



# CITY COUNCIL AGENDA FORM

REQUESTED COUNCIL MEETING DATE: 1/19/2010

**SUBJECT: CONCURRENCY AND FAIR-SHARE AGREEMENT FOR DOLLAR GENERAL (3741 CLYDE MORRIS BLVD.)  
CASE NO. 09-8000002**

**DEPARTMENT: COMMUNITY DEVELOPMENT**

**RECOMMENDED MOTION:**

To approve the Concurrency and Fair-Share Agreement for the Dollar General Site Plan (3741 Clyde Morris Blvd.).

**SUMMARY:**

The proposed Fair Share Agreement has been prepared in conjunction with the site plan for the development of a 9,100 square foot retail building located on the east side of Clyde Morris Blvd., north of Southwinds Blvd. The traffic impact analysis (TIA) completed by Kimley-Horn & Associates, Inc., projects impacts to the Dunlawton Ave./Clyde Morris Blvd. intersection upon completion of this project. The \$4,946.00 fair share mitigation payment will go toward the improvement cost at this location as reflected on Exhibit A-2 of the agreement. The agreement has been executed by the property owner and is attached for review.

The site plan has been reviewed by staff and found to be in compliance with the City's development requirements. A Development Order will be issued upon City Council approval of the Fair-Share agreement and receipt of the fair-share mitigation payment.

**ATTACHMENTS:**     Ordinance     Resolution     Budget Resolution  
 Other     Support Documents/Contracts Available for Review in Manager's Office

**DEPARTMENT HEAD**

Wayne Clark  
Community Development Director

Date

1/8/10

**FINANCE DEPARTMENT**

Approved as to Budget Requirements

Date

1/13/10

**CITY ATTORNEY**

Approved as to Form and Legality

Date

1.8.10

**CITY MANAGER**

Approved Agenda Item For:

Date

**COUNCIL ACTION:**     Approved as Recommended     Disapproved  
 Tabled Indefinitely     Continued to Date Certain     Approved with Modification

Document Prepared by:  
Margaret T. Roberts,  
City Attorney  
1000 City Center Circle  
Port Orange, FL 32129-4144  
Return Recorded Document to:  
Attention: Records Clerk  
1000 City Center Circle  
Port Orange FL 32129-4144

## CONCURRENCY AND FAIR SHARE AGREEMENT (Transportation)

This Concurrency and Fair Share Agreement (the "Agreement") made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2010, by and between **CITY OF PORT ORANGE, FLORIDA**, a Chartered Florida Municipality located in Volusia County, Florida, 1000 City Center Circle, Port Orange, Florida 32129 (the "City"); and **SOUTHWIND VILLAS-LAC, LLC**, a Florida limited liability company, with its principal office located at 220 Charles Street, Port Orange, Florida 32129 (the "Developer").

### RECITALS

WHEREAS, attached to this Agreement are Exhibits "A-1" and "A-2" describing in greater detail the parties hereto, real property, development, traffic study and transportation concurrency improvement projects which are referenced throughout this Agreement. The parties agree that all attached exhibits have been reviewed and previously approved by the parties and their respective professional consultants, and all cumulative information set forth or otherwise referenced therein is deemed incorporated herein by reference; and

WHEREAS, unless otherwise stated, the Developer is the owner of the real property described on the attached Exhibits "B-1" and "B-2." Developer desires to permit, develop and, if appropriate, plat the real property (the "Development"); and, in addition to other requirements, is seeking to comply with the City's concurrency requirements for roads/traffic circulation under Chapters 2, 4, and 21 of the City's Land Development Code ("Concurrency"); and

WHEREAS, the transportation concurrency improvement projects ("Concurrency Improvements" or "Transportation Improvements (TI)") described in the attached Exhibits are required in order for the Development to meet minimum concurrency requirements for roads/traffic circulation to support the proposed Development; and

WHEREAS, for purposes of this Agreement "DT" shall mean Development Trips and "CI" shall mean Capacity Increase; and

WHEREAS, the City and the Developer agree that the new capacity created by the Concurrency Improvements may not be the actual excess capacity of the roadway, as a result of the need to account for vested trips, pursuant to the City's Land Development Code, from previously approved, but unbuilt, developments; and

WHEREAS, the City is desirous of including the Concurrency Improvements described below in the City's Comprehensive Plan Capital Improvement Element in the next annual amendment; and

WHEREAS, the City and the Developer desire to enter into this Agreement in order to utilize the provisions of Section 163.3180(11) Florida Statutes (2009) to implement the "fair share" process.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the City and Developer hereby agree as follows:

1. **Incorporation of Recitals.** The facts stated above in the recitals are incorporated by reference herein and deemed by the parties to be true, correct and constitute a material part of this Agreement.
2. **Offsite Construction.** The City agrees to construct, or to have constructed, the Concurrency Improvements. Construction of the Concurrency Improvements will commence and be complete to meet state and local concurrency requirements, unless delay is caused for reasons outside of City's control, in which case construction will commence as soon as is reasonably practical. The City, or its designee, will be responsible for the design of the Transportation Concurrency Improvements, which design will be in accordance with the illustrations referenced on the Transportation Concurrency Master Form Exhibit(s), the recording information for which is shown on Exhibit A-2 hereof. All planning, permitting, and construction will be subject to the review and approval, if applicable, by the Florida Department of Transportation and the County of Volusia, and will comply with the standards and requirements established by the appropriate governmental entities. Developer will have no responsibility for maintenance or upkeep of the Concurrency Improvements except as may otherwise be lawfully enacted by the city. Subject to the Developer's compliance with this Agreement, the City hereby agrees that the Concurrency Improvements shall be under construction within three (3) years after the issuance of the first building permit resulting in a concurrency impact for the Development.
3. **Force Majeure.** For purposes of this Agreement, "reasons outside of City's control" shall mean: delays or stoppage caused by acts of God, war, inability to obtain labor or materials or reasonable substitutes therefore, inability to receive governmental permits and approvals, newly enacted federal, state and local governmental regulations or controls, the application of existing regulations or controls in a manner which City could not have foreseen or other similar matters or causes.
4. **Payment of Fair Share Assessment Amount.** In connection with the City's construction of the Concurrency Improvements and as a condition and requirement for receiving a Development Order for the Development, Developer shall pay to the City a fair share obligation, hereinafter the "Fair Share Payment." The "Fair Share Payment" shall be an amount determined and calculated pursuant to the methodology adopted in the City's Proportionate Fair-Share Ordinance, Chapter 21, Article V, as amended from time to

time, and a current Development Traffic Impact Analysis ("TIA") study. The Fair Share Payment shall include three stages for payments as follows: (1) the Reservation Deposit payment, (2) the Project Cost payment and (3) the Actual Cost payment, as shown in Exhibit "A-2."

5. **Developer Payment.**

- A. To guarantee payment of its fair share, the Developer herewith agrees to pay an initial cash Reservation Deposit to the City in the form of a certified check payable to the City of Port Orange in an amount as set forth in Development Exhibit A-2. Upon the City's receipt of the payment from the Developer, the funds shall become the property of the City. The payment must be deposited with the City within 30 days of the city council's approval of this Agreement and shall be required prior to the issuance of a Development Order for the Development.
- B. The City and the Developer acknowledge that other entities (the "Project Participant"), including but not limited to the Florida Department of Transportation and the County of Volusia, may participate in and contribute financially to one or more Concurrency Improvements. In the event that a Concurrency Improvement Project Participant reduces the amount of its proposed participation resulting in a funding shortfall for the cost of the Concurrency Improvement, then the Developer shall be responsible for the increased construction cost to the extent of the Developer's percentage share of the Concurrency Improvement. The dollar amounts reflected on the attached Development Exhibit A-2 do not include the anticipated financial contributions by a Concurrency Improvement Project Participant. Any adjustment will be reflected in the final accounting of the Actual Cost as described in subparagraph (D) below.
- C. The City shall recalculate the Concurrency Improvement costs and shall make adjustments, if applicable, at the time of the bid award for the Concurrency Improvements (the "Project Costs") and shall notify the Developer of any increase in the Developer's contribution.
- D. Upon completion of the construction, the City shall notify the Developer in writing of the final total construction cost (the "Actual Cost"). In the event the Developer's Payment exceeds the Developer's percentage share of the Actual Cost upon completion of the Concurrency Improvements, then the Developer may file a written claim for the refund of the overpayment with the City within ninety (90) calendar days after notice of completion of construction. In the event that the Developer fails to timely claim a refund, then any overpayment shall become the property of the City. All payments less than or equal to the amount of the final construction costs shall be nonrefundable.
- E. The City shall have the right to make one or more increased adjustments to the amount of the initial payment of the Reservation Deposit, based upon increased construction costs and all associated costs of the Concurrency Improvements. The increased adjustments shall be required to meet the costs as determined for

the Concurrency Improvement Project Costs and the Actual Costs. In the event an additional payment is required by the City, the City shall notify Developer in writing and within twenty (20) days thereafter, the Developer shall deposit the additional payment with the City.

6. **Vested Rights in Traffic Concurrency.** The City agrees that by paying to the City the Fair Share Payment, including the Reservation Deposit, the Project Cost and the Actual Cost and all adjustments, when due, and by receiving the Development Order for the Development, the Developer will be deemed to have satisfied the City's Traffic Concurrency requirements for the Development and that the Development shall be fully vested for Traffic Concurrency for purposes of development and related development construction.
7. **Entitlement to Impact Fee Credits.** Nothing herein is intended to alter, reduce or otherwise waive Developer's right to receive impact fee or capacity credits in connection with the Fair Share Payment to the extent that Developer would be entitled to receive such credits. It is the intent of the parties that if it is determined that any portion of the road segment where the Concurrency Improvements are to be constructed is eligible for impact fee credits under the Volusia County impact fee program, then the City shall not object to the Developer seeking a reimbursement from Volusia County to the extent that the Developer has paid impact fees to the extent applicable for the Development.
8. **Application of Agreement Limited to the Development.** Nothing herein is intended to bind the City in allocating the additional trip capacity provided by the construction of the Concurrency Improvements beyond that provided to the Development in connection with the Fair Share Payment. The City expressly reserves the right to determine and allocate available excess capacity for all future developments within its jurisdiction and other jurisdictions that impact the Concurrency Improvement Projects.
9. **Breach of Concurrency and Fair Share Agreement.** If a Developer upon proper notice fails to make timely payment of the Reservation Deposit, the Project Cost and the Actual Cost, then the Developer shall be deemed to be "Not in Good Standing" and shall be in breach of this Agreement. Upon a breach, the City shall determine the number of trips paid for under the adjusted calculation. The City shall not issue any permits for the Development until the adjusted cost of the trips allocated to that portion of the Development have been paid by the Developer and received by the City.
10. **Miscellaneous.**
  - A. **Attorney's Fees.** In the event of litigation to enforce the terms of this Agreement, the prevailing party shall be entitled to collect from the other party reasonable attorney's fees and costs of suit.
  - B. **Venue and Choice of Law.** In the event of litigation regarding the terms of this Agreement or documents executed as a result of this Agreement, venue of the action shall be in Volusia County and Florida law shall apply. Trial shall be non-jury for any issues subject to trial.

- C. Waiver. The waiver by a party of any terms or conditions of this Agreement or any breach hereof shall not constitute a waiver of any other term or condition or any subsequent breach of this Agreement.
- D. Successors. This Agreement shall be binding on the parties hereto, their heirs, administrators, executors, successors in interest and assigns.
- E. Construction of Contract. The parties hereto agree that they have all participated in the drafting of this Agreement and the calculations on Exhibits A-1 and A-2. Therefore, the presumption that any ambiguity or vagueness in the construction of this Agreement shall be construed against the drafter shall not apply. The terms and provisions of the Agreement shall be applied equally to each party and the interpretation of the Agreement shall be guided by the express intent of the parties and the Land Development Code as determined by the overall effect of the provisions herein.
- F. Expiration. This Agreement shall expire after Developer's payment of the Actual Cost based upon the final completed construction and related costs.
- G. Amendments. Amendment to this Agreement shall not be effective unless in writing and signed by all record title property owners of the land for which the amendment is to be applied (but excluding the record title property owners for land that is unaffected by the amendment), and the City. Before amending this Agreement, the City shall conduct one or more public hearings. At the City's option, one of these public hearings may be held by the City Planning Commission.
- i. Notice of intent to consider an amendment to this Agreement shall be published by the City at the Developer's expense in a newspaper of general circulation and readership in Volusia County, Florida.
  - ii. If applicable, notice of intent to consider an amendment shall comply with the requirements of Section 166.041(3)(c), Florida Statutes (2009), as amended from time to time.
  - iii. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing.
  - iv. Notices of intent to consider an amendment shall specify the location of the Property subject to the proposed amendment, the nature of the proposed amendment, and such other information as the City shall reasonably deem pertinent and appropriate.
  - v. All notices shall specify a place where a copy of the proposed amendment can be obtained.

- H. Conflicts. Developer agrees to be bound by all City codes and ordinances that are not in conflict with the provisions of this Agreement.
- I. Recording. Developer shall record a copy of this Agreement, at its sole cost and expense, in the Public Records of Volusia County, Florida.
- J. Binding Nature and Covenants Running With the Land. The provisions of this Agreement shall be binding upon the parties hereto, and upon all successors in interest in the subject real property. And further, the provisions of this Agreement shall constitute covenants running with the land applicable to all of the subject real property comprising the referenced Development.
- K. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. The delivery by facsimile of an executed copy of this Agreement shall be deemed valid as if an original signature was delivered.

IN WITNESS WHEREOF, the parties affix their signatures and seals on the dates set forth below:

WITNESSES AS TO BOTH  
SIGNATURES

CITY OF PORT ORANGE, a Florida  
municipal corporation

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

\_\_\_\_\_  
Allen Green, Mayor

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

Attest: \_\_\_\_\_  
Kenneth W. Parker, City Manager

*(Corporate Seal)*

STATE OF FLORIDA  
COUNTY OF VOLUSIA

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2010, by Allen Green and Kenneth W. Parker, as Mayor and City Manager, respectively, of the City of Port Orange, a Florida municipal corporation, on behalf of the city. They are personally known to me or have produced as \_\_\_\_\_ identification.

\_\_\_\_\_  
Notary Public, State of Florida at Large  
*Seal, Term Expiration and Commission Number*

WITNESSES:

DEVELOPER:

SOUTHWIND VILLAS-LAC, LLC  
a Florida limited liability company

Frank J. Dittmer  
Printed Name: FRANK J. DITTMER

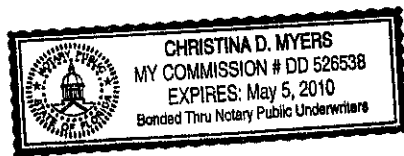
By: Ernest V. LaCour  
Ernest V. LaCour, Manager

Ernest V. LaCour  
Printed Name: E. LaCour

(Corporate Seal)

STATE OF FLORIDA  
COUNTY OF VOLUSIA

The foregoing instrument was acknowledged before me this 01 day of January, 2010, by Ernest V. LaCour, as Manager of SOUTHWIND VILLAS-LAC, LLC, a Florida limited liability company, on behalf of the company. He is  personally known to me, or  has produced \_\_\_\_\_ as identification.



Christina D. Myers  
Notary Public, State of Florida at Large  
Seal, Term Expiration and Commission Number



# EXHIBIT A-1



**Development Exhibit A - 1**  
**Concurrency and Fair-Share Agreement**  
**Transportation Improvement ("TI")**

<b>Development Data:</b>	
Development Name:	DOLLAR GENERAL
Site Address:	3741 Clyde Morris Boulevard
City Case No.	09-80000002
Zoning District	PUJ
TIA Report Date	October 14, 2009
TIA Prepared by:	Chris Walsh, P.E.
Name of Firm:	Kimley-Horn & Associates, Inc.
Est. Date of Impact	2011

<b>Developer:</b>	
Corporate Entity	LaCour & Company
Contact Person	E. V. LaCour
Mailing Address:	220 Charles Street, Port Orange, FL 32129-3426

<b>Land Owner:</b>	
Corporate Entity	Southwind Villas LAC-LLC
Contact Person	E. V. LaCour
Mailing Address:	2220 Charles Street, Port Orange, FL 32129

<b>Real Property</b>	
Total Acreage:	7.36
Parcel Number(s):	6306-11-00-001B
Legal Description	Legible real property legal description and sketch attached as EXHIBITS B-1 and B-2.

Agreement 11/04/2005-Amended 3/01/2006\*-7/11/06[4] May 2007 January 2009  
 Finance Updated Project Cost - January 7, 2010  
 Transportation Concurrency and Fair Share



**Development Exhibit A - 2  
Concurrence and Fair-Share Agreement  
Transportation Improvement ("TI")**

<b>Traffic Impact Analysis</b>	Dollar General Store
Development Name:	69-80000002
City Case No.:	October 14, 2009
TIA Report Date:	Chris Walsh, P.E. of Kimley-Horn & Associates, Inc.
TIA Prepared by (Firm):	2011
Estimated Date of Impact:	

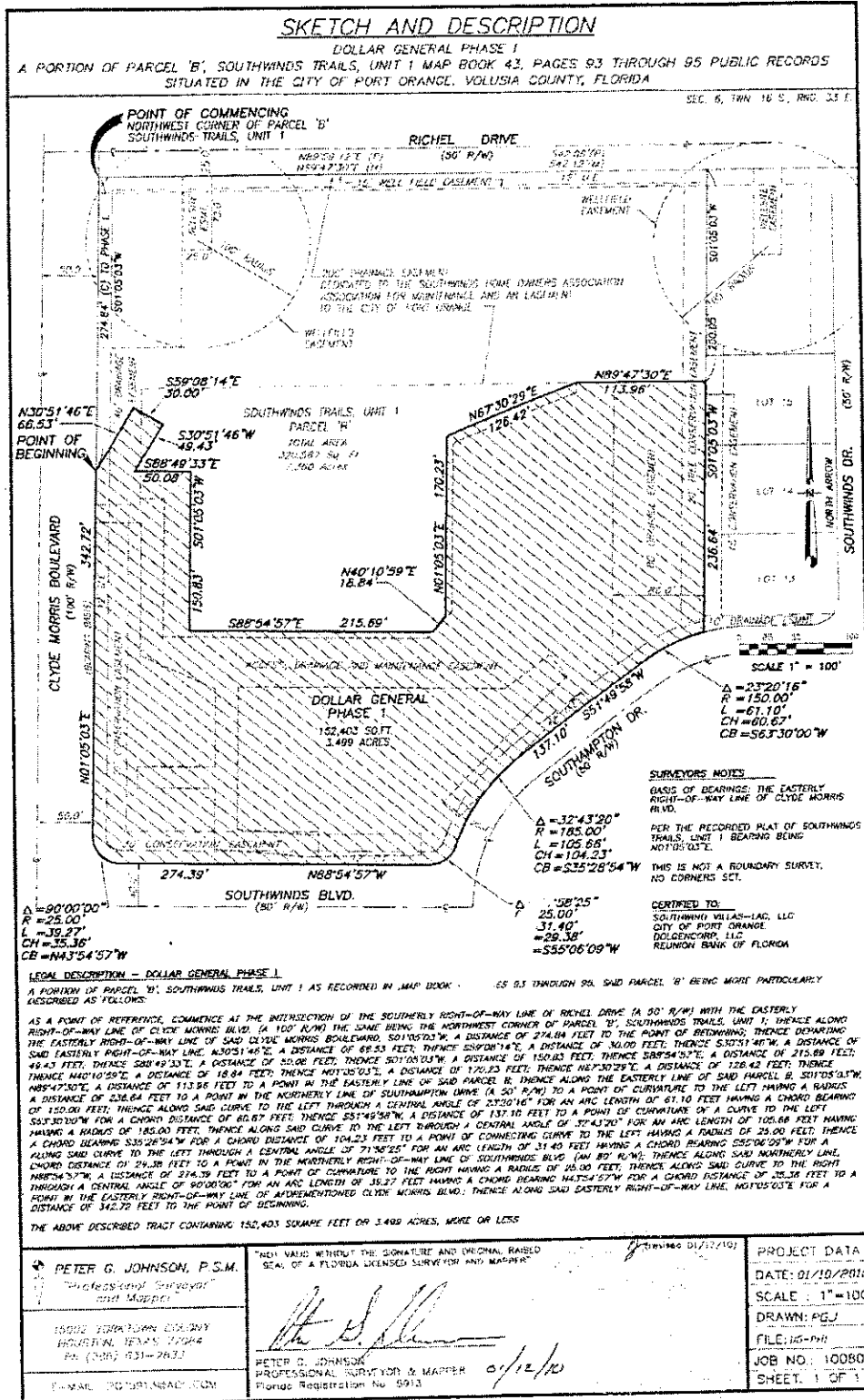
Contribution Calculations: Adjusted January 7, 2010									
Impacted Intersections/Road Segments per Transportation Master Concurrence Plan	TI Stage I Reservation Deposit Estimated Cost	TI Stage II Project Cost	TI Stage III Actual Cost	DT/CI Ratio	% of Cost	Subtotal Note N/A if Not Impacted	Contribution with Multiplier* 1/11		
Dunlawton/Taylor at I-95 <sup>[1]</sup> PRVCF OR Bk 5709 Pg 4728	N/A	N/A	\$2,548,708.81	0/930	%	\$	\$		
Dunlawton/Clyde Morris <sup>[1]</sup> PRVCF OR Bk 5709 Pg 4732	N/A	N/A	\$810,967.48	1/164	0.61%	\$4,946.90	N/A		
Town West/Williamson <sup>[2]</sup> PRVCF OR Bk 5709 Pg 4735	\$272,366	N/A	N/A	0/360	%	\$	\$		
Summerrees Road <sup>[3]</sup> PRVCF OR Bk 5709 Pg 4736	N/A	N/A	\$3,152,938.60	0/860	%	\$	\$		
Devon/Taylor PRVCF OR Bk6145 Pg 3697-3699	\$300,000	N/A	N/A	0/778	%	\$	\$		
* Financial Guarantee Multiplier	1.1	1.1	1.0						
<b>Total Fair-Share Contribution</b>							<b>\$4,946.90</b>		

- [1] FDOT Project Participant
- [2] County Road Project Participant
- [3] City Project Participant
- Eligible for City trans. impact fee credits
- [4] Rounded up to nearest whole dollar

Planning Review: *[Signature]* Date: 1-11-10  
 Finance Review: *[Signature]* Date: 1-11-10

Agreement 11/04/2005-Amended 3/01/2006\*: 7/11/06[4] May 2007 January 2009  
 Project Cost & Capacity - 5/30/07; Updated 8/12/08; Dec. 22, 2009; Jan 7, 2010  
 Transportation Concurrence and Fair Share

EXHIBIT B-1



Agreement 11/04/2005-Amended 3/01/2006\*-7/11/06(4) May 2007 January 2009  
 Finance Updated Project Cost - January 7, 2010  
 Transportation Concurrency and Fair Share -Dollar General, Clyde Morris

EXHIBIT B-2

