




Interoffice Memorandum

AGENDA ITEM

September 2, 2019

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

FROM: Jon V. Weiss, P.E., Chairman 
Roadway Agreement Committee

SUBJECT: September 24, 2019 – Consent Item
Proportionate Share Agreement For Wetherbee Acres
Boggy Creek Road

The Roadway Agreement Committee has reviewed a Proportionate Share Agreement for Wetherbee Acres Boggy Creek Road ("Agreement") by and between DHIC – South Creek, LLC and Orange County for a proportionate share payment in the amount of \$717,300. Pursuant to Section 163.3180(5)(h), Florida Statutes, an applicant may mitigate capacity deficiencies by entering into a Proportionate Share Agreement and contributing a proportionate share payment. The proportionate share payment is due within 90 days of the effective date of this Agreement.

The Agreement follows the recommendation of the Roadway Agreement Committee providing for the mitigation of road impacts for 50 deficient trips on the road segment of Boggy Creek Road from Tradeport Drive to Wetherbee Road in the amount of \$14,346 per trip.

The Roadway Agreement Committee approved the Proportionate Share Agreement on August 21, 2019. The Specific Project Expenditure Report and Relationship Disclosure Forms are on file with the Transportation Planning Division.

If you have any questions, please feel free to contact me at 407-836-5393.

ACTION REQUESTED: Approval and execution of Proportionate Share Agreement for Wetherbee Acres Boggy Creek Road by and between DHIC – South Creek, LLC and Orange County for a proportionate share payment in the amount of \$717,300. District 4

JVW/HEGB/fb
Attachment

BCC Mtg. Date: September 24, 2019

This instrument prepared by
and after recording return to:

Jonathan P. Huels, Esquire
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 North Eola Drive
Orlando, FL 32801

Parcel ID Number(s):
20-24-30-0000-00-004

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

**PROPORTIONATE SHARE AGREEMENT FOR
WETHERBEE ACRES**

Boggy Creek Road

This Proportionate Share Agreement (the "Agreement"), effective as of the latest date of execution (the "Effective Date"), is made and entered into by and between DHIC – SOUTH CREEK, LLC, a Delaware limited liability company ("Owner"), whose principal place of business is 834 Highland Avenue, Orlando, FL 32803, and ORANGE COUNTY, a charter county and political subdivision of the State of Florida ("County"), whose address is P.O. Box 1393, Orlando, FL 32802-1393.

WHEREAS, Owner is the owner of fee simple title to certain real property, as generally depicted on Exhibit "A" and more particularly described on Exhibit "B," both of which exhibits are attached hereto and incorporated herein by this reference (the "Property"); and

WHEREAS, the Property is located in County Commission District 4, within the County's Urban Service Area, and the proceeds of the PS Payment, as defined herein, will be allocated to Boggy Creek Road; and

WHEREAS, Owner intends to develop the Property as 300 Apartments and 70 Townhomes, referred to and known as Wetherbee Acres (the "Project"); and

WHEREAS, Owner received a revised letter from County dated June 4, 2019, stating that Owner's Capacity Encumbrance Letter ("CEL") application #CEL-18-09-072 for the Project was denied; and

WHEREAS, the Project will generate fifty (50) deficient PM Peak Hour trip(s) (the "Excess Trip(s)") for the deficient roadway segment on Boggy Creek Road from Tradeport Drive to Wetherbee Road (the "Deficient Segment"), and zero (0) PM Peak Hour trips were available on the Deficient Segment on the date the CEL was denied, as further described in Exhibit "C" attached hereto and incorporated herein; and

WHEREAS, the Excess Trip(s) will cause the Deficient Segment to operate below adopted Level of Service standards; therefore, pursuant to Section 163.3180(5)(h), Florida Statutes, as amended, the Owner shall provide the County with proportionate share mitigation for the Excess Trip(s); and

WHEREAS, Owner and County have agreed that the proportionate share payment necessary to mitigate the impact of the Excess Trip(s) on the Deficient Segment through the current anticipated Project buildout is SEVEN HUNDRED SEVENTEEN THOUSAND THREE HUNDRED DOLLARS and 00/100 Dollars (\$717,300.00) (the “**PS Payment**”); and

WHEREAS, County and Owner desire to set forth certain terms, conditions, and agreements between them as to the development of the Property into the Project.

NOW, THEREFORE, in consideration of the premises contained herein and other good and valuable consideration exchanged by and between Owner and County, the receipt and sufficiency of which are hereby acknowledged, the parties hereto stipulate and agree as follows:

Section 1. Recitals. The above recitals are true and correct and are incorporated herein by this reference.

Section 2. PS Payment; CEL.

(a) *Calculation of PS Payment:* The amount of the PS Payment for the Deficient Segment, as described in Exhibit “C,” totals SEVEN HUNDRED SEVENTEEN THOUSAND THREE HUNDRED DOLLARS and 00/100 Dollars (\$717,300.00). This PS Payment was calculated in accordance with the methodology outlined in Section 163.3180, Florida Statutes. Owner and County agree that the Excess Trip(s) constitute the Project’s impact on the aforementioned Deficient Segment based upon (i) Owner’s Revised Traffic Study titled Wetherbee Acres prepared by VHB, dated February, 2019 for D.R. Horton (the “**Traffic Study**”), which is incorporated herein by this reference, and (ii) upon the calculations described in Exhibit “C.” The Traffic Study was accepted by the Orange County Transportation Planning Division on May 21, 2019, and is on file and available for inspection with that division (CMS #2018072). Owner and County further acknowledge and agree that the PS Payment as set forth above shall be the final and binding calculation of the amount the Owner is required to pay through the buildout of the currently approved Project as proportionate share mitigation for impacts of the Project upon roadways within Orange County’s jurisdiction, notwithstanding any subsequent variance in the actual cost of improvement to the Deficient Segment or actual traffic impacts created by the Project; provided, however, that if Owner subsequently increases the number of units and/or square footage, as applicable, of the Project, the Project may then be subject to an additional concurrency evaluation and proportionate share agreement as set forth in Section 2(d) below. Owner and County further acknowledge and agree that the calculation of, and agreement regarding, the amount of the PS Payment constitute material inducements for the parties to enter into this Agreement.

(b) *Timing of PS Payment, Issuance of CEL.* Within ninety (90) days following the Effective Date, Owner shall deliver a check to County in the amount of SEVEN HUNDRED SEVENTEEN THOUSAND THREE HUNDRED DOLLARS and 00/100 Dollars (\$717,300.00) as the PS Payment. The check shall be made payable to "Orange County Board of County Commissioners" and shall be delivered to the Fiscal and Operational Support Division of the Planning, Environmental, and Development Services Department. Within twenty-one (21) days following its receipt of the PS Payment, if the Property's future land use designation and zoning are consistent with the Project's proposed development, County shall issue a CEL sufficient to encumber traffic capacity for the Project, irrespective of any actual traffic deficiency on the Deficient Segments. Within the time frame provided in the CEL, the Owner must reserve the encumbered trips by obtaining a Capacity Reservation Certificate as provided in Section 30-591 of the Orange County Code, as may be amended. An amount equal to the PS Payment shall be applied toward the amount of the initial capacity reservation payment (and any subsequent reservation payment(s), if the initial reservation payment does not exceed the amount of the PS Payment) as further set forth in Section 3 below. In the event Owner has not paid the PS Payment within ninety (90) days of the Effective Date, one extension of ninety (90) days may be granted by the manager of County's Transportation Planning Division. In the event Owner has not paid the PS Payment to County within one hundred eighty (180) days after the Effective Date, this Agreement shall become null and void.

(c) *Project Development.* Recordation of a subdivision plat or approval of a commercial site plan for the Project shall not be permitted prior to the issuance of a Capacity Reservation Certificate as contemplated in subparagraph 2(b) above.

(d) *Increase in Project Trips.* Any change to the Project which increases the unit count and/or square footage, as applicable, may result in an increase in trips on the Deficient Segment or other segments within the transportation impact area, as defined by County. Owner understands and agrees that any such additional trips are neither vested nor otherwise permitted under this Agreement, and that Owner is precluded from asserting any such vesting. In addition, Owner understands and agrees that any such changes resulting in an increase in trips may cause this Agreement to become null and void, and/or may require application for and execution of an additional Proportionate Share Agreement, along with any other required documentation, for the number of increased trips.

(e) *Satisfaction of Transportation Improvement Requirements.* County hereby acknowledges and agrees that upon Owner's payment of the PS Payment as required herein, and absent any change in the Project increasing the number of trips as set forth in subparagraph 2(d) above, Owner shall be deemed to have satisfied all requirements for the mitigation of the traffic impacts of the Project on all roads affected by the Project within County's jurisdiction through buildout of the Project. Owner shall be entitled to fully and completely develop the Project, without regard to whether the improvements to the Deficient Segment are actually constructed. Provided, however, Owner shall be required to obtain a Capacity Reservation Certificate prior to the expiration of Owner's Capacity Encumbrance Letter and shall be required to maintain the validity of the Capacity Reservation Certificate in accordance with its terms. Nothing herein shall be construed to exempt Owner from meeting the requirements of all other applicable laws, regulations, and/or Orange County Code provisions or from making the required payment of

transportation impact fees applicable to the Project, subject to credits as set forth in Section 3 below.

Section 3. Transportation Impact Fee Credits. County and Owner agree that Owner shall be entitled to receive transportation impact fee credits on a dollar for dollar basis in an amount up to but not exceeding the PS Payment in accordance with Section 163.3180, Florida Statutes, and as specifically described in Exhibit "C." County further agrees that such credits may be applied on a dollar for dollar basis against capacity reservation fees at such time as capacity reservation fees may be required to be paid by Owner in connection with the issuance of a Capacity Reservation Certificate as contemplated in Section 2 above. In no event shall Owner receive credits in excess of the PS Payment and in the event the PS Payment exceeds either the applicable transportation impact fees or capacity reservation fees, as the case may be, Owner shall not be entitled to a refund for the amount of the PS Payment in excess of such transportation impact fees or capacity reservation fees.

Section 4. No Refund. The PS Payment (including any capacity reservation fees paid with the PS Payment) is non-refundable.

Section 5. Notice. With the exception of the timing of the PS Payment as set forth in Section 2(b) hereof, the parties acknowledge and agree that no party shall be considered in default for failure to perform under this Agreement until such party has received written notice specifying the nature of such default or failure to perform and said party fails to cure said default or fails to perform within thirty (30) days of receipt of written notice. Any notice delivered with respect to this Agreement shall be in writing and be deemed to be delivered (whether or not actually received) (i) when hand delivered to the person(s) hereinafter designated, or (ii) upon deposit of such notice in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to the person at the address set forth opposite the party's name below, or to such other address or other person as the party shall have specified by written notice to the other party delivered in accordance herewith:

As to Owner: DHIC – SOUTH CREEK, LLC
834 Highland Avenue
Orlando, FL 32803

With copy to: Jonathan P. Huels
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 N. Eola Drive
Orlando, FL 32801

As to County: Orange County Administrator
P. O. Box 1393
Orlando, Florida 32802-1393

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

Orange County
Planning, Environmental, and Development Services Department
Manager, Transportation Planning Division
4200 South John Young Parkway, 2nd Floor
Orlando, Florida 32839

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

Section 6. Covenants Running with the Property. This Agreement shall be binding and shall inure to the benefit and burden of the heirs, legal representatives, successors, and assigns of the parties, and shall be a covenant running with the Property and be binding upon the successors and assigns of the Owner and upon any person, firm, corporation, or entity who may become the successor in interest to the Property.

Section 7. Recordation of Agreement. The parties hereto agree that this Agreement shall be recorded in the Public Records of Orange County, Florida, at Owner's expense, within ten (10) business days after the Effective Date.

Section 8. 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.

Section 9. Specific Performance. County and Owner shall each have the right to enforce the terms and conditions of this Agreement only by an action for specific performance. Venue for any action(s) initiated under or in connection with this Agreement shall lie in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

Section 10. Attorney Fees. In the event either party hereto brings an action or proceeding including any counterclaim, cross-claim, or third party claim, against the other party arising out of this Agreement, each party in such action or proceeding, including appeals therefrom, shall be responsible for its own attorney and legal fees.

Section 11. Construction of Agreement; Severability. Captions of the Sections and Subsections of this Agreement are for convenience and reference only; any words contained therein shall in no way be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of the provisions of this Agreement. If any provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefits

by any party hereunder or substantially increase the burden of any party hereunder, shall be held to be invalid or unenforceable to any extent by a court of competent jurisdiction, the same shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

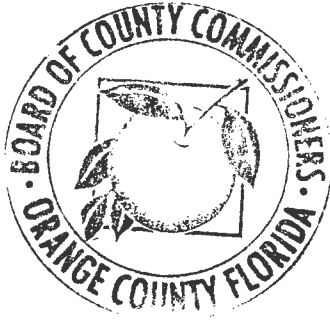
Section 12. Amendments. No amendment, modification, or other change(s) to this Agreement shall be binding upon the parties unless in writing and formally executed by all of the parties.

Section 13. Termination. In the event either (i) Owner has not paid the PS Payment to County within one hundred eighty (180) days after the Effective Date, as contemplated in Subsection 2(b), or (ii) Owner has timely paid the PS Payment to County and the Project has been constructed on the Property pursuant to a County building permit, this Agreement shall automatically terminate and thereafter be null and void for all purposes.

Section 14. Counterparts. This Agreement may be executed in up to three (3) counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

[Signatures appear on following pages]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed
by their respective duly authorized representatives on the dates set forth below.



“COUNTY”

ORANGE COUNTY, FLORIDA

By: Board of County Commissioners

By: *Jerry L. Demings*
Jerry L. Demings
Orange County Mayor

Date: 24 Sep 19

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

By: *Katie Smith*
Deputy Clerk

Print Name: Katie Smith

WITNESSES:

Brett McQuaide

Print Name: Brett McQuaide

Alexandra Lion-Do

Print Name: ALEXANDRA LION-DO

“OWNER”

DHIC – SOUTH CREEK, LLC, a Delaware limited liability company

By: DHI Communities II, LLC, a Delaware limited liability company, its sole member

Michael Mulhall

Print Name: Michael Mulhall

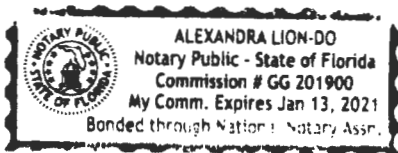
Title: Vice President

Date: 8/12/19

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged before me by Michael Mulhall, as Vice President of DHI Communities II, LLC, a Delaware limited liability company, which is the sole member of DHIC – South Creek, LLC, a Delaware limited liability company, who is known by me to be the person described herein and who executed the foregoing, this 12th day of August, 2019. He is personally known to me or has produced _____ (type of identification) as identification and did did not (circle one) take an oath.

WITNESS my hand and official seal in the County and State last aforesaid this 12th day of August, 2019.



Alexandra Lion-Do

NOTARY PUBLIC

Print Name: ALEXANDRA LION-DO

My Commission Expires: 1/13/21

Exhibit A

Project Location Map

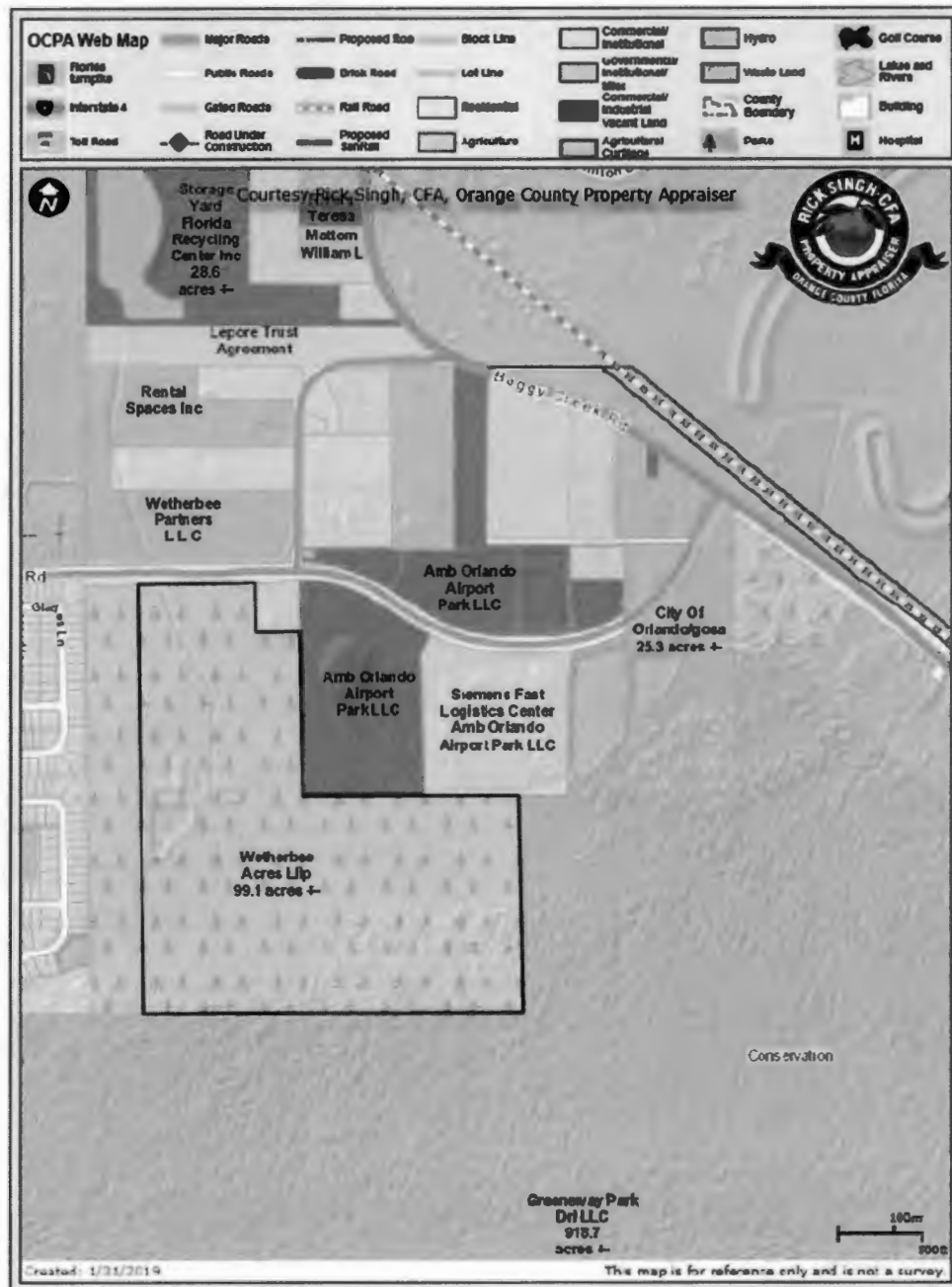


Exhibit "B"

Wetherbee Acres

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

Legal Description: 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 "C"

Wetherbee Acres

Log of Project Contributions
 Boggy Creek Rd (Tradeopt Dr to Wetherbee Rd)

Roadway Improvement Project Information

Planned Improvement Roadway(s)	Limits of Improvement (From - To)		Segment Length	Adopted LOS	Existing Generalized Capacity	Type of Improvement	Improved Generalized Capacity	Capacity Increase	Total Project Cost	Cost / Trip
Boggy Creek Rd	Tradeopt Dr	Wetherbee Rd	1.32	E	850	Widen from 2 to 4 lanes	2000	1120	\$76,037,452	\$14,348

County Share of Improvement

Planned Improvement Roadway(s)	Limits of Improvement (From - To)		Segment Length	Adopted LOS	Existing Generalized Capacity	Backlogged Trips	Improved Generalized Capacity	Capacity Increase	County (Backlog) Responsibility
Boggy Creek Rd	Tradeopt Dr	Wetherbee Rd	1.32	E	850	347	2000	1120	\$4,978,041

Developer Share of Improvement

Planned Improvement Roadway(s)	Limits of Improvement (From - To)		Segment Length	Adopted LOS	Existing Generalized Capacity	Improved Generalized Capacity	Capacity Increase	Backlogged Trips	Capacity Increase for New Development	Remaining Project Cost	Cost / Trip
Boggy Creek Rd	Tradeopt Dr	Wetherbee Rd	1.32	E	850	2000	1120	347	773	\$11,080,411	\$14,348

Updated: 5/21/19

Log of Project Contributions			
Date	Project	Project Trips	Prop Share
Existing Jun-18	Existing plus Committed	322	\$4,220,450
Apr-18	Wetherbee Rd Project	31	\$433,225
Jun-18	Long Property (Wetherbee Rd)	8	\$111,800
Oct-18	Woodland Park PD	6	\$50,078
Backlogged Totals:		347	\$4,851,551
Proposed May-19	Wetherbee Acres	50	\$717,300
			\$0
			\$0
			\$0
			\$0
Totals:		397	\$5,568,851