

This Instrument Prepared by:
Eric P. Gifford
Gilligan, King, Gooding & Gifford, P.A.
1531 SE 36th Avenue
Ocala, FL 34471

Record and Return to:

ELECTRIC SERVICE AGREEMENT

THIS AGREEMENT is made and entered into on the dates set forth below by and between the **CITY OF OCALA**, a Florida municipal corporation (“City”), through the Ocala Utility Services (“OUS”) and _____ (hereinafter the “Developer”).

WITNESSETH:

WHEREAS:

- A. Developer is the owner of the real property described on attached Exhibit “A” (the “Property”), which is located within the jurisdictional boundaries of the City; and
- B. Developer has previously filed a Request for Utility Design for “_____”, a commercial development (the “Development”), which is located on the real property described in the attached Exhibit A (“Property”).
- C. Article VI of Chapter 70 of the Code of Ordinances of the City of Ocala (the “City Code”) is incorporated into this document by reference and the Developer is required to follow all requirements therein.
- D. Section 70-585 of the City Code provides the following:

Sec. 70-585. New service extensions.

(b) For extensions of electric facilities to commercial or industrial developments, the Utility shall not be required to make the extension unless the estimated net electric revenues from the customer, together with additional revenues from other reasonably anticipated prospective customers, shall be sufficient to afford a fair and reasonable return on the cost of making the extension as determined by the City.

(c) Subject to the terms and conditions in this article, the Utility will extend its lines if the cost of the extension, less other applicable charges as contained in these ordinances, does not exceed four 4 times the estimated annual Net Revenue (for 48 months) to be derived from the customer.

(d) If the cost of the line extension exceeds the cost-to-revenue ratio in subsection (c) of this section, the Utility shall require the customer to advance the Utility a sum of money in cash as a contribution in aide of construction for construction costs, sufficient in amount to make up the deficiency in meeting the criteria specified in subsection (c) of this section.

(d) Where contributions in aide of construction money are advanced under subsection (d) of this section an electric service agreement will be required. At the end of the 48 month period an accounting of the actual revenue and expenses will be

made. Any over payment will be refunded and any shortage will be billed to the customer.

- E. Subsections 70-602(a) and (e) of the City Code provides the following:

Sec. 70-602. Generally.

(a) The underground electric system will be installed using approved conduits for all conductors, unless otherwise specifically stated. The required conduits shall be furnished and installed by the developer using the utility's design and specifications. The utility will own and maintain the electric distribution facilities up to the designated point of delivery. Any materials supplied, work performed, or payment made by the applicant under the provisions of this subdivision will not convey to the applicant any rights of ownership.

(e) Where the applicant requests underground electric facilities not specifically covered by this subdivision and where overhead facilities would otherwise be provided, the applicant shall pay the utility the estimated differential cost between the underground facilities and comparable overhead facilities.

- F. Subsections 70-606(a) and (b) of the City Code provides the following:

Sec. 70-606. Commercial buildings requiring both primary and secondary underground service.

(a) *Generally.* When requested by the applicant, or as required elsewhere in these ordinances, the utility will provide underground electric distribution facilities for commercial buildings in accordance with its general rules and the provisions of this section.

(b) *Payment of costs.* The applicant shall pay, before construction begins, the difference between the estimated cost of underground service and the equivalent overhead installation.

- G. Subsections 70-621(a) and (b) of the City Code provides the following:

Sec. 70-621. Streetlights required.

The developer of any property within the city shall be responsible for the cost to install street lighting on all city, county and state roads, both internal to and adjacent to the development, at the time the development is subdivided into individual lots or at the time of final site plan approval. The intent of this requirement is to provide for adequate lighting of the streets in and around all new construction, whether residential or commercial in nature, as determined appropriate by the city. Private streets will be lighted as part of the development design and paid for and maintained, including energy costs, by the developer.

- H. Section 70-622 of the City Code provides the following:

Sec. 70-622. Payment of costs.

The developer shall pay to the city, or if the provider of electric service to the property is not the city, the non-city provider, the estimated cost to install street lighting before the city or provider begins construction of any electrical facilities.

I. In order to service and meet Developer's stated electrical requirements, City has determined that the estimated cost of construction and expenses to install the equipment required to service Developer's needs and requirements is as follows:

Cost of construction per work order _____ \$ _____

J. The City has determined that the Developer contribution for underground construction under Section 70-606 is:

\$ _____

K. The City has determined that OUS's cost to serve the Developer's installation is the estimated cost of construction and expenses less the Developer contribution for underground construction:

OUS's estimated Cost to Serve: \$ _____

L. City estimates Developer's total net revenue generated over a 4 year period calculated as follows:

See attached detailed charges with assumed rates

TOTAL REVENUE \$ _____

M. City estimates the cost to install street lighting under work order _____ is: \$ _____

N. City estimates Developer's required Cost in Aid of Construction Cash Payment ("CIAC Cash Payment") sufficient in amount to make up the deficiency in revenue prior to commencement of construction to the City pursuant to Section 70-585 totals \$ _____ and is calculated as follows:

OUS estimated cost to serve Developer: \$ _____

Less 48 month Projected Net Revenue (_____)

Required CIAC Cash Payment \$ _____

NOW THEREFORE, the parties hereto agree as follows:

1. **Recitals.** The recitals contained above are true and correct and are incorporated herein by reference.

2. **Requirements of Developer.** Developer agrees to comply with the requirements under the City Ordinances described above as well as the following additional obligations:

2.1. Construction Cost Guarantee and Escrow Payment.

2.1.1. Pursuant to Section 70-585 of the City of Ocala Code of Ordinances, Developer shall guarantee the utility certain annual minimum revenues, sufficient in amount to equal OUS's estimated cost to serve Developer of: \$ _____.

2.1.2. Construction Cost Cash Payment. Pursuant to Section 70-585 of the City of Ocala Code of Ordinances, Developer shall advance the utility a sum of money in cash as a contribution in aide of construction ("CIAC") for construction costs in the amount of \$ _____.

2.1.3. Following an initial 48-month operating period, the City shall perform a final accounting to determine whether Developer's combined net revenues over the 48-month period are sufficient to defray the actual construction costs of

improvements made under this Agreement. Any deficiency due to insufficient net revenues will be paid to City within 30 days following receipt of the final accounting report.

2.1.4. The 48-month period commences upon operation of the Developer's equipment installed and constructed pursuant to this Agreement or six (6) months following completion of OUS's portion of the construction, whichever occurs first.

2.2. Underground cost differential payment. In accordance with Section 70-606 and prior to commencement of construction, Developer shall pay \$_____ related to construction of underground facilities to service the development.

2.3. Street Lighting: In accordance with Section 70-621, the Developer shall pay \$_____ for installation of street lighting.

2.4. Site Plan. Prior to commencement of construction, Developer shall provide and obtain approval for a final site plan depicting the location of all facilities to be constructed and placed on Developer's property.

2.5. Developer's Construction Requirement. Developer is responsible for all labor, materials and expenses related to construction of a conduit system and pads, if required, in accordance with section 70-602 and the City conduit policy.

2.6. Payment for Recording. Upon its execution of this Agreement, Developer shall pay City the costs to record this Agreement.

3. **Requirements of City.**

3.1. Upon receipt of all monies owed and other Developer requirements described above or as required in Section 70, Article VI of the City Code, City agrees to promptly commence construction of the improvements necessary to meet Developer's electric utility needs.

3.2. The construction timelines may be subject to unanticipated delays in delivery of materials and/or equipment as well as additional conditions beyond City's control as described in Section 7.18 below.

4. **Final Accounting.**

4.1. Upon the completion of construction of the improvements described in this Agreement, the City will perform a final audit utilizing the Federal Energy Regulatory Commission (FERC) accounting procedures in order to determine the actual construction costs related to this project. Following completion of the 48-month period of operation, the City will calculate the total net revenues generated through the Developer's facility and determine whether any additional payment is due from Developer or Developer is entitled to a credit.

4.2. Any deficiency will be deducted from the escrow deposit held by the City. If the escrow funds are insufficient to pay the amount due to City for construction costs, Developer will be billed the difference and payment will be due 30 days from the billing date.

5. **Indemnification.** The following provisions shall survive the termination of this Agreement and the performance by the parties of their obligations hereunder.

5.1. Developer shall, at its sole cost and expense, indemnify City, and its elected officials, employees and volunteers against, and hold City and its elected officials, employees and volunteers harmless from, any and all liability, damages, penalties, claims, liens, costs,

charges, losses, and expenses (including, without limitation, reasonable fees and expenses of attorney, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against City by reason of any act or omission of Developer, its personnel, employees, agents, contractors, or subcontractors, resulting in bodily injury, sickness, disease, or death to any person or damage to, loss of or destruction of tangible or intangible property, or any other right of any person, firm or corporation, which may arise out of or be in any way connected with: this Agreement, failure to comply with any federal, state, or local statute, ordinance or regulation, including, without limitation, harm or personal injury to Developer or third persons during Developer's ownership of the Property.

- 5.2. In the event any action or proceeding shall be brought against City by reason of any matter for which City is indemnified hereunder, Developer shall, upon notice from City, at Developer's sole cost and expense, resist and defend the same with legal counsel acceptable to City, provided however, that Developer shall not admit liability in any such matter on behalf of City without the written consent of City and provided further that City shall not admit liability for, nor enter into any compromise or settlement of, any claim for which they are indemnified hereunder, without the prior written consent of Developer.
- 5.3. The covenants herein will survive the consummation of the transactions under this Agreement, and are a material inducement for City entering into this Agreement and it shall survive the Closing.
6. **Billing and Payment.** All billing and payment transactions hereunder shall be in accordance with OUS policy and procedure for its retail electric service.
7. **Lien.**
 - 7.1. Developer hereby grants to City a lien on the Property to secure the amount owed to City under paragraphs 2 and 4 hereunder, including interest (calculated at the maximum rate allowed by law), costs and attorneys' fees.
 - 7.2. Such lien may be foreclosed in the manner provided by law for the foreclosure of mortgages.
 - 7.3. Upon Developer's payment of all amounts owed under paragraphs 2 and 4, City shall, upon Developer's written request, execute and deliver to Developer an instrument, in recordable form, releasing the lien. Such release shall have no affect on Developer's ongoing obligations under this Agreement.
8. **Right to Discontinue Service.** Developer consents to City's discontinuation of electric service to the Property, or any portion thereof, based upon Developer's failure to pay to City amounts owed hereunder. Such consent shall be deemed a covenant running with the Property and shall be binding upon all heirs, successors and assigns of the Property other than the purchasers of platted residential lots on the Property.
9. **General.**
 - 9.1. Effective Date. The Effective Date of this Agreement will be the date of execution by the last of the parties hereto.

- 9.2. No Assignment. This Agreement may not be assigned in whole or in part by any party except with the prior written consent of the other parties, which may be withheld at the sole discretion of the non-assigning parties.
- 9.3. Reference to Parties. Each reference herein to the parties shall be deemed to include their successors, permitted assigns, heirs, administrators and legal representatives, all whom shall be bound by the provisions hereof.
- 9.4. Waiver. The failure or delay of any party at any time to require performance by another party of any provision of this Agreement, even if known, shall not affect the right of such party to require performance of that provision or to exercise any right, power or remedy hereunder. Any waiver by any party of any breach of any provision of this Agreement should not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right, power or remedy under this Agreement. No notice to or demand on any party in any circumstance shall, of itself, entitle such party to any other or further notice or demand in similar or other circumstances.
- 9.5. Attorneys' Fees. If any legal action or other proceeding (including, without limitation, appeals or bankruptcy proceedings) whether at law or in equity, which: arises out of, concerns, or relates to this Agreement, any and all transactions contemplated hereunder, the performance hereof, or the relationship created hereby; or is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any provisions of this Agreement, the successful or prevailing party or parties shall be entitled to recover reasonable attorney's fees, court costs and all expenses even if not taxable as court costs, incurred in that action or proceeding, in addition to any other relief to which such party or parties may be entitled.
- 9.6. Jurisdiction and Venue. The parties acknowledge that a majority of the negotiations, anticipated performance and execution of this Agreement occurred or shall occur in Marion County, Florida. Any civil action or legal proceeding arising out of or relating to this Agreement shall be brought only in the courts of record of the State of Florida in Marion County or the United States District Court, Middle District of Florida, Ocala Division. Each party consents to the exclusive jurisdiction of such court in any such civil action or legal proceeding and waives any objection to the laying of venue of any such civil action or legal proceeding in such court or the right to bring an action or proceeding in any other court. Service of any court paper may be effected on such party by mail, as provided in this Agreement, or in such other manner as may be provided under applicable laws, rules of procedure or local rules.
- 9.7. JURY WAIVER. IN ANY CIVIL ACTION, COUNTERCLAIM, OR PROCEEDING, WHETHER AT LAW OR IN EQUITY, WHICH ARISES OUT OF, CONCERNS, OR RELATES TO THIS AGREEMENT, ANY AND ALL TRANSACTIONS CONTEMPLATED HEREUNDER, THE PERFORMANCE HEREOF, OR THE RELATIONSHIP CREATED HEREBY, WHETHER SOUNDING IN CONTRACT, TORT, STRICT LIABILITY, OR OTHERWISE, TRIAL SHALL BE TO A COURT OF COMPETENT JURISDICTION AND NOT TO A JURY. EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY. ANY PARTY MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS AGREEMENT WITH ANY COURT, AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO OF THE WAIVER OF THEIR RIGHT TO TRIAL BY

JURY. NEITHER PARTY HAS MADE OR RELIED UPON ANY ORAL REPRESENTATIONS TO OR BY ANY OTHER PARTY REGARDING THE ENFORCEABILITY OF THIS PROVISION. EACH PARTY HAS READ AND UNDERSTANDS THE EFFECT OF THIS JURY WAIVER PROVISION.

9.8. Governing Law. This Agreement is and shall be deemed to be a contract entered into and made pursuant to the laws of the State of Florida and shall in all respects be governed, construed, applied and enforced in accordance with the laws of the State of Florida.

9.9. Notices.

9.9.1. All notices, certifications or communications required by this Agreement shall be given in writing and shall be deemed delivered when served or delivered by overnight courier or in person, or when received if by facsimile transmission with a confirming copy mailed by registered or certified mail, postage prepaid, return receipt requested, or sent by overnight courier, addressed to the respective parties as follows:

a. Developer: (mailing address)

Phone #: _____
Fax #: _____

b. If to City: City of Ocala
Attn: Director, Electric Power Services
2100 NE 30 Ave, Bldg. B
Ocala, FL 34470
Phone #: (352) 351-6600
Fax #: (352) 351-8263

Copy to:
Assistant City Attorney Eric P. Gifford
Gilligan, King, Gooding & Gifford, P.A.
1531 SE 36th Avenue
Ocala, FL 34471
Phone #: (352) 867-7707
Fax #: (352) 867-0237

9.9.2. Each such notice shall be deemed delivered:

- a. On the date delivered if by personal delivery;
- b. On the date faxed if by fax; and
- c. If the notice is mailed, on the earlier of: (a) the date upon which the Return Receipt is signed; (b) the date upon which delivery is refused; (c) the date upon which notice is designated by the postal authorities as not delivered; or (d) the third business day after mailing.

9.9.3. If a notice is delivered by multiple means, the notice shall be deemed delivered upon the earliest date determined in accordance with the preceding subparagraph.

- 9.10. Severability of Illegal Provisions. Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. Should any portion of this Agreement be declared invalid for any reason, such declaration shall have no effect upon the remaining portions of this Agreement.
- 9.11. Paragraph Headings. The paragraph headings herein are included for convenience only and shall not be deemed to be a part of this Agreement.
- 9.12. Rights of Third Parties. Unless expressly stated herein to the contrary, nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties hereto and their respective legal representatives, successors and permitted assigns. Nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision give any third persons any right of subrogation or action over or against any party to this Agreement.
- 9.13. Successors. It is mutually understood and specifically agreed that this Agreement is binding upon the respective heirs, successors, administrators, executors, and assigns of the parties hereto.
- 9.14. Partnership/Joint Venture Relationship. This Agreement does not create any obligation or relationship such as a partnership, joint venture or other similar legal relationship under the laws of any state or the federal government. Any correspondence or other references to “partners” or other similar terms will not be deemed to alter, amend or change the relationship between the parties hereto unless there is a formal written Agreement specifically detailing the rights, liabilities and obligations of the parties as to a new, specifically defined legal relationship.
- 9.15. Non-interference Clause. In exercising its rights herein, OUS shall not unreasonably interfere with Developer’s operations.
- 9.16. Counterparts. This Agreement may be executed in counterparts, each of which shall be an original and all of which shall constitute the same instrument.
- 9.17. Time. Time is of the essence of all of the provisions and terms of this Agreement.
- 9.18. Force Majeure. Neither party shall be responsible for damages or delays caused by Force Majeure or other events beyond the control of the party and which could not reasonably have been anticipated or prevented. For purposes of this Agreement, Force Majeure includes, but is not limited to, adverse weather conditions, floods, epidemics, war, riot, strikes, lockouts, and other industrial disturbances; unknown site conditions, accidents, sabotage, fire loss of or failure to obtain permits, unavailability of labor, materials, fuel, or services; court orders; acts of God; acts, orders, laws, or regulations of the Government of the United States or the several states, or any foreign country, or any governmental agency. In the event that Force Majeure occurs, the parties shall mutually agree on the terms and conditions upon which services may continue.
- 9.19. Construction of Agreement. Each party acknowledges that all parties to this Agreement participated equally in the drafting of this Agreement and that it was negotiated at arm's length. Accordingly, no court construing this Agreement shall construe it more strongly against one party than another.

- 9.20. Order Of Interpretation. To the extent of any conflict or inconsistency between the provisions of this Agreement and the provisions of the City of Ocala Ordinances cited herein first, and the Agreement second shall control.
- 9.21. Amendment. The provisions of this Agreement may not be amended, supplemented, waived, or changed orally, but only by writing making specific reference to this agreement signed by the party as to whom enforcement of any such amendment, supplement, waiver, or modification is sought. No amendment to this Agreement shall be effective except those agreed to in writing and signed by both of the parties to this Agreement
- 9.22. Entire Agreement. This agreement and attachments (if any) constitute the entire Agreement between the parties hereto with respect to the subject matter hereof. No course of prior dealings between the parties and no usage of trade shall be relevant or admissible to supplement, explain, or vary any of the terms of this agreement. Acceptance of, or acquiescence in, a course of performance rendered under this or any prior agreement shall not be relevant or admissible to determine the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity to make objection. No representations, understandings, or agreements have been made or relied upon in the making of this Agreement other than those specifically set forth herein. This agreement can only be modified in writing and signed by the parties hereto and their duly authorized agents.

IN WITNESS WHEREOF, the Parties have entered into this agreement to be executed by their respective authorized officials on the day, month and year indicated below:

ATTEST:

CITY OF OCALA

 Angel B. Jacobs
 Interim City Clerk

By: _____
 Michael Poucher, P.E.
 Supervisor, Electric Engineering
 (Pursuant to City Council Resolution #2008-54)

Date: _____

Approved as to form and legality:

Eric P. Gifford
Assistant City Attorney

Developer: _____

By: _____
President (Please type or print name)

President (Signature)

Date: _____

Representative of Developer:

Title

Printed Name

Signature

Date: _____

Document1