

AGREEMENT

THIS AGREEMENT is made this ____ day of _____, 2017, by and between the BOARD OF COUNTY COMMISSIONERS (the "Board") of NASSAU COUNTY, FLORIDA (the "County"), a political subdivision of the State of Florida, and THE COMMERCIAL RANGE AT AMELIA, LLC, a Florida limited liability company (the "Developer").

WITNESSETH

WHEREAS, on _____, 2015, the County entered into that certain Agreement for Exchange of Real Property, Contract No. CM2247 (the "Exchange Agreement") in which the Developer agreed to convey and exchange the Tradeplex Property, as described in the Exchange Agreement to the County in consideration of, and in exchange for, the conveyance and exchange to the Developer of the County Property, as described in the Exchange Agreement;

WHEREAS, pursuant to the Exchange Agreement, the Developer agreed to split the Tradeplex Property into two parcels – one parcel for a future public road to run from Courtney Isle Way to Gene Lasserre Boulevard (the "New Public Road"), and the other parcel for a new County maintenance yard;

WHEREAS, Phase 1 of the New Public Road will be from Courtney Isle Way across the off-site and on-site wetlands along the north side of the Tradeplex Property a distance of 900 feet and Phase 2 of the New Public Road will be the balance of the road, a distance of approximately 800 feet which includes the median crossing on Gene Lasserre Boulevard;

WHEREAS, pursuant to the Exchange Agreement, the Developer has solicited bids for the construction of the New Public Road with both a primary bid and an alternative bid;

WHEREAS, the primary bid was for Phase 1 only and the alternative bid was for Phase 1 and Phase 2, together;

WHEREAS, pursuant to the Exchange Agreement, the County has elected to fund the construction of Phase 2, such that the entire project will be constructed at the same time resulting in a fully paved road meeting Nassau County Road and Drainage Standards;

WHEREAS, Developer agrees to complete construction of Phase 1 and Phase 2 of the New Public Road (collectively, the "Project") in accordance with the terms of this Agreement and the Exchange Agreement;

WHEREAS, it is the intention of the parties to plat and dedicate the New Public Road as a County right-of-way;

WHEREAS, the Board has the authority under Section 336.71, Florida Statutes ("Public-private cooperation in construction of county roads") to enter into an agreement with the Developer to pay for the completion of Phase 2 by the Developer from public funds; and

WHEREAS, the Board has determined that it is in the County's best interest to enter into this Agreement with the Developer for the design, permitting and construction of the New Public Road by the Developer.

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement and other valuable consideration, the County and the Developer agree as follows:

1. *Scope of Project.* The Board hereby authorizes the Developer to complete the Project as set forth herein, and the Developer agrees to do so at no expense to the County other than the "Contribution" described in Section 2 of this Agreement.

(a) *Design.* The Developer has caused the Project to be designed by an engineer or engineers (collectively, the "Engineer") selected and compensated by the Developer. The Engineer has produced those plans and specifications for the Project listed in the attached Exhibit A (collectively, the "Plans"), which are consistent with the County's Roadway and Drainage Standards Ordinance No. 99-17 and the State of Florida Department of Transportation ("FDOT") Standard Specifications for Road and Bridge Construction (collectively, the "Standards"), and have been approved by the County. The Plans may hereafter be modified by the Developer with the County's written approval, which approval shall not be unreasonably withheld, conditioned or delayed so long as the modifications are generally consistent with the Plans, are in compliance with the Standards, do not increase the Contribution, and do not materially increase the County's cost of maintaining the New Public Road upon its completion. The County may request Developer's approval for modifications to the Plans, which approval shall not be unreasonably withheld, conditioned or delayed, so long as the modifications are generally consistent with the Plans and compliant with the Standards, provided, however, that the County shall bear the entire increase in costs, if any, associated with such modifications.

(b) *Permitting.* The Developer shall obtain all necessary federal, state and local permits (collectively, the "Permits") for the Project. The County agrees to reasonably cooperate with the Developer in obtaining the Permits, at no material cost to the County beyond its Contribution.

(c) *Letter of Credit.* Prior to the commencement of construction, the Developer, at its sole cost and expense, shall provide the County with a letter of credit ("LOC") naming the County as sole beneficiary/payee in the amount of one hundred fifteen percent (115.00%) of the combined estimated cost to construct the Project. The County agrees that the provision of the LOC is in lieu of any warranty, express or implied, from the Developer as to the design/construction of the Project and the County waives, releases and holds the Developer harmless from any and all future claims related to the design and/or construction of the Project in return for the LOC. The County agrees to look solely to the LOC, contractors, subcontractors, or suppliers for any claims related to the design or construction of the Project. Developer shall reduce the amount of the LOC from 115% to ten percent (10.00 %) following Turnover of the Work/New Public Road to the County as set forth in Section 5(b) below (the "Reduced LOC"). The Reduced LOC will be for maintenance and operation of the Work/New Public Road. The Reduced LOC shall remain in full force and effect for twenty-six (26) months following Turnover and such requirement will survive this Agreement if the twenty-six (26) month time period exceeds the life of this Agreement until such time as the twenty-six (26) month time

period has lapsed. On such occasions as the County reasonably requests, the Developer shall provide the County with certified copies of the LOC and other documents requested by the County evidencing that the LOC is in place and in full force and effect.

(d) *Construction.* The Developer shall cause the Project to be constructed in a good and workmanlike manner in accordance with the Plans and Permits. In addition to its normal construction inspection procedures, the County Engineer may inspect the construction of the Project (the "Work") at any time and shall receive from the Developer advance notice of all third-party inspections and tests, plus copies of all certifications and test reports prepared by third parties as required by the Plans and Standards. The County Public Works Director (the "Director") shall be authorized to stop Work at any time if it is determined that the Project has not been constructed according to the Plans and Standards

(e) *Completion Schedule.* The Project shall be completed by the Developer within seven (7) months after the issuance of the Permits ("Completion Date"), subject to adjustment as set forth below. The County shall not unreasonably withhold, condition or delay its approval of any extension of the Completion Date caused by (i) interference by third parties beyond the Developer's control (i.e., third parties other than the Contractor, its subcontractors, or their vendors or suppliers), or (ii) the effects of rains or other inclement weather conditions, or adverse soil conditions related to such rains or other inclement weather conditions, that prevent the Contractor from productively performing controlling items of Work resulting in the Contractor being unable to work at least fifty percent (50%) of the normal work day on pre-determined controlling Work items due to such adverse weather conditions (collectively, "Excusable Delays"). No additional compensation or increase in the Contribution will be made for Excusable Delays. Proposed extensions of the Completion Date shall be submitted monthly by the Developer to the County Engineer if and to the extent Excusable Delays are encountered.

2. *County's Contribution.* The County agrees to pay the Developer the sum of \$245,000.00 (the "Contribution") as the County's contribution to the cost of completing Phase 2. The County will be responsible for the entire cost of Phase 2, including any change orders done at the request of the County, or otherwise required due to unforeseen site conditions, that may arise out of the construction of Phase 2. The Developer shall be responsible for all other costs of the Project associated with Phase 1, except as provided in 1(a) above, and shall hold the County harmless against any such excess costs. The Contribution shall be payable to the Developer in installments as follows:

(a) *Schedule of Values.* The Developer has provided a schedule of values to the County (the "Schedule of Values") allocating the entire Contribution to the various components of the Project, a copy of which is attached hereto as **Exhibit "A"**. This Schedule of Values shall be used as the basis for reviewing the Developer's draw requests for progress payments and final payment of the Contribution.

(b) *Draw Requests.* On or before the first day of each calendar month (or at such other date of the month as the parties may hereafter agree), the Developer shall submit to the Contractor and to the Director, or his designee, an itemized request for such payment (each, a "Draw") prepared in accordance with the Schedule of Values for those portions of the Project which are then complete. The Draw shall be supported by such data substantiating the

Developer's right to payment as the County may reasonably require, including copies of requisitions from the Contractors and suppliers, and it shall reflect a retainage of ten percent (10%) until "Substantial Completion" is certified as described in (j) below.

(c) *Certificate for Payment.* The Contractor shall within seven (7) days after receipt of a Draw request, either issue to the County a "Certificate for Payment," with a copy to the Developer, for such amount as the Contractor determines is properly due, or notify the Developer and County in writing of the Contractor's reasons for withholding certification in whole or in part as provided in (e) below. The issuance of a Certificate for Payment will constitute a representation by the Contractor to the County, based on the Contractor's evaluation of the Work and the data accompanying the Draw request, that to the best of the Contractor's knowledge, information and belief, the Work has progressed to the point indicated and that the quality of the Work is in accordance with the Plans and Standards. The foregoing representations are subject to an evaluation of the Work for conformance with the Plans upon Substantial Completion (i.e., the stage at which the Work can be legally and practically used for its intended purpose), to the results of subsequent tests and inspections, to correction of minor deviations from the Plans prior to final completion, and to specific qualifications expressed by the Contractor. The issuance of a Certificate for Payment will further constitute a representation that the Developer is entitled to payment in the amount certified.

(d) *Withholding Certification.* The Contractor may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the County, if in the Contractor's opinion the representations to the County required by (d) above cannot be made. If the Contractor is unable to certify payment in the amount of the Draw request, the Contractor will notify the Developer and County as provided in (d) above. If the Developer and Contractor cannot agree on a revised amount, the Contractor will promptly issue a Certificate for Payment for the amount for which the Contractor is able to make such representations to the County. The Contractor may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Contractor's opinion to protect the County from loss for which the Developer is responsible because of defective Work not remedied. When the reason for withholding certification is removed, a Certificate for Payment will be issued by the Contractor for the amount previously withheld.

(e) *Payment by County.* Once the Contractor has issued a Certificate for Payment, it shall be transmitted to the Director for payment within the time required by the Florida Local Government Prompt Payment Act. The County Manager or his designee shall process the approved Draw request for payment by the County as customary, and shall notify the Contractor when it is paid.

(f) *Nonconforming Work.* The issuance of a Certificate for Payment by the Contractor, the payment of a Draw by the County, and the partial or entire use or occupancy of the Project by the County, shall not constitute acceptance of any Work that is not in conformance with the Plans and Standards.

(g) *Nonpayment.* If the Contractor does not issue a Certificate for Payment through no fault of the Developer within seven (7) days after receipt of a Draw request, or if the

County does not pay the Developer the amount certified by the Contractor within seven (7) days after the date established in this Agreement, then the Developer may, upon seven additional days written notice to the County and Contractor, stop the Work until payment of the amount owing has been received. In that event, the Completion Schedule shall be extended appropriately and the Contribution shall be increased by the amount of the Developer's expenses or damage directly attributable to stopping the Work as permitted by this paragraph, unless such Work stoppage occurred due to the fault or neglect of the Contractor. Whether or not the Work is stopped, interest at the rate established in Section 55.03(1), Florida Statutes shall be due on all payments not made by the County within the time required by the Local Government Prompt Payment Act.

(h) *Substantial Completion.* When the Developer considers the Work to be Substantially Complete, the County or its designee, with input from the Developer, shall promptly prepare and submit to the Contractor a comprehensive punch list of items to be completed or collected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Developer to complete all Work in accordance with the Plans. Upon receipt of the County's punch list, the County Engineer will make an inspection to determine whether the Work or designated portion thereof is Substantially Complete. If the inspection discloses any item, whether or not included on the Developer's list, which is not sufficiently complete in accordance with the Plans so that the County can use the Work for its intended purpose, the Developer shall, before issuance of a Certificate of Substantial Completion, complete or correct such item upon notification by the County Engineer or the Director, or its designee. In that case, the Developer shall then submit a request for another inspection to determine Substantial Completion once the deficient item has been completed or corrected.

(i) *Certificate of Substantial Completion.* When the Work is Substantially Complete, the Contractor, with concurrence of the County Engineer, will prepare a certificate of Substantial Completion that shall establish the date of Substantial Completion and shall fix the time within which the Developer shall finish all items on the punch list accompanying the Certificate. Warranties required by this Agreement shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the certificate of Substantial Completion. The certificate of Substantial Completion shall be submitted to the County and the Developer for their written acceptance, which shall not be unreasonably withheld, delayed or conditioned. Upon acceptance by the County of the certificate of Substantial Completion and receipt of consent of the surety issuing the Bond, the County shall make payment of the remainder of the Contribution, including retainage, applying to such accepted items of Work. Such payment shall be adjusted for Work that is still incomplete or not in accordance with the requirements of the Plans, which shall be retained until such items of Work are finally completed and accepted.

(j) *Final Completion.* The Developer shall fully and finally complete the Work within forty-five (45) days after certificate of Substantial Completion, subject to Excusable Delays. Upon receipt of the Developer's written notice that the Work is ready for final inspection and acceptance, accompanied by the Developer's final Draw request, the Contractor shall promptly make such inspection and, when the Contractor, with the concurrence of the County Engineer, finds the Work acceptable under the Plans and the Standards, the Contractor shall

promptly issue a final Certificate for Payment stating that to the best of the Contractor's knowledge, information and belief, and on the basis of the Contractor's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of this Agreement, the Plans and the Standards, and that the entire remaining balance of the Contribution is then due and payable to the Developer ("Final Completion"). The final Draw shall not be paid by the County until (i) the Developer submits to the Contractor the consent of the surety which issued the Bond and the close-out documents required by Section 5 below, and (ii) the Board has authorized acceptance of the Work.

3. *Indemnity; Insurance.* The Developer shall indemnify and hold the Board, the County and its officers, attorneys, agents and employees harmless from liability, damage, loss and costs, including but not limited to reasonable attorneys' fees, to the extent caused by the negligence or wrongful conduct of the Developer or any persons employed or engaged by the Developer in the performance of this Agreement. Prior to commencement of the Work, the Developer shall provide, directly or through one or more of its Contractors, certificates of general liability and workers compensation insurance in favor of the County in the amounts customarily required for the performance of such work in County rights-of-way, and meeting all applicable legal requirements for such insurance policies.

4. *Project Coordination; Notice.* Prior to commencement of the Work, the County and the Developer shall designate in writing those persons to whom all official notices and demands should be delivered under this Agreement, which designations may be changed from time to time by notice to the other party. All such official notices and demands shall be delivered to the person(s) and addresses designated by the receiving party in accordance with the preceding sentence, either by hand delivery or by recognized courier such as Federal Express or UPS, with a written receipt evidencing delivery, and such notice shall be effective upon receipt. In addition, the parties agree to designate from time to time, by official written notice, those persons who are authorized to represent the parties and supervise or coordinate the Project on a day-to-day basis consistent with the terms of this Agreement.

5. *Project Close-out.* Upon Final Completion of the Work, the Developer shall provide the following to the County as a condition of the final Draw request, subject to the County's reasonable approval and acceptance as indicated:

(a) *As-Builts.* The Developer shall cause a complete set of as-built Plans together with copies of all approved shop drawings and other required maintenance and operation manuals and certifications to be provided to the Director, in such form and detail as the County customarily requires for similar work within County rights-of-way.

(b) *Turnover.* Upon approval of the final Certificate for Payment and acceptance of the close-out documents required by this Section 5, the County shall be responsible for the maintenance and operation of the New Public Road.

6. *Disputes.* Any dispute arising under this Agreement shall be addressed by the representatives of the County and the Developer in the following manner.

(a) *Written Statements.* A general statement of the dispute shall be set forth in writing as described in Section 4 above, with copies to the Developer, the County Manager, the Director and the Contractor. A prompt written response shall be provided in the same manner prior to any meetings of representatives of the parties.

(b) *Initial Meeting.* An initial meeting shall be held with representatives of the County Manager, the Director, the Developer and the Contractor. If the dispute is not settled at that stage, the County Attorney shall be notified in writing by the County Manager or his designee.

(c) *Subsequent Meetings; Mediation.* The County Attorney, County Manager and Director or their designee(s) shall meet with the Developer, or Developer's representatives, within ten (10) days of notification by the County Manager. If there is still no satisfactory resolution of the dispute, it shall be submitted to mediation in accordance with mediation rules established by the Florida Supreme Court. Mediators shall be mutually chosen by the County and the Developer and the cost of mediation shall be borne equally by the County and the Developer. No litigation shall be initiated unless and until the procedures set forth herein are followed.

(d) *Work to Continue.* No Work shall cease during a dispute unless the Board directs in writing that Work shall cease pending resolution of the dispute.

(e) *Termination by County.* Provided the County has first complied with the terms of this section ("Disputes"), the occurrence of anyone or more of the following events shall justify termination of this Agreement by the County for cause:

(1) The Developer's persistent failure to perform the Work in accordance with the Plans and this Agreement (including but not limited to failure to adhere to the Completion Schedule as adjusted from time to time pursuant to this Agreement);

(2) The Developer's disregard of applicable laws or regulations of any public body having jurisdiction over the Work;

(3) The Developer's violation in any substantial way of any provisions of the Plans or this Agreement.

If one or more of the events identified in this subsection should occur, the County may, after giving the Developer and Surety seven (7) days written notice of its intent to do so, terminate this Agreement and cause the Surety to complete the Work pursuant to the terms of the Bond. Notwithstanding the foregoing, this Agreement shall not be terminated if the Developer begins, within seven (7) days of receipt of the County's notice of intent to terminate, to correct its failure to perform and thereafter proceeds diligently to cure such failure within no more than thirty (30) days of receipt of said notice. The termination procedures of the Bond shall supersede the provisions of this subsection.

7. *Entire Agreement; Amendment.* This Agreement constitutes the entire understanding of the parties with respect to the Project and the Contribution, and it may only be amended in writing, signed by the parties in the same manner as this original Agreement

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Board and the Developer have caused this Agreement to be executed and delivered as of the day and year first above written.

Board:

BOARD OF COUNTY COMMISSIONERS
NASSAU COUNTY, FLORIDA

By _____
Daniel B. Leeper, Chairman

Attest:

John A. Crawford
Its Ex Officio Clerk

As approved to form by the
County Attorney:

Michael S. Mullin

Developer:

THE COMMERCIAL RANGE AT AMELIA,
LLC

By: _____
Name: _____
Title: _____