



## Interoffice Memorandum

APPROVED BY ORANGE  
COUNTY BOARD OF COUNTY  
COMMISSIONERS

BCC Mtg. Date: November 29, 2016

## AGENDA ITEM

October 28, 2016

TO:

Mayor Teresa Jacobs  
-AND-  
Board of County Commissioners

FROM:

Jon V. Weiss, P.E., Director  
Community, Environmental and Development  
Services Department

CONTACT PERSON:

Lori Cuniff, CEP, CHMM, Deputy Director  
Community, Environmental and Development  
Services Department  
(407) 836-1405

SUBJECT:

November 29, 2016 - Consent Item  
D.R. Horton, Inc. – Amended Escrow Agreement, CAI-15-08-028

On September 17, 2015, the Environmental Protection Division (EPD) approved a Conservation Area Impact (CAI) permit (CAI-15-08-028) to construct a single-family residential subdivision known as Creekstone Reserve (aka Bishop Property). The permit authorizes 4.50 acres of Class II wetland impacts and an associated mitigation plan (enhancement of 9.55 acres of onsite (Class I) wetlands and the preservation of 0.71 acre of associated uplands).

Condition No. 14 of CAI-15-08-028 requires the permittee to demonstrate that they have the financial responsibility to conduct the mitigation; monitoring and maintenance. D.R. Horton, Inc. has deposited cash in the principal amount of \$21,664.78 of Escrow Funds to be held as collateral security for the obligations related to this permit, and has executed the attached Amended Escrow Agreement, which has been approved as to form by the Orange County Attorney's Office.

On October 20, 2015, the Board of County Commissioners (BCC) approved the original Escrow Agreement for this project. The Agreement was signed by the Comptroller, but upon further review it was discovered that there was a blank in the document in regards to the amount of payable escrow funds. The amended version corrects this and also includes revisions requested by the Comptroller's Office.

**ACTION REQUESTED:**

**Approval and execution of Amended Escrow Agreement by and among Orange County, D.R. Horton, Inc., and Martha O. Haynie, Orange County Comptroller, required by Conservation Area Impact Permit CAI-15-08-028; Parcel ID No: 33-24-30-0000-00-011. District 4**

JVW/LC: mg

Attachments

BCC Mtg. Date: November 29, 2016

## AMENDED ESCROW AGREEMENT

**THIS AMENDED ESCROW AGREEMENT** ("**Amended Agreement**") is made and entered into by and among **Orange County**, a charter county and political subdivision of the State of Florida ("**County**") whose mailing address is P.O. Box 1393, Orlando, Florida 32802-1393, and **D. R. Horton, Inc.**, ("**Permittee**"), a Delaware corporation, whose mailing address is 6200 Lee Vista Boulevard, Suite 400, Orlando, Florida 32822, (herein collectively referred to as the "**Principals**") and **Martha O. Haynie, Orange County Comptroller**, whose mailing address is P.O. Box 38, Orlando, Florida 32802-0038 ("**Escrow Agent**").

### WITNESSETH:

**WHEREAS**, County has issued Conservation Area Impact Permit No. 15-08-028 ("**Permit**") to Permittee for wetlands impacts to property located at Bishop Property in Orange County, Florida, and more particularly described in "**Exhibit A**", attached hereto and incorporated herein by this reference; and

**WHEREAS**, pursuant to Section 15-419(4), Orange County Code, Permittee is required to provide reasonable financial assurance that the proposed development has the financial and institutional stability to carry out the required mitigation, monitoring, and maintenance requirements; and

**WHEREAS**, on October 20, 2015, the parties executed an Escrow Agreement, attached hereto as "**Exhibit B**" and now desire to rescind that Escrow Agreement and replace it with this Amended Agreement; and

**WHEREAS**, Escrow Agent has agreed to serve as the escrow agent in accordance with the terms and conditions set forth herein; and

**WHEREAS**, the Principals desire that Escrow Agent shall hold and release the escrowed funds subject to the terms and conditions set forth in this Amended Agreement.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the parties hereto represent, warrant, covenant, and agree as follows:

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

2. **Establishment of Escrow Relationship; Acceptance by Escrow Agent.** The Principals hereby retain Escrow Agent, at no cost to Permittee, to serve solely as the Escrow Agent (and in no other capacity) with respect to the Escrowed Funds, as later defined herein, and Escrow Agent hereby accepts such retention.

3. **Escrowed Funds.** No later than five (5) business days after the Effective Date, Permittee shall deliver funds in the amount of \$21,664.78 (representing 110% of the cost estimate of the approved mitigation, maintenance and monitoring plan) (the "Escrowed Funds") to Escrow Agent for the purpose of ensuring that Permittee performs all Permit obligations. Within five (5) business days of receipt, Escrow Agent shall place the Escrowed Funds into an escrow account (the "Escrow Account") to be held, administered and distributed as provided for herein. Escrow Agent shall acknowledge receipt of the Escrowed Funds by providing either in writing or by electronic mail notice to each of the Principals within five (5) business days after receipt of such funds.

4. **Disbursement of Escrowed Funds.** Upon performance of all Permit obligations by the Permittee to the County's satisfaction, County shall provide Escrow Agent with written notice of completion. Upon receipt of notice of completion, Escrow Agent shall disburse the Escrowed Funds to Permittee from the Escrow Account (less any funds disbursed to the County for noncompliance as provided below in this paragraph). Disbursements shall be payable to "D. R. Horton, Inc." and shall be delivered to the address provided in Section 14 below or such other address as Permittee may direct in writing. In the event the Orange County Environmental Protection Officer determines that Permittee has not fulfilled any or all Permit obligations, the Environmental Protection Officer shall submit written notification to Permittee describing each matter of noncompliance ("Noncompliance Notification"), providing Permittee thirty (30) days (unless a longer period is agreed upon by the Principals) to cure, or cause to be cured, such matter(s) referenced in the Noncompliance Notification. In the event the Environmental Protection Officer determines that Permittee has failed to resolve any matter(s) described in the Noncompliance Notification within the prescribed period of time, the Environmental Protection Officer may request withdrawal of any amount of the Escrowed Funds to cause the correction of the matter(s) of noncompliance in the following manner. The Environmental Protection Officer shall execute and present to the Escrow Agent, with a copy to the Permittee: (1) a statement that the Permittee has failed to comply with one or more Permit obligations, (2) an estimate of the cost of completion of the obligation(s), and (3) a draw request. The Escrow Agent shall promptly transfer to the County funds in the amount of the draw request from the Escrowed Funds. At the termination of this Amended Agreement, funds not transferred to the County shall be disbursed to the Permittee without interest.

5. **No Constructive Knowledge.** Escrow Agent shall not be deemed to have knowledge of any matter or thing unless and until Escrow Agent has actually received written notice of such matter or thing, and then shall only be required to act on that knowledge in its capacity as Escrow Agent as further described herein. Escrow Agent shall not be charged with any constructive knowledge whatsoever.

**6. Indemnification of Escrow Agent.** It is agreed that the duties of the Escrow Agent are purely ministerial in nature and shall be expressly limited to the matters herein for which Escrow Agent is expressly obligated. The Principals hereby indemnify Escrow Agent and agree to hold Escrow Agent harmless from and against any and all claims, liabilities, damages, costs, penalties, losses, actions, suits, or proceedings at law or in equity, and any other expenses, fees, or charges of any character or nature, which Escrow Agent may incur or with which Escrow Agent may be threatened directly or indirectly arising from or in any way connected with this Amended Agreement, except in the case of gross negligence, willful misconduct, or breach of trust of Escrow Agent, or any claims arising from, or in any way connected with, a breach of this Amended Agreement by Escrow Agent or Escrow Agent's failure to follow the instructions contained herein. In connection therewith, the Principals indemnify Escrow Agent against any and all reasonable expenses, including reasonable attorney fees (pre-litigation, litigation, and appellate) and the cost of defending or prosecuting any action, suit, or proceeding or resisting any such claim, whether or not litigation is instituted. Nothing contained herein is intended as, nor shall constitute, a waiver by County or Escrow Agent of its sovereign immunity protections pursuant to Section 768.28, Florida Statutes (2015).

**7. Limitation of Remedies.** The Principals expressly agree that the consideration, in part, for each of them entering into this Amended Agreement is the willingness of the other to limit the remedies for all actions arising out of or in connection with this Amended Agreement. Upon any failure by any party hereto to perform its obligations under this Amended Agreement, each party shall be limited strictly to only the following remedies:

- (a) action for specific performance or injunction;
- (b) action for declaratory judgment regarding the rights and obligations of the County;
- (c) any combination of the foregoing.

The Principals expressly waive their respective rights to sue for damages of any type for breach of or default under this Agreement by any party hereto.

**8. No Obligation to Overdraw.** Notwithstanding any provision of this Amended Agreement to the contrary, Escrow Agent shall not be required to make payment of an amount in excess of the balance in the Escrow Account.

**9. No Obligation to Pay Interest.** Notwithstanding any provision of this Amended Agreement to the contrary, Escrow Agent shall not be required to make any interest payment on any balance in the Escrow Account.

**10. Capacity of Escrow Agent.** It is expressly understood and agreed by the parties that the Escrow Agent shall not act under this Amended Agreement in any capacity as Clerk of the Board of County Commissioners, but rather in Escrow Agent's capacity as an independent constitutional officer.

**11. Escrow Term and Termination.** Unless terminated earlier as provided for in this Section, the term of this Amended Agreement shall be for a period of three (3) years, commencing upon the Effective Date, as later defined herein. This Amended Agreement may be terminated as follows:

A. Upon written notice given by all Principals of cancellation of designation of Escrow Agent to act and serve in said capacity, in which event, cancellation shall take effect no earlier than twenty (20) business days after notice to Escrow Agent of such cancellation; or

B. Upon Escrow Agent's resignation as Escrow Agent, which Escrow Agent may do at anytime upon giving written notice to Principals of its desire to so resign; provided, however, that resignation of Escrow Agent shall take effect no earlier than twenty (20) business days after the giving of notice of resignation; or

C. Upon disbursement of all Escrowed Funds as provided in Section 4. Simultaneous, with final disbursement of the Escrow Funds pursuant to this Amended Agreement, the Escrow Agent and all other parties shall be released of all liability, duties, and responsibilities under this Amended Agreement.

Notwithstanding the foregoing, the three-year term may not apply to any portion of the Escrowed Funds that are subject to any active or pending draw request(s) pursuant to Section 4 above.

**12. Delivery of Escrow Property to Successor Agent.** Upon termination of the duties of Escrow Agent in either manner set forth in Section 11A or 11B, Escrow Agent shall deliver all of the Escrowed Funds to the newly appointed escrow agent designated in writing by all Principals. In the event the Principals fail to agree upon a successor escrow agent prior to the effective date of the cancellation or resignation, Escrow Agent shall have the right to deposit the Escrowed Funds into the registry of an appropriate state court of competent jurisdiction in Orange County, Florida, and request judicial determination of the rights of the Principals by interpleader or other appropriate action.

**13. Settlement of Dispute.** In the event Escrow Agent is joined as a party to a lawsuit by virtue of the fact that it is holding the Escrowed Funds, Escrow Agent shall, at its option, either: (a) tender the Escrowed Funds into the registry of the appropriate court; or (b) disburse the Escrowed Funds in accordance with the court's ultimate disposition of the case. In the event Escrow Agent tenders the Escrowed Funds into the registry of the appropriate court and files an action of interpleader naming Principals and any affected third parties of whom Escrow Agent has received actual notice, Escrow Agent shall be released and relieved from any and all further obligation and liability hereunder or in connection herewith. The Principals agree that Escrow Agent shall not be liable to any party or person whomsoever for the misdelivery to Permittee and County or otherwise of any monies except where such misdelivery shall be due to breach of this Amended Agreement by Escrow Agent other than with respect to any liabilities for willful misconduct, gross negligence, or breach of trust by Escrow Agent.

**14. Notices.** All notices, consents, approvals, waivers, and elections which any party shall be required or shall desire to make or give under this Amended Agreement shall be in writing and (i) hand delivered by messenger to the named individual(s) representing the party to be notified; or (ii) mailed, postage prepaid, by United States Certified or Registered Mail, Return Receipt Requested; or (iii) dispatched by a nationally-recognized overnight mail delivery service for which receipt is provided to the notifying party; as follows:

As to County:	Orange County, Florida P.O. Box 1393 Orlando, Florida 32802-1393 Attn.: Orange County Administrator Facsimile: (407) 836-7399 E-mail: <a href="mailto:countyadmin@ocfl.net">countyadmin@ocfl.net</a>
With a copy to:	Orange County Environmental Protection Division 3165 McCrory Place, Suite 200 Orlando, Florida 32803 Attn.: Lori Cunniff, Manager Facsimile: (407) 836-1499 Email: <a href="mailto:lori.cunniff@ocfl.net">lori.cunniff@ocfl.net</a>
As to Permittee:	D. R. Horton, Inc. 6200 Lee Vista Blvd., Suite 4200 Orlando, Florida 32822 Attn.: <del>Ben Shoemaker</del> Christopher Wrenn Email: <del>bshoemaker@drhorton.com</del> <u>CWrenn</u>
As to Escrow Agent:	Orange County Comptroller P. O. Box 38 Orlando, Florida 32802-0038 Attn.: Director of Finance and Accounting Facsimile: (407) 836-5753 Email: <a href="mailto:paul.wunderlich@occompt.com">paul.wunderlich@occompt.com</a>

Notice shall be deemed to have been given and received: (i) if by hand delivery, upon delivery; (ii) if by mail, three (3) days after the date first deposited in the United States mail; (iii) if by overnight courier; on the date shown on the courier's receipt as the date of actual delivery. Facsimile numbers and email addresses are provided as a convenience only; unless expressly provided by the terms of this Amended Agreement, notification by either method is not sufficient to constitute notice. A party may change its address by giving written notice to other parties as specified herein.

**15. Waiver.** The failure of either party to insist in any one or more cases upon the strict performance of any one of the terms, covenants, conditions, or provisions of this Amended

Agreement shall not be construed as a waiver or a relinquishment of such party's right to insist on strict performance of any such term, covenant, condition, or provision in the future.

**16. Governing Law and Venue.** This Amended Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Florida, without regard to choice of law rules. Venue for any action arising out of or in connection with this Amended Agreement shall lie in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. Notwithstanding anything herein to the contrary, parties shall comply with all applicable federal and state laws and regulations and with all applicable County ordinances and regulations, including applicable development plans and permits.

**17. Modifications to Amended Agreement.** Neither Escrow Agent nor Principals shall be bound by any modification, cancellation or rescission of this Amended Agreement unless in writing and signed by Escrow Agent and Principals.

**18. Cumulative Rights.** No right, power or remedy conferred upon Escrow Agent by this Amended Agreement is exclusive of any other right, power or remedy, but each and every such right, power or remedy, shall be cumulative and concurrent and shall be in addition to any other right, power or remedy Escrow Agent may have under the Amended Agreement or now or hereafter existing at law, in equity or by statute. The exercise of one right, power or remedy by Escrow Agent shall not be construed or considered as a waiver of any other right, power or remedy.

**19. Entire Agreement.** With this Amended Agreement, the parties amend the Escrow Agreement, approved by the Orange County Board of County Commissioners on October, 20, 2015. Furthermore, this Amended Agreement contains the entire understanding between the parties and the parties agree that no representation was made by or on behalf of the other which is not contained in this Amended Agreement, and that in entering into this Amended Agreement neither relied upon any representation not especially herein contained.

**20. Binding Agreement.** This Amended Agreement shall be binding upon Principals and Escrow Agent and their respective successors and assigns.

**21. Typewritten or Handwritten Provisions.** Handwritten provisions and/or typewritten provisions inserted in this Amended Agreement, which are initialed by all parties, shall control over the printed provisions in conflict therewith.

**22. Captions; Days.** The captions contained in this Amended Agreement are for convenience of reference only and in no way define, describe, extend or limit the scope or intent of this Amended Agreement or the intent of any provision contained herein. Each reference to "day" or "days" herein shall mean calendar days unless otherwise stated. Any time period provided for herein which shall end on a Saturday, Sunday, or legal holiday shall extend to 5:00pm of the next full business day.

**23. Effective Date.** Upon execution by the last of the parties hereto, the Amended Agreement shall be valid and binding retroactively to October 28, 2015, the date of receipt by Escrow Agent of the Escrowed Funds (the "Effective Date").

**24. Counterparts.** This Amended Agreement may be executed in up to three identical counterparts, each of which, when executed, shall be deemed to be an original and all of which together shall constitute one and the same document.

**IN WITNESS WHEREOF,** the parties have executed this Amended Agreement or caused this Amended Agreement to be duly executed and delivered by their duly authorized officers on the date(s) noted below.

**Accepted and agreed to:**

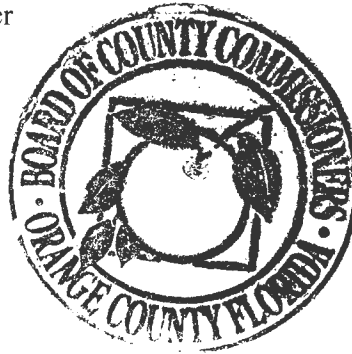
**ORANGE COUNTY, FLORIDA**

By: Board of County Commissioners

By: *Teresa Jacobs*  
Teresa Jacobs  
Orange County Mayor

ATTEST: Martha O. Haynie, County Comptroller  
As Clerk of the Board of County Commissioners

By: *Katie Smith*  
Deputy Clerk



[Signatures Continue on Following Pages]



Signed, sealed and delivered  
in the presence of:

Tiffany A. Pettigrew  
Signature

TIFFANY A. PETTIGREW  
Print Name

Toni Colangelo  
Signature

TONI COLANGELO  
Print Name

PERMITTEE:

D. R. HORTON, INC., a Delaware  
corporation

Christopher Nreem  
By: CHRISTOPHER NREEM  
Printed Name

ASSISTANT SECRETARY  
Title

Date: 10/18/16

STATE OF FLORIDA  
COUNTY OF ORANGE

SWORN and subscribed to freely and voluntarily for the purposes therein expressed  
before me by Christopher Nreem, of D. R. Horton, Inc., who is known by me to  
be the person described herein or who executed the foregoing this 18 day of  
October 2016, 2014. S/he is personally known to me or has produced  
as identification and did/did not take an  
oath.

WITNESS my hand and official seal in the County and State last aforesaid this 18  
day of October 2016, 2014.



Notary Signature  
Meghan Nelson  
Printed Notary Name

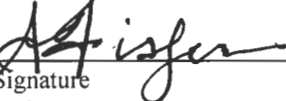
Notary Public in and for the  
County and State aforesaid  
My commission expires:

[Signatures Continue on Following Page]

Signed, sealed and delivered in the  
presence of:

  
Signature

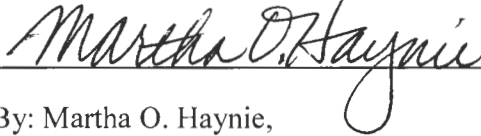
CATHERINE DIXON  
Print Name

  
Signature

ANDERA FISHER  
Print Name

ESCROW AGENT:

ORANGE COUNTY COMPTROLLER

  
By: Martha O. Haynie,  
Orange County Comptroller

Date: 11/30/16