



AGENDA REPORT
December 18, 2018

Second Public Hearing, Re: Second Amendment to M95 Developer's Agreement

SUBJECT:

Second Public Hearing, Re: Second Public Hearing on the Second Amendment to the Developer's Agreement with M95, et.al. (District 5)

FISCAL IMPACT:

Since Transportation Impact Fees collected within the City of West Melbourne are typically allocated to projects within the city and administered by them, there should be no fiscal impact to Brevard County.

DEPT/OFFICE:

Planning and Development

REQUESTED ACTION:

It is requested that the Board of County Commissioners consider approval of the Second Amendment to the Developer's Agreement with with Melbourne 95 New Haven, LLC; Echo Trading Company, LLC; Florida, Inc.; James E. and Barbara Fulcher; and the City of West Melbourne. If approved, it is requested that the Board authorize the Chair to execute the agreement on behalf of the County and authorize the Budget Office to execute any budget changes necessary to implement the agreement.

SUMMARY EXPLANATION and BACKGROUND:

On July 29, 2008, the Board of County Commissioners approved a Developer's Agreement with Melbourne 95 New Haven, LLC (M95); Echo Trading Company, LLC; Florida, Inc.; James E. and Barbara Fulcher; and the City of West Melbourne. That agreement required M95 to construct offsite improvements to US192 and John Rodes Boulevard and authorized the County to reimburse M95 from transportation impact fees collected on development in the participating properties.

On March 10, 2009 the Board approved the First Amendment to the Developer's Agreement with M95, et.al. That amendment reduced the amount of the performance bond M95 was required to post to 125% of the accepted bid amount.

On March 5, 2009 the Board of County Commissioners enacted the Transportation Impact Fee moratorium which remained in effect until December 31, 2016. There were no transportation impact fees collected from development on the participating properties during this time period.

This agreement expired on July 29, 2018. Now that the Transportation Impact Fee

moratorium has expired, M95 is requesting a five year extension of the agreement to allow them to recover the remainder of their expenses associated with construction of the offsite improvements which have been delayed due to the moratorium. M95 was initially entitled to receive \$1,260,945.61. To date they have received \$874,710.29 leaving a remaining balance of \$386,235.32.

The City of West Melbourne approved the Second Amendment to the Developer's Agreement on June 19, 2018.

The Board of County Commissioners approved this agreement at the first public hearing on December 4, 2018.

CLERK TO THE BOARD INSTRUCTIONS:

Execute three copies the agreement on behalf of the County and return them to Planning & Development for recording.

ATTACHMENTS:

Description

- **Second Amendment to M95 Developer's Agreement**
- **West Melbourne City Council minutes for June 19, 2018**



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

December 19, 2018

M E M O R A N D U M

TO: Tad Calkins, Planning and Development Director Attn: Stephen Swanke

RE: Item H.3., Second Public Hearing on the Second Amendment to the M95 Developer's Agreement

The Board of County Commissioners, in regular session on December 18, 2018, conducted the second public hearing and approved Developer's Agreement with Melbourne 95 New Haven, LLC (M95), Echo Trading Company, LLC, Florida, Inc., James E. and Barbara Fulcher, and the City of West Melbourne; authorized the Chair to execute the Agreement; and authorized the Budget Office to execute any necessary budget changes to implement the Agreement. Enclosed are five executed Agreements.

Upon execution by all parties, please return a fully-executed Agreement to this office for inclusion into the official minutes.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe

Tammy Rowe, Deputy Clerk

/kp

Encls. (5)

cc: Finance
Budget



BOARD OF COUNTY COMMISSIONERS

Planning & Development Department
2725 Judge Fran Jamieson Way
Building A, Room 114
Viera, Florida 32940

Inter-Office Memo

TO: Tammy Rowe, Deputy Clerk

FROM: Stephen M. Swanke, Program Manager
Planning & Development Department *SMS*

DATE: December 18, 2018

SUBJECT: Execution of Developer's Agreement; Item H.3. on December 18, 2018

M35

Please execute five copies of the enclosed Developer's Agreement. Once the originals executed by the other parties have been received from the City of West Melbourne, I will return a fully executed document to you for inclusion in the Official Minutes. Thank You.

enclosure

Notarize, Seal

M35 H.3

12/18/18

mail to
Steve Swanke
52739

Coastal Commerce Transportation Impact Fee Reimbursement Extension. City Attorney Richardson stated that Melbourne 95 New Haven LLC had agreed to a transportation impact fee reimbursement agreement in 2008. At that time, an assessment on traffic impacts was determined for needed transportation improvements. The developer completed over \$2,000,000 of improvements at U.S. 192 and Coastal Commerce. Therefore, a portion of those improvements (\$1.9 million) were eligible for reimbursement. The agreement stipulated that over the next 10 years the impact fees paid by developers in the Coastal Commerce area would go to the developer. In the first two years, there were two projects and fees were reimbursed to the developer. Then, the County implemented an impact fee moratorium to spur development which lasted eight years. During that time, projects like Chuck E. Cheese's were developed that would have paid approximately \$832,000 in impact fees. Representatives from Melbourne 95 New Haven LLC approached the City and negotiated an agreement which extends the agreement for an additional five years with a maximum impact fee reimbursement of \$832,522.

Mark Watts, with the law firm of Cobb & Cole in Deland, Florida, thanked the City Attorney for the summary on the request and reiterated that the developer was asking for a way to recoup the dollars that were lost during the moratorium.

Deputy Mayor Bentley moved to approve the amendment extending the Developer's Agreement between the City, Brevard County, Melbourne 95 New Haven, LLC, and other property owners for an additional five years to allow the developer to recoup up to \$832,522 in transportation improvement costs through transportation impact fees generated by development on certain properties near the intersection of Interstate 95 and U.S. 192, including Coastal Commerce Center commercial subdivision. Council Member Dittmore seconded the motion, which passed with a 6-0 vote.

Sylvan Drive Septic-to-Sewer Interlocal Agreement with Brevard County and Professional Engineering Task Order for the Sylvan Estates Septic-to-Sewer Project. City Manager Morgan stated one of the goals of Council was to seek external funding to do a septic-to-sewer conversion in the Sylvan Estates neighborhood. The concept engineering had been completed and this resulted in partial grant funding of the proposed project. Council was now being asked to approve the task order for design of the project. Once the project is designed and permitted, staff will be able to compete for additional funding for construction from the St. Johns River Water Management District. He noted that possible St. Johns River grant funding can only be considered for construction that is fully designed.

Council Member Young moved to approve the Save Our Indian River Lagoon Project Cost-Sharing Funding Interlocal Agreement between Brevard County, Florida, and the City of West Melbourne, Florida, and authorize the City Manager to execute the professional engineering task order with Infrastructure Solution Services for the Sylvan

This instrument prepared by:

Mark A. Watts, Esq.
Cobb Cole, P.A.
231 N. Woodland Avenue
DeLand, FL 32720

SECOND AMENDMENT TO DEVELOPER'S AGREEMENT

This First Amendment to Developer's Agreement (the "First Amendment") amends that certain Developer's Agreement entered into on July 8, 2008 by and between the Board of County Commissioners of Brevard County, Florida, a political subdivision of the State of Florida, whose address is 2725 Judge Fran Jamieson Way, Viera, Florida 32940 (hereinafter referred to as "County"); Melbourne 95 New Haven, LLC, a North Carolina limited liability company, successor-in-interest to Sooner Investment Group, Inc., whose address is 1228 East Morehead Street, Suite 100, Charlotte, North Carolina, 28204 (hereinafter referred to as "M95"); Dike Ventures, LLC, a Florida limited liability company, successor-in-interest to Echo Trading Company and Floridana Incorporated, whose address is 4012 Snowy Egret Drive, Melbourne, FL 32904 (hereinafter referred to as "Dike"); Fulcher, DLG, LLC, a Florida limited liability company, successor-in-interest to James E. Fulcher and Barbara Fulcher, whose address is 350 South Ranger Boulevard, Winter Park, Florida 32792 (hereinafter referred to as "Fulcher DLG"), and the City of West Melbourne, Florida, a municipal corporation, whose address is 2385 Minton Road, West Melbourne, FL 32904 (hereinafter referred to as the "City") (collectively, all signatories to this First Amendment may be referred to as the "Parties"), is based on the following premises.

WHEREAS, the Parties entered into a Developer's Agreement dated July 8, 2008 and with an effective date of September 3, 2008 providing, among other things, for vesting of transportation concurrency and reimbursement of costs incurred in the form of impact fee reimbursements (the "Developer's Agreement"); and

WHEREAS, based on the cost reimbursement commitments made in the Developer's Agreement, M95 incurred substantial costs associated with the design, permitting and construction of certain elements of public transportation infrastructure identified in the Developer's Agreement that provide long term benefits to the City, County and members of the public; and

WHEREAS, under the terms of the Developer's Agreement, the Parties acknowledged that the public transportation improvements provided were of the same nature as public transportation infrastructure improvements that could otherwise be funded from transportation impact fee revenues.

WHEREAS, in recognition of the fact that the public transportation infrastructure improvements provided were eligible for funding from impact fee revenues, the Parties agreed that M95 would be eligible to receive reimbursement for the costs it incurred from the impact fee

payments generated by the development of properties identified in the Developer's Agreement for a ten (10) year period commencing on the date of the Developer's Agreement; and

WHEREAS, subsequent to the execution of the Developer's Agreement, the County enacted a moratorium on the payment of transportation impact fees in connection with the development of property in Brevard County from March, 2009 through January 1, 2017 (the "Impact Fee Moratorium"); and

WHEREAS, as a result of the Impact Fee Moratorium, transportation impact fees which would have been paid to M95 under the terms of the Developer's Agreement were not collected; and

WHEREAS, the City, County and M95 have agreed to this First Amendment as an equitable solution to provide M95 with an opportunity to receive the impact fee reimbursements contemplated by the Developer's Agreement from transportation impact fee revenues now being paid in connection with development activity in Brevard County; and

WHEREAS, the Parties hereby agree to amend the provisions of the Developer's Agreement that provided for a ten (10) year period from the effective date of the Developer's Agreement during which time M95 could receive impact fee reimbursement payments to account for the time period during which the Impact Fee Moratorium was in effect; and

WHEREAS, the Parties further wish to specify that all other terms and conditions of the Developer's Agreement shall remain unchanged, including specifically provisions dealing with the maximum amount of impact fee reimbursements which M95 may be entitled to collect.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the receipt and sufficiency of which are hereby acknowledged by all Parties, the Parties hereto agree as follows:

1. Recitals. The above recitals are true and correct and are hereby adopted in their entirety, and are fully incorporated into and made an integral part of this First Amendment as though fully set forth herein.
2. Amendments to Paragraph 11. The original terms of Paragraph 11 of the Developer's Agreement are hereby amended as follows (changes shown in ~~strikethrough~~/underline format):

11. Transportation Impact Fee Reimbursement. In consideration of the financial expenses incurred by M95 for completion of the Project, the County and City agree that M95 and its successors in interest shall enjoy the benefit of a transportation impact fee reimbursement in lieu of transportation impact fee credit for the reasonable expenses associated with completion of any and all Eligible Improvements associated with the Project, subject to the following limitations and conditions:

- (a) for the purposes of transportation impact fee reimbursement only, the term of this Agreement shall be ~~ten~~ fifteen (15) years from the effective date of this Agreement, or the date on which the total impact fee reimbursements associated with the Eligible Improvements to M95 equals the lesser of the full amount of the reimbursement determined pursuant to paragraph 12 below or Three Hundred Eighty-Six Thousand Two Hundred Thirty-Five and 32/100 Dollars (\$386,235.32), whichever occurs first;
- (b) the transportation impact fees used to reimburse M95 or its successors in interest shall be derived exclusively from land development activity commenced on the M95 Property, Dike Property, and Fulcher DLG Property as evidenced by issuance of building permits by the City during the term of this Agreement;
- (c) M95 recognizes that unless land development activity is commenced on the M95, Dike and/or Fulcher DLG Properties during the term of this Agreement, adequate and sufficient transportation impact fees may not be collected by the County, in which case the County shall have no further obligation to pay the full amount of said impact fee reimbursement to M95 or its successors in interest subsequent to the term of this Agreement;
- (d) the full amount of the transportation impact fee reimbursement shall be determined as set forth in paragraph 12 below; provided, however, in no event shall the total impact fee reimbursement to M95 or its successors in interest exceed \$386,235.32; and
- (e) any and all expenses associated with the completion of the site-related improvements shall be the sole responsibility of M95 and pursuant to the Ordinance shall not be reimbursable to M95 or its successors in interest by the County through the use of transportation impact fees.

Within forty five days following final certification of the actual total cost of the Eligible Improvements, the County shall initiate the reimbursement to M95 by payment of all transportation impact fees collected as a result of land development activity on the M95 Property, Dike and Fulcher DLG Property provided that the total amount of the payment shall not exceed the full amount of the reimbursement determined pursuant to paragraph 12 below or \$386,235.32, whichever is less. In the event that the amount of the initial reimbursement payment is less than the full amount of the transportation impact fee reimbursement due to M95 or its successors in interest, the County shall refund any subsequent transportation impact fee collections as a result of land development activity on the M95 Property, Dike Property and Fulcher DLG Property during the term of this Agreement on a quarterly basis until M95 has been paid the full amount of the

With a copy to:

Charles Ian Nash, Esquire
Nash & Kromash, LLP
440 South Babcock Street
Melbourne, FL 32901

5. Effective Date. The effective date of this Agreement shall be the date on which the last of the parties hereto executed this Agreement. The execution of this Agreement has been duly authorized by the appropriate body of each of the parties hereto. Each party has complied with all the applicable requirements of law and has full power and authority to comply with the terms and conditions of this Agreement. The venue of any litigation arising out of this Agreement shall be Brevard County, Florida. The exhibits attached hereto and incorporated by reference herein are by such attachment and incorporation made a part of this Agreement for all purposes. The fact that one of the parties to this Agreement may be deemed to have drafted or structured the provisions of this Agreement, whether in whole or in part, shall not be considered in construing or interpreting any particular provision hereof, whether in favor of or against such party. The terms and conditions of this Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement is solely for the benefit of the parties hereto and their respective successors and assigns, and no right or cause of action shall accrue upon or result by reason hereof to or for the benefit of any third party not a formal party hereto. Nothing in this Agreement, whether express or implied, is intended or shall be construed to confer upon any person other than the parties hereto any right, remedy, or claim under or by reason of this Agreement or any of the provisions hereof. This Agreement may not be changed, amended, or modified in any respect whatsoever, nor may any covenant, condition, agreement, requirement, provision, or obligation contained herein be waived, except in writing signed by all of the parties hereto.
6. Recording. This Agreement shall be recorded in the Public Records of Brevard County, Florida, at the expense of M95.
7. Attorney's Fees/Hold Harmless/Prevailing Party. Should any litigation arise between the parties, each party shall bear its own attorney's fees and costs. In the event of litigation or claims against the County or City from third parties arising from this agreement or the construction described herein, Developer shall indemnify and hold harmless the County or City for any such claims. Developer acknowledges specific consideration has been paid and other good and sufficient consideration has been received for this.
8. Captions. Headings of a particular paragraph of this agreement are inserted only for convenience and are in no way to be construed as part of the agreement or as a limitation of the scope of the paragraphs to which they refer.

9. Severability. If any part of this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way. If any party's joinder in or execution of this agreement is deemed invalid for any particular purpose, the sections for which the joinder or execution is valid shall remain in full force and effect.

IN WITNESS WHEREOF, this agreement has been fully executed on behalf of the County, M95, Dike, Fulcher DLG, and the City by their duly authorized representatives on the respective dates below.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

ATTEST:


Scott Ellis, Clerk

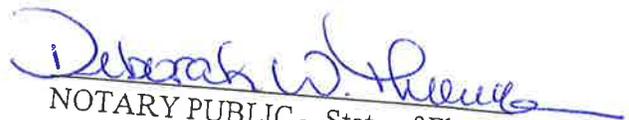
BREVARD COUNTY BOARD OF
COUNTY COMMISSIONERS


Kristine Isnardi, Chair

As approved by the Board of County
Commissioner on 12/18/18

STATE OF FLORIDA
COUNTY OF BREVARD

The foregoing instrument was acknowledged before this 18 day of Dec., 2018
by Kristine Isnardi, Board of County Commissioners of Brevard County, Florida, who
is personally known to me or produced _____ as identification and who
did (did not) take an oath.


NOTARY PUBLIC – State of Florida
My Commission expires:



WITNESSES:

MELBOURNE 95 NEW HAVEN, LLC
a North Carolina limited liability company

[Signature]

John Cheek
Printed Name

By: [Signature]
Robert C. Collett, Manager

(Seal)

[Signature]

Ken Short
Printed Name

STATE OF North Carolina
COUNTY OF BURKE

The foregoing instrument was acknowledged before me this 30th day of October, 2018, by ROBERT C. COLLETT, Manager of MELBOURNE 95 NEW HAVEN, LLC, a North Carolina limited liability company, on behalf of the company. He is personally known to me or has produced _____ as identification.



[Signature]
Notary Public, State of NC at Large
Printed Name: Shasta R Monn
Commission No. 200500700194
My Commission Expires: 5-25-20

WITNESSES:

DIKE VENTURES, LLC
a Florida limited liability company

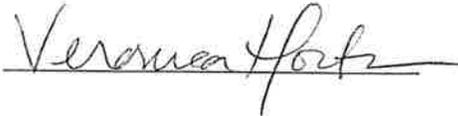
By: TPW VENTURES, LLLP, a
Florida Limited liability limited
partnership, its sole Member

By: TPW Managers, LLC, a
Florida limited liability
company, its sole General
Partner



Jan Kramreich
Printed Name

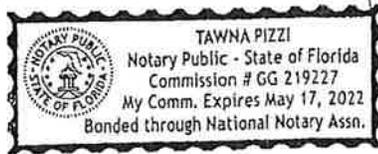
By: 
Name: Theodore P. Williams
Its: Manager



Veronica Horton
Printed Name

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this 12th day of October, 2018, by THEODORE P. WILLIAMS, Manager of TPW Managers, LLC, a Florida limited liability company, the sole general partner of TPW Ventures, LLLP, a Florida limited liability limited partnership, the sole member of Dike Ventures, LLC, a Florida limited liability company, on behalf of the company. He is personally known to me or has produced _____ as identification.




Notary Public, State of Florida
Printed Name: Tawna Pizzi
Commission No. GG 219227
My Commission Expires: May 17, 2022

WITNESSES:

Debra L. Gutierrez

Debra L. Gutierrez
Printed Name

[Signature]

Luis A. Lora
Printed Name

FULCHER DLG, LLC
a Florida limited liability company

By: James E. Fulcher
James E. Fulcher, Manager

(Seal)

STATE OF FLORIDA
COUNTY OF Orange

The foregoing instrument was acknowledged before me this 19 day of July, 2018, by JAMES E. FULCHER, Manager of FULCHER DLG, LLC, a Florida limited liability company, on behalf of the company. He is personally known to me or has produced Florida Driver License as identification.

[Signature]



Andriy Savchuk
State of Florida
My Commission Expires 11/24/2019
Commission No. FF 938912

Notary Public, State of Florida at Large
Printed Name: Andriy Savchuk
Commission No. FF 938912
My Commission Expires: November 24, 2019

ATTEST:

CITY OF WEST MELBOURNE, FLORIDA
a Florida municipal corporation

Cynthia Hanscom, Clerk

Hal Rose, Mayor

STATE OF FLORIDA
COUNTY OF BREVARD

The foregoing instrument was acknowledged before this _____ day of _____, 2018 by Hal Rose, Mayor of the City of West Melbourne, Florida, who is personally known to me or produced _____ as identification and who did (did not) take an oath.

NOTARY PUBLIC – State of Florida
My Commission expires:

Approved as to legal form and sufficiency:

Morris Richardson, City Attorney