

RIGHT-OF-WAY USE AGREEMENT

Oak Forest at Melbourne Homeowners Association

This Right-Of-Way Use Agreement (this “Agreement”), made by and between Brevard County, Florida, a political subdivision of the State of Florida (the “County”), and Oak Forest at Melbourne Homeowners Association, Inc., a Florida corporation (the “Association”), whose principal address is 1978 US HWY 1, STE 106, Rockledge, FL, 32955.

RECITALS

Whereas, the County owns the public right-of-way of John Rodes Boulevard (the “Public Right-of-Way”); and

Whereas, prior to the construction of the Oak Forest Subdivision, there were existing trees within the Public Right-of-Way; and

Whereas, the County commenced construction of the John Rodes Boulevard Sidewalk (Eau Gallie Blvd to Aurora Road) project (the “Project”) within the Public Right-of-Way which required the removal of a majority of said trees; and

Whereas, in conjunction with the Project, the County will also install irrigation and landscaping; and

Whereas, upon installation of the irrigation and landscaping, the Association shall be fully responsible for said improvements in the Public Right-of-Way; and

Whereas, the Association may desire to improve the Public Right-of-Way by installing additional improvements, which may consist of, but are not limited to, improvements for landscaping, signage, hardscape, irrigation, and/or other related improvements pursuant to plans and specifications approved by the County and further described below (collectively referred to as the “Improvements”); and

Whereas, the County, pursuant to the authority set forth in Section 125.01, Florida Statutes, may allow the use of a public right-of-way for purposes which do not conflict with the interests of the public or are in the interests of the public; and

Whereas, the County has determined that use of the Public Right-of-Way by the Association for the installation, operation, maintenance, repair and improvement of such improvements to the Public Right-of-Way pursuant to this Agreement promotes the public interest and serves a public benefit.

Now, therefore, in consideration of the covenants herein contained, it is mutually agreed between the parties as follows:

1. Recitals

The above recitals are true and correct and incorporated into this Agreement by this reference.

2. Definitions

The following terms used in this Agreement shall have the meaning given to such terms below:

- a) Agreement: shall mean this Right-of-Way Use Agreement.
- b) Association: shall mean Oak Forest at Melbourne Homeowners Association, Inc., a Florida not-for-profit corporation.
- c) County: shall mean Brevard County, Florida, a political subdivision of the State of Florida.
- d) Designated Premises: shall mean that portion of the Public Right-of-Way between the western edge of pavement to the westerly right-of-way line of John Rodes Boulevard, fronting Tracts A and B of the subdivision of Oak Forest at Melbourne (as defined in Plat Book 52, Page 95) and incorporated herein by this reference, where the Improvements will be installed and maintained, with the Designated Premises to be more particularly described in the Plans as approved by the County.
- e) Improvements (including, but not limited to, landscaping, signage, hardscape, irrigation, and/or other related improvements): shall mean those certain improvements either existing, installed, or to be installed by and/or on behalf of the Association within the Designated Premises in accordance with the Plans and necessary approvals from the authority(ies) having jurisdiction, and maintained by the Association in accordance with the provisions of this Agreement as approved by the County pursuant to any Right-of-Way Permit issued by the County. The County shall be responsible for the regular and routine maintenance of the sidewalk; however, any damage caused to the sidewalk from any of the Improvements shall be the responsibility of the Association
- f) Plans: shall mean those certain plans for the construction and installation of Improvements which have been approved by the Association and the County as part of a Right-of-Way Permit.
- g) Prompt or Promptly: For purposes of Paragraph 8, the term “promptly” shall mean no later than fourteen days after the Association receives written notice of the need for maintenance, repairs, or replacements to the applicable Improvements (as may be extended on a day-by-day basis for acts of force majeure beyond the Association’s control); however, to the extent such maintenance, repairs, or replacements cannot reasonably be completed within fourteen days, the term “promptly” shall mean the Association shall commence such maintenance, repairs, or replacements within such initial fourteen day period and shall diligently work to complete such maintenance,

repairs, or replacements. For purposes of Paragraph 10, the term “promptly” or “prompt” shall mean no later than fourteen days after the Association receives actual notice of the existence of a hazardous condition, or a condition in need of maintenance as required hereunder, at the Designated Premises.

- h) Public Right-of-Way: shall have the meaning given to such term in the second recital set forth above.
- i) Right-of-Way Permit: shall mean the official written approval to begin construction or installation of Improvements according to the application, plans, specifications and conditions approved by the County.

3. Construction and Maintenance of Property

During the term of this Agreement, the Association hereby agrees to maintain, and be otherwise responsible for, the Improvements within the Designated Premises in the manner described in this Agreement and as permitted by the County. Improvements shall be maintained in such a manner so as to not cause damage to or interfere with any County improvements or facilities. Any such damage to County improvements or facilities shall be remedied immediately by the Association at no cost to the County.

4. Term

The initial term of this Agreement shall be twenty years commencing with the date of last signature below, and shall thereafter be automatically renewed annually, unless terminated by either party in accordance with Paragraph 15 Termination herein.

5. Use of Designated Premises

During the term of this Agreement, the Association shall use the Designated Premises only for maintenance of the Improvements. It is hereby mutually agreed and understood that the use of any structure, improvement or facility now or hereafter located on the Designated Premises as part of the Improvements shall be for decorative or informational purposes only and not for human occupancy, nor shall such Improvements create traffic hazards. It is specifically agreed and understood that the use herein set forth for the Improvements upon the Designated Premises shall be the only use consented to by the County, and that failure to comply with this provision shall be considered a material breach of this Agreement, whereupon the County shall be entitled to immediately terminate this Agreement.

6. Improvements

All Improvements existing, installed, or to be installed upon the Designated Premises on behalf of and/or by the Association shall be maintained by the Association on the Designated Premises during the term of this Agreement in accordance with this Agreement and any County issued Right-of-Way Permit. It is hereby agreed and understood that any Improvements placed on or constructed on the Designated Premises and permanently attached thereto, shall remain the property of the Association and that the Association retains the right to remove such improvement within sixty days of the date of termination of this Agreement, whether by breach, termination, by expiration of its natural term, or any other means. In the event such

Improvements are not removed within sixty days of termination, the Improvements shall become the property of the County, and the County may remove the Improvements. To the extent the County elects to remove any such Improvements, the Association shall reimburse the County for the cost of removal within thirty days of receipt of an invoice for such removal expenses.

7. Utilities

The Association shall pay all charges for electrical service and other utility services supplied to the Association at the Designated Premises for the Improvements during the term of this Agreement.

8. Repairs and Maintenance

During the term of this Agreement, the Association shall, at its own expense, maintain the Designated Premises and all Improvements on the Designated Premises in accordance with this Agreement, any County issued Right-of-Way Permit and all applicable County and Florida Department of Transportation current maintenance and safety requirements, as may be updated, and make all necessary repairs and replacements to the Designated Premises and/or the Improvements. Such maintenance, repairs and replacements shall be made promptly as and when necessary. Notification of the need for such repair and/or maintenance may be given to the Association by written or electronic communication.

9. Illegal, Unlawful or Improper Use

The Association shall make no unlawful, improper, immoral or offensive use of the Designated Premises, nor will the Association use the Designated Premises or allow use of the Designated Premises for any purposes other than that hereinabove set forth. Failure of the Association to comply with this provision shall be considered a material default under this Agreement. In the event any of the Improvements are deemed a traffic safety hazard by the County or the Florida Department of Transportation, such use shall be deemed an improper use and this Agreement shall be subject to immediate termination.

10. Indemnification and Insurance

Except where limited by law, the Association agrees that it will indemnify and save harmless the County from any and all liability, claims, damages, expenses, proceedings and causes of action of every kind and nature arising out of or connected with the use, occupation, management or control of the Designated Premises or any of the Improvements thereon or any equipment or fixtures used in connection with the Designated Premises by the Association or its employees or independent contractors. The Association agrees that it will, at its own expense, defend any and all actions, suits or proceedings which may be brought against the County in connection with the Association's use of the Designated Premises pursuant to this Agreement and that it will satisfy, pay and discharge any and all judgments that may be entered against the County in any such action or proceedings. The Association shall include in any contract for work upon or involving the Designated Premises that the contractor shall indemnify and hold harmless the County from liabilities, damages, losses and costs, including, but not limited to, attorney's fees, to the extent caused by the negligence, recklessness, or intentional wrongful misconduct of the

contractor and persons employed or utilized by the contractor in the performance of the contract. The parties recognize specific consideration has been exchanged for this provision.

The County shall have no liability for any costs or expenses incurred in connection with the siting, testing, construction, operation, maintenance or removal of any improvements of any kind made or directed to be made on the Designated Premises by the Association. The rights granted to the Association hereunder shall not be construed to create any responsibility on the part of the County to pay for any improvements, alterations, or repairs occasioned by the Association, nor any injury or damage arising out of same.

The Association further agrees to provide and maintain at all times during the term of this Agreement, without cost or expense to the County, policies of **General Liability Insurance** insuring the Association against any and all claims, demands or causes of action whatsoever for injuries received and damages to property in connection with the use, occupation, management and control of the Designated Premises and the Improvements thereon. Such policies of insurance shall insure the Association in an amount not less than **one million dollars** to cover any and all claims arising in connection with any one particular accident or occurrence. It is the Association's responsibility to verify that the County is included as an additional insured on any and all insurance policies between the Association and its contractors needed for the work to be completed. A certificate of such insurance policies shall be filed with the Public Works Department, 2725 Judge Fran Jamieson Way, Bldg. A. 201, Viera, Florida, 32940, within ten days of the date of execution of this Agreement by the Association and the County and annually upon insurance renewal. The County's approval or failure to disapprove any policy/ies, coverage, or ACORD Certificates shall not relieve or excuse any obligation to procure or maintain the insurance required herein, nor serve as a waiver of any rights or defenses the County may have. **The County shall be named as an additional insured on the policy** that the Association secures and endorsed with a provision that entitles the County to thirty days written notice from the insurer of any change or cancellation in said policies.

The Association shall also be required to include in any contract for work upon or involving the Designated Premises that the contractor is required to maintain, without cost or expense to the County, the following types of insurance. The policy limits required are to be considered minimum amounts:

- General Liability Insurance in an amount not less than one million dollars combined single limit for each occurrence and to include coverage for Explosion, Collapse, Underground (X.C.U.) hazards. The Association and the County shall be named as an additional insured on the policy that the contractor secures for work upon or involving the Designated Premises.
- Workers' Compensation Insurance (for statutory limits) as required by Florida Statutes, Chapter 440.

Nothing contained in this Agreement shall be construed as a waiver of County's right to the protections of and/or caps on damages afforded by sovereign immunity under Section 768.28,

Florida Statutes, or other limitations imposed on the County's potential liability under State or Federal law.

The Association shall notify the County promptly in writing of any hazardous condition existing on or about the Designated Premises.

All Improvements or personal property constructed or placed on or about the Designated Premises by the Association or its employees or independent contractors shall be at the risk of the Association, and the County shall not be liable for any damage or loss to any Improvements or personal property located thereon for any cause whatsoever. The Association agrees and understands that the County does not and shall not carry liability, theft, or fire insurance on any of said items or facilities to cover the Association's interests therein. At the time of execution of this Agreement, any existing improvements installed on the Designated Premises will be the maintenance responsibility of the Association. In the event any pre-existing improvements cause damage to County property, including, but not limited to, sidewalk/roadway/curb and gutter/drainage inlets, the Association will be responsible for prompt repair to such County property. If the Association fails to promptly repair the damage, the Association will pay the County all costs incurred by the County to repair the damage.

11. Right of Entry

It is expressly stipulated that this Agreement is a license for permissive use only and that the construction within and/or upon public property pursuant to this Agreement shall not operate to create or vest any property right in said holder. This Agreement does not relieve the Association of local or other jurisdictional requirements. The County or its agents may enter in and on the Designated Premises at any time for any purpose, including, but not limited to, inspecting such property or performing other duties of the County as are required by law or by the terms of this Agreement. Nothing in this Agreement shall limit the County's ability to take necessary and appropriate action to protect property, preserve life, or ensure safety of citizens in any emergency situation. The County shall not be responsible to replace improvements if an emergency/safety situation requires immediate action be taken by the County whereby such actions result in the damage and/or removal to Improvements in order to preserve life, safety, and/or property.

12. Compliance with Statutes

The Association shall promptly execute and comply with all statutes, ordinances, rules, regulations, and requirements of all local, State and Federal governmental bodies applicable to the Designated Premises for the correction, prevention and abatement of nuisances or other grievances in, upon, or connected with the Designated Premises during the term of the Agreement.

13. Binding Effect; Assignability

This Agreement will inure to the benefit of and will be binding upon the parties hereto and their respective successors and assigns. The Association shall not assign this Agreement or any portion thereof of the Association's rights, obligations, or duties hereunder to any party without the prior written consent of the County.

14. Independent Contractor

The Association shall perform the services under this Agreement as an independent contractor and nothing herein shall be construed to be inconsistent with this relationship or status. Nothing in the Agreement shall be interpreted or construed to make the Association or any of its agents or employees to be the agent, employee or representative of the County.

15. Termination

This Agreement may be terminated with or without cause by either party upon sixty days' written notice thereof to the other party; provided, however, that upon termination, the Association or, if this Agreement or any portion thereof has been assigned as permitted hereunder, then the applicable assignees of this Agreement, shall, at the request of the County, remove all Improvements to the Designated Premises, or, in the alternative, reimburse the County for the cost of such removal. In the event this Agreement is terminated and the County assumes ownership of the Improvements within the Public Right-of-Way, the County does not assume maintenance responsibility unless expressly provided in writing. Any maintenance performed by the County will not constitute an assumption of maintenance responsibility as may be otherwise assigned by Florida law or County Code.

16. Notice; Notice of Breach

Notice under this Agreement shall be given to the County at the office of the County Manager, 2725 Judge Fran Jamieson Way, Bldg. C, Viera, Florida 32940 with a copy to the Public Works Department, 2725 Judge Fran Jamieson Way, Bldg. A. 201, Viera, Florida 32940. Notice under this Agreement shall be given to the Association at 1978 US HWY 1, STE 106, Rockledge, FL 32955 or by email to assistant@apmfla.com.

In the event the County determines the Association or any assignee has breached any term or provision of this Agreement, the County shall provide written notice of such breach to the breaching party, and the breaching party shall have thirty days after receipt of such notice to cure such breach or, if such breach is of a nature that it cannot reasonably be cured within such thirty day period, then the breaching party shall have such longer period to cure the breach as is reasonably necessary; provided, however, that if the breaching party commences reasonable action to remedy the breach within such thirty day period and diligently and continuously prosecutes such remedy to completion so that such breach is cured in a timely manner.

17. Right to Audit Records

In the performance of this Agreement, the Association and any assignee shall respectively keep books, records and accounts of all activities related to the Agreement, in compliance with generally accepted accounting procedures. Books, records and accounts related only to the performance of this Agreement (and no other books, records, and accounts of the Association or any assignee) shall be open to inspection during regular business hours by an authorized representative of the County upon written notice to the Association or any assignee not less than five business days advance notice and shall be respectively retained by the Association and each assignee for a period of five years after termination of this Agreement. All books, records and accounts related to the performance of this Agreement shall be subject to the applicable

provisions of the Florida Public Records Act, Chapter 119, Florida Statutes. All records or documents created by the Association or any assignee or provided to the Association or any assignee under the terms of this Agreement, are public records and the Association and any assignee agree to comply with any request for such public records or documents made in accordance with Section 119.07, Florida Statutes.

18. Waiver

The waiver by the County of any of the Association's or any assignee's respective obligations or duties under this Agreement shall not constitute a waiver of any other respective obligation or duty of the Association or any assignee under this Agreement.

19. Entirety and Modifications

This Agreement represents the understanding between the parties in its entirety as to the subject matter of this Agreement and no other agreements, either oral or written, exist between the County and the Association as to the subject matter of this Agreement. This Agreement may only be amended, supplemented or canceled by a written instrument duly executed by the parties hereto, except as otherwise provided herein. This Agreement is solely for the benefit of the formal parties to this Agreement and no right or cause of action shall accrue by reason hereof to or for the benefit of any third party not a formal party hereto.

20. Severability

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or otherwise unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

21. Attorney's Fees and Venue

In the event of any legal action to enforce, interpret, or construe the terms of this Agreement, each party shall bear its own attorney's fees and costs. Venue for any legal action brought by any party to this Agreement to interpret, construe or enforce this Agreement shall be in a court of competent jurisdiction in and for Brevard County, Florida, and **ANY TRIAL SHALL BE NON-JURY.**

22. Construction of Agreement; Counterparts

The parties hereby agree that they have reviewed this Agreement, have consulted with legal counsel of their choice, have participated in the drafting of this Agreement and that this Agreement is not to be construed against any party as if it were the drafter of this Agreement.

This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

23. Effective Date

This Agreement shall be effective on the last signature date required set forth below.

In witness whereof, the County and the Association caused this Agreement to be duly executed in their respective names as of the day and year written below.

Attest:

Brevard County, Florida

Rachel Sadoff, Clerk

By: _____

Kristine Zonka, Chair

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As approved by the Board on January ~~11~~, 2022

JBZ

Approved as to legal form and content
for Brevard County:

Ally

Assistant County Attorney

Witnesses:

Oak Forest at Melbourne Homeowners Association,
Inc., a Florida corporation

Brian Luby

Brian Luby, President

Nicola
Printed name: *Brian Luby*
Patricia Thompson
Printed name: *Patricia Thompson*

State of Florida
County of Brevard

The foregoing instrument was acknowledged before me this 28th day of December, 2021, by Brian Luby, as President of Oak Forest at Melbourne Homeowners Association, Inc., a Florida corporation, on behalf of the corporation, who is personally known to me or provided Driver License as identification.

Notary Public Signature

Lisa J. Kruse

Printed Name

