

Location Sketch

## PROPORTIONATE SHARE AGREEMENT

This Proportionate Share Agreement (hereinafter "Agreement") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2016, by and between Palm Beach County, a political subdivision of the State of Florida (hereinafter "County") and Lantana Development LLC, a Delaware Limited Liability Company (hereinafter "Developer").

### WITNESSETH

**WHEREAS**, the Board of County Commissioners has implemented the Proportionate Share Program as required by and in a manner consistent with section 163.3180(5)(h), Florida Statutes; and

**WHEREAS**, the Proportionate Share Program allows developers to proceed with development notwithstanding a failure of transportation concurrency, by contributing their proportionate share to one or more regionally significant transportation facilities; and

**WHEREAS**, in order to conform to the requirements of this Program, the County and the Developer agree to the conditions, rights and obligations established in this Agreement; and

**WHEREAS**, To the extent that any of the conditions of this Agreement constitute monetary or property exactions that are subject to *Nollan v. California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994), the Developer, and its successors and assigns, (a) agrees that there is a nexus and rough proportionality between such conditions and the impacts of this project/development, and that such conditions are necessary to ensure compliance with the criteria of the Palm Beach County Unified Land Development Code and Comprehensive Plan that are applicable to this approval, and (b) waives any claims based on such conditions; and

**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 to this Agreement agree as follows:

#### **Section 1. Recitals**

The above recitals are true and correct and form a part of this Agreement.

#### **Section 2. Project Identification**

The proposed Project is known as Water Tower Commons and is located on the north side of Lantana Road between Andrew Redding Road and North 8<sup>th</sup> Street, Lantana, Florida.

#### **Section 3. Proportionate Share Payment**

The amount of proportionate share payment for the required road improvement(s) shall be as follows: One Million Eight Hundred Forty Four Thousand Four Hundred Sixty One and 08/100 Dollars (\$1,844,461.08) ("Minimum Payment") if Developer completes construction of a third westbound through lane on Lantana Road between Lantana Shopping

Center and I-95 ("Through Lane") within twenty-four (24) months of acquisition of right of way sufficient for such Through Lane. If Developer does not complete construction of the Through Lane within twenty-four months of the acquisition of right of way sufficient for such Through Lane, Developer shall pay an additional Four Hundred Thirty Six Thousand Nine Hundred Seventy Two and 88/100 Dollars (\$436,972.88) ("Additional Payment"). The Minimum Payment and the Additional Payment were calculated in accordance with the methodology provided for in section 163.3180(5)(h), Florida Statutes, and based on the Developer's Traffic Study (hereinafter "the Study"), prepared by Kimley-Horn & Associates dated November 20, 2015, and approved by the Palm Beach County Traffic Division on November 23, 2015. While the proportionate share payment(s) set forth in the Study are based on the proportionate costs of specific road improvements, the parties hereto understand and agree that the Palm Beach County, in its sole discretion, may apply such payment(s) to one or more mobility improvements to regionally significant transportation facilities.

The Minimum Payment shall be remitted to County prior to receipt of the first building permit for vertical construction for the Water Tower Commons project. If the Additional Payment shall become due, it shall be remitted to County within thirty (30) days after it becomes due.

#### **Section 4. Payment Adjustment Calculation**

The following shall apply in the event that the Additional Payment is due pursuant to Section 3 above.

Pursuant s.163.3180(5)(h)2., F.S., proportionate share payments shall be based on the improvement cost at the time of payment. The parties hereto agree that the payment amounts set forth in this Agreement shall be subject to the following calculation to account for changes in road development costs that may occur between the effective date of this Agreement and the date the Additional Payment is due.

Adjusted Payment = Original Payment Amount x (BONS Payment Month / BONS Month of Prop Share Execution)

- Original Payment Amount = Proportionate Share Payment amount specified
- BONS payment = Latest Published Value (including preliminary values) at Time of Payment
- BONS Month of Prop Share Execution = Published Value

The cost adjustment for the total and amount of each payment shall be based on the Bureau of Labor Statistics Producer Price Index (PPI) for Other Non-Residential Construction ((BONS) (Series ID: WPUIP23122301).

#### **Section 5. Construction of Improvements**

If Developer constructs the Through Lane as set forth in Section 3 above, this Section 5 shall become applicable.

Developer recognizes that it is an independent contractor and not an agent or a service of the County. No person employed by any party to this Agreement shall in connection with the performance of the required improvement, be considered the employee of the other party, nor shall any employee claiming a right in or entitlement to any pension, workers' compensation benefit, unemployment compensation, civil service, or other employee rights or privileges granted by operation of law or otherwise, except through and against the entity by whom they are employed. The Developer shall protect, defend, reimburse, indemnify and hold the County, its agents, employees, and elected officers harmless from and against all claims, liability, expense, loss, cost, damages, or causes of action of every kind or character including attorneys' fees and costs, whether at trial or appellate levels or otherwise, as a direct result of Developer's negligence arising during or out of construction of the Through Lane.

The Developer shall maintain and require its contractor to maintain workers' compensation coverage in accordance with Florida Statutes. The Developer and contractor shall carry insurance naming the County as an Additional Insured Party, with minimum limits of one million dollars per occurrence and three million dollars general aggregate insurance, and shall carry automobile liability insurance with minimum limits of one million dollars per occurrence combined single limits.

To ensure faithful performance of the construction of the required improvements, the Developer shall also require all contractors performing work on the required improvements to execute and deliver to the Developer a payment and performance bond in an amount equal to one hundred ten percent (110%) of the certified cost estimate of the improvement prior to the issuance of any permit authorizing commencement of construction of the improvement. The bond shall be issued by a company authorized to do business in this State and which has a current valid certificate of authority issued by the United States Department of Treasury under 31 USC §9304-9308.

#### **Section 6. County Obligations**

For and in consideration of Developer's agreements as set forth in this Agreement, the County agrees to construct and/or implement, as applicable, the following:

- A. No later than Developer's receipt of a building permit for more than Two Hundred Twenty Thousand square feet (220,000 SF) of commercial retail uses, the County will construct an extension to the eastbound left-turn lane by approximately 150 feet at the intersection of Lantana Road & High Ridge Road;
- B. No later than Developer's receipt of a building permit for more than Twenty Four Thousand Five Hundred square feet (24,500 SF) of commercial retail uses, the County will construct an extension of the eastbound right-turn lane on Lantana Road at the intersection with the Lantana Shopping Center signalized driveway;
- C. No later than Developer's receipt of a building permit for than Twenty Thousand Nine Hundred square feet (20,900 SF) of commercial retail uses, the County will construct a continuous eastbound right-turn lane on Lantana Road between the Lantana Shopping Center signalized driveway and North 13<sup>th</sup> Street;

- D. The County will advance funds to the Florida Department of Transportation (FDOT) to accelerate the time table for the Planning/Design/Environmental phase of the I-95/Lantana Road Interchange project from 2019 to 2018, subject only to an agreement with FDOT that it will pay those funds back to the County in 2019.
- E. Use best efforts to work with FDOT to accelerate the construction of the I-95/Lantana Road Interchange improvements identified in Section 6.D above.

Developer will advise the County, in writing, when they receive building permits as set forth in Sections 6.A, 6.B, and 6.C. herein, at which time County's obligations to construction those improvements shall commence.

#### **Section 7. Term of concurrency approval**

In consideration for entering into this binding Proportionate Share Agreement with Palm Beach County, the Developer shall be deemed to have satisfied traffic concurrency requirements; provided, however, if the Developer fails to apply for a development permit (as defined in Section 380.031(4), Florida Statutes (2015)) within twelve months of the date of this Agreement, then this Agreement and, the certificate of concurrency approval, shall be considered null and void, and the applicant shall be required to reapply to meet Palm Beach County Traffic Performance Standards. The County recognizes and agrees that the development order approved by the Town on December 14, 2015 is a development permit as required by this Section 7 and that issuance therefore meets the requirements of this Section 7. In the event the Town denies the development order application that gave rise to this Agreement, or if the Developer for any reason withdraws the development order application, then this Agreement, and the certificate of concurrency approval will be void and of no further force and effect.

#### **Section 8. Increase in Project Trips**

Any change to the Project could result in an increase in trips that impact one or more of Palm Beach County's Major Thoroughfares, as defined by Unified Land Development Code, Section 1.I.2.M.6. The Developer understands and agrees that it is precluded from asserting that those additional trips are vested or otherwise permitted under this Agreement. In addition, Developer understands and agrees that any such changes resulting in an increase in trips may require the application for and execution of an Amendment to this Agreement or an additional Proportionate Share Agreement, along with any other traffic study or additional documentation.

#### **Section 9. Road Impact Fee Credit**

Proportionate share contributions shall be applied as a credit against road impact fees regardless of how the County ultimately uses the proportionate share payments. The Developer understands and agrees that in no event shall the Developer be entitled to road impact fee credits in excess of the proportionate share contribution and in the event the contribution exceeds the amount of road impact fees owed by the Project through buildout, Developer shall not be entitled to a refund for the proportionate share contribution in excess of such road impact fees.

**Section 10. No Refund**

Proportionate share contributions are non-refundable.

**Section 11. Third Party Beneficiaries**

There are no third party beneficiaries to this Agreement, express or implied.

**Section 12. Governing Law**

The Agreement and the rights and obligations created hereunder shall be interpreted, construed and enforced in accordance with the laws of the United States and the State of Florida. If any litigation should be brought in connection with this Agreement, venue shall lie in Palm Beach County, Florida.

**Section 13. 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 the other party to comply with the terms and provisions of this Agreement, each party in such litigation shall bear its own costs and expenses incurred and expended in connection therewith including, but not limited to, reasonable attorneys' fees and court costs through all trial and appellate levels.

**Section 14. 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 15. Agreement**

This Agreement contains the entire agreement between the parties. No rights, duties or obligations of the parties shall be created unless specifically set forth in this Agreement.

**Section 16. Amendment**

No modification or amendment of this Agreement shall be of any legal force or effect unless it is in writing and executed by both parties..

**Section 17. Binding Agreement**

This Agreement shall inure to the benefit of and shall bind the parties, their heirs, successors and assigns.

**Section 18. Assignment**

This Agreement may not be assigned without the prior written consent of the other party, and all the terms and conditions set forth herein shall inure to the benefit of and shall bind all future assignees.

**Section 19. Waiver**

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

**Section 20. Notices**

Any notice, request, demand, instruction or other communication to be given to either party under this Agreement shall be in writing and shall be hand delivered, sent by Federal Express or a comparable overnight mail service, or by U.S. Registered or Certified Mail, return receipt requested, postage prepaid, to County and to Developer at their respective addresses below:

*As to County:*

Tanya N. McConnell, P.E  
Deputy County Engineer  
Palm Beach County  
2300 N. Jog Road  
West Palm Beach, FL 33411

*With a copy to County's Legal Representative:*

Leonard Berger  
Chief Assistant County Attorney  
Palm Beach County Attorney's Office  
301 North Olive Avenue, Suite 601  
West Palm Beach, FL 33405

*As to Developer:*

Lantana Development LLC  
Ken Endelson  
7700 Congress Avenue  
Suite 2200  
Boca Raton, Florida 33487

*With a copy to Developer's Legal Representative:*

Brian M. Seymour, Esq.  
Gunster  
777 South Flagler Drive  
Suite 500 East  
West Palm Beach, Florida 33401

**Section 21. Effective Date**

The effective date of this Agreement shall be \_\_\_\_\_.

**Section 22. 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 shall be deemed to be one and the same Agreement.

[Remainder of page intentionally blank.]

IN WITNESS WHEREOF, the parties hereunto have executed this Agreement on the date and year first above written.

ATTEST:  
SHARON R. BOCK,  
CLERK & COMPTROLLER

PALM BEACH COUNTY, FLORIDA

By: \_\_\_\_\_  
Deputy Clerk

By: \_\_\_\_\_  
Mayor Mary Lou Berger

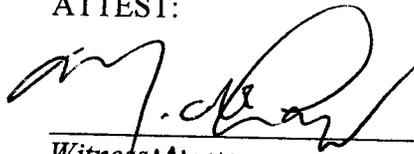
APPROVED AS TO FORM  
AND LEGAL SUFFICIENCY:

\_\_\_\_\_  
County Attorney

APPROVED AS TO TERMS  
AND CONDITIONS:

By: 

ATTEST:

  
Witness MICHAEL LANGOLF

DEVELOPER

By:   
Kenneth Endelson  
Vice-President