

RESOLUTION 15-44

BE IT RESOLVED that the appropriate officers of the City are authorized to execute and deliver on behalf of the City that certain First Amendment to that Agreement between the City and Holiday Resort PCB, Inc., a Florida corporation, relating to **the exchange of easements located at 11128 Front Beach Road, including improvements with utilities necessary for the Front Beach Road Segment 2 Improvement Project**, in a total amount of Three Hundred Fifty Nine Thousand Seven Hundred Eighty Two Dollars and Seventy Six Cents (\$359,782.76), in substantially the form of the documents attached and presented to the Council today, with such changes, insertions or omissions as may be approved by the City Manager, whose execution of such agreement shall be conclusive evidence of such approval.

THIS RESOLUTION shall be effective immediately upon passage.

PASSED in regular session this 8th day of January, 2015.

CITY OF PANAMA CITY BEACH

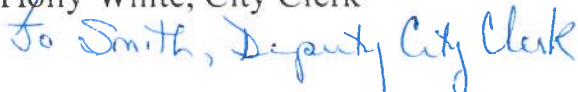
By: 

Gayle F. Oberst, Mayor

ATTEST:



Holly White, City Clerk


Jo Smith, Deputy City Clerk

FIRST AMENDMENT
TO
AGREEMENT
Between
CITY OF PANAMA CITY BEACH, FLORIDA
And HOLIDAY RESORT, PCB

This Amendment to Agreement dated _____, 201____, (the “First Amendment”), made and entered into by and between the CITY OF PANAMA CITY BEACH, FLORIDA, a municipal corporation (the “City”) and HOLIDAY RESORT PCB, INC, a Florida corporation (the “Developer”).

WHEREAS, the City and Developer entered into that certain Agreement relating to the purchase of an improved utility easement located at 11128 Front Beach Road on December ____, 2014, and

WHEREAS, in addition to the purchase of an easement by the City, the Agreement also contemplated the conveyance of an easement to the Developer by the City, for which each of the parties desire to enter into this First Amendment in order to clarify the obligations of each.

NOW THEREFORE, IN CONSIDERATION of the mutual terms and conditions, promises, covenants and payments set forth, the parties agree to amend the Agreement as follows:

1. The City and Developer wish to amend Section I of the Agreement to read as follows:

I. **Conveyance of Property.**

- A. Developer agrees to convey to the City, and City agrees to purchase, a 25’ wide permanent **underground** utility easement over those portions of Developer’s property where the Developer or Developer’s Contractor has constructed and installed the accepted CRA Improvements, containing approximately 9477 square feet in the approximate location of the easement illustrated on attached Exhibit A (the “Property”), and any other necessary ~~deeds~~, easements, permits or licenses for the continued operation, maintenance, repair, or reconstruction of and access to such facilities by the City, in a form approved by the City Attorney.
- B. Developer agrees to turn over and dedicate to the City the CRA Improvements constructed and installed on Developer’s property, upon the completion of construction and inspection, approval and acceptance of the same by the City based upon sound engineering practices as

determined and interpreted by the City in its sole, unfettered discretion. As a prerequisite to such turn over and acceptance, the Developer will furnish to the City ~~the following~~ a Bill of Sale in a form approved by the City Attorney; and Evidence of Owner's title interest to the land in which the CRA Improvements are located.

- C. Developer has requested conveyance of an easement from the City on an approximate 25' strip of land lying adjacent and immediately westward of Developer's property parking lot, described in Exhibit C, attached. ~~To the extent the City possesses the necessary title to the land to be able to convey the requested easement,~~ The City agrees to convey to Developer an **exclusive permanent** easement interest in the strip of land described in Exhibit C, provided such conveyance conforms to applicable law authorizing such conveyance to the Developer. The value of said conveyance to the Developer shall be offset against any amounts the City is obligated to pay to Developer pursuant to Section III of this Agreement, at \$9/sf ~~(the same price per square foot on which the easement described in Section I.A is based),~~ as such values are more particularly set forth in Section III.
- D. To the extent practicable, the conveyances set out in I.A and I.C shall be simultaneous and each party must receive marketable title to materially the easement set out herein. ~~The parties agree that in the event the City does not ultimately hold title to the land described in Exhibit C, the conveyance set out in IA shall nonetheless proceed.~~ The conveyances shall occur no later than thirty (30) days following the City's acceptance of the CRA Improvements, unless the parties agree in writing to another date.

2. The City and Developer wish to amend Section II of the Agreement to provide that some of Developer's obligations related to the construction of the CRA Improvements may also be performed by Developer's Contractor, as follows:

II. Construction of Improvements.

A. Project Described. The Developer and the City agree that the Project Improvements contemplate that the Developer or Developer's Contractor will construct and install approximately 411 linear feet each of electrical conduit, 36" stormwater pipe, and 24" sanitary sewer pipe, under and across Developer's parking lot facility located north of Front Beach Road, all within the 25' utility easement described in Section I.A.

B. Design. Developer or Developer's Contractor will construct the Project in accordance with plan prepared by Atkins North American, Inc., attached and incorporated as Exhibit B, which were reviewed and approved by the City in December 2014. Should any changes to

the plans be required during the construction of the Project, the Developer or Developer's Contractor shall be required to notify the City of the changes and receive the City's approval of such changes prior to the changes being constructed or implemented. All right of way construction shall be performed in accordance with the City's ROW standards and specifications.

C. Construction Timeline. Developer or Developer's Contractor may commence construction of the Project immediately upon execution of this Agreement by both parties, provided however, that Developer or Developer's Contractor shall give the City a minimum of 48 hours notice before beginning construction within the Front Beach Road right of way. Developer or Developer's Contractor shall complete the Project and tender final certified as-builts to the City on or before August 31, 2015, in a form acceptable to the City. If City determines that the Project is not completed in accordance with the provisions of this Agreement, the City shall deliver written notice of such to the Developer. The Developer shall have thirty (30) days from the date of receipt of the City's written notice, or such other time as the City and Developer agree in writing, to complete the Project and provide the City with written notice of the same. If the Developer fails to timely complete the Project, or if it is determined that the Project is not properly completed, the City, within its sole discretion may provide the Developer with written authorization granting such additional time as the City deems appropriate to correct the deficiencies, or correct the deficiencies at the Developer's sole cost and expense. If the City elects to correct the deficiencies, the actual costs incurred by the City to undertake and complete the installation of the CRA Improvements shall be offset against any amounts the City is obligated to pay to Developer pursuant to Section III of this Agreement.

D. Inspections. City may, at any time during the term of this Agreement, personally or through its employees, representatives and consultants, make such inspections, tests and investigations of the Property or the CRA Improvements being constructed or installed therein (including, without limitation, environmental inspections, borings and physical samplings) as City deems necessary or desirable, and Developer and Developer's Contractor shall cooperate fully in such inspections, tests, investigations and examinations and shall instruct its employees, representatives and agents to cooperate fully. Such inspections, tests, investigations and examinations shall be done at reasonable times and under reasonable circumstances.

Furthermore, from and during this Agreement, City shall have the right to enter upon the

Property for purposes of conducting any such inspections, tests, and investigations of the Property or CRA Improvements as City deems necessary or desirable and such right of City shall extend to City's agents, representatives, consultants, and contractors. Any damage to the Property or improvements caused by any such entry, inspections, tests, or investigations shall be repaired immediately by City. City shall indemnify Developer and hold Developer harmless from and in respect of any loss, costs, damage or expense as a result of any claim asserted against Developer arising out of such entry, inspections, tests or investigations.

E. General Liability Insurance Required. Developer or Developer's contractor shall procure and maintain general liability insurance on policies and with insurers acceptable to City. Current Insurance Service Office (ISO) policies, forms, and endorsements or equivalents, or broader, shall be used where applicable.

Developer or Developer's contractor shall purchase and maintain Commercial General Liability Insurance on a full occurrence form. Coverage shall include, but not be limited to, Premises and Operations, Personal Injury, Contractual for this Agreement, Independent Developers, Broad Form Property Damage, Products and Completed Operation Liability Coverages and shall not exclude coverage for the "X" (Explosion), "C" (Collapse) and "U" (Underground) Property Damage Liability exposures. Limits of coverage shall not be less than:

Bodily Injury, Property Damage & Personal Injury Liability	\$5,000,000	Combined Single Limit Each Occurrence, and
	\$ 5,000,000	Aggregate Limit

The General Aggregate Limit shall be specifically applicable to this Project. The Developer or Developer's contractor shall add City as an additional insured through the use of Insurance Service Office Endorsements No. CG 20.10.10.01 and No. CG 20.37.10.01 wording or equivalent, or broader, an executed copy of which shall be attached to or incorporated by reference on the Certificate of Insurance to be provided by Developer or Developer's Contractor to the City prior to commencement of Project construction.

This insurance requirement shall not limit the liability of the Developer. The insurance coverages and limits required of Developer or Developer's contractor under this Agreement are designed to meet the minimum requirements of City and the City does not represent these

types or amounts of insurance to be sufficient or adequate to protect the Developer's interests or liabilities. Developer **or Developer's Contractor** alone shall be responsible to the sufficiency of its own insurance program.

The Developer and the Developer's contractor and sub-contractors shall be solely responsible for all of their property, including but not limited to any materials, temporary facilities, equipment and vehicles, and for obtaining adequate and appropriate insurance covering any damage or loss to such property. The Developer and the Developer's contractor and sub-contractors expressly waive any claim against City arising out of or relating to any damage or loss of such property. The Developer is obligated to include, or cause to be included, provisions similar to this paragraph in all of the Developer's contracts and its subcontractors' contracts with their sub-subcontractors.

F. **Maintenance Bond.** Upon completion of the Project, Developer **or Developer's Contractor** shall deliver a bond or other suitable security in a form approved by the City Attorney, in an amount that is ten percent (10%) of the cost of the CRA Improvements, ensuring that the CRA Improvements will remain free from defects in workmanship and materials for a period of one year. If prior to the expiration of one year after the date of acceptance of the CRA Improvements, any work is found to be defective, the Developer **or Developer's Contractor** shall promptly, without cost to the City, and in accordance with written instructions issued by the CRA Engineer, either correct such defective work, or if it has been rejected by the CRA Engineer, remove and replace it with non-defective work. If the Developer **or Developer's Contractor** does not promptly comply with the terms of such instructions, the City may have the defective work corrected or the rejected work removed and replaced and may enforce its rights under the maintenance bond. All direct and indirect costs of such correction, removal or replacement not reimbursed pursuant to said bond, including compensation for professional services, shall at the City's option either be paid by the Developer to the City and or withheld from the costs to be paid to Developer pursuant to Section III of this Agreement. The maintenance bond shall be released to the Developer at the later date of twelve (12) months after acceptance of the Improvements by the City Council or completion of any maintenance or repair required by the CRA Engineer.

G. **Warranty.** Developer guarantees workmanship and material of the CRA Improvements for a period of one year after the City's acceptance of the CRA Improvements, **which warranty shall be automatically renewed and extended until the City's completion of the Front Beach Road Segment 2 Improvement Project, or five years, whichever occurs**

first. The Developer further agrees to defend, indemnify and hold harmless the City from any and all liability claims by a third party due to faulty workmanship and materials within the aforementioned one-year guarantee period.

H. Acceptance of CRA Improvements. City acceptance of the CRA Improvements (including utilities) shall be by Resolution of the City Council. The City Council shall accept the CRA Improvements only upon recommendation by the CRA Engineer following their completion, inspection and certification. The recommendation by the CRA Engineer shall be contingent upon satisfaction of each of the following conditions:

1. Fulfillment of the requirements for maintenance of the Improvements as outlined by this part;
2. An opinion by the City Attorney that satisfactory and proper conveyances of the CRA Improvements and any necessary property interests have been made by Developer to the City;
3. CRA Improvements have been completed and are in good repair, in accordance with approved plans and specifications reviewed by the CRA Engineer; and
4. As-built drawings dated, certified, and stamped by a registered Florida engineer have been submitted to and accepted by the CRA Engineer.

3. The City and Developer wish to amend Section III of the Agreement related to compensation to set forth the value of the easement to be conveyed to Developer and the amount to be offset for such easement from the total amount to be paid to Developer, as follows:

III. **Developer Compensation**

A. The City will pay the fees and costs reasonably incurred to effect the design, engineering, construction, installation and conveyance of the CRA Improvements and for the value of the real property interests necessary to perpetually maintain the same, to the Developer in the amounts mutually agreed upon by the parties and as more particularly set forth below:

Front Beach Road Seg 2 <u>Utility Drainage</u> Easement Value	\$ 85,293,300.00
<u>Section I.C 25' Strip Easement Value (1298 x \$9/sf)</u>	<u>(\$11,682.00)</u>
CRA Improvements Cost	<u>\$286,171.76</u>
Total	<u>\$371,471.76</u> — <u>\$359,782.76</u>

B. Payment Schedule.

1. The City shall pay Developer Three Hundred ~~Fifty Nine Seventy One~~ Thousand ~~Seven~~ Four Hundred ~~Eighty Two Seventy One~~ Dollars and Seventy Six Cents (~~\$359,782.76~~) (~~\$371,471.76~~) thirty (30) ~~ninety (90)~~ days after construction completion of the Project. No portion of funds shall be paid by City to the Developer until all CRA Improvements have been installed by Developer and accepted by the City.
 2. The City shall have no obligation to pay Developer any amount in excess of the Improvements and Easement Cost, provided that the City shall pay the cost of any change orders with respect to the CRA Improvements which are necessitated by unforeseen conditions, required by the City, or necessary in order to comply with any requirements of governmental authority.
4. The City and Developer wish to amend Section V of the Agreement regarding General Provisions to read as follows:
- A. Notice of Changes. Each party shall have the obligation of notifying the other party of any events or circumstances that will affect either party's ability to carry out their duties under this Agreement. Notice to the City shall be sent to:

Mario Gisbert City Manager
John Alaghemand, CRA Manager
City of Panama City Beach
110 S. Arnold Road
Panama City Beach, Florida 32413
Phone: (850) 233-5100
Fax: (850) 233-5108

with copy to:

Amy E. Myers, Asst. City Attorney
Harrison Sale, McCloy
P.O. Drawer 1579
Panama City, Florida 32401
Phone: (850) 769-3434
Fax: (850) 769-6121

Notice to the Developer shall be sent to:

Julie K. Hilton, Vice President
Holiday Resort PCB, Inc.
11127 Front Beach Road
Panama City Beach, Florida 32407
Phone: (850) 230-4043 or (850) 814-4212

Fax: (850) 235-0888

Or such other address as City or Developer may designate.

B. Indemnification and Hold Harmless.

1. For a period of one year following completion, Developer shall indemnify and hold harmless and defend the City and its officers, employees, agents and representatives from and against any and all damages, lawsuits, liabilities, claims, costs and expenses including reasonable attorney's fees ("Damages") arising in whole or in part from: (i) the construction, installation, maintenance or repair of the Improvements by Developer or anyone claiming by, through or under Developer; or (ii) the breach of any of Developer's representations, warranties, covenants or agreements hereunder, including any Damages arising from the fault of Developer, but excluding any Damages arising solely from the negligence or willful misconduct of the City. The covenants contained in this paragraph shall survive the termination of this Agreement.

2. If any third party claim is made against the City that, if sustained, would give rise to indemnification liability of the Developer or Developer's Contractor under this Agreement, the City shall promptly cause notice of the claim to be delivered to the Developer and shall afford the Developer and its counsel, at the Developer's sole expense, the opportunity to join in defending or compromising the claim. The covenants contained in this paragraph shall survive the termination of this Agreement.

3. Nothing in this Agreement shall be deemed or otherwise interpreted as waiving the City's sovereign immunity protections, or as increasing the limits of liability as set forth in Section 768.28, Florida Statutes. The City's liability for breach of this Agreement is limited in amount and shall not exceed the limitations of liability for tort actions as set forth in Section 768.28, Florida Statutes.

C. Time. Time is of the essence in this Agreement.

D. Remedies. All rights and remedies conferred upon the parties in this Agreement shall be cumulative and in addition to those available under the laws of the State of Florida.

E. Attorneys Fees. In the event of any litigation hereunder, each party shall be responsible for its own attorney's fees and court costs at all trial and appellate levels and at any mediation or arbitration.

F. Assignment. This Agreement is not assignable. **The recorded easements shall run with the land.**

G. Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

H. Modification. No modification, amendment, or alteration in the terms or conditions contained herein shall be effective unless contained in a written document prepared with the same or similar formality as this Agreement and executed by the City and Developer.

I. Governing Law. This Agreement shall be governed by and construed according to the laws of the State of Florida. Venue for any action or proceeding to enforce the provisions of this Agreement shall be in the Circuit Court in and for Bay County, Florida.

~~J. Termination. The City may terminate this Agreement at any time by providing sixty (60) days prior written notice of termination to the Developer.~~

~~K. J. Entire Agreement. This Agreement **and First Amendment** constitutes the entire agreement between the parties pertaining to the subject matter hereof, and supercedes all prior and contemporaneous agreements, understandings, negotiations and discussions of the parties, whether oral or written, and there are not representations, warranties, covenants or other agreements among them.~~

5. Except as expressly modified by this First Amendment, the Agreement remains unchanged and in full force and effect.

IN WITNESS WHEREOF, the parties have caused these presents to be executed in their names as of the day and year first above written.

WITNESSES:

DEVELOPER
HOLIDAY RESORT PCB, INC.
a Florida corporation

Name

By:
Its: President

Name

STATE OF Florida)
COUNTY OF Bay)

The foregoing instrument was acknowledged before me this _____ day of _____, 201____, by _____, President of Holiday Resort PCB, Inc., a Florida corporation, on behalf of that entity. She is personally known to me or has produced a _____ state driver's license as identification.

Printed Name: _____
NOTARY PUBLIC, State of Florida

[NOTARIAL SEAL]

CITY OF PANAMA CITY BEACH

Mario Gisbert, City Manager

ATTEST:

Holly J. White, City Clerk

Approved as to Form:

City Attorney

STATE OF FLORIDA)
COUNTY OF BAY)

The foregoing instrument was acknowledged before me this _____ day of _____, 201____, by Mario Gisbert, as City Manager of the **CITY OF PANAMA CITY BEACH, FLORIDA**. He is personally known to me or has produced a _____ state driver's license as identification.

Printed Name: _____
NOTARY PUBLIC, State of Florida

[NOTARIAL SEAL]