

Agenda Item #: 3-C-5

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: March 11, 2008

☒ Consent

☐ Regular

☐ Workshop

☐ Public Hearing

Department:

Submitted By: Engineering and Public Works

Submitted For: Roadway Production Division

Project No. 1995611B

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to approve: Amendment No. 1 to the Public Facilities Agreement (R-2007-1262) (Agreement) with Toll Brothers, Inc/Palm Beach Limited Partnership (Toll) regarding the funding and construction of Lyons Road from Linton Boulevard to West Atlantic Avenue (Project).

Summary: Toll is the developer of a project known as Mizner Country Club located on the east side of Lyons Road, south of Linton Boulevard. Toll is required by Development Order to construct the Project. Palm Beach County has the obligation to remediate environmental issues and concerns related to the old "Bushel Stop" site. The remediation is projected to cost \$48,714.50.

District: 5 (MRE)

Background and Justification: On August 21, 2007, the Board of County Commissioners approved a Public Facilities Agreement (R-2007-1262) with Toll to memorialize the process for Toll to construct the Project and for the County to provide funding assistance due to an alignment shift and maintenance of traffic issues. Per the Agreement, the County is to prepare the old "Bushel Stop" site for construction including the remediation of any environmental issues on the site. As a result of an environmental report prepared by the County's environmental consultant dated October 10, 2007, contaminated soil located on the "Bushel Stop" site must be removed, disposed of, and replaced with clean fill material. Through this Amendment, Toll will be reimbursed \$48,714.50 for their Contractor to remove, dispose of, and replace the contaminated soil and for material testing services related to this additional earthwork operation.

Attachments:

1. Location Map
2. Amendment No. 1 to Public Facilities Agreement (2 Originals)
3. Public Facilities Agreement (R-2007-1262)

Recommended by:

[Signature]
Division Director

[Signature] 2/6/08
Date

Approved by:

[Signature]
County Engineer

2/13/08
Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2008	2009	2010	2011	2012
Capital Expenditures	<u>\$48,715</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
Operating Costs	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
External Revenues	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
Program Income (County)	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
In-Kind Match (County)	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>
NET FISCAL IMPACT	<u>\$48,715</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>

ADDITIONAL FTE

POSITIONS (Cumulative) _____

Is Item Included in Current Budget? Yes X No
Budget Acct No.: Fund 3500 Dept. 361 Unit 0813 Object 6551
Program

B. Recommended Sources of Funds/Summary of Fiscal Impact:

Transportation Improvement Fund
Lyons Rd/Linton Blvd to W Atlantic Ave

Contribution-Clean-up Bushel Stop site \$48,714.50
Funded by a non-board transfer from excess ROW funds in the project

C. Departmental Fiscal Review: R.D. Ward 1/17/08

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

[Signature] 2-20-08
OFMB
(UD) 2/20/08 SN 2/15/08 CN 2/13/08

[Signature] 2/22/08
Contract Dev. and Control
C. Bone 2/22/08

B. Approved as to Form and Legal Sufficiency:

[Signature] 2/25/08
Assistant County Attorney

This amendment complies with our review requirements.

C. Other Department Review:

Department Director

This summary is not to be used as a basis for payment.

LOCATION SKETCH

**AMENDMENT NO. 1 TO PUBLIC FACILITIES AGREEMENT
DATED AUGUST 21, 2007**

BETWEEN

**PALM BEACH COUNTY AND THE TBI/PALM BEACH LIMITED PARTNERSHIP
REGARDING FUNDING AND CONSTRUCTION OF LYONS ROAD FROM LINTON
BOULEVARD TO ATLANTIC AVENUE**

This Amendment ("Amendment") to the Agreement dated August 21, 2007 shall be effective as of the ____ day of _____, 2008, by and between PALM BEACH COUNTY, a political subdivision of the State of Florida, hereinafter referred to as the "COUNTY", and TOLL BROTHERS, INC/PALM BEACH LIMITED PARTNERSHIP, a Florida limited partnership, whose address is 3970 West Indiantown Road, Jupiter, Florida 33478, hereinafter referred to as the "TOLL".

WITNESSETH:

WHEREAS, the COUNTY and TOLL entered into a Public Facilities Agreement dated August 21, 2007, hereinafter referred to as the "Agreement", for the purpose of memorializing the process for the COUNTY to provide funding assistance and TOLL to construct Lyons Road from Linton Boulevard to Atlantic Avenue ("Project"); and

WHEREAS, Sections 4(b) and 4(h) of the Agreement stipulate that the COUNTY be responsible to resolve and remediate all environmental issues and concerns relating to the old "Bushel Stop" site; and

WHEREAS, the COUNTY wishes to have TOLL's contractor on the Project remove and replace unsuitable soil from a proposed dry detention area located on the old "Bushel Stop" site and have a geotechnical consultant monitor and certify said removal and replacement of material in conformance with requirements of the environmental report prepared by the COUNTY's environmental consultant (ARCADIS U.S., Inc.); and

WHEREAS, the COUNTY and TOLL mutually agree that such amendment is in the best interest of the Project.

NOW, THEREFORE, in consideration of the mutual covenants, promises, and agreements herein contained, the parties agree as follows:

1. The above recitations are true and correct and incorporated herein.
2. Section 4 (b) of the Agreement is hereby revised to add the following:

As environmental remediation of the old "Bushel Stop" site, the COUNTY will reimburse TOLL a negotiated sum of Forty One Thousand Two Hundred Thirty Four and 50/100 Dollars (\$41,234.50) for their Contractor to remove and replace the contaminated soils in conformance with the Environmental Report prepared by ARCADIS U.S., Inc. dated October 10, 2007. The COUNTY will also reimburse TOLL up to Seven Thousand Four Hundred Eighty Dollars (\$7,480.00) for material testing services provided by a geotechnical consultant. COUNTY further agrees to pay all costs associated with any change orders requested or required by COUNTY or ARCADIS U.S., Inc. related to environmental remediation of the old "Bushel Stop" site.

3. All other provisions of the Agreement shall continue in full force and effect.

IN WITNESS WHEREOF, the parties executed this Amendment to the Agreement on the date written above.

Palm Beach County, Florida

**BY ITS BOARD OF COUNTY
COMMISSIONERS**

By: _____
Addie L. Greene, Chairperson

ATTEST:
SHARON R. BOCK,
CLERK & COMPTROLLER

By: _____
(Deputy Clerk)

APPROVED AS TO TERMS
AND CONDITIONS:

By: STC

APPROVED AS TO FORM &
LEGAL SUFFICIENCY:

By: Marlene R. [Signature]
Assistant County Attorney

**TBI/Palm Beach Partnership, a
Florida limited partnership**
By: Toll FL GP Corp., a Florida
corporation Its: General Partner

By: [Signature]
Print: D. K. BARNES

Its: REG UP OF CD
As to **TOLL**

WITNESSES

[Signature]

Print: Ronald Blum

[Signature]

Print: Joyce A. Spriggs

PUBLIC FACILITIES AGREEMENT

THIS PUBLIC FACILITIES AGREEMENT ("Agreement") is made and entered into this _____ day of AUG 21 2007, 2007 between PALM BEACH COUNTY, a political subdivision of the State of Florida (hereinafter referred to as "COUNTY"), and TBI/Palm Beach Limited Partnership, a Florida limited partnership, whose address is 3970 West Indiantown Road, Jupiter, Florida 33478 (hereinafter referred to as "TOLL").

RECITALS:

WHEREAS, TOLL is the developer of a residential project originally known as West Delray Estates and more commonly known today as Mizner Country Club, which is located on the east side of Lyons Road south of West Atlantic Avenue and south of Lake Worth Drainage District ("LWDD") Canal L-35 in unincorporated Palm Beach County, Florida (the "Development"); and

WHEREAS, the Development is authorized pursuant to a development order from COUNTY in accordance with Palm Beach County Resolution No. R-97-2079, dated December 4, 1997, which approved Zoning Petition DOA87-07(D) ("Development Order"); and

WHEREAS, Section E5 of the Development Order requires TOLL to fund the construction of or, at the option of the COUNTY, construct Lyons Road as a two (2) lane road from West Atlantic Avenue to the south property line of the Development ("Lyons Road Construction Project"); and

WHEREAS, the COUNTY desires TOLL to construct the Lyons Road Construction Project in accordance with the terms and conditions of this Agreement; and

WHEREAS, TOLL desires to construct the Lyons Road Construction Project in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the promises, mutual covenants and conditions contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

WITNESSETH:

SECTION 1. RECITALS. The above recitations are true and correct and are incorporated herein by this reference.

SECTION 2. RIGHT-OF-WAY ACQUISITION AND DESIGN.

(a) Other than Lake Worth Drainage District ("LWDD") rights-of-way and easements, COUNTY and TOLL hereby agree that all rights-of-way necessary and required for the Lyons Road Construction Project, including, but not limited to, all temporary and permanent easements, have been acquired by COUNTY. Any rights-of-way or easements required by LWDD shall not be the responsibility of TOLL and shall be acquired by COUNTY, at COUNTY's expense, either now or in the future as the COUNTY desires.

(b) COUNTY and TOLL hereby acknowledge and agree that the Lyons Road Construction Project shall be constructed in accordance with the roadway design plans and associated permits prepared by Lawson, Noble & Webb, Inc. under Project No. 95611B ("Project Plans").

SECTION 3. TOLL'S RESPONSIBILITIES.

(a) TOLL shall construct the Lyons Road Construction Project in accordance with the terms and conditions of this Agreement.

(b) Other than the County Contribution (defined herein), TOLL agrees to contract for the construction and completion of the Lyons Road Construction Project and shall be responsible for all costs and expenses associated with the construction pursuant to the terms and conditions provided in this Agreement. Costs and expenses shall include County inspections, testing, filing fees, CEI services, and other ancillary costs and expenses.

(c) TOLL agrees to commence the Lyons Road Construction Project promptly after issuance of all permits by COUNTY and any other governmental agencies with jurisdiction allowing TOLL to complete the Lyons Road Construction Project in accordance with the Project Plans.

(d) TOLL agrees to construct the Lyons Road Construction Project in a diligent manner and in good faith and to complete the project no later than twelve (12) months after commencement of construction. Notwithstanding anything to the contrary provided herein, the completion of the Lyons Road Construction Project shall be subject to change in the event of any of the following:

- (i) Any third party actions or force majeure;
- (ii) Unavailability of material or labor;
- (iii) Any governmental delays or challenges to any permits required to be issued for the project including, but not limited to, all environmental reports and approvals pertaining to the project.

(e) TOLL shall require each contractor engaged by TOLL for work associated with this Agreement to maintain:

- i) Worker's Compensation coverage in accordance with Florida Statutes; and
- ii) Commercial General Liability coverage, including vehicle coverage, in combined single limits of not less than One Million and No/100 Dollars (\$1,000,000.00). COUNTY shall be named in the coverage as an additional insured.

(f) To insure the performance of the construction of the Lyons Road Construction Project and to indemnify and hold harmless the COUNTY from any and all damages, either directly or indirectly arising out of the performance of this Agreement, TOLL has provided to COUNTY a bond in the amount of One Million Fifty-Five Thousand and No/100 Dollars (\$1,055,000.00) ("Performance Bond"). COUNTY acknowledges and agrees that the Performance Bond is the only bond or form of surety that TOLL shall provide to COUNTY to insure the construction of the Lyons Road Construction Project. Should TOLL fail to complete the Lyons Road Construction Project in accordance with the Project Plans, the COUNTY shall be authorized to draw against the Performance Bond in any amount necessary to finish the construction of the Lyons Road Construction Project or make payments to all persons identified in Florida Statute 713.01 should TOLL default on any of its payment and/or performance obligations in connection with the construction of the Lyons Road Construction Project by giving thirty (30) days advance written notice to TOLL of the COUNTY'S intention to draw funds against the Performance Bond. Prior to the expiration of the thirty (30) day period, TOLL shall have the right to pay to COUNTY all funds requested to be drawn from the Performance Bond and, upon doing so the Performance Bond shall be reduced by any amounts paid to COUNTY by TOLL. Upon receipt of payment from TOLL within such thirty (30) day period, COUNTY agrees not to draw upon the Performance Bond. COUNTY shall refund and reduce the Performance Bond, dollar for dollar, upon review and approval of paid receipts by TOLL to COUNTY for work already

performed on the Lyons Road Construction Project until the entire Performance Bond has been refunded to TOLL. COUNTY shall have thirty (30) days from the acceptance of paid receipts in which to refund the commensurate portion of the Performance Bond and failure to do so shall be a material default and entitle TOLL to all remedies at law and in equity.

(g) TOLL hereby agrees to indemnify, defend and save COUNTY harmless against any and all claims, demands, actions, suits, proceedings, judgments, liabilities, losses and expenses of any kind or nature, including litigation costs and attorney's fees, whether for injury to person or damage to property including but not limited to wrongful death or impairment of any property interest arising out of or connected with negligence, whether by act or omission of TOLL pertaining to the Lyons Road Construction Project unless such claims, demands, actions, suits, proceedings, judgments, liabilities, losses and expenses of any kind or nature arose subsequent to COUNTY assuming responsibility for the Lyons Road Construction Project.

(h) To ensure the faithful performance of the construction of the Lyons Road Construction Project and to indemnify and hold harmless the COUNTY from any and all damages, either directly or indirectly, arising out of any failure to perform same, the contractor hired to construct the Lyons Road Construction Project shall be required to execute and deliver a payment and performance bond, reasonably satisfactory to COUNTY, in an amount equal to the final contract bid price obtained by TOLL from the contractor ("Final Bid Price") less the amount of the Performance Bond and less the amount of the County Contribution (defined herein) ("Contractor Surety") at least ten (10) days prior to the commencement of construction. The bond shall be issued by a company authorized to do business in the State of Florida and having a current valid certificate of authority and bonding capacity issued by the United States Department of Treasury under Section 31 USC 9304-9308. Such bond shall be made on forms reasonably acceptable to the COUNTY. The contractor shall verify at the time of execution of the construction contract acceptability of the surety provided there under. Such bond will not be accepted unless the surety company is authorized by law to do business in the State of Florida and reasonably satisfactory to the COUNTY. COUNTY shall be entitled to hold the Contractor Surety until the completion of the Lyons Road Construction Project.

SECTION 4 COUNTY'S RESPONSIBILITIES

(a) COUNTY agrees to use its best efforts to provide an expedited review process for

all plans, designs and permit applications, and payment reimbursements required for the Lyons Road Construction Project.

(b) Due to alignment revisions and maintenance of traffic issues related to the forthcoming widening of West Atlantic Avenue, COUNTY agrees to provide TOLL reimbursement funding for construction of the Lyons Road Construction Project in the amount of Six Hundred Thousand and No/100 Dollars (\$600,000.00) ("County Contribution"). In addition to the County Contribution, COUNTY shall be solely responsible for all costs and expenses associated with the demolition, removal, and environmental remediation of all structures and improvements located on the site commonly known as "Bushel Stop" and located on the Southeast corner of the current intersection of One Mile Road and Atlantic Avenue ("Bushel Stop Work"). COUNTY shall contract separately for the Bushel Stop Work, which shall not be part of the Lyons Road Construction Project as defined in this Agreement.

(c) The County Contribution shall be paid by COUNTY to TOLL on a dollar for dollar reimbursement basis within forty five (45) days of review and approval of paid invoice receipts to COUNTY by TOLL, and only after the entire Performance Bond has been refunded by COUNTY to TOLL. In other words, TOLL must have expended One Million Fifty-Five Thousand and No/100 Dollars (\$1,055,000.00) (i.e. the amount of the Performance Bond) prior to TOLL being permitted to begin drawing on the County Contribution. COUNTY's failure to reimburse TOLL the amount of the County Contribution within forty five (45) days of acceptance of paid invoice receipts shall be a material default and entitle TOLL to all remedies at law and in equity.

(d) COUNTY agrees that the cost of the Land Development Permit for the Lyons Road Construction Project shall be three percent (3%) of the Final Bid Price minus the County Contribution.

(e) Due to pending construction for the widening of West Atlantic Avenue within the limits of Lyons Road, and to the existence of a traffic signal and turn lanes at the existing One Mile Road and West Atlantic Avenue intersection, and that the Lyons Road Construction Project includes an additional northbound through lane (at West Atlantic Avenue) not included in the Development Order, the COUNTY hereby releases TOLL from Conditions E8 and E9 of the Development Order.

(f) COUNTY acknowledges and agrees that upon completion of the Lyons Road Construction Project, TOLL will have satisfied all conditions of the Development Order.

(g) Upon execution of this Agreement, COUNTY agrees to release to TOLL the performance bonds in the amount of: (aa) Seventy-Two Thousand and No/100 Dollars (\$72,000) insuring the completion of parcel H of the Development (Bond # 929213824) and (bb) One Hundred Seventy-Three Thousand Six Hundred and No/100 Dollars (\$173,600) insuring completion of parcel J of the Development (Bond # 929245748). COUNTY acknowledges and agrees that TOLL has satisfactorily completed all work in parcels H and J and that TOLL is entitled to a refund of all performance bonds insuring the same.

(h) COUNTY acknowledges and agrees that the COUNTY is responsible for all environmental issues, concerns, reports, approvals and remediation pertaining to the Bushel Stop site.

SECTION 5. RECORDING. It is understood by all parties that this Agreement may be recorded in the Public Records of Palm Beach County, Florida.

SECTION 6. TIME OF PERFORMANCE AND TIME OF THE ESSENCE. TOLL agrees to utilize its best efforts to complete the Lyons Road Construction Project as expeditiously as possible. Upon completion of the Lyons Road Construction Project and its acceptance by COUNTY, COUNTY shall provide to TOLL written confirmation of the completion and acceptance of the Lyons Road Construction Project as provided for in this Agreement.

SECTION 7. GOVERNING LAW AND VENUE. This Agreement and the rights and obligations created hereunder shall be interpreted, construed and enforced in accordance with the laws of the State of Florida. This Agreement shall not be construed against the party who drafted it as both parties have consulted experts and attorneys of their choice. If any litigation should be brought in connection with this Agreement, venue shall lie in Palm Beach County, Florida.

SECTION 8. ATTORNEYS' FEES AND COSTS. The parties hereto agree that in the event it becomes necessary for either party to defend or institute legal proceedings as a result of the failure of either party to comply with the terms, covenants and provisions of this Agreement, the prevailing party shall be entitled to recover attorney's fees, court costs, and expenses (including paralegal, planning, and engineering expenses) from the non-prevailing party through all trial and appellate levels as well as mediation or arbitration.

SECTION 9. SEVERABILITY. If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

SECTION 10. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the parties with respect to the subject matter hereof. No right, duties or obligations of the parties shall be created unless specifically set forth in this Agreement and will not be binding and valid unless in writing and executed and approved by the parties or their successors or assigns.

SECTION 11. AMENDMENT. No modification or amendment of this Agreement shall be of any legal force or effect unless in writing and executed by all parties.

SECTION 12. BINDING AGREEMENT. This Agreement shall inure to the benefit of and shall bind the parties, their successors and assigns.

SECTION 13. ASSIGNMENT. This Agreement may not be assigned without the prior written consent of the other parties and in the event of such an approved assignment, all terms and conditions set forth herein shall inure to the benefit of and shall bind all such assignees. This assignment provision permits the assignment by TOLL of all of TOLL'S right, title and interest in this Agreement to an affiliate of TOLL and/or the collateral assignment of TOLL'S right, title and interest in this Agreement to any lender providing financing for TOLL without the prior written approval and consent of COUNTY. In the event of such a permitted assignment, written notice of and a copy of such assignment shall be provided to COUNTY in accordance with Section 15 below.

SECTION 14. WAIVER. Failure to enforce any provision of this Agreement by any party shall not be considered a waiver of the right to later enforce that or any other provision of this Agreement.

SECTION 15. NOTICES. Any notice request, demand, instruction or other communication to be given to any party hereunder shall be in writing and shall be hand-delivered, telecopied, e-mailed, sent by Federal Express or a comparable overnight mail service, or by U.S. registered or certified mail, return receipt requested, postage prepaid, to the parties at their respective

addresses below:

As to COUNTY'S Legal
Representative:

Marlene R. Everitt, Esquire
Palm Beach County Attorney's Office
301 N. Olive Avenue, Suite 601
West Palm Beach, FL 33401
Telephone: 561-355-3629
Fax: 561-355-4398

As to COUNTY'S Road
Project Representative:

Steven Carrier, P.E.
Palm Beach County Department of
Engineering and Public Works
P.O. Box 2429
West Palm Beach, FL 33402
Telephone: 561-684-4013
Fax: 561-684-4167

As to TOLL:

Donald R. Barnes, P.E.
Regional Vice President of Land
Development
Toll Brothers, Inc.
3970 West Indiantown Road
Jupiter, Florida 33478
Telephone: 561-741-5710
e-mail: dbarnes@tollbrothersinc.com

with a copy to:

Harvey E. Oyer III, Esquire
800 Claremore Drive
West Palm Beach, Florida 33401
Telephone: 561-379-2768
e-mail: harveyoyer@comcast.net

SECTION 16. EFFECTIVE DATE. This Agreement shall be effective when executed by all parties and approved by the Board of County Commissioners of Palm Beach County, Florida.

SECTION 17. COUNTERPARTS. This Agreement may be executed by the parties in any number of counterparts, each of which shall be deemed to be an original, and all of which, when taken together, shall be deemed to be one and the same agreement.

SECTION 18. AUTHORITY. The execution, delivery and performance of this Agreement and all provisions contained in it have been duly and validly authorized by all necessary actions on the part of all parties and all required consents and approvals have been obtained for same.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

WITNESSES:

Amber Jones

Print: Amber Jones

Patricia Gasparini

Print: Patricia Gasparini

TBI/PALM BEACH PARTNERSHIP, a
Florida limited partnership
By: Toll FL GP Corp., a Florida corporation
Its: General Partner

By: Ronald Blum
Print: Ronald Blum

Its: Vice President
as to TOLL

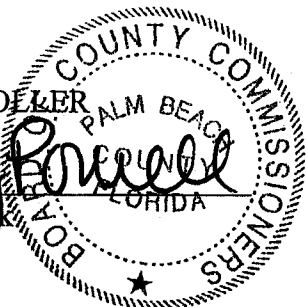
R2007 1262
AUG 21 2007

PALM BEACH COUNTY, FLORIDA,
a Political Subdivision of the State of
Florida

ATTEST:

SHARON R. BOCK,
CLERK & COMPTROLLER

By: Maya Powell
Deputy Clerk



APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

By: Paul F. [Signature]
Assistant County Attorney

BY ITS BOARD OF COUNTY
COMMISSIONERS

By: Addie L. Greene
Addie L. Greene, Chairperson

As to COUNTY

Approved: As to terms and conditions

By: [Signature]