

41 Perimeter Center East, Suite 250 Dunwoody, Georgia 30346 P (678) 382-6700 F (678) 382-6701 dunwoodyga.gov

MEMORANDUM

To: City Council

From: Steve Foote, AICP

Date: August 10, 2015

Subject: Approval of Development Agreement between City of Dunwoody and Atlanta

Office Investment, L.L.C. related to 245 Perimeter Center Parkway, Dunwoody,

GA 30346 (18-329-04-003)

ITEM DESCRIPTION

The development agreement for consideration accompanies a request for rezoning for the property at 245 Perimeter Center Parkway. The rezoning request will be first read at the August 10 meeting and second read at the August 24 meeting. The agreement can be approved any time prior to the vote for the rezoning.

BACKGROUND

During the process of the rezoning application, it was determined that another tool was necessary to address all the concerns shared by the applicant and staff teams related to infrastructure improvements. In particular, the contemplated construction of the "East-West Connector Road" is critical to support the intensity of developed proposed on the subject site and was shown to alleviate some of the volume at other intersections in the network once it is fully connected through the adjacent parcel in Sandy Springs. The development agreement allows the City Council to agree to the terms of construction of the road under different circumstances than as a condition of rezoning. The details of the agreement outline obligations of the developer for the permitting and construction of the road, financial alternatives, and timing of its completion and in what circumstances the construction of the road is not required. The agreement further outlines a process of returning funds to the applicant, should the construction of the East-West Connector not be achieved.

RECOMMENDATION

The development agreement should be approved and in place in advance of the final rezoning decision. Staff recommends that the City Council approve the development agreement in the attached form and content.

DRAFT – August 6, 2015

UPON RECORDING RETURN TO: Troutman Sanders LLP 600 Peachtree Street, N.E. Suite 5200 Atlanta, Georgia 30308-2216 Attention: Maureen Theresa Callahan

STATE OF GEORGIA

COUNTY OF DEKALB

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WHEREAS, the Georgia Development Impact Fee Act, O.C.G.A. §§ 36-71-1 through 36-71-13 (the "Impact Fee Act"), neither prevents nor prohibits private agreements between property owners and cities regarding the construction or installation of transportation system improvements as defined by the Impact Fee Act; and

WHEREAS, Atlanta Office Investment, L.L.C., a Delaware limited liability company (the "Owner"), owns certain property consisting of a single tract located in Land Lot 329 and 348 of the 18th District of DeKalb County, Georgia more particularly described on Exhibit "A" attached hereto (the "Property"), which is located in the City of Dunwoody, a municipal corporation (the "City"); the Property and a proposed mixed-use development on the Property (the "Development") being the subject of a rezoning application submitted to the City on April 21, 2015 (RZ15-072); and

WHEREAS, the City and the Owner, their respective successors and assigns, desire to provide additional transportation facilities in connection with the construction of the Development; and

WHEREAS, the City and the Owner have voluntarily agreed to enter into this Private Development Agreement (the "<u>Agreement</u>") pursuant to O.C.G.A. § 36-71-13 for the construction and dedication of certain improvements; and

WHEREAS, in the interest of public safety and convenience, in the event the Development is constructed by Owner, Owner desires to construct, to current City and Perimeter Community Improvement District standards, as applicable, all or a portion of, as will be determined by the terms of this Agreement, a proposed new road in the City of Dunwoody (such road being referred to as the "East-West Connector Road") with a configuration as generally depicted on the site plan of the proposed Development attached hereto as Exhibit "B," as the site

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PAGE 1 DUNWOODY, GA plan may be updated by the Owner after the date hereof with the approval of the City (the "Site Plan"); and

WHEREAS, the Owner desires to construct entrances to the Development along the East–West Connector Road as generally depicted on the Site Plan to provide additional transportation options to users of the Development (such entrances being designated on the Site Plan, and referred to at times in this Agreement, as "P-5" and "P-10"); and

WHEREAS, the City and the Owner desire for the Owner to construct a multi-use path as generally depicted on the Site Plan (the "Path") to provide for enhanced pedestrian and bicycle connectivity in the area of the Development; and

WHEREAS, the City and the Owner recognize that the location and alignment of the East-West Connector Road, the Path, and entrances P-5 and P-10 (collectively, the "Improvements") give rise to the possibility of impacts to areas subject to Federal, State, and local regulation and protection and that such impacts will require review and approval of the Improvements by various levels of government before the Improvements may be constructed; and

WHEREAS, to facilitate the construction of the Improvements, the City has agreed to reduce, eliminate, or otherwise exempt the construction of the Improvements from requirements related to any stream buffers over which the City has authority to the extent necessary to construct the Improvements; and

WHEREAS, the City also desires the construction of the proposed East-West Connector Road and the Path, has afforded the public the opportunity to review and comment on such proposed improvements during the process for the rezoning of the Property, supports the safety and mobility goals such improvements are intended to meet, and has agreed to grant the Owner the right to make the Improvements defined in this Agreement on any property that may be owned by the City and to grant any other rights as may be required by the Owner to construct such Improvements; and

WHEREAS, the City and the Owner recognize and agree there is uncertainty regarding whether all governmental approvals required for the construction of the Improvements will be granted and, if so, whether the issuance of such approvals will precede or follow the period during which the Owner intends to construct the Development; and

WHEREAS, the Owner does not want its ability to proceed with the construction and occupancy of the Development to be contingent on the receipt of approvals for all of the Improvements; and

WHEREAS, the City and the Owner further recognize that the location and alignment of the Improvements give rise to the possibility of impacts to adjoining private properties and that such impacts will require the grant of certain easements and other rights from the affected property owners before certain of the Improvements may be constructed; and

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PAGE 2 DUNWOODY, GA **WHEREAS**, the City and the Owner recognize and agree there is uncertainty regarding whether all easements and rights required from affected property owners will be granted for the Improvements and, if so, whether the grant of such easements and rights will precede or follow the period during which the Owner intends to construct the Development; and

WHEREAS, the City and Owner do not want the ability of the Owner to proceed with the construction and occupancy of the Development to be contingent on the receipt of the necessary easements and rights from affected private property owners for the Improvements; and

WHEREAS, the Owner desires to, upon the completion of the East-West Connector Road and the Path, convey that portion of the Path as may be located within the Property to the City in either fee simple/right-of-way or through the grant of an easement (at the Owner's option) and to convey to the City a fee simple/right-of-way interest in that portion of the East-West Connector Road as may be located within the Property (collectively, the "Dedicated Property"); and

WHEREAS, the City has determined the acceptance of maintenance responsibilities for the Dedicated Property are in the best interest of the public; and

WHEREAS, the City and the Owner now desire to set forth their mutual understandings concerning the contemplated construction of the Improvements, the dedication of the Dedicated Property associated with the East-West Connector Road and Path, and the acceptance of maintenance responsibilities for the Dedicated Property.

NOW, THEREFORE, for and in consideration of Ten and 00/100 Dollars (\$10.00), the receipt and sufficiency of which are hereby acknowledged, the City and the Owner, their successors and assigns, do hereby agree as follows:

SECTION 1.

The Owner agrees to diligently pursue all Federal, State, and local permits, exemptions, and approvals required to construct the Improvements, as well as any private easement agreements and rights required from adjoining property owners in connection with the construction of the Improvements (collectively, the "Approvals;" and if a reference to "Approvals" in this Agreement relates to a specific portion of the Improvements, as the context requires, the term "Approvals" will mean those Approvals required only for that specific item comprising a portion of the Improvements). All Improvements constructed by Owner pursuant to this Agreement will be at Owner's expense. The East-West Connector Road discussed in this Agreement will be constructed to City and Perimeter Community Improvement District standards as the same are in place as of the date the Approvals are obtained. For the purposes of this Agreement, the East-West Connector Road is further defined as consisting of two (2) segments (because, as provided below, Owner may obtain Approvals for only one of the two segments). The portion of the East-West Connector Road extending from Perimeter Center Parkway approximately to the entrance to the Development designated on the Site Plan as "P-5" is referred to as the "Eastern E-W Segment." From that point westerly to the City of Sandy Springs' boundary line is referred to as the "Western E-W Segment." The City has confirmed to

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PAGE 3 DUNWOODY, GA Owner that the City can, and will, grant all Approvals required from the City to construct the Eastern E-W Segment and entrance P-5 and it is acknowledged that Owner's willingness to go forward with the construction of the Development is contingent on receipt of such Approvals from the City, as well as any other Approvals required for the Eastern E-W Segment and entrance P-5, prior to or at the time permits are issued for the First Building, as that term is defined below. Owner acknowledges that the City's agreement to grant Approvals is intended to obligate the City to grant permits, variances, exemptions and discretionary approvals in order to give effect to the intent and goals of this Agreement but is not intended to relieve Owner of complying with standard application requirements, document submittals, and compliance with all applicable ordinances of the City (but subject, if applicable, to any variances or exemptions actually granted by the City pursuant to this Agreement).

SECTION 2.

The City hereby agrees to cooperate and assist in the Owner's efforts to obtain all Approvals necessary for the construction of the Improvements and to provide all Approvals within its control for such Improvements, subject to the final sentence of Section 1.

SECTION 3.

The City hereby authorizes the Owner to construct the Improvements and grants and conveys to Owner the right to enter into and perform work on City-owned property to construct the Improvements. This right will include the right to put in place all necessary traffic control measures pursuant to a plan to be agreed on by the City and Owner at the time of the issuance of permits for any particular portion of the Improvements, all to facilitate the safe movement of traffic during such construction and in consultation with the City's traffic and public safety personnel. This Agreement, together with the future issuance of permits by the City for any particular portion of the Improvements, constitutes (i) the City's agreement to grant to Owner a temporary construction easement appurtenant to the Property on, over and under any City-owned land as reasonably required to so construct the applicable portion of the Improvements in accordance with the plans approved by the City for the same, and (ii) the reduction or elimination of the City-controlled stream buffer (as contemplated in Section 4, below) as required for the same. Upon the request of the Owner and at the time the permits are issued by the City for all or any portion of the Development or for all or any portion of the Improvements, as the case may be, the City will enter into one or more recordable documents setting forth with particularity the rights and easements needed for the Development and Improvements for which permits are so issued, including, without limitation, tie back easements, shoring easements, excavation easements, sewer line easements, temporary construction easements, crane swing easements, and permanent easements for maintenance and repair.

SECTION 4.

The City hereby approves the elimination of the City-controlled stream buffer to the extent necessary to construct the Development and, as applicable, the Improvements and agrees to timely issue any and all permits needed for the construction of the Development and, as applicable, the Improvements.

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SECTION 5.

The City agrees that the construction of the proposed East-West Connector Road (in whole or in part), Path and entrance P-10 shall not be a condition precedent to the issuance of any permits, certificates of occupancy, or other approvals required to construct or occupy the Development unless otherwise explicitly set forth in this Agreement.

SECTION 6.

Should the Owner fail to obtain all necessary Approvals for the Western E-W Segment, the Path, and entrance P-10 prior to the date Owner receives the building permit to construct the first of the three (3) buildings depicted on the Site Plan (the "First Building"), despite the Owner's reasonable and diligent efforts to obtain such Approvals, the Owner may, but is not obligated to, continue to pursue the Approvals.

SECTION 7.

Owner shall secure Owner's obligation to pay the costs of construction of the Western E-W Segment as provided in, and subject to the maximum set out in, this Section 7. Owner will escrow immediately available funds (the "Security") in an amount equal to \$2,155,000.00, to be increased by 3% per year starting on January 1 of 2016 and again on January 1 of each year thereafter, if applicable, until the funds are actually deposited (such amount is "Owner's Secured Contribution"). Owner's Secured Contribution will be escrowed with the national title insurance company that has issued Owner's title insurance policy. The amount of Owner's Secured Contribution as determined by this Section 7 will be Owner's maximum contribution towards the construction of the Western E-W Segment. The term of the escrow agreement will be three (3) years after the date the escrow agreement is signed and the Security is deposited (the "Deposit Date"). If the Western E-W Segment is not constructed (or is not under construction) by Owner prior to the date of completion of construction of the First Building, the Security will be deposited by Owner at the time of Owner's application to the City for the final certificate of occupancy for the First Building. From and after the Deposit Date, the City will thereafter pursue the Approvals permitting and construction of the Western E-W Segment. If the City has not obtained all Approvals for the Western E-W Segment, the Path and P-10 and does not commence construction of the Western E-W Segment within three (3) years after the Deposit Date, the Security shall be returned to the Owner automatically by the escrow holder. In addition, if at any time the City determines that it is no longer feasible to continue to pursue construction of the Western E-W Segmentthe Approvals, the City will notify Owner in writing and will direct the escrow holder in writing to return the Security to Owner. The City shall not withhold the temporary or final certificate of occupancy for the First Building or any other building in the Development provided that either (i) Owner commences construction of the Western E-W Segment prior to the completion of the First Building and issuance of the final certificate of occupancy for the First Building, or (ii) the Security is deposited by Owner as required by this Agreement. If the Owner commences construction of the Western E-W Segment as described herein but, prior to completing such construction, ceases construction for more than 30 days for any reason other than force majeure, the City shall have the right to

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PAGE 5 DUNWOODY, GA withhold building permits or certificates of occupancy for buildings other than the First Building until such time as the Owner recommences such construction.

SECTION 8.

Should the Owner provide the Security described in Section 7 of this Agreement, the City agrees that in order to be entitled to apply Owner's contribution towards the cost of construction of the Western E-W Segment as provided in this Agreement, the City must obtain all aApprovals for the construction of the Western E-W Segment, the Path, and entrance P-10 and construct, or commence construction of, the Western E-W Segment not later than the date which is three (3) years after the Deposit Date. If the City timely obtains the Aapprovals and timely constructs or commences construction of the Western E-W Segment, then on completion by the City of the Western E-W Segment and provided that the City has obtained for Owner's benefit the Approvals for entrance P-10 and the Path, Owner will be obligated to then construct the Path and entrance P-10. In such event, the Path and entrance P-10 will be completed by Owner not later than the later of (i) the completion date of the final of the three (3) buildings depicted on the Site Plan (the "Final Building"), or (ii) one (1) year after the City completes the Western E-W Segment. Should the City fail to construct or commence construction of the proposed Western E-W Segment by the date which is three (3) years after the Deposit Date, Owner will have no further obligation to construct, or pay the costs of construction of, the Western E-W Segment, the Path or P-10 and the funds escrowed as the Security will be returned to Owner. On the timely commencement and subsequent completion of the Western E-W Segment, Owner will be obligated to pay to the City an amount equal to the actual cost of the same, not to exceed the amount of the Owner's Secured Contribution. The escrow agreement will be structured in a manner that is commercially reasonable so as to secure Owner's obligation to pay Owner's Secured Contribution pursuant to the express terms of this Agreement.

SECTION 9.

If only the Eastern E-W Segment is constructed, then for as long as it provides access solely to the Property, Owner will maintain the area as a private entrance to the Development. Owner agrees that, upon the completion of the entire East-West Connector Road and Path, Owner shall donate and dedicate the same (to the extent within the Property) at no cost to the City. The donation and dedication of the East-West Connector Road will occur by execution and delivery to the City of a deed or other instrument in a manner consistent with applicable legal requirements. The East-West Connector Road will be dedicated in fee simple by way of a rightof-way deed. At the Owner's discretion, the Path will either be dedicated in fee simple or by a perpetual easement. The exact legal description of each portion of the Dedicated Property will be reasonably agreed to by Owner and the City. The City agrees to accept such dedication of the Dedicated Property upon completion of all required inspections and verification that the same has been constructed to applicable City standards and, thereafter, the City agrees to be responsible for maintaining and repairing the Dedicated Property as a public right-of-way and, as applicable, a public path for pedestrian and bicycle use. In addition, if at any time the Eastern E-W Segment is used for access to any property in addition to the Development, the City will take over the maintenance of the Eastern E-W Segment as public right-of-way and the Owner will, at that time, dedicate the Eastern E-W Segment.

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SECTION 10.

By this Agreement, the parties hereto acknowledge, understand, and agree that, if Owner does construct the Development, Owner shall remain responsible for completing at its own expense all project improvements as may be required pursuant to the Overall Development Plan for rezoning case #RZ15-072 approved and adopted by the Mayor and City Council of the City of Dunwoody on ________, 2015 (the "ODP"), and that such are not affected by this Agreement. The parties further acknowledge, understand, and agree that, except as explicitly provided herein or in the ODP, under no circumstances shall Owner be required by the City to construct, contribute right-of-way for, or provide any funds for the design or construction of, other transportation improvements in the City or elsewhere, such transportation improvements including, but not limited to, improvements to the Hammond Drive/Ashford – Dunwoody Road intersection, improvements to Hammond Drive, or improvements to or extensions of Gold Kist Drive. Owner and City further agree that if either party is obligated to construct the Western E-W Segment as provided in this Agreement, the construction will be diligently pursued to completion.

SECTION 11.

Nothing in this Agreement shall be construed to compel or require the Owner to construct the Development or to otherwise build, open or operate any business on the Property. The Improvements will only be constructed if the Development is constructed, and only if and to the extent required by the terms of this Agreement, and Owner's construction obligations are subject to the express terms of this Agreement. If the Development is not constructed and if the Approvals are not obtained, the Owner shall be relieved of any obligation to construct or fund the Improvements.

SECTION 12.

This Agreement represents the entire understanding of the parties and any changes, additions or deletions shall be made in writing upon the mutual agreement of the parties and set forth in an amendment to this Agreement. Owner and City agree to execute such additional documents as are necessary and appropriate to carry out the intent of this Agreement.

SECTION 13.

This Agreement shall inure to the successors and assigns of the City and to the successors and express assigns of Owner. Notwithstanding anything contained herein to the contrary, this Agreement shall not bind Owner and shall not be binding upon future owners of the Property unless Owner (or, as applicable, a future owner) constructs the Development in accordance with the terms of the ODP or, as applicable, a future owner expressly assumes the terms and conditions hereof in connection with another proposed development on the Property. The Owner and the City agree this Agreement will be recorded in the real estate records of DeKalb County, Georgia.

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SECTION 14.

Notices will be given as follows:

IF TO CITY

Mr. Eric Linton, AICP

City Manager

City of Dunwoody, Georgia

41 Perimeter Center East, Suite 250

Dunwoody, Georgia 30346

With copy to: Leonid Felgin, Esq.

City Attorney

City of Dunwoody, Georgia

41 Perimeter Center East, Suite 250

Dunwoody, Georgia 30346

IF TO OWNER:

Mr. Bill Rogalski

Senior Investment Analyst

State Farm Insurance Companies

One State Farm Plaza, E-7 Bloomington, Illinois 61710

With copy to: Atlanta Office Investment, L.L.C.

c/o Alex Chambers, Esq.

KDC Real Estate Development & Investments

1040 Crown Pointe Parkway, Suite 1070

Atlanta, Georgia 30338

And copy to: Atlanta Office Investment, L.L.C.

c/o Mr. James F. George

KDC Real Estate Development & Investments

1040 Crown Pointe Parkway, Suite 1070

Atlanta, Georgia 30338

And copy to: Maureen Theresa Callahan, Esq.

Troutman Sanders LLP 5200 Bank of America Plaza 600 Peachtree Street, NE Atlanta, Georgia 30308

And copy to: Christiane M. Stoffer, Esq.

Associate General Counsel

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PAGE 8 DUNWOODY, GA State Farm Insurance Companies One State Farm Plaza, A-3 Bloomington, Illinois 61710

Each party may, in its sole discretion, designate alternate or additional notice recipients by providing written notice of such designation to the other party.

[Signatures appear on next page.]

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SO AGREED this day of	, 2015.
NOTARY:	
	ATLANTA OFFICE INVESTMENT, L.L.C., a Delaware limited liability company
Sworn to and subscribed before me this day of, 20	By: Transwestern Investment Management, L.L.C., a Delaware limited liability company, as Managing Member
NOTARY PUBLIC My Commission Expires:	By:(SEAL) Name: Laurie Dotter Title: President
ATTEST:	APPROVED AS TO FORM: BY:
CITY CLERK	CITY ATTORNEY DATE:
	BY: MICHAEL G. DAVIS MAYOR, CITY OF DUNWOODY
	DATE:

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EXHIBIT "A" (to Private Development Agreement)

DESCRIPTION OF PROPERTY

All that tract or parcel of land lying and being in Land Lots 329 & 348 of the 18th District of DeKalb County, Georgia and being more particularly described as follows:

Beginning at a 1" square rod found at the Southwest corner of Land Lot 348 (said corner being the common corner of Land Lots 329 & 348 of the 18th District of DeKalb County, Georgia and Land Lots 17 & 18 of the 17th District of Fulton County, Georgia; thence running along the west line of Land Lot 348.

- 1. North 00°33'37" East, 48.24 feet to a point located on the southeasterly right of way line of Hammond Drive (variable R/W); thence continuing along said right of way line,
- 2. North 38°41'07" East, 54.63 feet; thence,
- 3. North 51°18'53" West, 15.00 feet; thence,
- 4. North 38°36'53" East, 252.13 feet; thence,
- 5. 385.24 feet along the arc of a curve deflecting to the right and having a radius of 673.43 feet and a chord bearing and distance of North 55°00'10" East, 380.01 feet; thence,
- 6. 112.22 feet along the arc of a curve deflecting to the right and having a radius of 597.48 feet and a chord bearing and distance of North 76°46'17" East, 112.05 feet; thence,
- 7. 61.08 feet along the arc of a curve deflecting to the right and having a radius of 88.86 feet and a chord bearing and distance of South 78°09'15" East, 59.89 feet to the intersection formed by the southwesterly right of line of Hammond Drive and the westerly right of way line of Perimeter Center Parkway (variable R/W); thence running along the right of way line of Perimeter Center Parkway.
- 8. 25.65 feet along the arc of a curve deflecting to the right, having a radius of 29.50 feet and a chord bearing and distance of South 27° 11' 33" East, 24.85 feet; thence,
- 9. 28.47 feet along the arc of a curve deflecting to the left, having a radius of 364.79 feet and a chord bearing and distance of South 04° 21' 17" East, 28.47 feet; thence,
- 10. South 09° 42' 06" West, 24.78 feet; thence,
- 11. South 14° 08' 22" West, 31.94 feet; thence,
- 12. 69.87 feet along the arc of a curve deflecting to the left, having a radius of 382.15 feet and a chord bearing and distance of South 19° 45' 40" East, 69.77 feet; thence,
- 13. South 26° 36' 38" East, 168.18 feet; thence,
- 14. North 53° 13' 37" East, 7.98 feet; thence,
- 15. 13.66 feet along the arc of a curve deflecting to the right, having a radius of 7.50 feet and a chord bearing and distance of South 74° 35' 13" East, 11.85 feet; thence,
- 16. South 22° 24' 04" East, 2.53 feet; thence,
- 17. 47.67 feet along the arc of a curve deflecting to the right, having a radius of 833.33 feet and a chord bearing and distance of South 20° 55' 01" East, 47.66 feet; thence,
- 18. 73.44 feet along the arc of a curve deflecting to the right, having a radius of 314.55 feet and a chord bearing and distance of South 12° 39' 21" East, 73.28 feet; thence,

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- 19. South 89° 05' 52" East, 4.14 feet; thence,
- 20. 177.94 feet along the arc of a curve deflecting to the right, having a radius of 385.00 feet and a chord bearing and distance of South 14° 30′ 53″ West, 176.36 feet; thence,
- 21. South 27°45'19" West, 125.45 feet; thence,
- 22. South 37°16'29" West, 118.42 feet; thence,
- 23. South 34°48'05" West, 65.01 feet; thence leaving said right of way line of Perimeter Center Parkway,
- 24. 17.46 feet along the arc of a curve deflecting to the right and having a radius of 237.84 feet and a chord bearing and distance of South 66°22'46" West, 17.45 feet; thence,
- 25. South 68°05'43" West, 58.40 feet; thence,
- 26. 41.15 feet along the arc of a curve deflecting to the right and having a radius of 50.00 feet and a chord bearing and distance of North 87°59'56" West, 40.00 feet; thence,
- 27. 66.03 feet along the arc of a curve deflecting to the left and having a radius of 75.00 feet and a chord bearing and distance of North 89°38'35" West, 63.92 feet; thence,
- 28. South 89°50'29" West, 429.34 feet to the west line of Land Lot 329; thence running along said Land Lot line,
- 29. North 00°07'53" West, 367.68 feet to the Point of Beginning, containing 555,140 square feet or 12.7443 acres of land, more or less.

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