

Meeting Date
February 20, 2018



AGENDA	
Section	Consent
Item No.	II.A.6

AGENDA REPORT
 BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

SUBJECT:	Approval Re: Right-of-Way Use Agreement for Viera Town Center with The Viera Company – District 4 Fiscal Impact: None
DEPT/OFFICE:	Public Works Department – Finance & Contracts Administration

Requested Action:

It is requested that the Board of County Commissioners approve and authorize the Chair to execute the Right-of-Way Use Agreement with The Viera Company to permit improvements to be installed and maintained in Viera Town Center.

Summary Explanation & Background:

The Viera Company (TVC) desires to install and maintain improvements in the public right-of-way within Viera Town Center, as depicted on Exhibit “A”. The improvements will consist of landscaping, signage, hardscape, irrigation, traffic control devices, excluding traffic signals. The improvements shall be submitted by TVC to the County as a right-of-way permit application, and issuance of the permit to install shall be subject to approval by the County.

The County may allow the use of the public right-of-way for purposes which do not conflict with the interests of the public as set forth in Section 125.01, Florida Statutes. In accordance with the Agreement, TVC shall be required to maintain, repair, and replace the permitted improvements without cost to the County. Additionally, TVC is required to provide general liability insurance in an amount not less than one million dollars and name the County as additional insured. The Right-of-Way Use Agreement for Viera Town Center has been reviewed and approved by the County Attorney’s Office and Risk Management.

The initial term of this Agreement shall be ten (10) years commencing with the date of execution by the Board and shall automatically renew annually unless terminated by either party with sixty (60) days’ written notice. Upon termination, TVC or the applicable assignee, at the request of the County, shall remove all improvements from the right-of-way or TVC shall reimburse the County for the cost of such removal. Furthermore, in the event of termination and the County assumes ownership of the improvements, the County does not assume maintenance responsibility unless expressly provided in writing.

Fiscal Impact: FY 17/18: None

Clerk to the Board Instructions: Please return 2 fully executed Right-of-Way Use Agreements to the Public Works Department

Exhibits Attached: Right-of-Way Use Agreement (3 originals)

Contract /Agreement (If attached): Reviewed by County Attorney Yes No PR

County Manager
 Frank Abbate

Assistant County Manager
 John P. Denninghoff

Department Director / Extension

Interim Assistant County Manager
 Jim Liesenfelt

Andrew J. Holmes, P.E. / 57202

**BREVARD COUNTY
BOARD OF COUNTY COMMISSIONERS**



INITIAL CONTRACT REVIEW AND APPROVAL FORM

SECTION I - GENERAL INFORMATION

1. Contractor:	
2. Fund/Account #:	3. Department Name: Public Works
4. Contract Description: Right-of-Way Use Agreement for Viera Town Center	
5. Contract Monitor: Jeanette Scott	7. Contract Type: USE AGREEMENT
6. Dept/Office Director: Andrew J. Holmes, P.E., Public Works	

SECTION II - REVIEW AND APPROVAL TO ADVERTISE

<u>COUNTY OFFICE</u>	<u>APPROVAL</u>		<u>SIGNATURE</u>	<u>DATE</u>
	<u>YES</u>	<u>NO</u>		
User Agency	<input type="checkbox"/>	<input type="checkbox"/>	_____	_____
Risk Management	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Lairsey, Matt <small>Digital signature of Matt Lairsey on 02/06/2018 at 10:00:00 AM Public Key Infrastructure Date: 2018.02.06 10:00:00 AM</small>	02/06/2018
County Attorney	<input type="checkbox"/>	<input type="checkbox"/>	_____	_____

SECTION III - REVIEW AND APPROVAL TO EXECUTE

<u>COUNTY OFFICE</u>	<u>APPROVAL</u>		<u>SIGNATURE</u>	<u>DATE</u>
	<u>YES</u>	<u>NO</u>		
User Agency	<input type="checkbox"/>	<input type="checkbox"/>	_____	_____
Risk Management	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Lairsey, Matt <small>Digital signature of Matt Lairsey on 02/06/2018 at 10:00:00 AM Public Key Infrastructure Date: 2018.02.06 10:00:00 AM</small>	02/06/2018
County Attorney	<input checked="" type="checkbox"/>	<input type="checkbox"/>		2/6/18

SECTION IV - CONTRACTS MANAGEMENT DATABASE CHECKLIST

<u>CM DATABASE REQUIRED FIELDS</u>	<u>Complete</u> ✓
Department Information	<input type="checkbox"/>
Department	<input type="checkbox"/>
Program	<input type="checkbox"/>
Contact Name	<input type="checkbox"/>
Cost Center, Fund, and G/L Account	<input type="checkbox"/>
Vendor Information (SAP Vendor #)	<input type="checkbox"/>
Contract Status	<input type="checkbox"/>
Contract Title	<input type="checkbox"/>
Contract Type	<input type="checkbox"/>
Contract Amount	<input type="checkbox"/>
Storage Location (SAP)	<input type="checkbox"/>
Contract Approval Date	<input type="checkbox"/>
Contract Effective Date	<input type="checkbox"/>
Contract Expiration Date	<input type="checkbox"/>
Contract Absolute End Data (No Additional Renewals/Extensions)	<input type="checkbox"/>
Material Group	<input type="checkbox"/>
Contract Documents Uploaded in CM database (Initial Contract Form with County Attorney/ Risk Management Approval; Signed/Executed Contract)	<input type="checkbox"/>
"Right To Audit" Clause Included in Contract	<input type="checkbox"/>
Monitored items: Uploaded to database (Insurance, Bonds, etc.)	<input type="checkbox"/>



Tammy Rowe, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001
Fax: (321) 264-6972
Tammy.Rowe@brevardclerk.us

February 21, 2018

MEMORANDUM

TO: Andrew Holmes, Public Works Director

RE: Item II.A.6., Right-of-Way Use Agreement for Viera Town Center with The Viera Company

The Board of County Commissioners, in regular session on February 20, 2018, executed Right-of-Way Use Agreement for Viera Town Center with The Viera Company to permit improvements to be installed and maintained in the Viera Town Center. Enclosed are two fully-executed copies of the Right-of-Way Use Agreement.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe, Deputy Clerk

/cmw

Encls. (2)

cc: Contracts Administration
Budget
Finance

RIGHT-OF-WAY USE AGREEMENT
(Viera Town Center)

THIS RIGHT-OF-WAY USE AGREEMENT (the "Agreement"), made and entered into this 20 day of February, 2018 by and between the BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, a political subdivision of the State of Florida (hereinafter referred to as "County"), and THE VIERA COMPANY, a Florida corporation (hereinafter referred to as "TVC").

WITNESSETH

WHEREAS, the public right-of-way(s) known/described as Town Center Avenue and Rodina Drive has/have been dedicated to Brevard County, Florida (collectively, the "Public Right-of-Way");

WHEREAS, TVC desires to improve the Public Right-of-Way by installing improvements, which may consist of, but are not limited to, improvements for landscaping, signage, hardscape, irrigation, traffic control devices (excluding traffic signals), and/or other related improvements) pursuant to plans and specifications approved by the County and further described below;

WHEREAS, the County pursuant to the authority set forth in Section 125.01, Florida Statutes, may allow the use of a public right-of-way for purposes which do not conflict with the interests of the public or are in the interests of the public; and

WHEREAS, the County has determined that use of the Public Right-of-Way by TVC for the installation, operation, maintenance, repair and improvement of such improvements to the Public Right-of-Way pursuant to this Agreement promotes the public interest.

NOW THEREFORE, in consideration of the covenants herein contained, it is mutually agreed between the parties as follows:

1. RECITALS. The above recitals are true and correct and incorporated into this Agreement by this reference.

2. DEFINITIONS. The following terms used in this Agreement shall have the meaning given to such terms below:

- a. Agreement: shall mean this Right-of-Way Use Agreement.
- b. Association: shall mean Viera Town Center Merchants Association, Inc., a Florida not-for-profit corporation, as more particularly described in that certain Declaration of Covenants, Conditions, Easements, Reservations and Restrictions for Viera Town Center District recorded on December 29, 2016 in Official Records Book 7788, Page 438, of the Public Records of Brevard County, Florida, as may be amended from time to time (the "Town Center Declaration")

- c. County: shall mean the Board of County Commissioners of Brevard County, Florida, a political subdivision of the State of Florida.
- d. Designated Premises: shall mean that portion of the Public Right-of-Way more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference, where the Improvements will be installed and maintained.
- e. Improvements: shall mean those certain improvements installed or to be installed by TVC within the Designated Premises in accordance with the Plans and maintained by TVC in accordance with the provisions of this Agreement as approved by the County.
- f. Public Right-of-Way: shall refer to the public right-of-way(s) known/described as Town Center Avenue and Rodina Drive.
- g. Plans: Shall mean those certain plans for the construction, installation, and maintenance of Improvements which have been approved by TVC and the County as part of a right-of-way permit.
- h. Prompt or Promptly: For purposes of paragraph 8, the term "promptly" shall mean no later than fourteen (14) days after TVC receives written notice of the need for maintenance, repairs, or replacements to the applicable Improvements (as may be extended on a day-by-day basis for acts of force majeure beyond TVC's control); however, to the extent such maintenance, repairs, or replacements cannot reasonably be completed within fourteen (14) days, the term "promptly" shall mean TVC shall commence such maintenance, repairs, or replacements within such initial fourteen (14) day period and shall diligently work to complete such maintenance, repairs, or replacements. For purposes of this paragraph 10, the term "promptly" or "prompt" shall mean no later than fourteen (14) days after TVC receives actual notice of the existence of a hazardous condition, or a condition in need of maintenance as required hereunder, at the Designated Premises.
- i. TVC: shall mean The Viera Company, a Florida corporation.

3. CONSTRUCTION AND MAINTENANCE OF PROPERTY. During the term of this Agreement, TVC hereby agrees to construct and maintain the Improvements within the Designated Premises in the manner described in this Agreement and as permitted by the County.

4. TERM. The initial term of this Agreement shall be ten (10) years commencing with the date of the execution of this Agreement by the County and TVC, and shall thereafter be automatically renewed annually unless terminated by either party, in accordance with paragraph 13 Termination herein.

5. USE OF DESIGNATED PREMISES. During the term of this Agreement, TVC shall use the Designated Premises only for construction and installation of the Improvements and related maintenance thereto. It is hereby mutually agreed and understood that the use of any

structure, improvement or facility now or hereafter located on the Designated Premises as part of the Improvements shall be for decorative or informational purposes only and not for human occupancy, nor shall such structures or improvements create traffic hazards. It is specifically agreed and understood that the use herein set forth for the Improvements upon the Designated Premises shall be the only use consented to by the County, and that failure to comply with this provision shall be considered a material breach of this Agreement, whereupon the County shall be entitled to immediately terminate this Agreement.

6. IMPROVEMENTS. All Improvements permitted and installed upon the Designated Premises by TVC shall be maintained by TVC on the Designated Premises during the term of this Agreement in accordance with all County specifications and the Plans. It is hereby agreed and understood that any Improvements placed on or constructed on the Designated Premises and permanently attached thereto, shall remain the property of TVC and that TVC retains the right to remove such improvement within sixty (60) days of the date of termination of this Agreement, whether by breach or by expiration of its natural term. In the event such improvements are not removed within sixty (60) days of termination, the improvements shall become the property of the County, and the County may remove the Improvements. To the extent the County elects to remove any such Improvements, TVC shall reimburse the County for the cost of removal within thirty (30) days of receipt of an invoice for such removal expenses.

7. UTILITIES. TVC shall pay all charges for electrical service and other utility services supplied to TVC at the Designated Premises for the Improvements during the term of this Agreement.

8. REPAIRS AND MAINTENANCE. During the term of this Agreement, TVC shall, at its own expense, maintain the Designated Premises and all Improvements on the Designated Premises and make all necessary repairs and replacements to the Designated Premises and/or the Improvements. Such maintenance, repairs and replacements shall be made promptly as and when necessary. Notification of the need for such repair and/or maintenance may be given to TVC by written or electronic communication.

9. ILLEGAL, UNLAWFUL OR IMPROPER USE. TVC shall make no unlawful, improper, immoral or offensive use of the Designated Premises, nor will TVC use the Designated Premises or allow use of the Designated Premises for any purposes other than that hereinabove set forth. Failure of TVC to comply with this provision shall be considered a material default under this Agreement. In the event any of the Improvements are deemed a traffic safety hazard by the County or the Florida Department of Transportation, such use shall be deemed an improper use and this Agreement shall be subject to immediate termination.

10. INDEMNIFICATION AND INSURANCE. Except where limited by law, TVC agrees that it will indemnify and save harmless the County from any and all liability, claims, damages, expenses, proceedings and causes of action of every kind and nature arising out of or connected with the use, occupation, management or control of the Designated Premises or any of the Improvements thereon or any equipment or fixtures used in connection with the Designated Premises by TVC or its employees or independent contractors. TVC agrees that it will, at its own expense, defend any and all actions, suits or proceedings which may be brought against the County in connection with TVC's use of the Designated Premises pursuant to this Agreement

and that it will satisfy, pay and discharge any and all judgments that may be entered against the County in any such action or proceedings. The parties acknowledge specific consideration has been exchanged for the provision.

TVC further agrees to provide and maintain at all times during the term of this Agreement, without cost or expense to the County, policies of General Liability Insurance insuring TVC against any and all claims, demands or causes of action whatsoever for injuries received and damages to property in connection with the use, occupation, management and control of the Designated Premises and the Improvements thereon. Such policies of insurance shall insure TVC in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) to cover any and all claims arising in connection with any one particular accident or occurrence. A certificate of such insurance policies shall be filed with the Public Works Department, 2725 Judge Fran Jamieson Way, Bldg. A-201, Viera, Florida, 32940, within ten (10) days of the date of execution of this Agreement by TVC and the County. The County shall be named as an additional insured on the policy that the Association secures and endorsed with a provision that entitles the County to thirty (30) days written notice from the insurer of any change or cancellation in said policies.

TVC shall notify the County promptly in writing of any hazardous condition existing on or about the Designated Premises.

All Improvements or personal property constructed or placed on or about the Designated Premises by TVC or its employees or independent contractors shall be at the risk of TVC, and the County shall not be liable for any damage or loss to any Improvements or personal property located thereon for any cause whatsoever. TVC agrees and understands that the County does not and shall not carry liability, theft, or fire insurance on any of said items or facilities to cover TVC's interests therein.

At the time of execution of this Agreement, any existing improvements installed on the Designated Premises will be the maintenance responsibility of TVC. In the event this pre-existing improvements causes damage to County property, to include but not limited to, sidewalk/roadway/curb and gutter/drainage inlets, TVC will be responsible for prompt repair to such County property. If TVC fails to promptly repair the damage, TVC will pay the County all costs incurred by the County to repair the damage.

11. RIGHT OF ENTRY. The County or its agents may enter in and on the Designated Premises at any reasonable time for the purpose of inspecting such property or performing other duties of the County as are required by law or by the terms of this Agreement.

12. COMPLIANCE WITH STATUTES. TVC shall promptly execute and comply with all statutes, ordinances, rules, regulations, and requirements of all local, state and federal governmental bodies applicable to the Designated Premises for the correction, prevention and abatement of nuisances or other grievances in, upon, or connected with the Designated Premises during the term of the Agreement.

13. BINDING EFFECT; ASSIGNABILITY. This Agreement will inure to the benefit of and will be binding upon the parties hereto and their respective successors and assigns.

Except as otherwise provided herein below, TVC shall not assign this Agreement or any of TVC's rights, obligations, or duties hereunder to any party without the prior written consent of the County. However, the County and TVC agree that upon completing the initial installation of the Improvements, all of the rights, obligations and duties of TVC under this Agreement shall be assignable by TVC to the Association without the prior, written consent of the County, in which case the Association shall maintain the improvements as part of the common areas under the Town Center Declaration. Any such assignment shall be by a written instrument executed with the formality of a deed on behalf of TVC assigning such rights, obligations and duties to the Association, and on behalf of the Association assuming such rights, obligations and duties. Such assignment shall also set forth the address of the Association for purposes of receiving notices under this Agreement in accordance with paragraph 16 herein below. Upon the execution of such Assignment and its delivery to the County, the County agrees that TVC shall be released from all obligations and duties hereunder and that the County shall thereafter look solely to the Association or other assignee for the performance of such obligations and duties.

14. INDEPENDENT CONTRACTOR. TVC shall perform the services under this Agreement as an independent contractor and nothing herein shall be construed to be inconsistent with this relationship or status. Nothing in the Agreement shall be interpreted or construed to make TVC or any of its agents or employees to be the agent, employee or representative of the County.

15. TERMINATION. This Agreement may be terminated with or without cause by either party upon sixty (60) days' written notice thereof to the other party; provided, however, that upon termination, TVC or, if this Agreement has been assigned as permitted hereunder, then the applicable assignee of this Agreement, shall, at the request of the County, remove all improvements to the Designated Premises, or, in the alternative, reimburse the County for the cost of such removal. In the event this Agreement is terminated and the County assumes ownership of the Improvements within the Public Right-of-Way, the County does not assume maintenance responsibility unless expressly provided in writing. Any maintenance performed by the County will not constitute an assumption of maintenance responsibility as may be otherwise assigned by Florida Statute or County Code.

16. NOTICE; NOTICE OF BREACH Notice under this Agreement shall be given to the County at the office of the County Manager, 2725 Judge Fran Jamieson Way, Bldg. C, Viera, Florida 32940. Notice under this Agreement shall be given to TVC at 7380 Murrell Road, Suite 201, Viera, Florida 32940 or by email to maryellen.mckibben@duda.com and vieralegal@duda.com . In the event the County determines TVC has breached any term or provision of this Agreement, the County shall provide written notice of such breach to TVC and TVC shall have thirty (30) days after receipt of such notice to cure such breach or, if such breach is of a nature that it cannot reasonable be cured within such thirty (30) day period, then TVC shall have such longer period to cure the breach as is reasonably necessary provided, however, that TVC commences reasonable action to remedy the breach within such thirty (30) day period and diligently and continuously prosecutes such remedy to completion so that such breach is cured in a timely manner.

17. RIGHT TO AUDIT RECORDS. In the performance of this Agreement, TVC shall keep books, records and accounts of all activities related to the Agreement, in compliance with generally accepted accounting procedures. Books, records and accounts related only to the

performance of this Agreement (and no other books, records, and accounts of TVC) shall be open to inspection during regular business hours by an authorized representative of the County upon written notice to TVC not less than five (5) business days advance notice and shall be retained by TVC for a period of five (5) years after termination of this Agreement. All books, records and accounts related to the performance of this Agreement shall be subject to the applicable provisions of the Florida Public Records Act, Chapter 119, Florida Statutes. All records or documents created by TVC or provided to TVC under the terms of this Agreement, are public records and TVC agrees to comply with any request for such public records or documents made in accordance with Section 119.07, Florida Statutes.

18. WAIVER. The waiver by the County of any of TVC's obligations or duties under this Agreement shall not constitute a waiver of any other obligation or duty of TVC under this Agreement.

19. ENTIRETY AND MODIFICATIONS. This Agreement represents the understanding between the parties in its entirety as to the subject matter of this Agreement and no other agreements, either oral or written, exist between the County and TVC as to the subject matter of this Agreement. This Agreement and any exhibits may only be amended, supplemented or canceled by a written instrument duly executed by the parties hereto, except as otherwise provided herein.

20. SEVERABILITY. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

21. ATTORNEY'S FEES AND VENUE. In the event of any legal action to enforce, interpret, or construe the terms of this Agreement, each party shall bear its own attorney's fees and costs. Venue for any legal action brought by any party to this Agreement to interpret, construe or enforce this Agreement shall be in a court of competent jurisdiction in and for **Brevard County, Florida, and ANY TRIAL SHALL BE NON-JURY.**

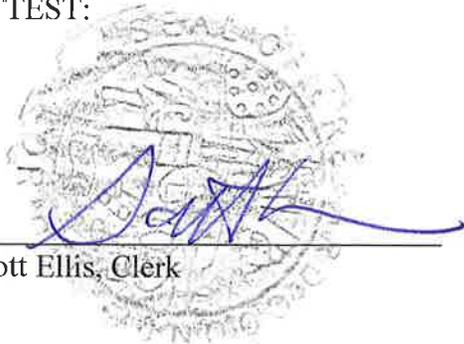
22. CONSTRUCTION OF AGREEMENT. The parties hereby agree that they have reviewed this Agreement, have consulted with legal counsel of their choice, have participated in the drafting of this Agreement and that this Agreement is not to be construed against any party as if it were the drafter of this Agreement.

(SIGNATURES ARE ON THE FOLLOWING PAGE.)

DONE, ORDERED and ADOPTED in Regular Session this 20 day of FEB., 2018.

ATTEST:

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA



Scott Ellis, Clerk



Rita Pritchett, Chair

As approved by the Board on 2/20/18

Approved as to legal form and content:

D. J. [Signature] 2/6/18
Assistant County Attorney

THE VIERA COMPANY,
a Florida corporation

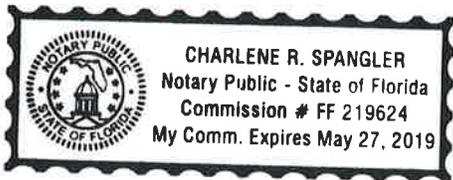
Benjamin E. Wilson
Printed name: Benjamin E. Wilson

[Signature]
Name: Stephen L. Johnson
Title: President

Charlene R. Spangler
Printed name: Charlene R. Spangler

STATE OF FLORIDA }
 }
County OF BREVARD}

The foregoing instrument was acknowledged before me this 6th day of February, 2018, by Stephen L. Johnson, as President of The Viera Company, a Florida corporation, on behalf of the corporation, who is personally known to me.

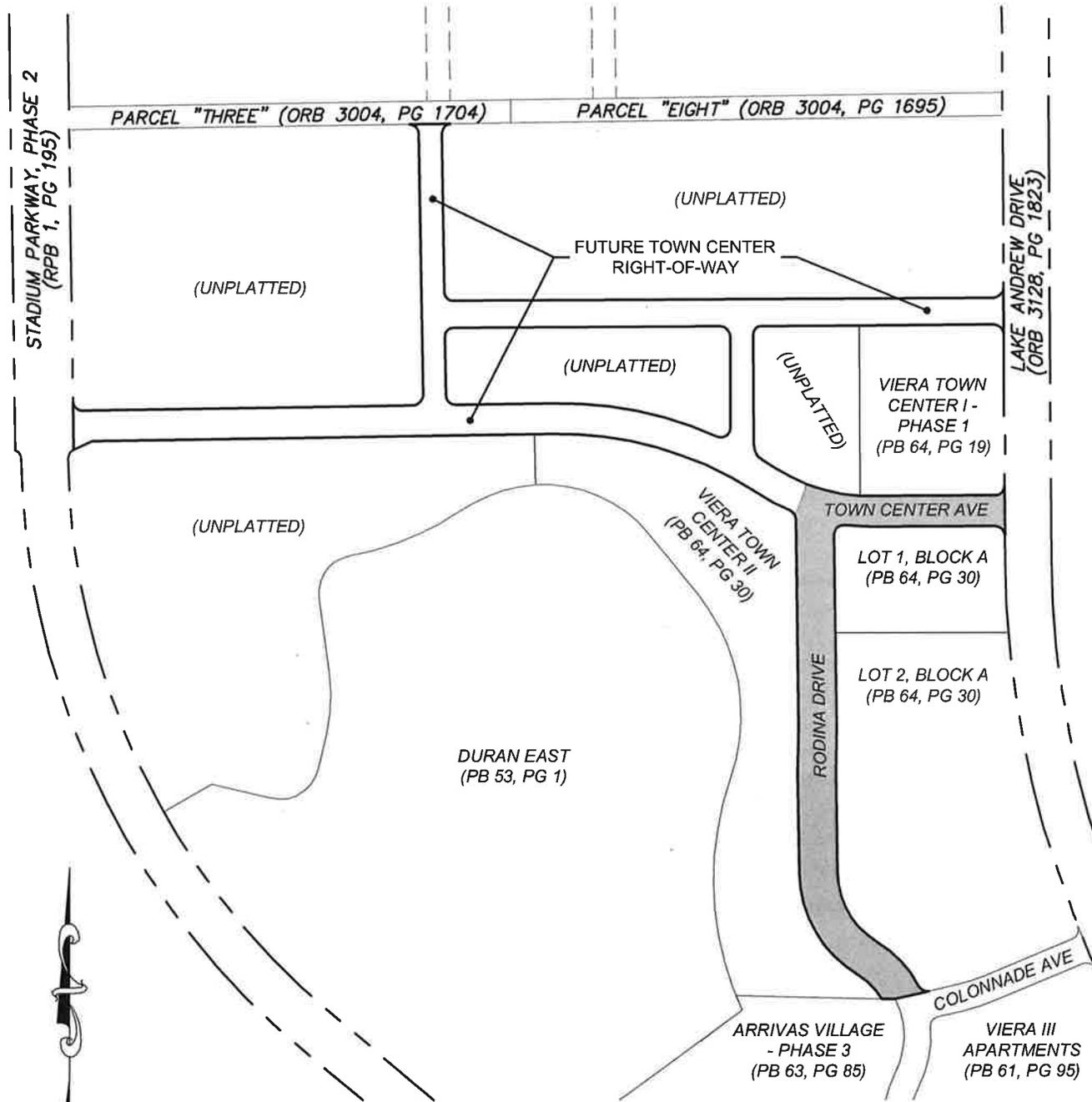


Charlene R. Spangler
NOTARY PUBLIC
Charlene R. Spangler
Printed Name

EXHIBIT "A"

TOWN CENTER RIGHT-OF-WAY USE AGREEMENT

NOTE:
 IN ACCORDANCE WITH THE RIGHT-OF-WAY USE AGREEMENT FOR VIERA TOWN CENTER, EXHIBIT "A" DOES NOT INDICATE APPROVAL OF IMPROVEMENTS IN THE COUNTY RIGHT-OF-WAY. APPROVAL OF IMPROVEMENTS IN THE COUNTY RIGHT-OF-WAY ARE CONTINGENT UPON PERMITTING AND ACCEPTANCE BY THE COUNTY. EXHIBIT "A" MAY BE CHANGED WITH CONSENT AND APPROVAL BY THE COUNTY.





B.S.E. CONSULTANTS, INC.
 CONSULTING - ENGINEERING - LAND SURVEYING
 312 SOUTH HARBOR CITY BOULEVARD, SUITE 4 MELBOURNE, FL 32901
 PHONE: (321) 725-3874 FAX: (321) 723-1159
 CERTIFICATE OF BUSINESS AUTHORIZATION: 4905
 CERTIFICATE OF LAND SURVEYING BUSINESS AUTHORIZATION: LB0004905

DATE: 1/17/18
 DESIGN/DRAWN: HAK/RLR
 DRAWING# 1132801_200_002
 PROJECT# 11328.01
 SHEET 1 OF 1

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