

### **CONSTRUCTION & MAINTENANCE AGREEMENT**

This Construction & Maintenance Agreement ("Agreement") is made and entered into by and between the State of Florida Department of Transportation ("Department") and the City of Gainesville ("Agency").

**WHEREAS**, the term "Property" shall refer to certain real property located in Alachua County, Florida, owned by the Department and described as SR 20 (NW 8<sup>th</sup> Ave) from North Main St. to NW 6<sup>th</sup> St; and

**WHEREAS**, the term "Improvement" means and shall refer to the construction of brick pavers in medians at NW 2<sup>nd</sup> street and NW 4<sup>th</sup> street on SR 20 (NW 8<sup>th</sup> Ave); 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 Agency shall construct, maintain and repair the Improvement; and

**WHEREAS**, the Improvement shall be located on the Property; and

**WHEREAS**, by Resolution \_\_\_\_\_ dated \_\_\_\_\_, the Agency authorized its representative to execute and enter this Agreement on behalf of the Agency, see 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 be legally bound hereby, acknowledge and agree as follows:

#### **1. RECITALS AND EXHIBITS**

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

#### **2. EFFECTIVE DATE**

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

#### **3. TERM**

The initial term of the Agreement shall be for a period of one (1) year from the Effective Date. The Agreement shall automatically renew for successive and continuing like one (1) year terms unless terminated by the Department.

#### **4. E-VERIFY**

The Agency (A) shall utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired by the Agency during the term of the contract; and (B) shall expressly require any subcontractors performing work or providing services pursuant to the state contract to likewise utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired by the subcontractor during the contract term.

#### **5. COMPLIANCE**

The Agency shall perform the Agreement in a good and workmanlike manner, with reasonable care, in accordance with the terms and provisions hereof and all applicable federal, state, local, administrative, regulatory, safety and environmental laws, codes, rules, regulations, policies, procedures, guidelines, standards, specifications and permits, as the same may be constituted and amended from time to time, 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 entities ("Governmental Law").

## **6. PERMITS**

In the performance of the Agreement the Agency may be required to obtain one or more Department permits which may include copies of the Agreement as an exhibit. Notwithstanding the inclusion or incorporation of the Agreement as part of any such Department permits, the Agreement shall remain separate and apart from such permits and shall not be merged into the same absent the prior written express consent of the Department. Should any term or provision of the Agreement conflict with any term, provision or requirement of any Department permit, the terms and provisions of the Agreement shall control unless specifically noted otherwise in any such Department permit. For purposes of this Agreement, the term "permit" shall also include the Department's Construction Agreement which is required for all permanent improvements installed within the Department's right-of-way.

## **7. CONSTRUCTION**

A. The Agency shall furnish the Department's Local Maintenance Engineer ("LME") with four (4) signed and sealed copies of the construction plans and specifications for the Improvement ("Plans and Specifications") prepared by a Florida registered professional engineer, or landscape architect providing professional services pursuant to Chapter 481, Florida Statutes, together with a construction schedule ("Construction Schedule") and such other documentation as the Department may require.

B. The Agency shall not commence construction of the Improvement until such time as the LME issues final written approval of the Plans and Specifications and Construction Schedule for the Improvement via issuance of one or more appropriate Department permits.

C. The Agency shall not make any changes to the approved Plans and Specifications for the Improvement without the prior written approval of the LME. Changes to the approved Plans and Specifications for the Improvement absent the prior written approval of the LME shall be deemed a material breach of this Agreement.

D. The Agency shall provide the Department with a minimum of seventy-two (72) hours prior written notice of its intent to commence construction of the Improvement.

E. The Agency shall complete construction of the Improvement in accordance with the Construction Schedule and shall provide the Department's LME with written notice of completion of construction of the Improvement, including, final as-built plans and an engineering certificate that construction was completed in accordance with the Plans and Specifications. Thereafter, the LME, or designee, shall perform a final inspection. If the construction is in compliance with the Plans and Specifications and applicable Governmental Law, the Department shall issue a final acceptance letter ("Final Acceptance"). In determining compliance with applicable Governmental Law, the Department may defer to the appropriate local, state, federal, administrative, regulatory or environmental entity. The Department shall notify the Agency in writing if the construction is deficient or not in compliance with the Plans and Specifications and applicable Governmental Law. Thereafter, the Agency shall have thirty (30) days from the date of the Department's written notice, or such other time as the Department and Agency mutually agree in writing, to correct the deficiency and provide the Department with written notice of the same. The Department shall not issue its Final Acceptance until the deficiency / non-compliance is corrected.

F. If the deficiency is not corrected timely, or if the Department determines that the construction remains deficient or non-compliant after receipt of the Agency's written notice indicating that the deficiency has been corrected, the Department, within its discretion, may: (1) provide the Agency with written authorization granting such additional time as the Department deems appropriate to complete correction of the deficiency; (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 at the Agency's sole cost and expense. Should the Department elect to correct the deficiency, 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.

G. The Plans and Specifications, Construction Schedule, final as-built plans and engineering certificate for the Improvement are incorporated herein and made part of this Agreement by reference.

### **8. MAINTENANCE & REPAIR**

A. The Agency shall maintain and repair 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. Nothing in this Agreement shall obligate the Department to maintain or repair the Improvement, said obligations to remain the sole responsibility of the Agency.

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 and provide the Department with written notice of the same.

C. If the deficiency is not corrected timely, or if the Department determines that the deficiency remains after receipt of the Agency's written notice indicating that the deficiency has been corrected, the Department, within its discretion, may: (1) provide the Agency with written authorization granting such additional time as the Department deems appropriate to complete correction of the deficiency; (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 at the Agency's sole cost and expense. Should the Department elect to correct the deficiency, the Department shall provide the Agency with an invoice for the costs incurred by the Department to correct the deficiency and the Agency shall pay the invoice in accordance with the "Payment" section of this Agreement.

D. 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. The Department shall provide the Agency with written notice of the emergency 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.

### **9. IMPROVEMENTS & MODIFICATIONS**

A. The Department may require the Agency to improve or modify the Improvement if the Department determines: (1) improvements or modifications are required by applicable Governmental Law; or (2) improvements or modifications will benefit the Department in the conduct of its business.

B. Required improvements and modifications shall be subject to the terms and provisions of this Agreement, specifically including, without limitation, the "Construction" and "Maintenance & Repair" sections hereof.

C. Improvements and modifications shall be constructed and completed by the Agency within sixty (60) days of the date of the Department's written notice requiring improvements or modifications.

### **10. UTILITIES**

The Agency shall be responsible for locating, removing and relocating utilities, both aerial and underground, if required for the Agency to perform this Agreement. The Agency shall ensure all utility locations are accurately documented on the construction Plans and Specifications, including the final as-built plans. All utility conflicts shall be resolved by the Agency directly with the applicable utility.

### **11. MAINTENANCE OF TRAFFIC**

A. The Agency shall be responsible for the maintenance of traffic ("MOT") at all times during its performance of this Agreement. MOT shall be performed in accordance with applicable Governmental Law and the most current edition of each of the following, as the same may be constituted and amended from time to time, all of which are incorporated herein and made part of the Agreement by reference: (1) Section 102 of the Department's Standard Specifications for Road and Bridge Construction; (2) the Manual on Uniform Traffic Control Devices; and (3) the Department's Roadway Design Standards Index 600 Series.

B. If the Agency fails to perform MOT as required herein, the Department, within its discretion, may elect to perform MOT at the Agency's sole cost and expense. Should the Department perform MOT, 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.

#### **12. REMOVAL**

A. The Department may require the Agency to remove the Improvement and restore the Property to the condition that existed immediately prior to the Effective Date of this Agreement if the Department determines: (1) the Improvement is not constructed or maintained in accordance with Governmental Law; (2) removal of the Improvement is required by applicable Governmental Law; (3) the Agency breaches a material provision (as determined by the Department) of this Agreement, or (4) removal of the Improvement will benefit the Department in the conduct of its business. Removal and restoration shall be completed by the Agency within sixty (60) days of the date of the Department's written notice requiring removal of the Improvement, or such other time as the Department and the Agency mutually agree in writing.

B. Removal and restoration shall be completed by the Agency in accordance with applicable Governmental Law, specifically including the Department's Standard Specifications for Road and Bridge Construction.

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 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.

#### **13. PERMISSIVE USE**

This Agreement creates a permissive use only and neither the granting of permission to use the Property, nor construction of the Improvement on or within the Property shall operate to create or vest any property right to or in the Agency. The Agency shall not acquire any right, title, interest or estate in the Property by virtue of the execution, operation, effect or performance of this Agreement.

#### **14. EMINENT DOMAIN AND DAMAGES**

Under no circumstances shall the Department's exercise of any right provided in this Agreement create any right, title, interest or estate entitling the Agency to full and just compensation from the Department either through inverse condemnation or 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 or damages, including, without limitation, special damages, severance damages, removal costs, and loss of business profits resulting in any manner from the Department's exercise of any right provided in this Agreement. This waiver and relinquishment specifically includes all damages flowing from adjacent properties owned, leased or otherwise controlled by the Agency, as a result of the Department's exercise of any right provided in this Agreement.

#### **15. DUE DILIGENCE & WARRANTIES**

A. All due diligence requirements related to the Agency's negotiation, execution and performance of this Agreement are the sole responsibility of the Agency.

B. The Department makes no representations or warranties of any kind, express or implied, concerning the Property, including, without limitation, representations and warranties concerning: (1) the physical condition of the Property; and (2) merchantability or fitness for a particular purpose.

#### **16. PAYMENT**

All Department invoices submitted to the Agency for payment pursuant to the terms and provisions of this Agreement are due and payable within forty-five (45) days of the date of the invoice ("Due Date"). Any

Financial Project Id. No. 211363-2-52-01  
Federal Id. No. (if applicable) 8887 724 A  
Project Description Brick Pavers in Medians along SR 20 (NW 8<sup>th</sup> Ave)  
at NW 4<sup>th</sup> Street and NW 2<sup>nd</sup> Street  
On System Agency Construct & Maintain

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, Florida Statutes, until paid in full.

#### **17. INDEMNIFICATION**

A. The Agency shall promptly defend, indemnify, hold the Department harmless from and pay all demands, claims, judgments, liabilities, damages, fines, fees, taxes, assessments, costs, losses, penalties, construction delay costs / penalties, expenses, attorneys' fees and suits of any nature or kind whatsoever caused by, arising out of or related to the Agency's performance, or breach, of this Agreement ("Liabilities"). The term "Liabilities" shall also specifically include all civil and criminal environmental liability arising, directly or indirectly under any Governmental Law, including, without limitation, liability under the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Clean Air Act ("CAA") and the Clean Water Act ("CWA"). The Agency's duty to defend, indemnify and hold the Department harmless specifically does not encompass indemnifying the Department for its negligence, intentional or wrongful acts, omissions or breach of contract.

B. The Agency shall notify the Department in writing immediately upon becoming aware of any 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.

#### **18. SOVEREIGN IMMUNITY & LIMITATION OF LIABILITY**

Nothing in this Agreement shall be deemed or otherwise interpreted as waiving either party's sovereign immunity protections, or as increasing the limits of liability set forth in §768.28, Florida Statutes, as the same may be amended from time to time.

#### **19. NOTICE**

All notices, communications and determinations between the parties hereto and those required by the Agreement, including, without limitation, changes to the notification addresses set forth below, shall be in writing and shall be sufficient if mailed by regular United States Mail, postage prepaid, to the parties at the following addresses:

Department: Florida Department of Transportation  
Attention: Steve Scanlan, P.E.  
Gainesville Maintenance Engineer  
5301 NE 39<sup>th</sup> Avenue  
Gainesville, Florida 32609

Agency: City of Gainesville  
Attention: Ms. Teresa Scott, Public Works Director  
Post Office Box 490-58  
Gainesville, Florida 32602

#### **20. GOVERNING LAW**

This Agreement shall be governed in all respect by the laws of the State of Florida.

#### **21. 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 the Agreement.

#### **22. VENUE AND JURISDICTION**

A. Venue for any and all actions arising out of or in any way related to the interpretation, validity, performance or breach of the 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 in Leon County, Florida.

B. The Agency and all persons and entities accepting an assignment of this Agreement, in whole or in part, shall be deemed as having consented to personal jurisdiction in the State of Florida and as having forever waived and relinquished all personal jurisdiction defenses with respect to any proceeding related to the interpretation, validity, performance or breach of this Agreement.

**23. JURY TRIAL**

The parties hereby waive the right to trial by jury of any dispute concerning the interpretation, validity, performance or breach of the Agreement, including, without limitation, damages allegedly flowing therefrom.

**24. ASSIGNMENT**

The 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's District Secretary or his/her designee. The Department has the sole discretion and authority to grant or deny proposed assignments of this Agreement, with or without cause. Nothing herein shall prevent the City from delegating its duties hereunder, but such delegation shall not release the City from its obligation to perform the Agreement.

**25. 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.

**26. VOLUNTARY EXECUTION OF AGREEMENT**

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

**27. ENTIRE AGREEMENT**

This instrument, together with any exhibits and documents made part hereof by reference, contains the entire agreement of the parties and no representations or promises have been made except those that are specifically set out in the Agreement. All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter of the Agreement, and any part hereof, are waived, merged herein and superseded hereby.

**28. 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 the Agreement and shall do all other acts to effectuate the Agreement.

**29. SUFFICIENCY OF CONSIDERATION**

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

**30. WAIVER**

The failure of either party to insist on the strict performance or compliance with any term or provision of the Agreement on one or more occasions shall not constitute a waiver or relinquishment thereof and all such terms and provisions shall remain in full force and effect unless waived or relinquished in writing.

**31. INTERPRETATION**

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

### **32. 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 the Agreement, or any provision hereof.

### **33. SEVERANCE**

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

### **34. COMPUTATION OF TIME**

In computing any period of time prescribed in the Agreement, the day of the act, event or default from which the designated period of time begins to run, shall not be included. The last day of the period 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 not a Saturday, Sunday or legal holiday.

### **35. MODIFICATION OF AGREEMENT**

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

### **36. ANNUAL APPROPRIATION / FUNDING**

Pursuant to §339.1365(6)(a), Florida Statutes, the Department's obligation to fund construction of the Improvement is contingent upon 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), Florida Statutes, 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 execute this Agreement, consisting of eight (8) pages.

**SIGNATURES ON FOLLOWING PAGE**

Financial Project Id. No. 211363-2-52-01  
Federal Id. No. (if applicable) 8887 724 A  
Project Description Brick Pavers in Medians along SR 20 (NW 8<sup>th</sup> Ave)  
at NW 4<sup>th</sup> Street and NW 2<sup>nd</sup> Street  
On System Agency Construct & Maintain

**Florida Department of Transportation**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Legal Review:**

By: \_\_\_\_\_

Office of the General Counsel  
Florida Department of Transportation

**Attest:**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**City of Gainesville**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Legal Review:**

By: \_\_\_\_\_

Legal Counsel for Agency

**Attest:**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_



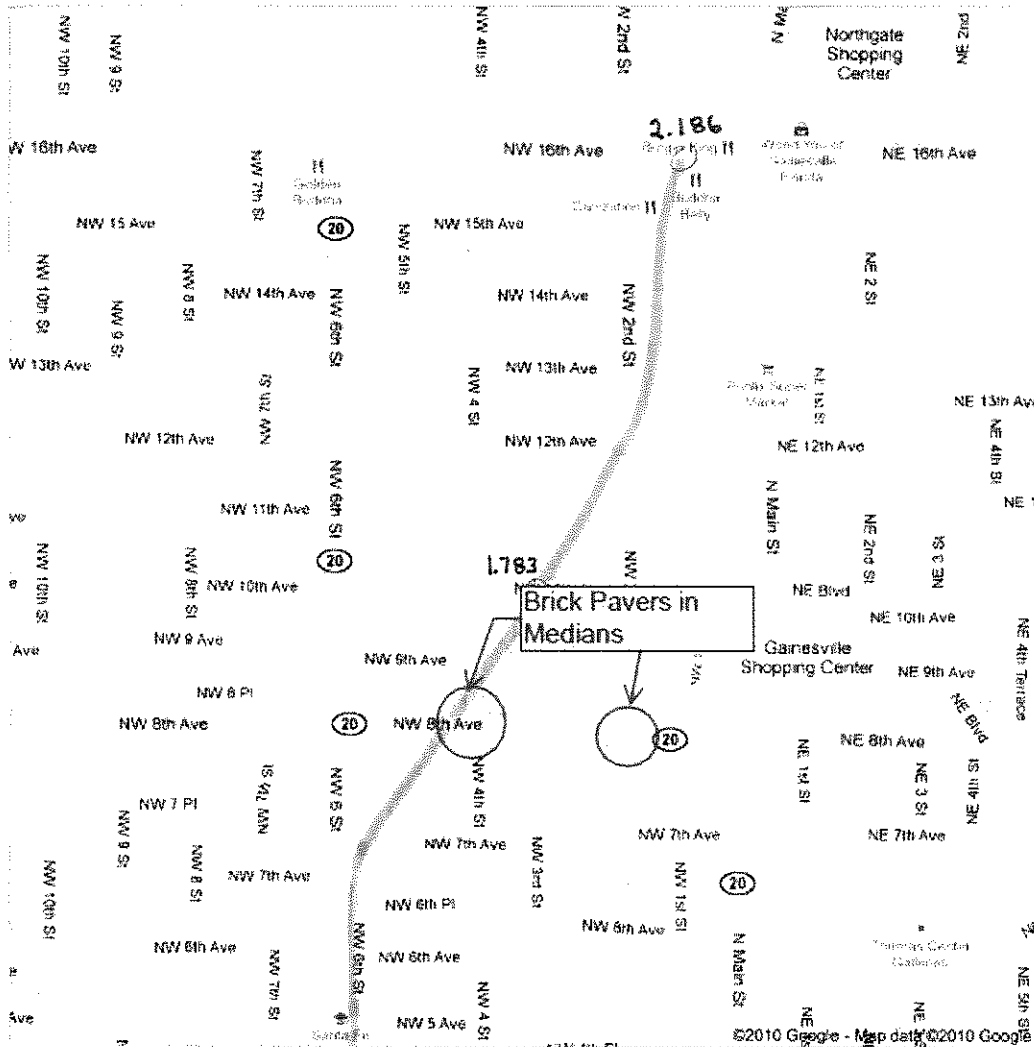
Financial Project Id. No. 211363-2-52-01  
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 at NW 4<sup>th</sup> Street and NW 2<sup>nd</sup> Street  
 On System Agency Construct & Maintain

Google maps

Address Gainesville, FL

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211363-2 3E LAP FY 2011