



# Agenda Report

2725 Judge Fran Jamieson  
Way  
Viera, FL 32940

## Consent

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F6

9/17/2019

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### Subject:

Approval Re: RightofWay Use Agreement for West Viera with The Viera Company.

### Fiscal Impact:

None

### Dept/Office:

Public Works

### Requested Action:

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

### Summary Explanation and Background:

The Viera Company (TVC) desires to install and maintain improvements in the public rightsofway within West Viera Planned Unit Development, depicted on Attachment "A" of the RightofWay Use Agreement, which have been or will be dedicated to Brevard County. The improvements will consist of landscaping, signage, hardscape, irrigation, and traffic control devices, excluding traffic signals. The improvements shall be submitted by TVC to the County as rightofway permit applications, and issuance of the permits shall be subject to approval by the County.

The County may allow the use of the public rightofway 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 RightofWay Use Agreement for West Viera has been reviewed and approved by the County Attorney's Office and Risk Management.

The initial term of this Agreement shall be twenty years commencing with the date of execution by the Board and shall automatically renew annually unless terminated by either party with sixty days' written notice. Upon termination, TVC or the applicable assignee, at the request of the County, shall remove all improvements from the rightsofway or TVC or the applicable assignee 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.

### Clerk to the Board Instructions:

An original RightofWay Use Agreement (signed by TVC) will be provided to the Clerk to the Board prior to the meeting for execution by the Chair.

the applicable assignee 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.

**CLERK TO THE BOARD INSTRUCTIONS:**

An original Right-of-Way Use Agreement (signed by TVC) will be provided to the Clerk to the Board prior to the meeting for execution by the Chair.

**ATTACHMENTS:**

**Description**

- **West Viera Right-of-Way Use Agreement**

**BREVARD COUNTY  
BOARD OF COUNTY COMMISSIONERS**

# INITIAL CONTRACT REVIEW AND APPROVAL FORM

**SECTION I - GENERAL INFORMATION**

<b>1. Contractor:</b>	
<b>2. Fund/Account #:</b>	<b>3. Department Name:</b>
<b>4. Contract Description:</b>	
<b>5. Contract Monitor:</b>	<b>7. Contract Type:</b>
<b>6. Dept/Office Director:</b>	

**SECTION II - REVIEW AND APPROVAL TO ADVERTISE**

<u>COUNTY OFFICE</u>	<u>APPROVAL</u>		<u>SIGNATURE</u>
	<u>YES</u>	<u>NO</u>	
User Agency			_____
Risk Management			_____
County Attorney			_____

**SECTION III - REVIEW AND APPROVAL TO EXECUTE**

<u>COUNTY OFFICE</u>	<u>APPROVAL</u>		<u>SIGNATURE</u>
	<u>YES</u>	<u>NO</u>	
User Agency			_____
Risk Management			_____
County Attorney			_____

**SECTION IV - CONTRACTS MANAGEMENT DATABASE CHECKLIST**

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



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

September 18, 2019

MEMORANDUM

TO: Corrina Gumm, Interim Public Works Director

RE: Item F.6., Approval for Right-of-Way Use Agreement for West Viera with The Viera Company

The Board of County Commissioners, in regular session on September 17, 2019, approved and authorized the Chair to execute the Right-of-Way Use Agreement with The Viera Company to permit improvements to be installed and maintained in West Viera. Enclosed is a fully-executed Right-of-Way Use Agreement.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS  
SCOTT ELLIS, CLERK

*Tammy Rowe*

Tammy Rowe, Deputy Clerk

/kp

Encl. (1)

## **RIGHT-OF-WAY USE AGREEMENT (West Viera)**

This Right-Of-Way Use Agreement (the "Agreement"), made and entered into this 17 day of September, 2019 by and between 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 "The Viera Company") whose principal address is 7380 Murrell Road, Suite 201, Viera, Florida 32940.

### **RECITALS**

Whereas, the public rights-of-way within the West Viera Planned Unit Development (P.U.D.) of the "Viera" master planned community located in Brevard County, Florida, more particularly set forth in Attachment "A" attached hereto and incorporated herein by this reference have been or will be dedicated to Brevard County, Florida (collectively, the "Public Right-of-Way");

Whereas, The Viera Company 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 The Viera Company 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 (West Viera).
- b) Association: shall mean the homeowner's association to which The Viera Company elects to assign its rights, and delegates its duties and obligations to, under this Agreement

as permitted under Paragraph 13 of this Agreement, with the Association to be either the Community Association or the Neighborhood Association, as to be determined by The Viera Company in its sole and absolute discretion.

c) Community Association: shall mean Central Viera Community Association, Inc., a Florida not-for-profit corporation (the "Community Association"), as more particularly described in that certain Declaration of Covenants, Conditions, Easements, Reservations and Restrictions for Central Viera Community recorded in Official Records Book 3409, Page 624, of the Public Records of Brevard County, Florida, as may be amended from time to time.

d) County: shall mean Brevard County, Florida, a political subdivision of the State of Florida.

e) Designated Premises: shall mean that portion of the Public Right-of-Way more particularly described in Attachment "A" attached hereto and incorporated herein by this reference, where the Improvements will be installed and maintained, with the Designated Premises to be more particularly described in the Plans as approved by the County

f) Improvements: shall mean those certain improvements installed or to be installed by The Viera Company within the Designated Premises in accordance with the Plans and maintained by The Viera Company in accordance with the provisions of this Agreement as approved by the County pursuant to any Right-of-Way Permit issued by the County.

g) Neighborhood Association: shall mean a Florida not-for-profit corporation responsible for the operation of a community neighborhood subdivision as defined in Florida Statutes, Chapter 720 that is not the Community Association.

h) Plans: shall mean those certain plans for the construction and installation of Improvements which have been approved by The Viera Company and the County as part of a Right-of-Way Permit.

i) Prompt or Promptly: For purposes of paragraph 8, the term "promptly" shall mean no later than fourteen days after The Viera Company 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 The Viera Company's control); however, to the extent such maintenance, repairs, or replacements cannot reasonably be completed within fourteen days, the term "promptly" shall mean The Viera Company shall commence such maintenance, repairs, or replacements within such initial fourteen day period and shall diligently work to complete such maintenance, repairs, or replacements. For purposes of paragraph 10, the term "promptly" or "prompt" shall mean no later than fourteen days after The Viera Company receives actual notice of the existence of a hazardous condition, or a condition in need of maintenance as required hereunder, at the Designated Premises.

j) Public Right-of-Way: shall have the meaning given to such term in the first recital set forth above.

j) Public Right-of-Way: shall have the meaning given to such term in the first recital set forth above.

k) Right-of-Way Permit: shall mean the official written approval to begin construction or installation of Improvements according to the application, plans, specifications and conditions approved by the County.

l) The Viera Company: shall mean The Viera Company, a Florida corporation.

### **3. Construction and Maintenance of Property**

During the term of this Agreement, The Viera Company 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. Improvements shall be constructed and installed in such a manner so as to not cause damage to or interfere with any County improvements or facilities. Any such damage to County improvements or facilities shall be remedied immediately at no cost to the County.

### **4. Term**

The initial term of this Agreement shall be twenty years commencing with the date of the execution of this Agreement by the County and The Viera Company, and shall thereafter be automatically renewed annually unless terminated by either party, in accordance with paragraph 15 Termination herein.

### **5. Use of Designated Premises**

During the term of this Agreement, The Viera Company 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 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 The Viera Company shall be maintained by The Viera Company on the Designated Premises during the term of this Agreement in accordance with this Agreement and any County issued Right-of-Way Permit. 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 The Viera Company and that The Viera Company retains the right to remove such improvement within sixty 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 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, The Viera Company shall reimburse the County for the cost of removal within thirty days of receipt of an invoice for such removal expenses.

## **7. Utilities**

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

## **8. Repairs and Maintenance**

During the term of this Agreement, The Viera Company shall, at its own expense, maintain the Designated Premises and all Improvements on the Designated Premises in accordance with all applicable County and Florida Department of Transportation current maintenance and safety requirements and as updated 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 The Viera Company by written or electronic communication.

## **9. Illegal, Unlawful or Improper Use**

The Viera Company shall make no unlawful, improper, immoral or offensive use of the Designated Premises, nor will The Viera Company use the Designated Premises or allow use of the Designated Premises for any purposes other than that hereinabove set forth. Failure of The Viera Company 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, The Viera Company 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 The Viera Company or its employees or independent contractors. The Viera Company 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 The Viera Company'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 Viera Company shall include in any contract for work upon or involving the Designated Premises that the contractor shall indemnify and hold harmless the County from liabilities, damages, losses and costs, including but not limited to attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the contractor and persons employed or utilized by the contractor in the performance of the contract. The parties acknowledge specific consideration has been exchanged for the provision.

The Viera Company 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 The Viera Company 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 The Viera Company in an amount not less than one million dollars 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 days of the date of execution of this Agreement by The Viera Company and the County and annually upon insurance renewal. The County shall be named as an additional insured on the policy that The Viera Company secures and endorsed with a provision that entitles the County to thirty days written notice from the insurer of any change or cancellation in said policies.

The Viera Company shall also be required to include in any contract for work upon or involving the Designated Premises that the contractor is required to maintain, without cost or expense to the County, the following types of insurance. The policy limits required are to be considered minimum amounts:

- General Liability Insurance in an amount not less than one million dollars combined single limit for each occurrence and to include coverage for Explosion, Collapse, Underground (X.C.U.) hazards.
- Workers' Compensation Insurance (for statutory limits) as required by Florida Statutes, Chapter 440.

Nothing contained in this Agreement shall be construed as a waiver of County's right to the protections of and/or caps on damages afforded by sovereign immunity under Section 768.28, Florida Statutes, or other limitations imposed on the County's potential liability under state or federal law.

The Viera Company 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 The Viera Company or its employees or independent contractors shall be at the risk of The Viera Company, and the County shall not be liable for any damage or loss to any Improvements or personal property located thereon for any cause whatsoever. The Viera Company 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 The Viera Company'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 The Viera Company. In the event any pre-existing improvements causes damage to County property, to include but not limited to, sidewalk/roadway/curb and gutter/drainage inlets, The Viera Company will be responsible for prompt repair to such County property. If The Viera Company fails to promptly repair the

damage, The Viera Company will pay the County all costs incurred by the County to repair the damage.

### **11. Right of Entry**

It is expressly stipulated that this Agreement is a license for permissive use only and that the construction within and/or upon public property pursuant to this Agreement shall not operate to create or vest any property right in said holder. This Agreement does not relieve The Viera Company of local or other jurisdictional requirements. The County or its agents may enter in and on the Designated Premises at any time for any purpose, including 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**

The Viera Company 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, The Viera Company shall not assign this Agreement or any portion thereof of The Viera Company's rights, obligations, or duties hereunder to any party without the prior written consent of the County. However, the County and The Viera Company acknowledge that upon completing the initial installation of the Improvements upon a particular Public Right-of-Way, it is intended that all of the rights, obligations and duties of The Viera Company under this Agreement relating to the Improvements on that Public Right-of-Way will be assigned by The Viera Company to either the Community Association or a Neighborhood Association (with such assignee association being the "Association" for purposes of this Agreement as to the assigned rights and obligations), as to be determined by The Viera Company in its sole and absolute discretion, but subject to the County's written consent. Any such assignments shall be by a written instrument executed with the formality of a deed on behalf of The Viera Company assigning such rights, obligations and duties to the assignee, and on behalf of the assignee assuming such rights, obligations and duties. Such assignments shall also set forth the address of the assignee for purposes of receiving notices under this Agreement in accordance with paragraph 16 herein below. Upon the execution of such assignments by The Viera Company, the assignee, and the County, and its delivery to the County, the County agrees that The Viera Company shall be released from all obligations and duties hereunder as to the assigned obligations and duties and that the County shall thereafter look solely to the applicable assignee for the performance of such obligations and duties.

### **14. Independent Contractor**

The Viera Company shall perform the services under this Agreement as an independent contractor and nothing herein shall be construed to be inconsistent with this relationship or

## **15. Termination**

This Agreement may be terminated with or without cause by either party upon sixty days' written notice thereof to the other party; provided, however, that upon termination, The Viera Company or, if this Agreement or any portion thereof has been assigned as permitted hereunder, then the applicable assignees 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 with a copy to the Public Works Department, 2725 Judge Fran Jamieson Way, Bldg. A. 201, Viera, Florida 32940. Notice under this Agreement shall be given to The Viera Company at 7380 Murrell Road, Suite 201, Viera, Florida 32940 or by email to brenton.albertson@duda.com and vieralegal@duda.com.

In the event the County determines The Viera Company or any assignee has breached any term or provision of this Agreement, the County shall provide written notice of such breach to breaching party and the breaching party shall have thirty 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 day period, then the breaching party shall have such longer period to cure the breach as is reasonably necessary provided, however, that if the breaching party commences reasonable action to remedy the breach within such thirty 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, The Viera Company and any assignee shall respectively 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 The Viera Company or any assignee) shall be open to inspection during regular business hours by an authorized representative of the County upon written notice to The Viera Company or any assignee not less than five business days advance notice and shall be respectively retained by The Viera Company and each assignee for a period of five 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 The Viera Company or any assignee or provided to The Viera Company or any assignee under the terms of this Agreement, are public records and The Viera Company and any assignee agree to comply with any request for such public records or documents made in accordance with Section 119.07, Florida Statutes.

records and The Viera Company and any assignee agree 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 The Viera Company's or any assignee's respective obligations or duties under this Agreement shall not constitute a waiver of any other respective obligation or duty of The Viera Company or any assignee 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 The Viera Company as to the subject matter of this Agreement. This Agreement and any Attachments may only be amended, supplemented or canceled by a written instrument duly executed by the parties hereto, except as otherwise provided herein. This Agreement is solely for the benefit of the formal parties to this Agreement and no right or cause of action shall accrue by reason hereof to or for the benefit of any third party not a formal party hereto.

**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.)

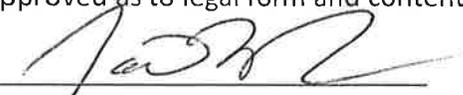
Done, ordered and adopted in Regular Session this 17 day of Sept., 2019.

Attest:

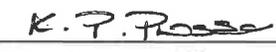
Board of County Commissioners  
of Brevard County, Florida

  
\_\_\_\_\_  
Scott Ellis, Clerk

  
\_\_\_\_\_  
Kristine Isnardi, Chair  
As approved by the Board on 9/17/19

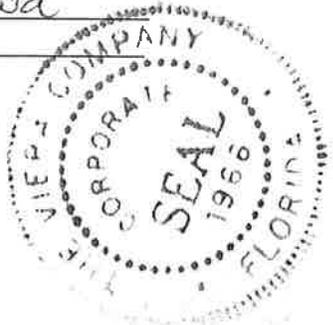
Approved as to legal form and content:  
  
\_\_\_\_\_  
Assistant County Attorney

The Viera Company, a Florida corporation

  
\_\_\_\_\_  
Printed name: KAREN P. PROSSER

  
\_\_\_\_\_  
Name: Todd J. Pokrywa  
Title: President

  
\_\_\_\_\_  
Printed name: Mary Ellen M-Kibben



STATE OF FLORIDA }  
                                  }  
COUNTY OF BREVARD }

The foregoing instrument was acknowledged before me this 12<sup>th</sup> day of Sept, 2019,  
by Todd J. Pokrywa, as President of The Viera  
Company, a Florida corporation, on behalf of the corporation, who is personally known to me.

  
\_\_\_\_\_  
Notary Public  
Mary Ellen M-Kibben  
\_\_\_\_\_  
Printed Name



