HUNDRED AND 00/100 DOLLARS (\$2,260,800.00) and are anticipated to be paid in accordance with the schedule below. However, Applicant shall be obligated to pay the School Capacity Reservation Fees at the rates in effect at the time Applicant applies for the SCRC for the Project and in accordance with the schedule contained within the SCRC at the time of issuance.

- a. Prior to plat approval and upon application for a SCRC:
\$ 753,600.00; and
- b. 12 months from date of SCRC:
\$ 753,600.00; and
- c. 24 months from date of SCRC:
\$ 753,600.00 (the remaining balance of the SCRC fees).

Notwithstanding the schedule provided by this Section, Applicant may prepay any or all of the School Capacity Reservation Fees in advance. School Capacity Reservation Fees paid pursuant to this Agreement shall be credited towards School Impact Fees as provided in Section 30-599 of the County Code. In the event Applicant has an established pre-paid School Impact Fee Credit Account, the School Capacity Reservation Fees may be paid from such School Impact Fee Credit Account.

10. TERMINATION. This Agreement shall terminate and Applicant shall forfeit any administrative fees paid, as well as any capacity encumbered or reserved under the following

County: Orange County Planning, Environmental, and Development Services
Department
Manager, Fiscal and Operational Support Division
201 South Rosalind Avenue, 2nd Floor
Orlando, Florida 32801

13. CAPTIONS AND PARAGRAPH HEADINGS. Captions and paragraph headings contained in this Agreement are for convenience and reference only. They in no way define, describe, extend or limit the scope or intent of this Agreement.

14. NO WAIVER. No waiver of any provision of this Agreement shall be effective unless it is in writing, and signed by the party against whom it is asserted. Any such written waiver shall only be applicable to the specific instance to which it relates, and shall not be deemed to be a continuing or future waiver.

15. EXHIBITS. All Exhibits attached hereto are a part of this Agreement and are fully incorporated herein by this reference.

16. AMENDMENTS. No modification, amendment, or alteration to the terms or conditions contained herein shall be binding upon the parties hereto unless in writing and executed by all the Parties to this Agreement.

17. ASSIGNMENT, TRANSFER OF RIGHTS. The Applicant may assign its rights, obligations and responsibilities under this Agreement to a third-party purchaser of all or any part of fee simple title to the Property; provided, however, that any such assignment shall be in writing and shall require the prior written consent of all of the Parties hereto, which consent shall not be unreasonably withheld, conditioned, or delayed. Such consent may be conditioned upon the receipt by the other parties hereto of the written agreement of the assignee to comply with conditions and procedures to aid in the monitoring and enforcement of the assignee's performance of the Applicant's obligations with regard to Proportionate Share Mitigation under this Agreement. The assignor under such assignment shall furnish the Parties with a copy of the written assignment within ten (10) days of the date of execution of same.

18. COUNTERPARTS. This Agreement may be signed in counterparts, each of which may be deemed an original, and all of which together constitute one and the same agreement.

19. RECORDING OF THIS AGREEMENT. The School Board agrees to record this Agreement, at Applicant's expense, within fourteen (14) days after the Effective Date, in the Public Records of Orange County, Florida.

20. ENTIRE AGREEMENT. This Agreement sets forth the entire agreement among the Parties with respect to the subject matter addressed herein, and it supersedes all prior and contemporaneous negotiations, understandings and agreements, written or oral, among the Parties.

21. SEVERABILITY. If any provision of this Agreement is declared invalid or unenforceable by a court of competent jurisdiction, the invalid or unenforceable provision will be stricken from the Agreement, and the balance of the Agreement will remain in full force and effect as long as doing so would not affect the overall purpose or intent of the Agreement.

22. APPLICABLE LAW. This Agreement and the provisions contained herein shall be construed, controlled, and interpreted according to the laws of the State of Florida and in accordance with the Orange County Code and venue for any action to enforce the provisions of this Agreement shall be in the Ninth Judicial Circuit Court in and for Orange County, Florida.

23. ATTORNEY'S FEES. In the event any party hereto brings an action or proceeding, including any counterclaim, cross-claim, or third party claim, against any other party hereto arising out of this Agreement, each party in such action or proceeding, including appeals therefrom, shall be responsible for its own attorney fees.

24. EFFECTIVE DATE. The effective date of this Agreement shall be the date when the last one of the parties has properly executed this Agreement as determined by the date set forth immediately below their respective signatures (the "Effective Date").

Signatures on Following Page

“APPLICANT”

Signed and sealed in the presence of:

DHIC – South Creek, LLC, a Delaware limited liability company

Julia A. Aragona
Print Name: JULIA A. ARAGONA

By: DHI Communities II, LLC, a Delaware Limited liability company

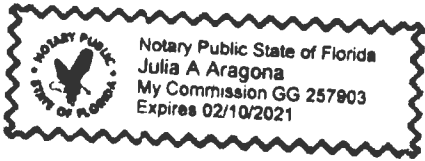
Brett McQuade
Print Name: BRETT McQuade

By: [Signature]
Michael Mulhall, Vice President

Date: October 20, 2019

STATE OF FLORIDA)
) s.s.:
COUNTY OF ORANGE)

The foregoing instrument was acknowledged before me this 20th day of October, 2019, by Michael Mulhall as Vice President of DHI Communities II, LLC, a Delaware limited liability company, the Managing Member of DHIC – South Creek, LLC, a Delaware limited liability company, on behalf of the organization. He/she is personally known to me or has produced _____ (type of identification) as identification.



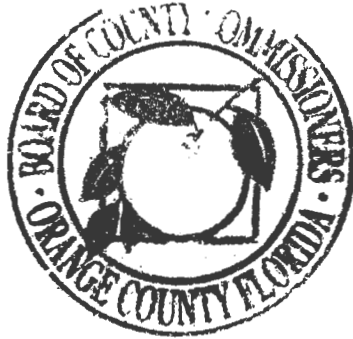
AFFIX NOTARY STAMP

Julia A. Aragona
NOTARY PUBLIC OF FLORIDA
Print Name: JULIA A. ARAGONA
Commission No.: GG 257903
Expires: Feb. 10, 2021

“COUNTY”

ORANGE COUNTY, FLORIDA

By: Board of County Commissioners



By: Byron W. Brooks

JL Jerry L. Demings
Orange County Mayor

Date: 17 Dec 19

ATTEST: Phil Diamond, CPA, County Comptroller
As Clerk of the Board of County Commissioners

By: Craig A. Stopyna

fol Deputy Clerk

Exhibit "A" – Legal Description of Project

The land referred to herein below is situated in the County of Orange, State of Florida, and is described as follows:

THE NORTHEAST 1/4 OF THE NORTHWEST 1/4 AND THE SOUTHEAST 1/4 OF THE NORTHWEST 1/4 AND THE SOUTHWEST 1/4 OF THE NORTHEAST 1/4 OF SECTION 20, TOWNSHIP 24 SOUTH, RANGE 30 EAST, ORANGE COUNTY, FLORIDA; LESS THE WEST 330 FEET OF THE EAST 1/2 OF THE NORTHWEST 1/4, ORANGE COUNTY, FLORIDA.

SUBJECT TO ROAD RIGHT OF WAY ON NORTH

LESS: BEGINNING AT THE NORTHEAST CORNER OF THE NORTHEAST 1/4 OF THE NORTHWEST 1/4 OF SAID SECTION, RUN WEST 270 FEET; THENCE SOUTH 322.666 FEET; THENCE EAST 270 FEET; THENCE NORTH 322.666 FEET TO POINT OF BEGINNING.



Exhibit "B"-Location Map