

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (“Agreement”) is made and entered into by and between the State of Florida Department of Transportation (“Department”) and City of Gainesville, Florida (“Agency”).

WHEREAS, the term “Property” shall refer to certain real property located in Alachua County, Florida, owned by the Department and described as the Bridge Overpass over NW 8th Avenue; and

WHEREAS, the term “Improvement” means and shall refer to the black painted galvanized steel pedestrian railing on US 441/SR 25/13th Street on the Bridge Overpass over NW 8th Avenue; and

WHEREAS, the Department shall fund construction of the Improvement subject to the provisions of that certain separate funding agreement entered by and between the Department and the Agency; and

WHEREAS, the Department shall construct the Improvement; and

WHEREAS, the Agency shall maintain and repair the Improvement.

WHEREAS, the City by Resolution _____ dated _____ authorizes its representative to enter into this Agreement, see attached Exhibit “A”.

NOW THEREFORE, with full knowledge and understanding of the laws governing the subject matter of this Agreement, and in consideration of the foregoing recitals and the mutual covenants and conditions contained in this Agreement, the parties, intending to legally bound hereby, acknowledge and agree as follows:

RECITALS AND EXHIBITS

The recitals set forth above and Exhibits attached hereto are specifically incorporated herein by reference and made part of this Agreement.

EFFECTIVE DATE

The effective date of this Agreement shall be the date the last of the parties to be charged executes the Agreement.

TERM

The initial term of this Agreement shall be for a period of one (1) year, commencing on the Effective Date and concluding on the anniversary of the Effective Date. This Agreement shall automatically renew for successive and continuing like one (1) year terms unless terminated by the Department in writing a minimum of sixty (60) days prior to the expiration of any term.

CONSTRUCTION

The Department shall construct the Improvement and perform such other activities as the Department deems necessary and appropriate to complete construction of the Improvement, including, without limitation, seeking and obtaining approval and participation by one or more federal agencies, design of the Improvement, acquisition of right-of-way and any other activities to facilitate satisfactory completion of the Improvement. The Department shall notify the Agency in writing when construction of the Improvement is complete (“Notice of Completion”).

MAINTENANCE & REPAIR

A. From the date of the Department’s Notice of Completion, the Agency shall maintain, repair, remove and restore the Improvement at its sole cost and expense, in a good and workmanlike manner, with reasonable care, in accordance with the terms and provisions of this Agreement and all existing and future applicable federal, state, local, administrative, regulatory and environmental laws, rules, regulations, policies, procedures, guidelines, standards and permits, including, without limitation, those of the Department, Water Management District with requisite jurisdiction, Florida Department of Environmental Protection, Environmental Protection Agency, Army Corps of Engineers, United States Coast Guard and local governmental entity(s) (“Governmental Law”).

B. If the Department determines that the Agency is not maintaining and repairing the Improvement in accordance with the terms and provisions of this Agreement, the Department shall deliver written

notification of such to the Agency. The Agency shall have thirty (30) days from the date of the Department's written notice, or such other time as the Department and the Agency mutually agree in writing, to correct the deficiency(s) and provide the Department with written notice of the same ("Notice of Correction").

C. If it is determined that the deficiency(s) remains after receipt of the Agency's Notice of Correction, the Department, within its discretion, may: (1) provide the Agency with written authorization granting such additional time as the Department deems appropriate to correct the deficiency(s); (2) require the Agency to remove the Improvement and restore the Property pursuant to the "Removal" section of this Agreement; or (3) correct the deficiency(s) at the Agency's sole cost and expense. Should the Department elect to correct the deficiency(s), the Department shall provide the Agency with an invoice for the costs incurred by the Department and Dover shall pay the invoice in accordance with the "Payment" section of this Agreement.

D. The Department's right to correct deficiencies and complete required maintenance and repairs shall not relieve the Agency from its duty to maintain and repair the Improvement in accordance with the terms and provisions of this Agreement.

E. If at any time in the sole determination of the Department, the integrity or safety of the Improvement requires immediate maintenance or repair for the benefit of public health, safety or welfare, the Department may perform such maintenance and repairs it deems appropriate under the circumstances without prior notice to the Agency. As soon as practical thereafter, the Department shall provide the Agency with written notice of the maintenance and repairs performed by the Department and an invoice for the same. The Agency shall pay the invoice in accordance with the "Payment" section of this Agreement.

IMPROVEMENTS

The Department may make any improvements and modifications to the Improvement the Department deems appropriate. Improvements and modifications made to the Improvement shall be maintained and repaired by the Agency in accordance with "Maintenance & Repair" section of this Agreement.

REMOVAL

A. The Department may terminate this Agreement and remove the Improvement without liability to the Agency if the Department determines that removal is required pursuant to applicable Governmental Law, or that removal of the Improvement would be beneficial to the Department in the conduct its business.

B. The Department may require the Agency to remove the Improvement and restore the Property in accordance with the provisions of this paragraph in conjunction with termination of this Agreement, or pursuant to paragraph "C" of the "Maintenance & Repair" section of this Agreement. The Agency shall have sixty (60) days from the date of the Department's written notice requiring removal of the Improvement and restoration of the Property, or such other time as the Department and the Agency mutually agree in writing, to: (1) remove the Improvement and restore the Property to the condition that existed immediately prior to the Effective Date of this Agreement; and (2) notify the Department in writing that the removal and restoration work is complete ("Notice of Removal & Restoration"). The Agency shall bear the cost of the removal and restoration work, including, without limitation, the cost of all permits required to complete the work. The removal and restoration work shall be performed by the Agency in accordance with applicable Governmental Law.

C. Should the Agency fail to complete the removal and restoration work as required herein, the Department may: (1) provide the Agency with written authorization granting such additional time as the Department deems appropriate to complete the removal and restoration; or (2) complete the removal and restoration at the Agency's sole cost and expense. Should the Department elect to complete the removal and restoration, the Department shall provide the Agency with an invoice for the costs incurred by the Department and the Agency shall pay the invoice in accordance with the "Payment" section of this Agreement.

PAYMENT

All Department invoices submitted to the Agency for payment pursuant to the terms and provisions of this Agreement are due and payable within thirty (30) days of the date of the invoice ("Due Date"). Any

portion of an invoice not received by the Department by the Due Date shall immediately thereafter begin accruing interest at a rate of interest established pursuant to §55.03, Fla. Stat., until paid in full.

INDEMNIFICATION

The Agency shall defend, indemnify and hold the Department, including its agents, employees and assigns, harmless from any and all demands, claims, liabilities, damages, costs, fines, penalties, expenses, attorneys' fees and suits of any nature or kind whatsoever that arise out of or are in any way related to the performance or breach of this Agreement ("Liabilities"). The Agency's duty to defend and indemnify the Department is subject to the provisions of §768.28, Fla. Stat. (2009), and specifically does not encompass indemnifying the Department for its negligence, intentional or wrongful acts, omissions or breach of contract. The Agency shall notify the Department in writing immediately upon becoming aware of any such Liabilities. The Agency's obligation to defend, indemnify and hold the Department harmless from any Liabilities, or at the Department's option to participate and associate with the Department in the defense and trial of any Liabilities, including any related settlement negotiations, shall be triggered by the Department's written notice of claim for indemnification to the Agency. The Agency's inability to evaluate liability, or its evaluation of liability, shall not excuse performance of the provisions of this paragraph.

SOVERIGN IMMUNITY

Nothing in this Agreement shall be deemed or otherwise interpreted as waiving the Department's sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Fla. Stat. (2009). The limits of the Department's liability for breach of this Agreement shall be identical to the limitations of liability for tort actions set forth in §768.28 (5), Fla. Stat. (2009).

DUE DILIGENCE, WARRANTY OR FITNESS FOR PARTICULAR PURPOSE

The Agency agrees that nothing in this Agreement, or the performance thereof, constitutes or complies with any due diligence requirements of the Department and that all due diligence requirements are the responsibility of the Agency. The Agency agrees that nothing in this Agreement constitutes or establishes representations or warranties of any kind, express or implied, by the Department, including its employees and agents, concerning the Property, including, without limitation, any physical condition, zoning, compliance with applicable laws, merchantability or fitness for any particular purpose.

EMINENT DOMAIN

Under no circumstances shall the performance, breach, expiration or termination of this Agreement, or the condemnation of any portion of the Property encompassing the Improvement, create any interest or right entitling the Agency to full and just compensation from the Department either through inverse condemnation, eminent domain laws or any similar laws regarding the taking of property for public purposes. The Agency forever waives and relinquishes all legal rights and monetary claims which it has, or which may arise in the future, for compensation and/or damages, including, without limitation, special damages, severance damages, removal costs, and loss of business profits resulting in any manner from: (1) the performance, breach, expiration or termination of this Agreement; or (2) condemnation of any portion of the Property encompassing the Improvement. This waiver and relinquishment applies whether this Agreement is still in existence on the date of taking / sale or has been terminated prior thereto.

GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

INITIAL DETERMINATION OF DISPUTES

The Department's District Two Secretary ("District Secretary") shall act as the initial arbiter of all questions, difficulties, and disputes concerning the interpretation, validity, performance or breach of this Agreement.

VENUE AND JURISDICTION

Venue for any and all actions arising out of or in any way related to the interpretation, validity, performance or breach of this Agreement that are not resolved to the mutual satisfaction of the parties by the Department's District Secretary shall lie exclusively in a state court of appropriate jurisdiction selected by the Department, including, without limitation, Leon County. In the event that legal action is initiated by the Agency, the Agency shall consent to the transfer of venue to a county identified by the Department in an appropriately filed motion requesting the same.

JURY TRIAL

The parties hereby waive right to trial by jury of any dispute concerning the validity, interpretation, performance or breach of this Agreement.

NOTICE

All notices, communications and determinations between the parties hereto and those required to be given under this Agreement, including, without limitation, any change to the notification address set forth below, shall be in writing and shall be sufficient if mailed by registered or certified mail to the parties at the following addresses:

Department: Florida Department of Transportation
Attention: Gainesville Maintenance Engineer
5301 NE 39th Ave
Gainesville, Florida 32205

- and -

Florida Department of Transportation
Attention: Chief Counsel District 2
1109 South Marion Avenue, Mail Station 2009
Lake City FL 32025

Agency: City of Gainesville Public Works Department
Ms. Teresa Scott, P.E., Director
Post Office Box 490
Gainesville, Florida 32601

Agency agrees that if it fails to notify Department by certified mail of any changes to its notification address, Agency shall have waived any defense based on Department's failure to notify Agency.

ASSIGNMENT

Agency shall not assign, pledge or transfer any of the rights, duties and obligations provided in this Agreement without the prior written consent of the Department. The Department has the sole discretion to approve or disapprove proposed assignments, with or without cause.

THIRD PARTY BENEFICIARIES

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Nothing in this Agreement is intended to confer any rights, privileges, benefits, obligations or remedies upon any other person or entity except as expressly provided for herein.

VOLUNTARY EXECUTION OF AGREEMENT

Each party warrants and represents to the other: (1) that each understands all of the rights and obligations set forth in this Agreement and the Agreement accurately reflects the desires of the parties; (2) each provision of this Agreement has been negotiated fairly at arm's length; (3) each fully understands the advantages and disadvantages of this Agreement and executes this Agreement freely and voluntarily of their own accord and not as a result of any duress, coercion, or undue influence; and (4) each has had, or had the opportunity to have, independent legal advice by counsel of its own choosing in the negotiation and execution of this Agreement.

ENTIRE AGREEMENT

This instrument contains the entire Agreement of the parties. No representations or promises have been made except those that are set out in this Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter hereof are waived, merged herein and superseded hereby.

EXECUTION OF DOCUMENTS

The parties agree that they shall promptly execute and deliver to the other all documents necessary to accomplish the intent and purpose of this Agreement and shall do all other acts to effectuate this Agreement, time being of the essence.

SUFFICIENCY OF CONSIDERATION

By their signature below, the parties hereby acknowledge the adequacy and sufficiency of consideration provided in this Agreement and forever waive the right to object to or otherwise challenge the same.

WAIVER

The failure of either party to insist on one or more occasions the strict performance or compliance with a term, provision or otherwise of this Agreement shall not be deemed a waiver or relinquished in the future of the enforcement thereof, and it shall continue in full force and effect unless waived or relinquished in writing by the party to be charged.

INTERPRETATION

No provision in this Agreement shall be interpreted for or against any party because that party or that party's legal representative drafted the provision.

CAPTIONS

Paragraph title or captions contained herein are inserted as a matter of convenience and reference and in no way define, limit, extend or describe the scope of this Agreement or any provision.

SEVERANCE

If any section, paragraph, clause or provision of this Agreement is adjudged by a court, agency or authority of competent jurisdiction to be invalid and unenforceable, all remaining parts of this Agreement shall remain in full force and effect and the parties shall be bound thereby so long as the Department, in its sole discretion, determines the principle purposes of this Agreement remain enforceable.

COMPUTATION OF TIME

In computing any period of time prescribed in this Agreement, the day of the act, event or deficiency or material breach from which the designated period of time begins to run, shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or legal holiday.

MODIFICATION OF AGREEMENT

A modification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement.

ANNUAL APPROPRIATION / FUNDING

Pursuant to §339.1365(6)(a), Fla. Stat., the Department's obligation to construct the Improvement is contingent upon the annual appropriation by the Florida Legislature. This Agreement may be terminated by the Department without liability to the Agency if sufficient funds are not appropriated to the Department. The provisions of §339.135(6)(a), Fla. Stat., are set forth herein verbatim and made part of this Agreement, to wit:

"The department, during any fiscal year, shall not expend money, incur any liability, or enter into any contract which, by its terms, involves the expenditure of money in excess of the amounts budgeted as available for expenditure during such fiscal year. Any contract, verbal or written, made in violation of this subsection is null and void, and no money may be paid on such contract. The department shall require a statement from the comptroller of the department that funds are available prior to entering into any such contract or other binding commitment of funds. Nothing herein contained shall prevent the making of contracts for periods exceeding 1 year, but any contract so made shall be executory only for the value of the services to be rendered or agreed to be paid for in succeeding fiscal years; and this paragraph shall be incorporated verbatim in all contracts of the department which are for an amount in excess of \$25,000 and which have a term for a period of more than 1 year."

IN WITNESS WHEREOF, intending to be legally bound hereby, the parties hereby execute this Agreement, consisting of six (6) pages.

{Signatures on Following Page}

“DEPARTMENT”
**STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION**

ATTEST:

By: _____

Print Name: _____

Title: _____

Date: _____

By: _____

Printed Name: _____

Title: _____

Date: _____

Legal Review:

By: _____
Chief Counsel District 2

ATTEST:

By: _____

Print Name: _____

Title: _____

Date: _____

“AGENCY”

By: _____

Printed Name: _____

Title: _____

Date: _____

Legal Review:

By: _____
Legal Counsel for Agency