

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2009	2010	2011	2012	2013
Capital Expenditures	\$ -0-	-0-	-0-	-0-	-0-
Operating Costs	-0-	-0-	-0-	-0-	-0-
External Revenues	-0-	-0-	-0-	-0-	-0-
Program Income (County)	-0-	-0-	-0-	-0-	-0-
In-Kind Match (County)	-0-	-0-	-0-	-0-	-0-
NET FISCAL IMPACT	\$ 0	-0-	-0-	-0-	-0-

ADDITIONAL FTE POSITIONS (Cumulative) _____

Is Item Included in Current Budget? Yes _____ No _____
 Budget Acct No.: Fund ___ Dept. ___ Unit ___ Object _____
 Program _____

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

* The fiscal impact is indeterminable at this time. Should Liberty Mutual complete the improvements as set forth in the agreement, there will not be a fiscal impact to Palm Beach County.

C. Departmental Fiscal Review: Adwillhite

III. REVIEW COMMENTS

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

Jan Oul 8-24-09
 OFMB
 (NO) 8/24/09
 CN 8/19/09

Jan J. Jacobson 8/25/09
 Contract Dev. and Control
 E. Jones 8/25/09

B. Approved as to Form and Legal Sufficiency.
Morlon R. [Signature] 9/3/09
 (Assistant County Attorney)

This Contract complies with our contract review requirements.

C. Other Department Review:

 Department Director

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

LOCATION MAP

PGA BOULEVARD (SR 786) AT PROSPERITY FARMS ROAD



**TAKEOVER AGREEMENT FOR THE
MAC ARTHUR CENTER PROJECT
UNDER BOND NUMBER 6405574**

THIS AGREEMENT made this ____ day of _____, 2009 between Palm Beach County, Florida (“Obligee” or “Owner” or the “County”) and Liberty Mutual Surety, as successor by merger to Safeco Insurance Company of America (and hereinafter referred to as “Liberty Mutual” or “Surety”) (collectively, the “Parties”).

RECITALS:

WHEREAS, by Resolution 9-1984, the City of Palm Beach Gardens adopted and passed a Development Order pertaining to the development of certain real property located in Palm Beach County, FL (the “Development Order”); and

WHEREAS, Communities Finance Company, LLC (“CFC” or “Contractor”) was obligated to perform the work arising under the Development Order relating to MacArthur Center, particularly Conditions 13, 14 and 15 of the Development Order concerning the acquisition of road right-of-way and road construction and other improvements required by the Development Order;

WHEREAS, in connection with the CFC’s obligations under the Development Order, Safeco Insurance Company of America (n/k/a Liberty Mutual as a result of a merger) issued a Bond naming CFC as principal, and the County as Obligee, bearing bond number 6405574 and containing a penal sum in the amount of \$3,343,000.00, which was subsequently reduced to \$2,350,000.00 pursuant to a Surety Rider dated May 11, 2006 (the “Bond”); and

WHEREAS, by letter dated March 5, 2009, the County claims that CFC defaulted on, and failed to perform, its obligations arising out of the Development Order; and

WHEREAS, the County has made a demand upon Liberty Mutual under the Bond; and

WHEREAS, the work that CFC has allegedly not performed is described in Section 13(D)(3)(a) and (b) of the Development Order, all of which is referred to herein as the “Incomplete Work,” as: Construct the intersection of PGA Boulevard and Prosperity Farms Road to the following configurations:

- (a) Eastbound – two left-turn, one right-turn, and three through lanes;
- (b) Westbound – two left-turn, one right-turn, and three through lanes.

WHEREAS, Liberty Mutual has agreed to arrange for the completion of the Incomplete Work through a Completion Contractor; and

WHEREAS, the County has agreed to allow Liberty Mutual to arrange for the completion of the Incomplete Work; and

WHEREAS, it is in the best interest of the health, safety and welfare of the public to construct the Incomplete Work; and

WHEREAS, the Parties agree that given the alleged default of CFC, this is the most efficient method to complete the Incomplete Work and wish to memorialize their agreement to ensure a diligent and workmanlike completion of the Incomplete Work.

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

1. Recitals.

All recitals set forth above are true and correct to the best of the Parties’ knowledge and are incorporated herein by reference.

2. Contract Documents.

The Contract documents consist of the following:

- (a) This Agreement;

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- (b) The Completion Contract, Exhibits, General Conditions, Supplemental Conditions, Addenda, Attachments to Addenda, Plans and Specifications, Alternates, Existing Approved Modifications, Approved Change Orders, approved shop drawings and submittals entered between Liberty Mutual and Bergeron Land Development, Inc. for the Performance of the Incomplete Work;
 - (c) All documents or specific portions of documents that may be referred to in the Completion Contract or in any exhibits attached thereto and incorporated therein by reference;
 - (d) All documents or specific portions of documents that may be referred to herein or in any exhibits attached hereto and incorporated herein by reference; and
 - (e) Development Order (but only to the extent of CFC's obligations thereunder).

3. **Covenants of Liberty Mutual.**

- (a) Liberty Mutual represents that it and Bergeron Land Development, Inc. (hereinafter the "Completion Contractor") have received and reviewed all the Contract Documents and that both are fully familiar with the contents of such Contract Documents and with the location of the Incomplete Work and the conditions thereof. Liberty Mutual further represents that it and Completion Contractor are aware of the work to be performed in order to comply with the Development Order and conditions resulting from omissions, oversights and errors, if any, by the CFC, the engineer, subcontractors and suppliers.
- (b) Liberty Mutual or its Completion Contractor shall be responsible for obtaining all necessary permits and assume all of the obligations of CFC

under the Development Order and will commence work on the Incomplete Work and perform in accordance with the terms of the Development Order.

- (c) Liberty Mutual will require Completion Contractor to provide the following:
- (1) A payment and performance bond for the total amount of the Incomplete Work in accordance with Florida Statute 255.05, naming the County as a Dual Obligee.
 - (2) Workers Compensation coverage in accordance with Florida law, and
 - (3) Commercial General Liability coverage, including vehicle coverage in combined single limits of not less than ONE MILLION DOLLARS (\$1,000,000.00). The County shall be listed as an additional insured.
- (d) Liberty Mutual will issue a Notice to Proceed to its Completion Contractor within five (5) business days of its receipt of the last of all permits that are necessary to commence the Scope of Work (as defined in paragraph 4 of this Takeover Agreement). For each calendar day after five (5) business days from Liberty Mutual's receipt of the last of all permits that are necessary to commence the Scope of Work, the County shall be entitled to recover from Liberty Mutual liquidated damages in the amount of One Thousand Dollars (\$1,000.00) per business day until Liberty Mutual issues such notice to proceed to the Completion Contractor.
- (e) Liberty Mutual shall provide a copy of all approved Change Orders to the County within 5 business days of said approval.

4. **Scope of Work.**

Liberty Mutual, through the "Completion Contractor", hereby agrees to fully and faithfully perform and complete the Incomplete Work, which term is defined in the above

Recitals in accordance with the following Plans and specifications prepared by Miller, Legg & Associates: (1) Intersection Improvements - sheets 1-22 dated 11-05-07; (2) Signing & Pavement Marking - sheets 1-6 dated 3-28-07; and (3) Traffic Signal - sheets 1-4 dated 7-22-08. This work is identified in this Agreement as the Scope of Work. The County acknowledges that Liberty Mutual will arrange for the performance of the Scope of Work by retaining Completion Contractor and that Liberty Mutual's obligations under this Agreement and the Bond shall be satisfied upon completing the requirements set forth in the Development Order that were applicable to CFC, completing the Scope of Work, securing final acceptance of the work by the Florida Department of Transportation and the County, and accomplishing the close out of all permits.

5. Commencement of Performance.

Liberty Mutual contemplates that the work will commence within fourteen (14) calendar days from the execution of this Agreement, and will be complete within two hundred ten (210) calendar days thereafter. The County shall have the right to terminate this Agreement for cause, if the Incomplete Work has not commenced within the time frame stated above unless the Completion Contractor is entitled to an extension of time to complete the Scope of Work because of delays that are beyond its control. Prior to terminating this Agreement, the County must give Liberty Mutual seven (7) calendar days' notice of its intent to terminate the contract and an opportunity to remedy the reason(s) for the County's notice of intent to terminate this Agreement.

6. Reservation of Rights as Between Liberty Mutual and County.

Except as modified herein, Liberty Mutual and the County hereby expressly enter into this Agreement under a complete reservation of rights, and acknowledge that nothing herein shall be construed as a waiver, release, estoppel or modification as to any rights or

defenses available to them under contract, by statute, or at common law. Should Liberty Mutual determine, after the date of the execution of this Agreement, that it had no obligation to arrange for the completion of the Incomplete Work, then Liberty Mutual shall be entitled to terminate this Agreement and Liberty Mutual's obligations to the County shall be at an end. In such event, Liberty Mutual will cause the property to be substantially restored to the condition in which Liberty Mutual found it before the execution of this Agreement to the satisfaction of the applicable FDOT permit conditions.

7. Designation of Surety's Construction Manager.

Liberty Mutual designates Completion Contractor to perform the Scope of Work, and authorizes Forcon International and/or Miller Legg to represent it in dealing with the County on day to day construction issues related to the Scope of Work. Notwithstanding such designation, neither Completion Contractor nor Forcon has authority to negotiate change orders, credits, backcharges, or modifications of any nature whatsoever, without Liberty Mutual's prior written approval. Moreover, Liberty Mutual shall have the authority to make final decisions as it relates to the completion of the Scope of Work.

8. Independent Contractor.

Liberty Mutual recognizes that it, the Completion Contractor, and the Construction Manager are independent contractors and not an agent or servant of the County and will include the following provision in any contract associated with the Incomplete Work, including the Completion Contract: "Completion Contractor recognizes that it is an independent contractor, and not an agent or servant of the County or its Board of County Commissioners. In the event a claim or lawsuit is brought against the County, its officers, employees, servants or agents, relating to the Incomplete Work or any item which is the responsibility of the Contractor under the Development Order, the

Completion Contractor hereby agrees to indemnify, save and hold harmless the County, its officers, employees, servants or agents and to defend said persons from any such claims, liabilities, causes of action and judgments of any type whatsoever arising out of or relating the Incomplete Work or the performance of this Agreement. Completion Contractor agrees to pay all costs, attorney's fees and expenses incurred by the County, its officers, employees, servants or agents in connection with such claims, liabilities or suits".

9. **Use of Existing Equipment.**

Intentionally deleted.

10. **Penal Sum Limitation of Performance Bond.**

The Bond shall remain in full force and effect, all rights and defenses thereunder of the Parties being specifically reserved, except as modified herein. Without limiting the foregoing, the County acknowledges that Liberty Mutual's total liability in performing the Scope of Work under this Agreement is strictly limited to and shall not exceed, \$2,350,000.00. Liberty Mutual shall be entitled to a dollar for dollar reduction from this sum for any payments made by Liberty Mutual to complete the Scope of Work under this Agreement. The County acknowledges that Liberty Mutual, by its execution of this Agreement, is acting in its capacity as surety for CFC in making arrangements for the performance and completion of the Scope of Work, and not as a completing contractor, and that Liberty Mutual is not assuming any obligations or liabilities beyond those set forth in the bonds. The County acknowledges and agrees that Liberty Mutual, by entering into this supplemental agreement, does not abandon, waive, or alter its status as surety.

11. Warranty.

Upon completion of the Incomplete Work and its acceptance by the County, Liberty Mutual and Completion Contractor shall remain liable to the County for all warranty work and for any latent defects in the work of the Completion Contractor.

12. Assignment of Rights from County to Liberty Mutual.

Upon completion of the Incomplete Work, the County shall be deemed to have assigned all impact fee credits, development rights, and all other right, title, and interest that would have accrued to CFC had it performed according to the Development Order to the extent permitted by law.

13. No Admission of Liability.

This Agreement does not constitute an admission of liability on the part of either of the Parties

14. No Third-Party Benefits.

This Agreement shall only extend to and be binding upon the Parties hereto and their respective successors and assigns. Nothing contained in this Agreement shall create any third party benefits to other claimants under the Bond, nor confer any benefit or enforceable rights under this Agreement to any person, firm, or entity other than to the Parties hereto and their respective successors, assigns, and reinsurers.

15. Modifications to and Interpretation of Agreement.

This Agreement may not be modified unless in writing and executed by the Parties hereto. The provisions of this Agreement shall be applied and interpreted in a manner consistent with each other so as to carry out the purposes and intent of the Parties. If for any reason, any provision is deemed unenforceable or invalid, such provision shall be deemed severed from this Agreement and the remaining provisions shall be carried out

with the same force and effect as if the severed portion had not been a part of this Agreement.

16. Merger.

This Agreement incorporates, includes, and supersedes all prior negotiations, correspondence, conversations, agreements or understandings applicable to the matters contained herein. The Parties further agree that there are no commitments, agreements or understandings concerning the subject matter of this Agreement that are not contained in this Agreement. Accordingly, the Parties agree that no deviations from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written.

17. Construction of Agreement.

The Parties acknowledge that they have sought and received whatever competent advice and counsel as was necessary for them to form a full and complete understanding of all rights and obligations herein and that the preparation of this Agreement has been their joint effort. The language agreed to expresses their mutual intent and the resulting document shall not, solely as a matter of judicial construction, be construed more severely against one of the Parties than the other.

18. Cooperation.

The Parties agree to execute all such further instruments, and to take all such further actions as may be reasonably required by any Party to fully effectuate the terms and provisions of this Agreement and the transactions contemplated herein.

19. Survival of Representations.

All covenants, warranties and representations contained in this Agreement, and all documents to be delivered by the Parties in connection with the consummation of the transaction contemplated herein, shall survive the consummation of said transaction.

20. Notices.

All notices given under any of the provisions of this Agreement shall be deemed to have been duly given by the County if sent via U.S. Mail and facsimile to:

Liberty Mutual:
Jason Stonefeld
Liberty Mutual Surety
1600 N. Collins Blvd., Ste. 3000
Richardson, TX 75080
Phone: (972) 808-4641
Facsimile: (972) 808-4755

and shall be deemed to have been duly given by Liberty Mutual if sent via U.S. Mail and facsimile to:

COUNTY:

Omelio A. Fernandez, P.E., Director
Engineering & Public Works - Roadway Production Division
2300 N. Jog Road
West Palm Beach, FL 33411-2745
Phone: (561) 684-4150
Facsimile: (561) 684-4166

or at such other address as each of the foregoing may designate in writing by registered or certified mail to the other.

21. Applicable Law and Venue; Waiver of Jury Trial.

The parties hereto acknowledge and agree that this Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any controversies or legal problems arising out of this Agreement and any action involving the enforcement or interpretation of any rights hereunder shall be submitted to the jurisdiction and venue of the State Courts of the Fifteenth Judicial Circuit of Palm Beach County, Florida. If it becomes necessary for either of the Parties hereto to apply to a court of competent jurisdiction for the enforcement of this Agreement, the Party

determined by such court to be the prevailing party shall be entitled to recover from the other Party all reasonable costs, including attorneys' fees (pre-litigation, and litigation at trial and appellate levels) and expenses associated with expert witnesses, travel, and the like TO ENCOURAGE PROMPT AND EQUITABLE RESOLUTION OF ANY LITIGATION THAT IT MAY ARISE HEREUNDER, EACH PARTY HEREBY WAIVES ANY RIGHTS IT MAY HAVE TO TRIAL BY JURY OF ANY SUCH LITIGATION.

22. Counterpart.

This Agreement may be executed in one or more counterparts, each of which, when executed and delivered, shall be deemed to be an original, but such counterparts shall together constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have affixed their hands and seals to this Agreement the day and year first set forth above, and the individuals who execute this Agreement personally represent and warrant that they have full authority to execute this Agreement on behalf of the respective parties.

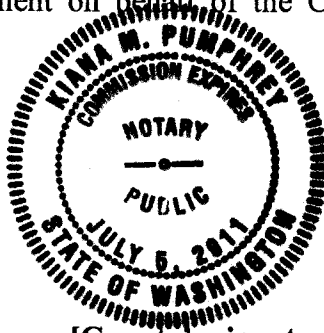
LIBERTY MUTUAL SURETY

By: Nicholas Hyslop
Name: Nicholas Hyslop
Title: Vice President
Date: July 30, 2009

STATE OF WASHINGTON)
COUNTY OF KING)

On this 30th day of July, 2009, before me personally appeared Nicholas Hyslop, who [X] is personally known to me or [] has produced drivers license as identification, and who being by me first duly sworn did depose and state that he/she is the named Vice President of Liberty Mutual Surety, named in the foregoing Agreement, that he/she executed the foregoing instrument

on behalf of the Company with full authority to do so, and that he/she executed the foregoing instrument on behalf of the Company for the uses and purposes set forth therein.



Kiana M. Pumphrey
Notary Public
Name: Kiana M. Pumphrey
My Commission Expires: July 5, 2011

[County's signature on next page.]

PALM BEACH COUNTY

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

ATTEST:

BY ITS BOARD OF COUNTY
COMMISSIONERS

SHARON R. BOCK,
CLERK & COMPTROLLER

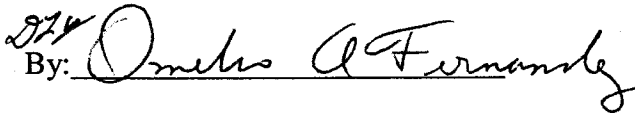
By: _____
Deputy Clerk

By: _____
John F. Koons, Chairman

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

APPROVED AS TO TERMS AND
CONDITIONS

By: _____
Assistant County Attorney

By:  _____