

REQUEST FOR CITY COUNCIL CONSIDERATION

Meeting Date: September 19, 2022

Agenda Item: 7B	Prepared by: Chris Noury, City Attorney
Agenda Section: New Business: Second Public Hearing	Date: September 7, 2022
Subject: Second Public Hearing regarding the Development Agreement (DA) for the Building Materials and Assembly site (a.k.a., the “Truss” site)	Division: Legal

Main elements of the Development Agreement regarding the Truss site:

1. **Term:** The Parkway Group Planned Development District (PDD) Development Agreement was executed on January 9, 2009 and expires on January 9, 2029.
2. **Improvements to Water Tower Road:** The Developer shall widen the existing public right-of-way of Water Tower Road, as depicted in Exhibit C, to accommodate turning movements, concurrently with the site work improvements for the first building within the amended Site Plan Parcel.

The improvements will be complete or bonded no later than the issuance of a CO for the first building within the Amended Site Plan Parcel.
3. **Financial Contribution to Comply with the Complete Streets portion of the City’s LDRs:** The Developer shall pay \$50,000, in two separate and equal installments, the first of which is due on or before the issuance of the building permit for the first building within the Amended Site Plan Parcel. The second installment shall be due before the issuance of the CO for the first building within the Amended Site Plan Parcel.
4. **Open Space:** The project shall contain not less than 20% open space which shall include protected wetlands, required buffers, ponds, green space or other undeveloped acreage within the project.
5. **Maintenance and Mowing:** The Developer will mow the undeveloped property no less than eight times a year until the project is fully developed. Mowing shall occur between March 1 and November 30 of each year. Removal of any fallen trees on the undeveloped property will occur during the above referenced schedule.
6. **Jurisdictional and Non-jurisdictional Waters:** Jurisdictional and non-jurisdictional waters within the project which are not mitigated, filled, or otherwise modified shall be surrounded by a water quality buffer of not less than 20’ in width within which no building shall occur.
7. **Prohibition Against Conservation Easements:** The Developer agrees not to subject the property to a conservation easement or other restrictive covenant regarding any portion of the property shown as single homes or amenities on the approved concept plan.

Recommended Action:

Allow comments from the public regarding the proposed Development Agreement

Reviewed by City Manager

Reviewed by City Attorney

Council Action:

Motion By _____ 2nd By _____ To _____

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF HORRY)
(Building Materials Distribution and Assembly)

THIS SEPARATE AND INDEPENDENT AMENDMENT TO THE MASTER DEVELOPMENT AGREEMENT (this “**Agreement**”) entered into by and among the **CITY OF NORTH MYRTLE BEACH, SOUTH CAROLINA** (the “**City**”), a South Carolina municipal corporation, **HENRY ROAD WEST, LLC**, a South Carolina limited liability company (“**Henry Road**”) and **INNOVATIVE CONSTRUCTION GROUP** (“**Developer**”).

RECITALS:

WHEREAS, the City, Henry Road, Reach 9, LLC, a South Carolina limited liability company (“**Reach 9**”), Apache Properties, LLC, a South Carolina limited liability company (“Apache”), RW Hills, LLC, a South Carolina limited liability company (“**RW**”), CW Hills, LLC, a South Carolina limited liability company (“**CW**”), JW Holiday Family, LLC, a South Carolina limited liability company (“**Holiday**”), Myrtle Beach National Company (“**MB National**”), Seashore Farms, LLC, a South Carolina limited liability company (“**Seashore**”) and LL Chestnut, LLC, a purported South Carolina limited liability company (“**LL Chestnut**”) entered into that certain Master Development Agreement, dated January 9, 2009, recorded January 20, 2009 in Deed Book 3382 at Page 3357, and re-recorded in Deed Book 3383 at Page 1662 to include signature pages, all in the public records of Horry County, South Carolina (the “***Master Development Agreement***”); and

WHEREAS, the Master Development Agreement as amended, by the City and the then current owners of all of the Land which is subject to the Master Development Agreement, by that certain First Amendment to Master Development Agreement, dated March 23, 2020 and effective December 16, 2019, recorded March 24, 2020 in Deed Book 4298 at Page 2823 to include all signature pages, in the public records of Horry County, South Carolina (the “**First Master Amendment**”), which First Master Amendment provided, among other things, for the negotiation by and between the City and any of the then current Landowners, of amendments to certain public benefits agreed to by the City and the Landowners, at the time of any proposed amendment to the Master Site Plan, or the Parkway Group Planned Development District (the “**PDD**”), by and individual Landowner, which amendments would be separate and independent of any other amendments, and applicable only to the portions of the Land owned by the Landowner, or its successors and assigns, proposing such amendment to the Master Site Plan or the PDD, which separate and independent amendment would be evidenced by a written amendment; and

WHEREAS, the Master Development Agreement and the First Master Amendment are hereinafter sometimes collectively referred to as the “*Development Agreement*”; and

WHEREAS, as a result of a scrivener's error, LL Chestnut, which was never organized as a South Carolina limited liability company, and did not appear in the chain of title for any of the properties subject to the Master Development Agreement, should have instead been referred to as J.B.

Chestnut Limited Liability Company, a South Carolina limited liability company ("**JB Chestnut**"), which was the owner of record of the tract referred to in the Master Development Agreement as the "LL Chestnut Tract"; and

WHEREAS, the real property owned by Henry Road at the time of the Master Development Agreement and the First Master Amendment is herein referred to as the "**Henry Road Tract**"; and

WHEREAS, Henry Road has proposed an amendment to the Master Site Plan and the PDD (collectively the "**PDD Amendment**"), for a portion of the real property owned by Henry Road, West of S.C. Highway 31, within the PDD, an unrecorded map of which is attached hereto as **Exhibit "A"** (the "**Amended Site Plan Parcel**") which PDD Amendment is approved by the City simultaneously with the approval of this Agreement; and

WHEREAS, any portion of the Henry Road Tract which is not included in the Amended Site Plan Parcel shall remain subject to the terms and provisions set forth in the Master Development Agreement, as amended by the First Master Amendment, shall not be subject to this Agreement, without further amendment except by one or more separate and independent amendments for the portions of the Henry Road Tract which are not included in the Amended Site Plan Parcel; and

WHEREAS, the Parties now desire to enter into a separate and independent amendment to the Development Agreement, in order to specify certain fees and obligations imposed by the City pursuant to the Development Agreement, as amended, which would only be applicable to the Amendment Site Plan Parcel portion of the PDD, in the manner set forth below.

NOW, THEREFORE, for and in consideration of the covenants and conditions herein, and the sum of Five and No/100 (\$5.00) Dollars, to each party by the other paid, the parties agree as follows:

1. **Term**. The Development Agreement, unless deemed extended by executive order of the Governor of South Carolina, was executed on January 9, 2009, and expires on January 9, 2029 (the "**Term**"). For purposes of this Agreement, the "**Effective Date**" shall be the date on which the last of the parties has executed this Agreement.
2. **Continuing Encumbrance**. Despite any change in ownership and/or the configuration and boundaries of the various tracts subjected to the Development Agreement, as amended, and the Exhibits to the Development Agreement, previously subjected to the Development Agreement, as amended, by this Agreement, except as hereby expressly amended or supplemented, shall remain in full force and effect. Notwithstanding any change in ownership and/or the configuration or boundaries of the Henry Road Tract and the Apache Tract subjected to the Development Agreement, as amended, and the Exhibits attached to the Development Agreement, including the obligations regarding the Traffic Circle, which was dedicated as a public road as of August 2021, whether previously and currently encumbered by the Development Agreement, as amended by this Agreement, except as hereby expressly amended or supplemented, all terms and provisions of the Development Agreement relating to the Henry Road Tract, including any portion of the Henry Road Tract which is included in the Amended Site Plan Parcel, shall remain in full force and effect (the "**Continuing Encumbrance**").

2. **Amendment to Section 2.13.** In accordance with the Continuing Encumbrance provision contained herein and solely with respect to the Amended Site Plan Parcel, Section 2.13 of the Development Agreement, as amended, is further amended to acknowledge the Traffic Circle, as defined in Section 2.13, has been dedicated as a public road as of August 2021.

3. **Wetland/Wetland Buffer Maintenance.** In accordance with the Continuing Encumbrance provision contained herein, Henry Road acknowledges and agrees that the Amended Site Plan Parcel includes those areas identified by the United States Army Corps of Engineers (“**Corps**”) and/or the South Carolina Department of Health and Environmental Control (“**DHEC**”) or any other applicable governmental authority as wetland areas subject to the regulation of the Corps and/or DHEC (“**Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States**”) which are located adjacent to Water Tower Road. Unless and until such Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States are filled or otherwise mitigated to no longer remain classified as Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States, Henry Road agrees that all on-site Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States not filled or modified pursuant to permits issued by the governmental entities having jurisdiction over such on-site Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States, shall be surrounded with a minimum 20-foot wide water quality buffer within which no building shall occur. These buffer areas and the Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States they surround shall be maintained in common ownership, shall remain natural except to the extent vegetation is mulched to maintain required sight triangle distances along Water Tower Road.

4. **Party Obligations Run with the Land/Cross Default by Owner of Multiple Parcels.** For purposes of this Agreement, the obligations hereunder shall run with the land, such that the owner of the portion of the real property which is subject to any particularly provisions hereof shall be obligated to fulfill such obligations. Further to the extent that any owner of real property which is subject to the terms and conditions of this Agreement owns more than One (1) parcel of real property which is subject to the terms and conditions of this Agreement, a default under the obligations with regards to any one of such parcels of real property shall also constitute a default with regards to any of the other parcels of real property also owned by such owner. Provided, however, that no owner of any portion of the real property which is subject to this Agreement shall be responsible for the obligations of any other owner, or accountable to the City or the other owners for the obligations of any other owner.

5. **Improvements to Water Tower Road.** In accordance with the Continuing Encumbrance provision contained herein, Henry Road, or its successor in title to the Amended Site Plan Parcel only, as a condition to the improvement of the Amended Site Plan Parcel, shall, at the expense of the owner of the Amended Site Plan Parcel:

(A) As an obligation, widen the paved section of Water Tower Road, within the existing public right-of-way of Water Tower Road, to accommodate a turning movement, concurrently with the site work improvements for the first building within the Amended Site Plan Parcel, such improvements being either (i) complete; or (ii) bonded in accordance with the City’s typical roadway improvement bonding standards, at or prior to the issuance of a certificate of occupancy for the first building within the Amended Site Plan Parcel. A map of such improvements

to Water Tower Road is attached hereto as **Exhibit “C”** (the “**Road Improvement Exhibit**”), which road improvements shall be at the sole cost and expense of Developer.

(B) The City intends to improve Water Tower Road to comply with the Complete Streets portion of the City’s land development regulations, provided however, that as of the date of this Amendment, the existing roadway section of Water Tower Road does not allow for installation of sidewalks or street trees, and therefore, in lieu of sidewalks and street trees being installed during the development of the Amended Site Plat Parcel, the owner of the Amended Site Plan Parcel, as an obligation, will contribute to the City, based upon an engineer’s estimate approved by the City, an amount equal to Fifty Thousand and No/100 (\$50,000.00) Dollars, in two separate and equal installments, the first of such installments due and payable on or before the issuance of the building permit of the first building within the Amended Site Plan Parcel, and the second of such installments due and payable on or before the issuance of the certificate of occupancy for the first building within the Amendment Site Plan Parcel, to be used by the City for improvement of Water Tower Road.

(C) As an obligation, Developer shall install or cause to be installed, streetlights within the Project, together with street lights along the boundary of the Project with Water Tower Road, in accordance with the ordinances of the City (the “**Code of Ordinances**”). To the extent such street lights are located within the public right-of-way of Water Tower Road, following the installation of such street lights at the expense of Developer, the City shall thereafter contribute toward the monthly cost for each streetlight in an amount equal to the costs for the base street light fixture offered by the utility provider. The remaining monthly cost for each streetlight, if any, including additional charges associated with an enhancement street light fixture, if any, shall be borne by the Developer and/or a property owners association (the “**Owners Association**”) established by Developer for the Amended Site Plan Parcel.

6. **Other Obligations, Fees and Public Benefits.** Developer agrees that the following shall constitute additional obligations, fees and public benefits to be provided by the Developer for the Amended Site Plan Parcel:

(A) **Conservation Easement Restriction.** As a public benefit, Developer specifically covenants and agrees not to subject the Amended Site Plan Parcel to a conservation easement or other restrictive covenant, whereby any portion of the Amended Site Plan Parcel shown as single family homes or amenities on the approved Master Site Plan is restricted for future development of such portion of the Amended Site Plan Parcel, the same shall also constitute a Developer Default hereunder, provided that, for purposes of this Agreement any conveyance to the Owners Association shall not be deemed such an easement or restriction, and shall not constitute a Developer Default.

(B) **Mowing and Maintenance.** As an obligation, Developer must maintain the Amended Site Plan Parcel consistent with the Code of Ordinances of the City, provided that, at a minimum, Developer will mow the undeveloped Amended Site Plan Parcel no less than eight times per year until the Project is fully developed. The mowing shall occur in the periods between March 1 and November 30 of each calendar year. In addition, until the Project is fully developed, the Developer shall remove any fallen trees on the Amended Site Plan Parcel, such tree removal to occur during the same periods set out for mowing above. The Developer shall be given a

reasonable period of time to be determined by the City Manager or his designee, to mow the Amended Site Plan Parcel and remove fallen trees on the Amended Site Plan Parcel in the event of a hurricane, rain event or other force majeure that prevents the Developer from complying with the mowing/maintenance schedule referenced above.

If the Developer fails to comply with the scheduled time frames for mowing and removal of fallen trees, as determined by the City Manager or his designee, then the City shall have the right to enter the Property for the purpose of mowing and removing any fallen trees, and the Developer shall reimburse the City for the costs of such mowing and/or tree removal in an amount equal to One Hundred (100%) percent of such the costs incurred by the City for mowing and/or tree removal. In the event Developer should fail to reimburse the City within Thirty (30) days of the date an invoice is delivery by the City to the Developer, the City may place a lien upon the Amended Site Plan Parcel, which lien shall be enforceable in the same manner as a property tax lien, which may only be satisfied by payment thereof.

(C) **Development Regulations.** As an obligation, the Amended Site Plan Parcel shall be developed in accordance with this Agreement, the Code of Ordinances and other applicable land development regulations required by the City, State and/or Federal Government. The City shall, throughout the Term, maintain or cause to be maintained a procedure for processing of reviews as contemplated by this Agreement and the Code of Ordinances. The City shall review applications for development approval based on the development standards adopted as part of the Code of Ordinances, unless such standards are superseded by the terms of this Agreement, in which case the terms of this Agreement shall govern.

(D) **Assignment of Development Rights.** Developer shall be entitled to assign and delegate the development rights and obligations set forth in this Agreement to a subsequent purchaser of all or any portion of the Amended Site Plan Parcel with the consent of the City, provided such consent shall not be unreasonably withheld or delayed. Upon the assignment or transfer by Developer of the development rights and obligations under this Agreement, then the assigning Developer shall not have any responsibility or liability under this Agreement.

(E) **Development Schedule.** As an obligation, the Amended Site Plan Parcel shall be developed in accordance with the following development schedule (the “**Development Schedule**”): development of the Amended Site Plan Parcel shall commence upon the issuance of all permits and approvals, which issuance is anticipated to be complete within Two (2) years of the date of this Agreement, and development of the Amended Site Plan Parcel is anticipated to be complete within Five (5) years of the date of this Agreement.

(F) **Code of Ordinances.** As an obligation, Development of the Amended Site Plan Parcel shall be determined in accordance with the Code of Ordinances, as the same may be amended from time to time, pursuant to this Agreement, including, but not limited to the PDD, as the same may be amended.

(G) **Stormwater and Drainage.** As an obligation, all stormwater runoff, drainage, retention and treatment improvements within the Amended Site Plan Parcel shall be designated in accordance with the Code of Ordinances. All stormwater runoff and drainage system structural improvements, including culverts and piped infrastructure, will be constructed by the

Developer and dedicated to the City. Upon final inspection and acceptance by the City, the Developer shall provide a one-year warranty period for all drainage system structural improvements within the Amended Site Plan Parcel. Retention ponds, ditches and other stormwater retention and treatment areas will be constructed and maintained by the Developer and/or an Owners Association, as appropriate, and will not be accepted or maintained by the City.

(H) **Solid Waste and Recycling.** The City shall provide solid waste and recycling collection services to the Amended Site Plan Parcel on the same basis as is provided to other residents and businesses within the City. Payment for such services to the City by Developer, an Owners Association or each individual purchaser or owner of any portion of the Amended Site Plan Parcel is required in return for such service for each owner of any portion of the Amended Site Plan Parcel, and the City reserves the right to terminate or discontinue such service(s) to any owner of any portion of the Amended Site Plan Parcel until such payment(s) have been made.

(I) **Police Protection.** The City shall provide police protection services to the Amended Site Plan Parcel on the same basis as provided to other residents and businesses within the City.

(J) **Fire Protection.** The City shall provide fire services to the Amended Site Plan Parcel on the same basis as is provided to other residents and businesses within the City.

(K) **Emergency Medical Services.** The City shall provide emergency medical services to the Amended Site Plan Parcel on the same basis as is provided to other residents and businesses within the City.

(L) **No Education Services.** The City neither provides nor is authorized by law to provide public education facilities or services. Such facilities and services are now provided by the Horry County School District. The person or entity, whether

(M) **Open Space Requirement.** As a public benefit, Developer agrees that the development of the Amended Site Plan Parcel shall incorporate not less than Twenty (20%) percent open space, which for purposes of this Agreement shall include protected wetlands, required buffers, ponds, lakes, open spaces, green space or other undeveloped acreage which is within the Amended Site Plan Parcel.

(N) **Minimum Rental Period.** As a public benefit, Developer, or the then current owner of the Amended Site Plan Parcel agree that the minimum term of any rental agreement for Residential Units constructed upon the Amended Site Plan Parcel shall be Six (6) months, provided that following any such initial Six (6) month period, residential leases may be extended for periods of less than Six (6) months to the same tenant, provided such extensions are for successive periods of not less than Thirty (30) days. No sub-lease or assignment shall be permitted which would result in a party occupying a Residential Unit for a period of less than Six (6) months, the express intent of this provision being to prohibit short-term and/or overnight rentals.

(O) **Easements.** As an obligation, Developer shall be responsible for obtaining, at Developer's cost, all easement, access rights and other instruments that will enable the Developer to tie into current or future water and sewer infrastructure on adjacent properties.

(P) **Ponds and Lakes.** As an obligation, Developer shall install pond(s) or lake(s) as reflected on the approved site plan for the Amended Site Plan Parcel. The City agrees to cooperate with the Developer in the permitting process for such pond(s) and lake(s), it being understood that the City will not accept maintenance responsibility or any other liability for such pond(s) and lake(s), and that such pond(s) and lake(s) shall either be maintained by Developer, or conveyed to an Owners Association for on-going maintenance following completion of the development on the Amended Site Plan Parcel.

(Q) **Recording.** Pursuant to Title 6, Chapter 31, Section 120 of the Code of Laws for the State of South Carolina, this Agreement shall be recorded in the public records of Horry County, South Carolina, on or before the date which is Fourteen (14) days following the date on which the City enters into this Agreement. The burdens of the development agreement are binding upon, and benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

7. **Master Site Plan.** The master site plan for the Amended Site Plan Parcel, which is the same site plan incorporated in the PDD, as amended, is attached hereto as **Exhibit “B”** (the “**Master Site Plan**”).

8. **Independent Amendment.** In accordance with the Continuing Encumbrance provision contained herein, this Separate and Independent Amendment to Master Development Agreement is intended to be applicable only to the Amended Site Plan Parcel, which is a portion of the Henry Road Tract, and shall not be deemed applicable to any other portion of the Land which is subject to the Development Agreement, as amended, or to any other Landowner within the PDD, who is not a successor or assign of Henry Road.

9. **Restrictive Covenants.** The obligations and public benefits agreed to and accepted by Developer set forth in this Agreement (collectively the “**Restrictive Covenants**”) shall survive and continue in full force and effect without regard to the termination of this Agreement for a period ending on the earlier of (i) Fifty (50) years after the Term of this Agreement; or (ii) such time as the parties hereto, or their respective successors and assigns, have recorded a fully executed and effective termination of the Restrictive Covenants in the Office of the Register of Deeds for Horry County. Developer further covenants and agrees that, to the extent the Amended Site Plan Parcel is encumbered by covenants, conditions and restrictions (the “**CCRs**”), whether administered by an Owners Association or not, such CCRs shall include the Restrictive Covenants, the effect of which shall be to extend the term of the Restrictive Covenants, the same thereafter running with the Amended Site Plan Parcel as continuing obligations, public benefits and restrictions.

10. **No Further Amendment.** In accordance with the Continuing Encumbrance provision contained herein, except as specifically amended by this Separate and Independent Amendment to Master Development Agreement all of the terms and conditions of the Development Agreement as amended, shall remain in full force, unless and until amended in a writing signed by all of the parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement the date below their respective signatures.

[Individual signature pages follow for each of the Parties]

[Signature page to Separate and Independent Amendment to
Master Development Agreement for City of North Myrtle Beach]

CITY OF NORTH MYRTLE BEACH

Witness:

By: _____
Name: _____
Title: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGEMENT

PERSONALLY appeared before me the undersigned witness who made oath that (s)he saw the within named CITY OF NORTH MYRTLE BEACH by _____, its _____, sign and seal and as both his act and deed deliver the within written Agreement and that (s)he with the other witness whose signature appears above witnessed the execution thereof.

Witness #1

Sworn to before me this ____ day of _____, 2022

Notary Public for _____
My Commission Expires: _____

[Signature page to Separate and Independent Amendment to
Master Development Agreement for Henry Road West, LLC]

HENRY ROAD WEST, LLC, a South
Carolina limited liability company

Witness:

By: _____
Name: _____
Title: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ACKNOWLEDGEMENT

PERSONALLY appeared before me the undersigned witness who made oath that (s)he saw
the within named HENRY ROAD WEST, LLC by _____, its
_____, sign and seal and as both his act and deed deliver the
within written Agreement and that (s)he with the other witness whose signature appears above
witnessed the execution thereof.

Witness #1

Sworn to before me this ____ day of
_____, 2022

Notary Public for _____
My Commission Expires: _____

[Signature page to Separate and Independent Amendment to
Master Development Agreement for Innovative Construction Group]

**INNOVATIVE CONSTRUCTION
GROUP**

Witness:

By: _____
Name: _____
Title: _____

STATE OF _____)
COUNTY OF _____)

ACKNOWLEDGEMENT

PERSONALLY appeared before me the undersigned witness who made oath that (s)he saw the within named INNOVATIVE CONSTRUCTION GROUP by _____, its _____, sign and seal and as both his act and deed deliver the within written Agreement and that (s)he with the other witness whose signature appears above witnessed the execution thereof.

Witness #1

Sworn to before me this ____ day of _____, 2022

Notary Public for _____
My Commission Expires: _____

Map of Amended Site Plan Parcel (Portion of the Henry Road Tract)

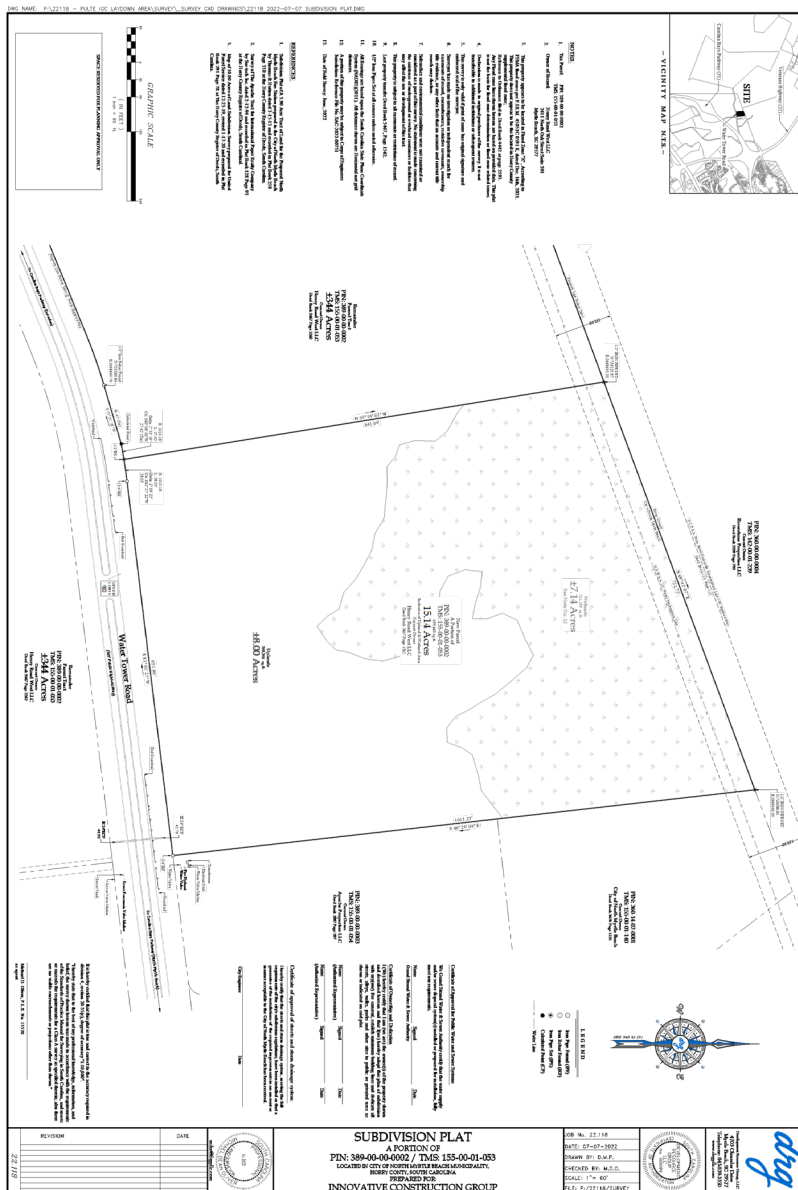


EXHIBIT "B"

Master Site Plan

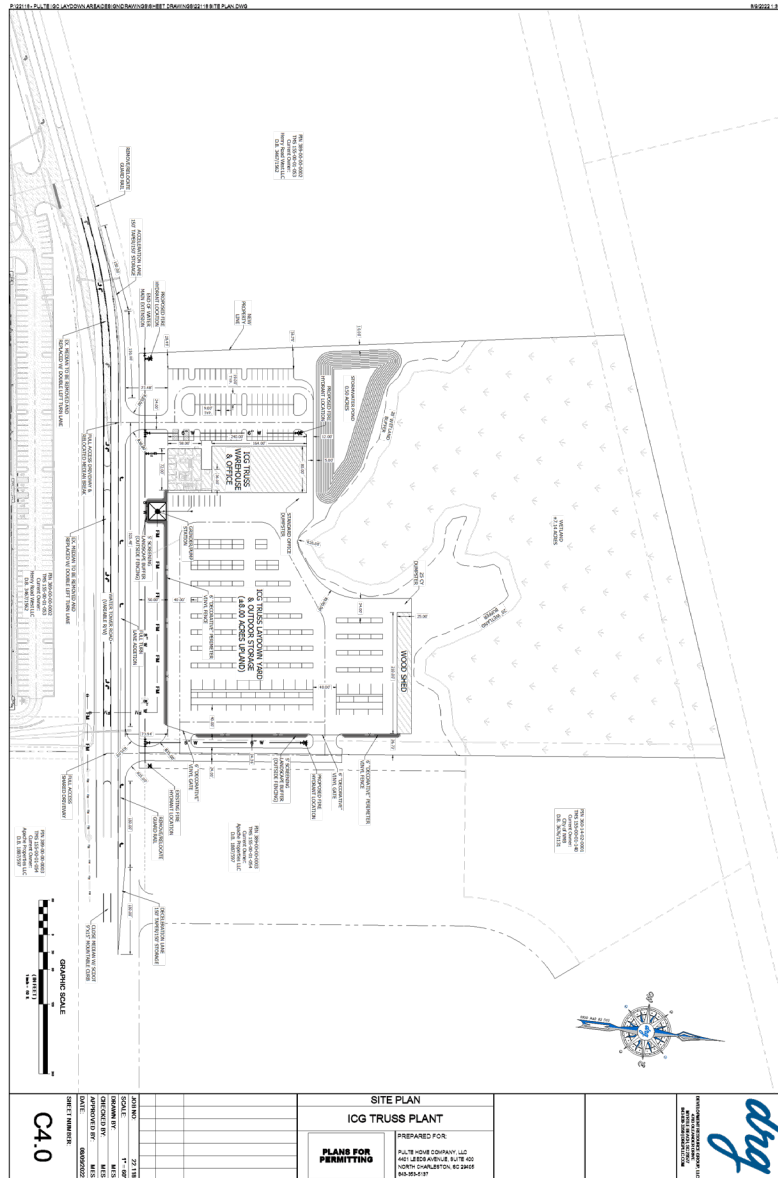


EXHIBIT "C"

Road Improvement Exhibit

