

REQUEST FOR CITY COUNCIL CONSIDERATION

Meeting Date: October 17, 2022

Agenda Item: 7C	Prepared By: Chris Noury, City Attorney
Agenda Section: New Business: Second Public Hearing	Date: October 7, 2022
Subject: Regarding the Separate and Independent Amendment to the Master Development Agreement for the area of the Parkway Group Planned Development District (PDD) known as the Apache Lakes Townhomes	Division: Legal

The main provisions of the Amendment to the Master Development Agreement regarding Apache Lakes are as follows:

1. **Term:** The Parkway PDD Development Agreement was executed on January 9, 2009 and expires on January 9, 2029.
2. **Enhancement Fees:**
Beachfront Parking Enhancement Fee: \$1,100 per residential unit (due at issuance of building permit for each RDU).
Park Enhancement Fee: \$300 per RDU (due at issuance of building permit for each RDU).
Public Safety Fee: \$3,600 per RDU (due at issuance of building permit for each RDU).
\$5,000 total for each RDU.

The above referenced fees will be subject to an annual increase beginning January 1, 2024 per the formula contained in section 6 of the document.

3. **Improvements to Water Tower Road:** The developer shall widen the paved section of WTR within the existing public ROW for WTR to accommodate turning movements concurrently with the sitework improvements for the amended site plan parcel. The improvements will be either complete or bonded at or before the issuance of a building permit for the 50th residential unit within the amended site plan parcel.

In addition, the Developer will also pay \$90,000 in two separate installments in lieu of installing sidewalks and street trees (1st installment due on or before the issuance of 1st building permit for a residential unit within the amended site plan parcel and the 2nd installment due on or before the issuance of the 50th building permit for a residential unit 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. **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.
- 7. **Prohibition Against Short-Term Rentals:** No leases less than 6 months for each RDU. Leases can be extended to the same tenant for less than 6 months, provided such extensions are for successive periods of not less than 30 days.

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)

**SEPARATE AND INDEPENDENT
AMENDMENT TO THE MASTER
DEVELOPMENT AGREEMENT
(Apache Lakes Townhomes)**

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 **DELTA INVESTMENT ASSOCIATES, LLC**, a South Carolina limited liability company (“Delta”) and **TRASK LAND COMPANY, INC.**, a North Carolina corporation (“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 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, 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; 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, Delta is the owner of real property within the PDD (collectively the "**Delta Tract**"); and

WHEREAS, Delta, acting together with Developer, 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 Delta, West of S.C. Highway 31, within the PDD, consisting of One (1) separate parcel, 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 Delta 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 Delta 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, and real property 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 (the "**Continuing Encumbrance**").

3. **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.

4. **Wetland/Wetland Buffer Maintenance.** In accordance with the Continuing Encumbrance provision contained herein, Delta 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, Delta agrees that all 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 in accordance with applicable permits.

5. **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.

6. **Improvements to Water Tower Road.** In accordance with the Continuing Encumbrance provision contained herein, Delta, 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) 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 Amended Site Plan Parcel, such improvements being either (i) complete; or (ii) bonded in accordance with the City’s typical roadway improvement bonding standards, as a part of the subdivision plat approval process, and in accordance with the subdivision regulations of the City. . For purposes of this Agreement, a “**Residential Unit**” shall mean an attached or detached single family home, townhome, multi-family unit or any other improvement for occupancy as a residential home. 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, will contribute to the City, based upon an engineer’s estimate approved by the City, an amount equal to Ninety Thousand and No/100 (\$90,000.00) 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 Residential Unit within the Amended Site Plan Parcel, and the second of such installments due and payable on or before the issuance of the building permit for the Fiftieth (50th) Residential Unit within the Amendment Site Plan Parcel, to be used by the City for improvement of Water Tower Road.

(C) Developer shall install or cause to be installed, street lights within the Project, together with street lights along the boundary of the Project with Water Tower Road, in accordance with 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 street light, including additional charges associated with an enhancement street light fixture within the public right-of-way of Water Tower Road, if any, shall be borne by the Developer and/or Owners Association established by Developer for the Amended Site Plan Parcel.

7. **Other Obligations, Fees and Public Benefits.** Delta and Developer, and their respective successors and assigns agree that the then current owner of the Amended Site Plan Parcel, or any portion thereof, shall pay to the City, the enhancement fees, as set forth below (collectively the “**Enhancement Fees**”). Developer further agrees that the Enhancement Fees shall be subject to annual increase, beginning January 1, 2024, in an amount equal to the lesser of (i) the increase in the Consumer Price Index, published by the U.S. Bureau of Labor Statistics (“**CPI**”) between the beginning and end of the most recent calendar year; or (ii) Two (2%) percent per annum, which increase is intended to ensure that the Enhancement Fees continue to reflect the City’s on-going increases in the costs of services provided. Developer will provide the Enhancement Fees, together with any additional public benefits, as follows:

(A) **Park Enhancement Fee.** As a public benefit, for the Amended Site Plan Parcel, the Developer, or the then current owner, shall pay to the City, as to each Residential Unit within the Amended Site Plan Parcel, a park enhancement fee (the “**Park Enhancement Fee**”) in an amount equal to \$300.00 for each Residential Unit, paid at the time of issuance of each respective building permit.

(B) **Beachfront Parking Enhancement Fee.** As a public benefit, for the Amended Site Plan Parcel, the Developer, or the then current owner, shall pay to the City, as to each Residential Unit within the Amended Site Plan Parcel, a beach parking enhancement fee (the

“**Beachfront Parking Enhancement Fee**”) in an amount equal to \$1,100.00 for each Residential Unit, paid at the time of issuance of each respective building permit.

(C) **Public Safety Enhancement Fee.** As a public benefit, for the Amended Site Plan Parcel, the Developer, or the then current owner, shall pay to the City, as to each Residential Unit within the Amended Site Plan Parcel, a public safety enhancement fee (the “**Public Safety Enhancement Fee**”) in an amount equal to \$3,600.00 for each Residential Unit, paid at the time of issuance of each respective building permit.

(D) **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.

(E) **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 Amended Site Plan Parcel 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 delivered 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, and the City may elect to withhold the issuance of any further building permits for Residential Units within the Amended Site Plan Parcel.

(F) **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.

(G) **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.

(H) **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.

(I) **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.

(J) **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.

(K) **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.

(L) **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.

(M) **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.

(N) **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.

(O) **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

(P) **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.

(Q) **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.

(R) **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.

(S) **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.

(T) **Prohibited Materials.** As a public benefit, Developer further agrees that certain materials shall be prohibited for incorporation in the Residential Units or other buildings constructed as part of the Project, and those prohibited materials and encouraged building elements are set forth on **Exhibit "D"** attached hereto (the "***Prohibited Materials***").

(U) **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.

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

9. **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, 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 Delta. Notwithstanding the above, to the extent more than one parcel of real property within the Amended Site Plan Parcel is owned by the same owner, a default as to the obligations of that owner with regards to one parcel shall also constitute a default as to the obligations of that same owner as to any other parcels owned by such owner. For purposes of clarity, a default by any owner of real property within the Amended Site Plan Parcel shall constitute a default as to that particular owner, and a default by one owner shall not be deemed to create a default by any other owner with the Amended Site Plan Parcel.

10. **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.

11. **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]

EXHIBIT "C"

Road Improvement Exhibit

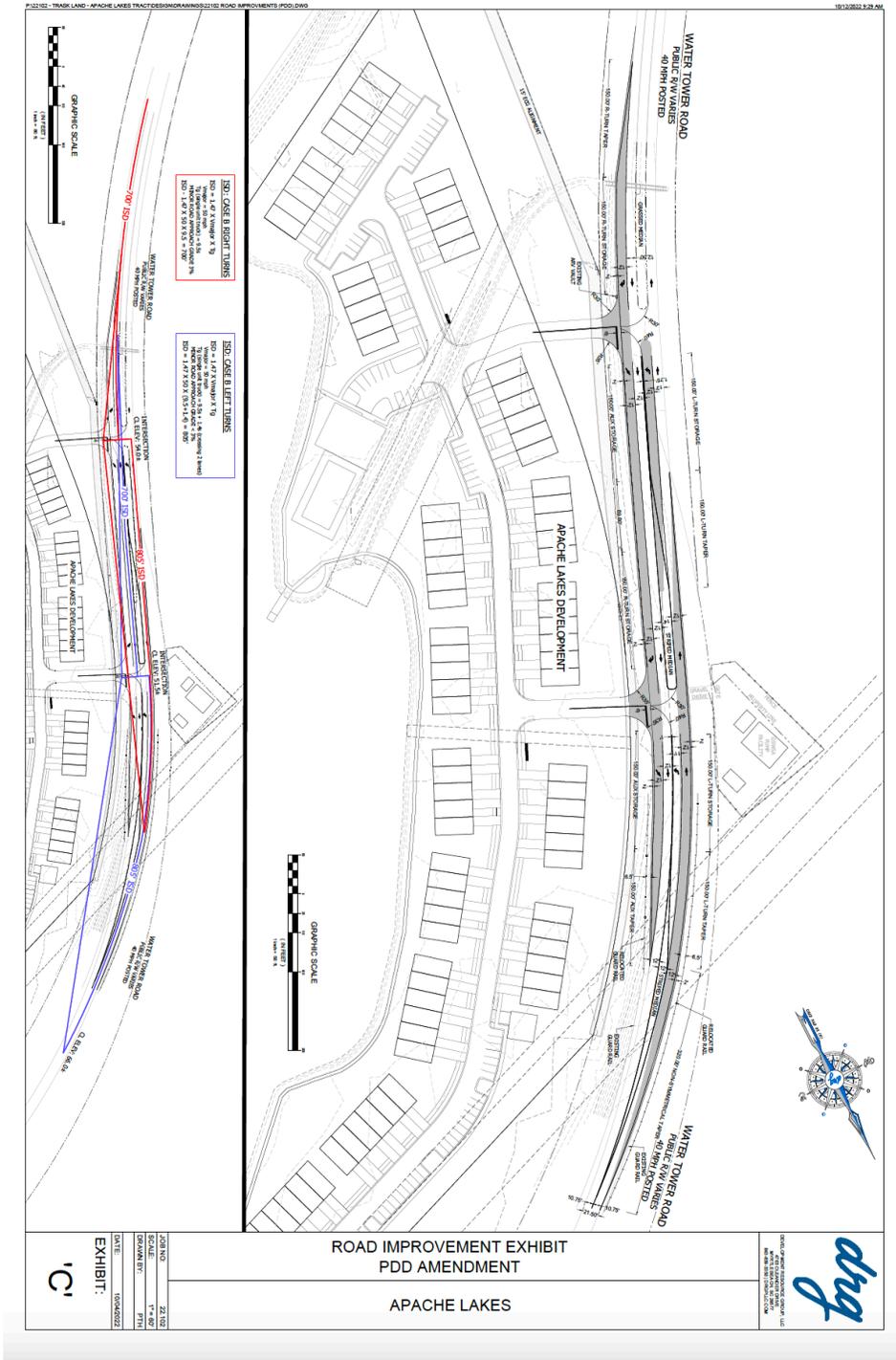


EXHIBIT “D”

Prohibited Materials and Building Elements

1. Porches and patios are encouraged and will be allowed up to 10’ from the front property line.
2. All homes shall be clad in wood siding, cementitious fiberboard, brick or tabby.
3. Vinyl siding, metal siding, concrete block, fiberglass, plastic, asphalt siding, logs and other siding materials not set forth in Section 2 above, shall be strictly prohibited.
4. Exterior brick walls shall use Flemish, English or other more intricate bond patterns, common bond being strictly prohibited.
5. Large expanses of blank walls on the front and rear elevations should be avoided.
6. Window sizing should be proportionate with the wall area where window is installed.