

After Recording Return to:
Daniel W. Langley, Esquire
Fishback Dornick
1947 Lee Road
Winter Park, Florida 32789

Volusia County Tax Parcel Identification # 04-19-30-16-00-000I

ROAD MAINTENANCE DEVELOPER'S AGREEMENT

This **ROAD MAINTENANCE DEVELOPER'S AGREEMENT** (hereinafter, the "Agreement") is made and entered into this ___ day of September, 2015, by and between the **CITY OF DEBARY**, a Florida municipal corporation whose address is 16 Columba Road, DeBary, Florida 32713 (the "City"), and **PREFERRED MATERIALS, INC.**, a Georgia corporation, d/b/a Yelvington Distributors, whose address is 2328 Bellevue Avenue, Daytona Beach, Florida 32119 (the "Developer").

WITNESSETH:

WHEREAS, the Developer is the fee simple owner of that certain 15.66 +/- acres real property (the "Property") located in DeBary, Volusia County, Florida, having Volusia County Tax Parcel Identification # 04-19-30-16-00-000I and legally described to wit

TRACT "I" SPRINGVIEW INDUSTRIAL PARK UNIT 2, ACCORDING TO THE PLAT THEREOF RECORDED AT PLAT BOOK 49, PAGES 19-20, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA.

; and

WHEREAS, Developer is developing the Property with a distribution terminal facility as more specifically identified in the approved final site plan on file with the City (the "Project"), and such Project will utilize heavy equipment and trucks for hauling and distribution activities; and

WHEREAS, ingress and egress to and from the Property will be over and through the public right-of-way known as Springview Commerce Drive (the "Road") as more particularly described in the plats for Springview Industrial Park Unit 1 and Springview Industrial Park Unit 2 recorded at Plat Book 49, Pages 17 through 20; and

WHEREAS, there is a concern that Project's distribution and hauling operations to and from the Property by utilization of the Road may cause distress and damage to the Road, and this Agreement is meant to address such concerns and Developer's responsibilities regarding same; and

WHEREAS, the Developer acknowledges and agrees that the City could have required the Developer to reconstruct the Road at Developer's expense prior to development of the Project, however, that the provisions set forth herein set forth a reasonable and less burdensome alternative condition for final site plan approval of the Project; and

WHEREAS, this Agreement is not a statutory development agreement pursuant to Chapter 163, Florida Statutes (Florida Local Government Development Agreement Act), and is being entered into formalize conditions of final site plan approval; and

WHEREAS, the purpose of this Agreement is to set forth the understanding and agreement of the parties with respect to the foregoing matters.

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

1. **Recitals**. The foregoing recitals are true and correct, are incorporated herein by this reference, and form a material part of this Agreement.

2. **Road Maintenance**. Prior to the obtaining building permits for and construction of the Project, the Developer, at its expense, shall cause the detailed videotaping and photographing in the manner required by the City's engineering consultant of the then current condition of the Road and at least the first 200 feet of each public road intersecting with the Road (said 200 feet commencing from the applicable intersection with the Road) and provide a copy of said videotapes and photographs to the City ("Pre-Existing Condition Documentation"). The Pre-Existing Condition Documentation activities shall be coordinated with the City. No building permits or certificates of occupancy shall be issued for the Property or the Project unless and until the Pre-Existing Condition Documentation is completed to the City's satisfaction.

For a two year period commencing the later of (i) the date a certificate of occupancy and/or inspection approval is issued for the structures and improvements to be constructed on the Property as part of the Project, and (ii) the commencement of Developer's distribution operations on the Property, the City will monitor the condition of the Road asphalt, base and other Road improvements to determine whether the Road appears distressed or is being damaged by Project operation's utilization of the Road ("Monitoring Period"). If at any time during the Monitoring Period, the City observes damage or signs of distress to the Road asphalt, base or any other Road improvements, the City may conduct core samples and other testing to confirm the potential damage and impacts to the Road by the Project's operations, and said core samples and testing costs shall be reimbursed to the City by Developer. If at any time during the Monitoring Period the City determines that the Project's operations have caused damage or distress to the Road, the City shall have the right, at Developer's expense, to either repair the Road or reconstruct the Road with a typical cross section of 2-inches of asphalt, 10-inches of base, and 12-inches of sub-base, or lower standard as determined by the City. The City shall have the right to obtain reimbursement from the Developer for any Road repair or reconstruction that commences anytime that is within the Monitoring Period or within 18 months after the end of the Monitoring Period. The Developer shall reimburse the City for any expenses sought by the City hereunder within 30 days from the City sending an invoice(s) to the Developer for the same.

3. **Notices**. Except as otherwise provided in this Agreement, whenever either party desires to give notice to the other, notice shall be sent to:

If to City:

City of DeBary

Attn: City Manager
16 Columba Road
DeBary, Florida 32713

With a copy to:

Daniel W. Langley
Fishback Dominick
1947 Lee Road
Winter Park, Florida 32789

If to Developer:

PREFERRED MATERIALS, INC
2328 Bellevue Avenue
Daytona Beach, Florida 32119

Either of the parties may change, by written notice as provided herein, the addresses or persons for receipt of notices. Each such notice shall be deemed delivered on the date delivered if by personal delivery or on the date upon which the return receipt is signed or delivery is refused or notice is designated by the postal authorities as not deliverable, as the case may be, if mailed or date of delivery by overnight delivery services as evidenced by a service receipt.

4. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, and may not be modified or amended except by a written instrument equal in dignity herewith and executed by the parties to be bound thereby.

5. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the successors in interest, transferees and assigns of the parties, and shall run with the Property. Developer, at Developer's cost, shall obtain all necessary joinders and consents and subordinations to this Agreement (and documents called for herein) or releases from appropriate parties with an interest in the Property. Upon request by the City, Developer shall provide to City, certified surveys, title reports or other documents evidencing said ownership interest.

6. **No Third Party Beneficiaries.** This Agreement is intended solely for the benefit of the Developer and the City and their respective successors in interest and title. No right or cause of action shall accrue under or by reason of this Agreement to or for the benefit of any third party. Nothing contained in this Agreement, whether expressed or implied, is intended, nor shall be construed, to confer upon or give to any person or entity not a party hereto any right, remedy or claim under or by reason of this Agreement or any particular term, provision or condition of this Agreement other than Developer and the City and their respective successors in interest and title.

7. **Applicable Law/Venue/Remedies.** This Agreement shall be construed, controlled and interpreted according to the laws of the State of Florida. Venue for any proceeding arising under this Agreement shall be in Volusia County, Florida. Each party shall bear its own costs and fees.

8. **Time is of the Essence.** Time is hereby declared of the essence as to the lawful performance of all duties and obligations set forth in this Agreement.

9. **Non-Waiver.** No consent or waiver, expressed or implied, by either party, to or of any breach or default of the other party, with regard to the performance by said other party of its obligations under this Agreement shall be deemed or construed to constitute consent or waiver, to or of, any other breach or default in the performance of that party, of the same or of any other objection of performance incumbent upon that party. Failure on the part of either party to complain of any act or failure to act on the part of the other party in default, irrespective of how long the failure continues, shall not constitute a waiver by that party of its rights and any remedies that exist under this Agreement, at law, or in equity. Nothing contained in this Agreement nor in any instruments executed pursuant to the terms of this Agreement shall be construed as a waiver or attempted waiver by the City of its sovereign immunity under the Constitution and laws of the State of Florida.

10. **Severability.** If any particular term, provision or condition of this Agreement, the deletion of which would not adversely affect the receipt of any of the material benefit of this Agreement by either party hereto or substantially increase the burden of this Agreement upon either party hereto, shall be held to be invalid or unenforceable to any extent by a court of competent jurisdiction, the same shall not affect in any respect whatsoever the validity or enforceability of the remaining terms, provisions and conditions of this Agreement.

11. **Construction.** This Agreement shall not be construed against either party on the basis of it being the drafter of the Agreement. The parties agree that each played an equal part in drafting this Agreement. Capitalized terms contained herein shall have no more force or effect than uncapitalized terms. Captions and section headings in this Agreement are provided for convenience only and shall not be deemed to explain, modify, amplify or aid in the interpretation, construction or meaning of this Agreement.

12. **Local Development Approvals and Permits.** Notwithstanding anything herein to the contrary, all development of the Property shall be in compliance with all applicable federal, state, county and municipal laws and ordinances, rules and regulations (including, but not limited to, the City's land development regulations, zoning requirements and comprehensive plan). Unless expressly authorized or granted herein, nothing in this Agreement shall constitute or be deemed to constitute or require the City to issue any approval by the City of any rezoning, Comprehensive Plan amendment, variance, special exception, final site plan, preliminary subdivision plan, final subdivision plan, plat, building permit, grading, stormwater drainage, engineering, or any other land use or development approval. Nor shall this Agreement be deemed to reduce, eliminate, derogate from or otherwise adversely affect any such approvals, permissions or rights. These and any other required City development approvals and permits shall be processed and issued by the City in accordance with procedures with respect to same as otherwise set forth in the City's Code of Ordinances and subject to any conditions of approval thereof. Nothing in this Agreement shall constitute or be deemed to constitute a limitation, restriction or any other type of waiver of Developer's right or ability to seek a rezoning, comprehensive plan amendment, variance, special exception, site plan, preliminary subdivision plan, final subdivision plan, or any other land use or development approval.

13. **Indemnity.** Developer hereby indemnifies and holds City and its elected and appointed officials, employees and agents harmless from and against any and all claims, disputes, lawsuits, injuries, damages, attorneys' fees (including trial and appellate fees), costs and experts' fees, interest and all adverse matters in any way arising out of or relating to the Developer's and its officers', employees' and agents' acts, omissions, negligence, misrepresentation and default under this Agreement, or any combination thereof, arising from or related to the Developer's exercise of (or failure to exercise) the rights or obligations of Developer under this Agreement and for the risk assumed by Developer under this Agreement.

14. **Breach.** In the event of a breach, default, or violation of one or more of the provisions herein by the Developer or the City, the violating party shall be given ten (10) days to cure such violation upon receipt of written notice of the violation from a non-violating party. In the event such violation is not cured within said period or good faith efforts are not being used to cure such violation, the City or the Developer, as the case may be, shall have the right to pursue any and all legal and equitable remedies available provided by law. Notwithstanding the foregoing, the City shall be permitted to without notice immediately withhold the issuance of certificates of occupancy or building permits associated with the Property in the event Developer is in violation of any provision of this Agreement. In addition, if Developer fails to timely pay the City any monies due pursuant to this Agreement, the City may record a Notice of Lien against the Property in the amount owed to the City plus interest to accrue at eighteen percent per annum. A copy of such Notice of Lien shall also be delivered to Developer in the same manner as required under this Agreement for delivery of written notices. The recorded Notice of Lien shall constitute a lien upon the Property and the lien may be foreclosed upon for the benefit of the City any time after ten (10) days after the Notice of Lien has been recorded in the public records. The City may foreclose the lien in accordance with the procedures established in Section 702.10, Florida Statutes, or successor or other statute providing for lien foreclosure procedures. The Developer may obtain a release from the lien by paying the amount stated in the lien, plus accrued interest of eighteen percent per annum, plus attorney's fees and costs incurred by the City in filing and collecting upon the lien.

15. **Reimbursement.** On or before thirty (30) days after the date of invoicing, Developer shall reimburse the City for the City's engineer and attorney fees for negotiations, inspections, conferences, title issues, meetings, reviews, drafting of this Agreement and other matters relating to this Agreement and development reviews concerning the Property.

16. **Recordation of Agreement.** An executed original of this Agreement shall be recorded by City, at Developer's expense, among the Public Records of Volusia County, Florida.

CITY

**CITY OF DEBARY, A FLORIDA
MUNICIPAL CORPORATION**

Attest:

City Clerk

Clint Johnson, Mayor

Date Approved by the City Council

WITNESSES

DEVELOPER

Signed, sealed and delivered
in the presence of:

PREFERRED MATERIALS, INC.

Print: _____

Print: _____

By: _____

Its: _____

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, 2015 by _____, as _____ of **PREFERRED MATERIALS, INC.**, a Georgia corporation, on behalf of the company. He is personally known to me or has produced _____ as identification.

Notary Public
Print: _____
My Commission Expires:

(NOTARY SEAL)

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