

REQUEST FOR CITY COUNCIL CONSIDERATION

Meeting Date: April 3, 2023

Agenda Item: 7F	Prepared By: Chris Noury, City Attorney
Agenda Section: New Business: Second Public Hearing	Date: March 30, 2023
Subject: Second public hearing regarding the Second Separate and Independent Amendment to the Master Development Agreement regarding the Village at Waterway Hills	Division: Legal

Background:

The City Council approved the Village at Waterway Hills in the Parkway Group PDD Development Agreement at their August 15, 2022, meeting. Since this time development interests have remained strong, and the Developer is moving forward with roadway and construction plans which have been submitted for review.

The applicant is requesting to modify the approved agreement by shifting the obligation triggers for off-site roadway improvements and on-site amenities from issuance of building permit to issuance of the certificate of occupancy, or “c/o.”

1. The Developer agrees to complete installation of sidewalks and street trees along Water Tower Road, Henry Road, and Long Branch Loop or bond improvements on or before 1) the 20th building c/o for single-family, 2) second building c/o for multifamily, or 3) first building c/o for the commercial zone portion of the project.
2. The on-site multi-family amenity center started prior to the issuance of the 5th multi-family building c/o and completed by the 7th multi-family building c/o.
3. The on-site single-family amenity center started prior to the issuance of the 140th RDU c/o and completed by the 160th RDU c/o.

Language has also been added to the proposed amendment for each of the triggers respectively, which provides that the City will have no obligation to issue additional building permits until roadway improvements/amenities are complete.

Recommended Action:

Allow comments from the public regarding the proposed Development Agreement

Reviewed by Department Head	Reviewed by City Manager	Reviewed by City Attorney
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Council Action:

Motion By _____ 2nd By _____ To _____

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, the Master Development Agreement and First Master Amendment were amended by Separate and Independent Amendment dated the ____ day of _____, 2023, and recorded in the Office of the Register of Deeds for Horry County, South Carolina in Deed Book ____ at Page _____, on the ____ day of _____, 2023 (the "***Separate and Independent Amendment***"); and

WHEREAS, the Parties now desire to enter into an amendment to certain provisions of the Development Agreement, in order to further specify the timing of certain fees and obligations imposed by the City upon the Developer pursuant to the Separate and Independent Amendment, as amended, applicable to only the real property which is the subject of the Separate and Independent Amendment, 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. **Section 5 Improvements Off-Site and within the Amended Site Plan Parcel.** Section 5, Subsection (B) of the Separate and Independent Amendment is deleted in its entirety and replaced with the following:

“(B) Install sidewalks and street trees during the development of the Amended Site Plan Parcel in accordance with the Complete Streets portion of the City’s land development regulations, along the boundary of the Project with Water Tower Road , with Long Branch Loop such installments are to be complete, or bonded for completion under the City’s standard bonding procedures (i) on or before the issuance of the twentieth (20th) certificate of occupancy for the Single Family Neighborhood portion of the Amended Site Plan Parcel for that portion of the Project; and (ii) on or before the issuance of the second certificate of occupancy for the Multi-Family Neighborhood portion of the Amended Site Plan Parcel for that portion of the Project; and (iii) on or before the issuance of the first certificate of occupancy for the Commercial Zone portion of the Amended Site Plan Parcel for that portion of the Project. In the event the roadway improvements are not completed in accordance with this Section 5(B), then the City will have no obligation to issue additional building permits until such roadway improvements are complete.”

2. **Section 6 Additional Enhancement Fees, Obligations and Public Benefits.** Section 6, Subsection (E) of the Separate and Independent Amendment is deleted in its entirety and replaced with the following:

“(E) Multi-Family On-Site Amenity Trigger. As an obligation, for the Multi-Family Neighborhood portion of the Amendment Site Plan Parcel, the on-site amenity, as shown on the Master Site Plan, shall be commenced prior to the date on which the certificate of occupancy is issued for the 5th multi-family building within the Multi-Family Neighborhood portion of the Amended Site Plan, and the on-site amenity as shown on the Master Site Plan shall be completed prior to the date on which the certificate of occupancy is issued for the 7th multi-family building within the Multi-Family Neighborhood portion of the Amended Site Plan. In the event the Multi-Family on-site amenity is not completed in accordance with this Section 6(E), then the City will have no obligation to issue additional building permits until such on-site amenity improvements are complete.”

3. **Section 6 Additional Enhancement Fees, Obligations and Public Benefits.** Section 6, Subsection (F) of the Separate and Independent Amendment is deleted in its entirety and replaced with the following:

“(F) Single Family Neighborhood Amenity Trigger. As an obligation, for the Single Family Neighborhood portion of the Amendment Site Plan Parcel, the on-site amenity, as shown on the Master Site Plan, shall be commenced prior to the date on which the certificate of occupancy is issued for the 140th residential unit within the Single Family Neighborhood portion of the Amended Site Plan, and the on-site amenity as shown on the Master Site Plan shall be completed prior to the date on which the certificate of occupancy is issued for the 160th residential unit within the Single Family Neighborhood portion of the Amended Site Plan. In the event the Single Family on-site amenity is not completed in accordance with this Section 6(F), then the City will have no obligation to issue additional building permits until such on-site amenity improvements are complete.”

4. **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, 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 or the Apache Tract, including any portion of the Henry Road Tract or the Apache Tract which is included in the Amended Site Plan Parcel, and the Riparian Trailhead Site, shall remain in full force and effect (the “**Continuing Encumbrance**”).

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. **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 this Agreement shall inure to, all successors in interest to the parties to the agreement.

7. **Independent Amendment.** In accordance with the Continuing Encumbrance provision contained herein, this Second Separate and Independent Amendment to Master Development Agreement is intended to be applicable only to the Amended Site Plan Parcel, the Single Family Neighborhood which is located on a portion of the Henry Road Tract, the Multi-Family Neighborhood, which is located on a portion of the Apache 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 and/or Apache, respectively. 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 owner 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.

8. **No Further Amendment.** In accordance with the Continuing Encumbrance provision contained herein, except as specifically amended by this Second 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.

9. **Invalidity.** The invalidity of one or more phrases, sentences, clauses or paragraphs contained in this Agreement shall not affect the remaining portions of this Agreement or any part thereof, and in the event that any one or more of the phrases, sentences, clauses or paragraphs contained in this Agreement shall be declared invalid by the final order, decree or judgment of a court of competent jurisdiction, this Agreement shall be constituted as if such invalid phrases, sentences, clauses or paragraphs had not been inserted in the Agreement.

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 Second Separate and Independent Amendment to
Master Development Agreement for Apache Properties, LLC]

APACHE PROPERTIES, 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 APACHE PROPERTIES, 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 _____, 2023

Notary Public for _____
My Commission Expires: _____

[Signature page to Second Separate and Independent Amendment to Master Development Agreement for Third Lake Development, LLC]

THIRD LAKE DEVELOPMENT, LLC, a Delaware limited liability company

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 THIRD LAKE DEVELOPMENT, 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 _____, 2023

Notary Public for _____
My Commission Expires: _____