

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date:	April 5, 2022	<input checked="" type="checkbox"/> Consent	<input type="checkbox"/> Regular
		<input type="checkbox"/> Ordinance	<input type="checkbox"/> Public Hearing
Department:	Engineering & Public Works		
Submitted By:	Engineering & Public Works		
Submitted For:	Traffic Division		

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to receive and file: an amended proportionate share agreement for \$15,828,921 (Project Control Number # 2005-00394) with Highland Dunes Associates Property LLC dated December 21, 2021, for their proposed project located at 660 Arden Lake Way, Wellington, FL 33470.

SUMMARY: In accordance with Countywide PPM CW-O-051, all delegated contracts, agreements, and grants must be submitted by the initiating Department as a receive and file agenda item. This agreement was executed by the County Administrator on December 21, 2021, per Resolution R2016-0125. The amendment updated the required proportionate share payment amount and phasing of payments, resulting from the elimination of Test 2 phasing conditions, as part of the Development Order Amendment (EAC-2021-00810) approved by the Board of County Commissioners (BCC) on October 28, 2021. District 6 (SAS)

Background and Justification: Resolution R2016-0125 delegates authority to the County Administrator or designee to enter into proportionate share agreements on behalf of the BCC.

Attachments:

1. Location Map
2. Highland Dunes Associates Property, LLC Proportionate Share Agreement (Project Control # 2005-00394)

Recommended By:	<i>Margie David Reed</i>	<i>3/9/22</i>
YBH/TEL	County Engineer	Date
Approved By:	<i>Paul</i>	<i>3/29/22</i>
	Assistant County Administrator	Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2022	2023	2024	2025	2026
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 X
 Does this item include the use of federal funds? Yes No X

Budget Account No:


Fund 3543 Dept 800 Unit 8016-0038 Rvsc 2430

Recommended Sources of Funds/Summary of Fiscal Impact:

Proportionate Share Fund - Zone 3
 Proportionate Share Revenue

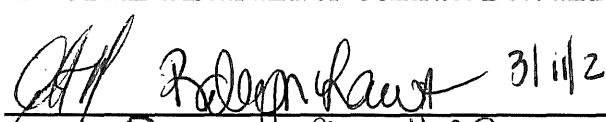
****The fiscal impact of this item is a developer contribution and road improvements at a minimum of \$15,828,921.00. Proportionate share contributions shall be applied as a credit against road impact fees. Revenue received will be deposited in the Zone 3 proportionate share trust fund. Timing of receipt of revenue is indeterminable at this time.

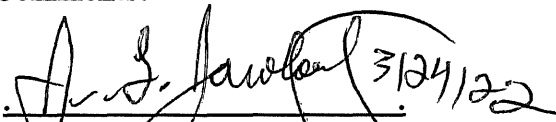
C. Departmental Fiscal Review:



III. REVIEW COMMENTS

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

 3/11/22
 OFMB 3-11-22

 3/24/22
 Contract Dev. and Control
 3-24-22 TW

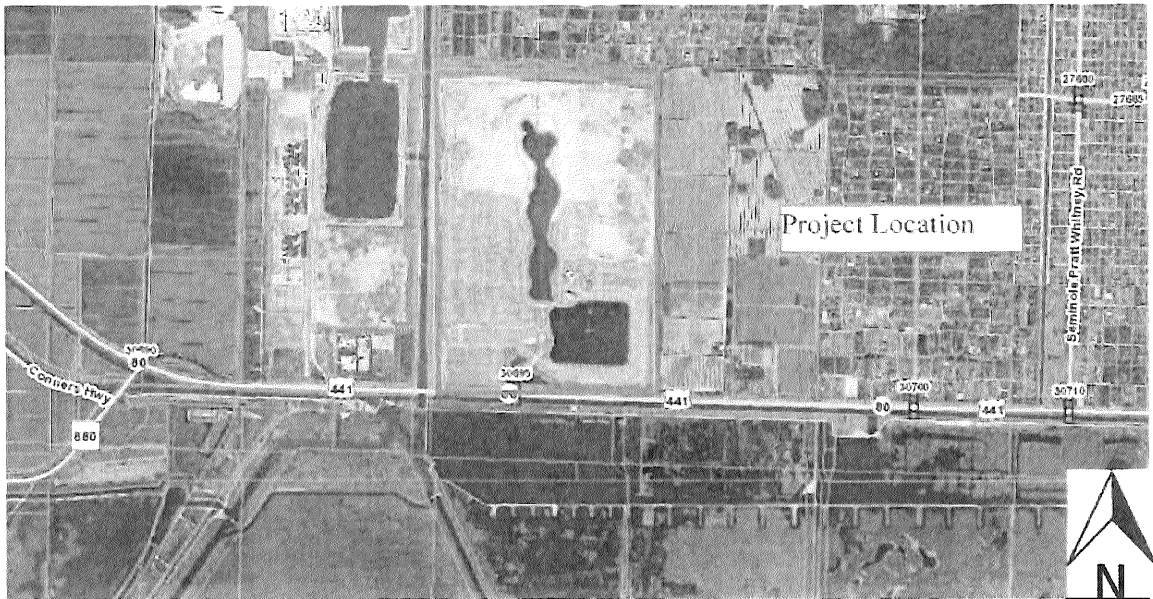
B. Approved as to Form and Legal Sufficiency:

 3/29/22
 Assistant County Attorney

C. Other Department Review:

 Department Director

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



Project Name: Arden PUD

Impact Fee Zone: 3

AMENDED PROPORTIONATE SHARE AGREEMENT

This Amended Proportionate Share Agreement (hereinafter "Agreement") is made and entered into this 21st day of December 2021, by and between Palm Beach County, a political subdivision of the State of Florida (hereinafter "County"), and Highland Dunes Associates Property LLC, a Delaware Limited Liability Company (hereinafter "Developer").

WITNESSETH

WHEREAS, on October 29, 2020, the County and Developer entered into a Proportionate Share Agreement relating to the Arden project (the "Original Agreement"); and

WHEREAS, the parties wish to amend the Original Agreement in order to accommodate a proposed Development Order Amendment for Arden PUD requested in Development Order Amendment/ Expedited Application Consideration, Control Number:2005-00394, Application Number EAC-2021-00810, Submitted June 7, 2021 ("Application") if the Application is approved by the Board of County Commissioners by updating the required Proportionate Share payment amount and phasing of payments resulting from the elimination of Test 2 phasing conditions; and

WHEREAS, the Original Agreement shall be replaced by this Agreement; and

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 applicant/owner, and 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

WHEREAS, the Board of County Commissioners of Palm Beach County has delegated to the County Administrator or his or her designee the authority to enter into this Agreement on behalf of the County; 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 Arden and is located at 660 Arden Lake Way, Wellington, Florida 33470.

Section 3. Proportionate Share Payment

The total amount of proportionate share payment for the required road improvement(s) shall be Fifteen Million and Eight Hundred and Twenty-Eight Thousand and Nine Hundred and Twenty-One and no/100 Dollars (\$15,828,921.00). This amount was 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 and Associates, Inc., dated June 2, 2021, and approved by the Palm Beach County Traffic Division on July 19, 2021. 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: A) any and all payment amounts are subject to adjustment pursuant to Section 4 of this Agreement; and B) Palm Beach County, in its sole discretion, may apply such payment(s) to one or more mobility improvements to regionally significant transportation facilities. Subject to the escalator provision below, the proportionate share payment shall be paid in accordance with Exhibit "A" attached; provided that the proportionate share payments previously made by the Developer on March 26, 2019 in the amount of \$3,134,274.32 and on August 27, 2020 in the amount of \$1,351,595.45 in accordance with Resolution R-2013-1528 shall be applied on the date this agreement becomes effective to the payments first accruing under Exhibit "A". Building Permits shall be tied to proportionate share payments as set forth in Exhibit "A".

Section 4. Payment Adjustment Calculation

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 each proportionate share payment is due.

Adjusted Payment (when payment is being made) = Original Payment Amount x Cost Adjustment Factor

Where,

Original Payment Amount = Proportionate Share Payment amount specified in the Proportionate Share Agreement

Cost Adjustment Factor =
$$\frac{\text{Producer Price Index (PPI) for Commodities Code ID WPUIP2312301 (month of payment)}}{\text{Producer Price Index (PPI) for Commodities Code ID WPUIP2312301 (month of Prop Share Execution)}}$$

The Bureau of Labor Statistics Producer Price Index (PPI) for Commodities (Series ID: WPUIP2312301), can be found at <http://data.bls.gov/timeseries/WPUIP2312301>.

If at the time a Proportionate Share payment is due, the Commodities Code ID WPUIP2312301 is no longer used by the United States Bureau of Labor Statistics, the Adjusted Payment will be based on the Producer Price Index for non-residential commodities then in effect. In the event such an index is no longer in use, the Adjusted Payment will be based on the United States Bureau of Labor Statistics Consumer Price Index then in effect.

Section 5. 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 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. In the event the County or municipality as applicable 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 6. 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 cause his Agreement to be null and void, or may require the application for and execution of an additional Proportionate Share Agreement, along with any other traffic study or additional documentation.

Section 7. Road Impact Fee Credit

Proportionate share contributions made pursuant to this Agreement shall establish road impact fee credits. These credits are assignable and transferrable in accordance with Section 163.31801(10), Florida Statutes and as described in Chapter 2021-63 Laws of Florida. 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 8. No refund

Proportionate share contributions are non-refundable.

Section 9. 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 10. 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 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 11. 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 12. 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 13. 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 14. Binding Agreement

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

Section 15. 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 16. 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 17. 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:

David L. Ricks, P.E.
Palm Beach County Engineer
Director of Engineering and Public Works Department
P.O. Box 21229
West Palm Beach, FL 33416-1229

With a copy to County's Legal Representative:

Scott A. Stone
Assistant County Attorney I
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, FL 33401

As to Developer:

Highland Dunes Associates Property LLC
c/o Freehold Capital Management, LLC
500 Boylston Street, Suite 2010
Boston, MA 02116
Attn: Contracts

With a copy to Developer's Legal Representative:

Clifford Hertz
Nelson Mullins
One North Clematis Street
Suite 500
West Palm Beach, FL 33401

Section 18. Effective Date

The effective date of this Agreement shall be the date of approval of the Application.

Section 19. 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.

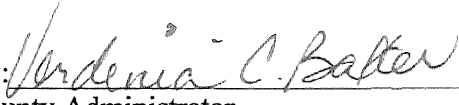
[Remainder of page intentionally blank.]

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

ATTEST:

PALM BEACH COUNTY, FLORIDA, BY ITS COUNTY ADMINISTRATOR

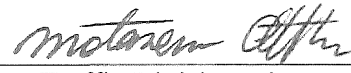

Witness

By: 
County Administrator

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

APPROVED AS TO TERMS AND CONDITIONS:


County Attorney

By: 
Traffic Division Director


ATTEST:

DEVELOPER

Highland Dunes Associates Property LLC,
a Delaware limited liability company

By: Highland Dunes Associates LLC,
a Delaware limited liability company,
its Member Manager

By: FCA Highland Dunes, LLC,
a Delaware limited liability company
its Administrative Member

Witness
Signature 

Signature 

Printed Name Sean M. Sweeney

Printed Name Jesse R. Baker

Title Authorized Signatory

NOTARY CERTIFICATION


COMMONWEALTH OF MASSACHUSETTS

KNOW ALL MEN BY THESE PRESENTS

COUNTY OF SUFFOLK

Before me, the undersigned authority, on this day personally appeared JESSE R. BAKER known to me to be the Authorized Signatory of FCA Highland Dunes, LLC, Administrative Member of Highland Dunes Associates LLC, Member Manager of Highland Dunes Associates Property LLC on behalf of said limited liability company and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL of office this 5th day of AUGUST, 2021.


Notary Public in and for the State of Massachusetts
My Commission expires on: 7/8/24

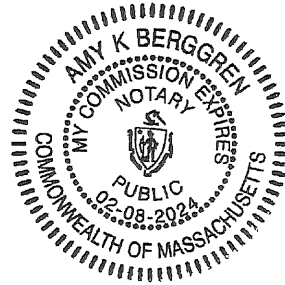


EXHIBIT A

1. No building permits for development generating more than 587 PM peak hour Outbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$605,270.
2. No building permits for development generating more than 635 PM peak hour Outbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$211,161.
3. No building permits for development generating more than 639 AM peak hour Outbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$6,929,691.
4. No building permits for development generating more than 882 AM peak hour Outbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$3,600,200.
5. No building permits for development generating more than 959 PM peak hour Inbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$545,140.
6. No building permits for development generating more than 970 PM peak hour Inbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$3,454,123.
7. No building permits for development generating more than 1,090 AM peak hour Outbound trips shall be issued until the Property Owner makes a proportionate share payment in the amount of \$483,336.
8. Prior Proportionate Share payments shall be applied as credits against the total amounts of Proportionate Share payment #1 (\$605,270) and payment #2 (\$211,161), and partially against payment #3 (\$6,929,691).

PRIOR PAYMENTS: As of the effective date of the Agreement, two Proportionate Share payments totaling \$4,485,869.77 have been made as follows:

1. \$3,134,274.32 (March 26, 2019)
2. \$1,351,595.45 (August 27, 2020)