

## AGREEMENT

**THIS AGREEMENT** entered into this \_\_\_\_ day of \_\_\_\_\_, 2018, by and between the **CITY OF DELRAY BEACH**, a Florida municipal corporation, (hereinafter referred to as **CITY**) and **DELRAY BEACH 4<sup>TH</sup> & 5<sup>TH</sup> AVENUE LLC**, a **Delaware** limited liability company, (hereinafter referred to as Developer) to provide as follows:

WHEREAS, **DEVELOPER** is the owner of certain real property located in the boundaries of the City of Delray Beach and generally located south of Atlantic Avenue between S.E. 4th Avenue and S.E. 5th Avenue, and legally described on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, the **DEVELOPER** has submitted plans to the **CITY** to construct a movie theater, parking garage, offices and retail stores ("Project"). As part of the Project, **DEVELOPER** shall relocate all above-ground electric, telephone, cable, and data distribution facilities (collectively, the "Facilities") currently located within the Project to underground locations within the Project site, and within certain portions of City-owned right-of-way as shown in Exhibit "B"; and

WHEREAS, the **CITY** has, simultaneous with approval of this Agreement, approved an agreement with Florida Power & Light Company ("FPL") entitled "City/County Right-Of-Way Agreement for Underground Facilities" (the "Underground Agreement"), which is attached hereto as Exhibit "C" for reference; and

WHEREAS, as part of the Underground Agreement, the **CITY** is obligated to pay FPL the cost of such Facilities and such other costs, fees, and expenses as described in

the Underground Agreement as required by FPL's electric tariff and the Florida Administrative Code; and

WHEREAS, at the time of **CITY** approval of this Agreement and the Underground Agreement, FPL has not established a final design or budget for the Facilities; and

WHEREAS, **DEVELOPER** is willing to assume all of the costs related to installation of the Facilities and such other costs, fees, and expenses as described in the Underground Agreement on behalf of the **CITY**. Developer also agrees to restore the right-of-way to its original condition after the installation of Facilities is complete; and

**NOW, THEREFORE**, in consideration of the mutual covenants and undertakings set forth herein, the **DEVELOPER** and **CITY** hereby agree as follows:

1. **Recitals.** The above-stated recitals are incorporated herein as if fully set forth herein.

2. **Payment to FPL.** **DEVELOPER** agrees to be liable for and pay to FPL all of the costs of installing the Facilities as required by and described in the Underground Agreement; provided however, as contemplated in the Underground Agreement, any cost associated with providing increased capacity, improved reliability, future use Facilities or other such enhancements over and above the FPL standards in effect at the time of the relocation, and any costs of relocation or removal when such relocation or removal is initiated by FPL shall not be the responsibility of the **DEVELOPER**.

3. **Invoices.** In the event that FPL generates and sends an invoice to **DEVELOPER** for any item related to the installation of the Facilities, **DEVELOPER** will forward a copy of the invoice to **CITY** upon receipt thereof, and **DEVELOPER** will

pay to FPL the full amount of the invoice within thirty (30) days of **DEVELOPER's** receipt of said invoice. In the event that FPL generates and sends an invoice to the **CITY** for any item related to the installation of the Facilities, the **CITY** will forward the invoice to **DEVELOPER** upon receipt thereof, and **DEVELOPER** will pay to FPL within thirty (30) days of **DEVELOPER's** receipt of said invoices. If the **CITY**, in its sole discretion elects to pay an invoice generated by FPL related to the obligations of the Developer herein, which has been sent to **DEVELOPER** and not paid within the prescribed timeframe above, **DEVELOPER** will reimburse the **CITY** for payment made to FPL. **DEVELOPER** agrees that upon receipt of any invoice related to the installation of the Facilities from **CITY**, Developer will pay said amount to the **CITY** within twenty (20) days.

4. **Restoration of ROW.** All restorations of the area affected by the installation of the Facilities, if any, shall be the responsibility of the **DEVELOPER**. The restorations shall be performed in accordance with the **DEVELOPER'S** approved engineering plans. The cost and expense for all restorations of the area affected by the installation of the Facilities, if any, shall be the responsibility of the **DEVELOPER**.

5. **Warranty.** **DEVELOPER** warrants and guarantees to the **CITY** that all work related to the installation of the Facilities and the restoration of the site shall be constructed in accordance with the applicable codes of the City of Delray Beach. The **DEVELOPER'S** warranty and guarantee shall remain in place as long as **DEVELOPER** owns the property. Unremedied defects identified for correction during the warranty/guarantee period shall be considered as part of the obligations of the guarantee and warranty. Defects in the restoration of the site, which are remedied as a result of

obligations of the warranty/guarantee shall subject the remedied portion of the work to an extended warranty/guarantee period of one year after the defect has been remedied.

6. **Indemnification.** **DEVELOPER** shall at all times hereafter indemnify, hold harmless and, at the City Attorney's option, defend or pay for an attorney selected by the City Attorney to defend **CITY**, its officers, agents, servants, and employees from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including attorney fees, court costs, and expenses, caused by any intentional, negligent, or reckless act of, or omission of, **DEVELOPER**, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, losses, liabilities, expenditures, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property proximately caused by the gross negligence of Developer in undertaking its obligations hereunder.. In the event any lawsuit or other proceeding is brought against **CITY** by reason of any such claim, cause of action, or demand, **DEVELOPER** shall, upon written notice from **CITY**, resist and defend such lawsuit or proceeding by counsel satisfactory to **CITY** or, at **CITY** 's option, pay for an attorney selected by City Attorney to defend **CITY**. The obligations of this section shall survive the expiration or earlier termination of this Agreement. The indemnification obligations herein shall only serve for two (2) years subsequent to the relocation of the facilities.

7. **Insurance.** At all times **DEVELOPER** or its contractor, at its expense, shall procure and maintain worker's compensation insurance in an amount required by law and General liability insurance with a minimum limit of \$1,000,000 per occurrence and \$2,000,000 in the aggregate annually, governing bodily injury and property damage

in standard form, insuring **CITY** as additional insured. Certificates of insurance shall be delivered to **CITY**, prior to the issuance of the permit by **CITY** to perform the installation of the Facilities, or if no permit is required, prior to the contractor commencing the installation of the Facilities. The required insurance must be in a form and amount acceptable to the City's Risk Manager.

8. **Venue.** Any claims, lawsuits or disputes that may arise under this Agreement shall be governed by the Laws of Florida, with venue in Palm Beach County, Florida. The **CITY** shall also have any other remedy available to it in law or equity. **By entering into this Agreement, Developer and City expressly waive any rights either party may have to a trial by jury of any civil litigation related to or arising out of this Agreement.**

9. This Agreement constitutes the entire agreement and understanding of the parties, as it pertains to the construction, installation, and relocation of the Facilities and restoration of the site. There are no representations or understandings of any kind not set forth herein. Any amendments to this Agreement must be in writing and executed by both parties.

10. **Notice.** Any notice, invoice, instruction, or other communication to be given by either party hereunder shall be in writing and shall be hand delivered, telecopied, sent by Federal Express or a comparable overnight service or by U.S. registered or certified mail, with return receipt requested and postage prepaid to each party at their respective addresses set forth below:

**As to CITY:**

City Manager  
200 NW 1<sup>st</sup> Avenue  
Delray Beach, FL 33444

**With a copy to:**

City Attorney  
200 NW 1<sup>st</sup> Avenue  
Delray Beach, FL 33444

**As to DEVELOPER:**

Mike Fitzpatrick and Tom Bloch, Esq.  
Delray 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC  
Samuels & Associates  
136 Brookline Avenue  
Boston, MA. 02115

**With copy to:**

Scott A. Elk, Esq.  
Scott A. Elk, P.A.  
750 Park of Commerce Blvd.  
Suite 400  
Boca Raton, FL. 33487

**With a copy to:**

SVF Delray Beach, LLC  
c/o American Realty Advisors  
801 North Brand Boulevard, Suite 800  
Glendale, California 91203  
Attention: Stanley L. Iezman and Kirk V. Helgeson

[Signatures to appear on the following page]

**IN WITNESS WHEREOF**, the parties hereto have entered into this Agreement  
as of the day and year first above written.

ATTEST:

\_\_\_\_\_  
City Clerk


Approved as to Form:

\_\_\_\_\_  
City Attorney

**CITY OF DELRAY BEACH**

By: \_\_\_\_\_  
Mark Lauzier, City Manager

WITNESSES:

  
Samantha Chase

(Name Printed or Typed)

  
Hamid Hashemi

(Name Printed or Typed)

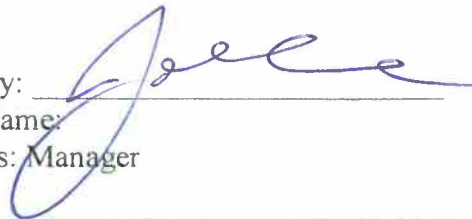
DELRAY BEACH 4<sup>TH</sup> & 5<sup>TH</sup> AVENUE LLC, a  
Delaware limited liability company

By: Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings  
LLC, a Delaware limited liability company,  
its sole member

By: Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue  
Developer LLC, a Delaware limited liability  
company, its managing member

By: S&A Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue  
LLC, a Delaware limited liability  
company, its manager

By: S&A GP LLC, a Massachusetts  
limited liability company, its manager

By:   
Name:  
Its: Manager

By: IPIC-DELRAY INVESTMENT, LLC,  
a Delaware limited liability company, its  
manager

By: \_\_\_\_\_  
Name: Hamid Hashemi  
Its: CEO

WITNESSES:

\_\_\_\_\_  
(Name Printed or Typed)

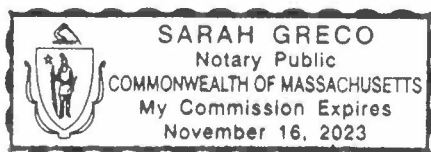
\_\_\_\_\_  
(Name Printed or Typed)

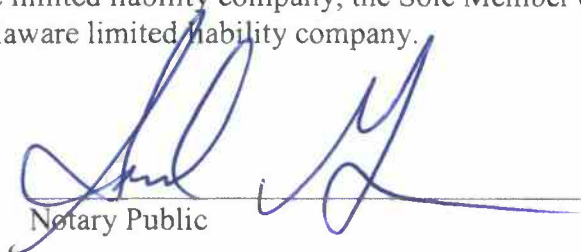
[NOTARY PAGE WILL FOLLOW]



STATE OF Massachusetts)  
 ) ss:  
COUNTY OF Suffolk)

The foregoing instrument was acknowledged before me this 11 day of September 2018 by Joel Sklar, the Manager of S&A GP LLC, a Massachusetts limited liability company, the Manager of S&A Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company, the Co-Manager of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Developer LLC, a Delaware limited liability company, the Managing Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings LLC, a Delaware limited liability company, the Sole Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company.



  
Notary Public

STATE OF \_\_\_\_\_)  
 ) ss:  
COUNTY OF \_\_\_\_\_)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2018 by Hamid Hashemi, the CEO of IPIC-Delray Investment, LLC, a Delaware limited liability company, the Co-Manager of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Developer LLC, a Delaware limited liability company, the Managing Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings LLC, a Delaware limited liability company, the Sole Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company.

\_\_\_\_\_  
Notary Public

WITNESSES:

\_\_\_\_\_

(Name Printed or Typed)

\_\_\_\_\_

(Name Printed or Typed)

DELRAY BEACH 4<sup>TH</sup> & 5<sup>TH</sup> AVENUE LLC, a  
Delaware limited liability company

By: Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings  
LLC, a Delaware limited liability company,  
its sole member

By: Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue  
Developer LLC, a Delaware limited liability  
company, its managing member

By: S&A Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue  
LLC, a Delaware limited liability  
company, its manager

By: S&A GP LLC, a Massachusetts  
limited liability company, its manager

By: \_\_\_\_\_

Name:

Its: Manager

WITNESSES:

Michelle Sweeney

(Name Printed or Typed)

\_\_\_\_\_

Sandy Harp  
(Name Printed or Typed)

By: IPIC-DELRAY INVESTMENT, LLC,  
a Delaware limited liability company, its  
manager

By: 

Name: Hamid Hashemi

Its: CEO

[NOTARY PAGE WILL FOLLOW]

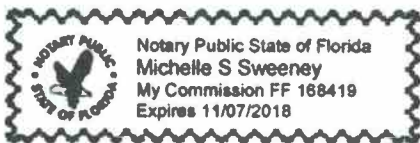
STATE OF \_\_\_\_\_ )  
 ) ss:  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2018 by Joel Sklar, the Manager of S&A GP LLC, a Massachusetts limited liability company, the Manager of S&A Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company, the Co-Manager of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Developer LLC, a Delaware limited liability company, the Managing Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings LLC, a Delaware limited liability company, the Sole Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company.

\_\_\_\_\_  
Notary Public

STATE OF Florida )  
 ) ss:  
COUNTY OF Palm Beach )

The foregoing instrument was acknowledged before me this 12<sup>th</sup> day of Sept., 2018 by Hamid Hashemi, the CEO of IPIC-Delray Investment, LLC, a Delaware limited liability company, the Co-Manager of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Developer LLC, a Delaware limited liability company, the Managing Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings LLC, a Delaware limited liability company, the Sole Member of Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue LLC, a Delaware limited liability company.



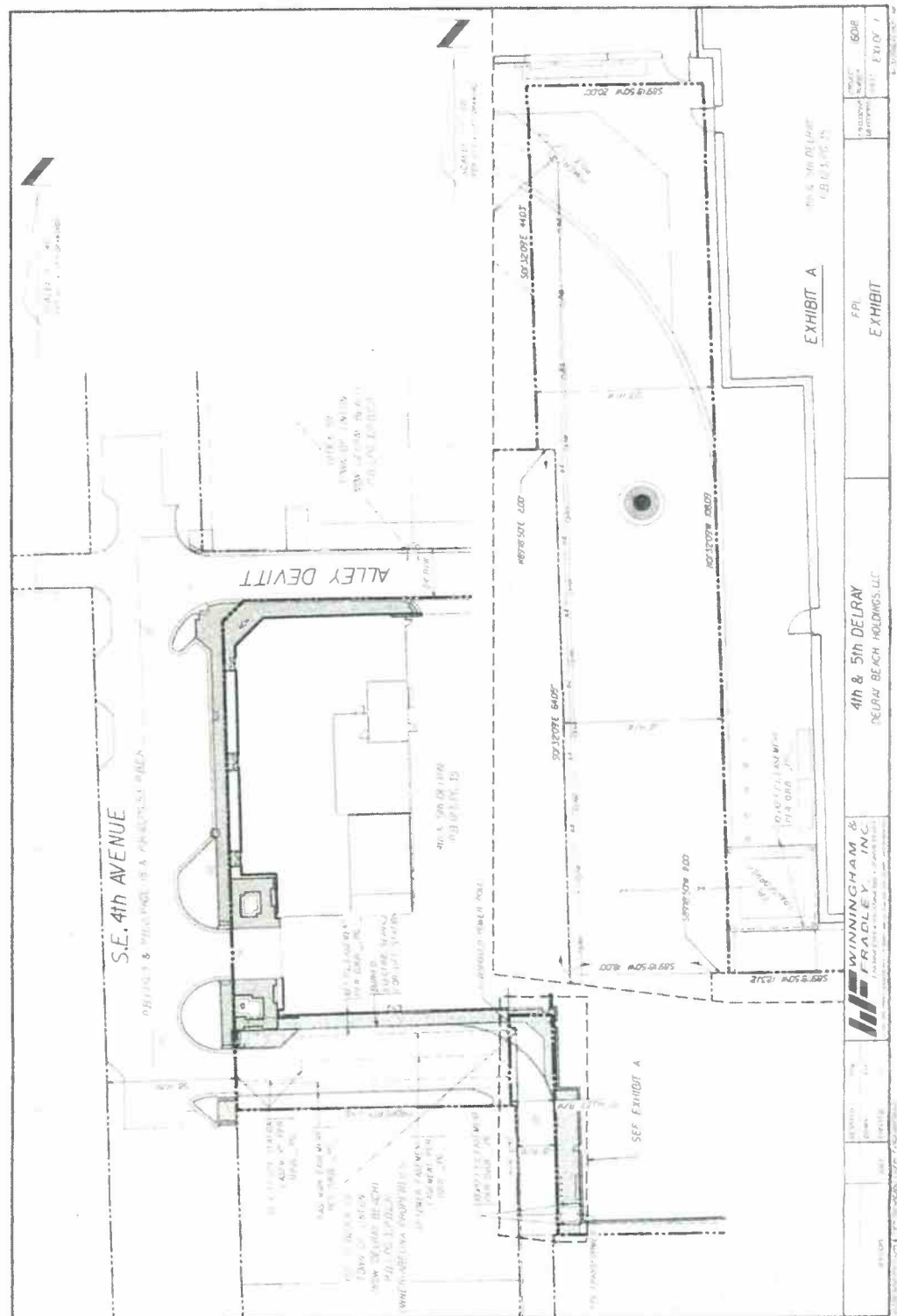
Michelle S Sweeney  
Notary Public

## EXHIBIT "A"

All of Plat of FOURTH & FIFTH DELRAY , according to the plat thereof, as recorded in Plat Book 123, Pages 35 and 36, of the Public Records of Palm Beach County, Florida.

## EXHIBIT "B"

Within that certain dedicated right-of-way running the east side of Lot 10, Block 101, Town of Linton (now Delray Beach) and previously owned by Delray Beach 4<sup>th</sup> & 5<sup>th</sup> Avenue Holdings LLC



# EXHIBIT "C"

## CITY/COUNTY RIGHT-OF-WAY AGREEMENT FOR UNDERGROUND FACILITIES

**THIS AGREEMENT** ("**Agreement**") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2018, by and between the City of Delray Beach, a Florida municipal corporation ("**Local Government**"), with an address of 100 N.W. 1<sup>st</sup> Avenue, Delray Beach, Florida 33444, and Florida Power & Light Company, a Florida corporation ("**FPL**"), with an address of 700 Universe Boulevard, Juno Beach, Florida 33408.

**WHEREAS**, Local Government has requested that FPL install certain FPL electric utility facilities above ground electric, cable, conduits and other facilities (collectively, the "**Facilities**") upon, across and/or under that certain dedicated right-of-way running along the East side of Lot 10, Block 101, Town of Linton (now Delray Beach) (previously owned by Delray Beach 4th & 5th Avenue LLC), and has further requested that certain of the Facilities be placed in certain of its road rights-of-way ("**Local Government ROW**") and/or certain road rights-of-way owned by or under the jurisdiction of other agencies ("**Other ROW**"). Local Government ROW and Other ROW may be referred to collectively as "**ROW**"; and

**WHEREAS**, the Local Government has agreed to pay FPL the cost of such installation of the Facilities as required by FPL's electric tariff and the Florida Administrative Code and has or will enter into a separate installation agreement with FPL;

**WHEREAS**, FPL would not have agreed to such installation but for receipt of this Agreement; and

**WHEREAS**, FPL is willing, subject to the terms and conditions set forth in this Agreement, FPL's electric tariff and the Florida Administrative Code, to place the Facilities in the ROW.

**NOW THEREFORE**, in recognition of the foregoing premises and the covenants and agreements set forth herein, and other consideration the sufficiency of which is hereby acknowledged, intending to be legally bound hereby, the parties covenant and agree as follows:

1. **Recitals.** The foregoing recitals are true and correct, and are hereby incorporated by reference into this Agreement.

2. **Conditions Precedent to Placement of Facilities in ROW.**

(a) Local Government covenants, represents and warrants that:

- (i) Local Government has full legal right and authority to enter into this Agreement;
- (ii) Local Government has full legal right and authority to take all actions and measures necessary to fulfill Local Government's obligations under this Agreement;
- (iii) Local Government hereby authorizes the use of the ROW by FPL for the purposes stated herein.

- (b) All applicable permits for FPL to install, construct, or maintain Facilities in ROW must be issued on a timely basis by the appropriate agency.
- (c) Local Government agrees to provide, at its expense, a legal description that is acceptable to FPL of the ROW to be occupied by the Facilities at a time before FPL initiates the design of the Facilities. Said legal description shall be made part of this Agreement and attached as Exhibit "A".
- (d) FPL agrees to identify and document all existing FPL underground facilities within the ROW that will not be included under this Agreement. Local Government shall reimburse FPL's reasonable costs and expenses to deliver said documentation. Said documentation shall be made part of this Agreement and attached as Exhibit "B".
- (e) The design and location of the Facilities to which Local Government has agreed are in compliance with all operational and safety guidelines, codes and standards,

3. **Relocation and Rearrangement of FPL Facilities.** If the Local Government or other agency with control over the Local Government ROW or Other ROW, for any reason whatsoever, requires that FPL relocate or rearrange, in whole or in part, any Facilities (as they are to exist as a result of this Agreement, or as they may later be modified, upgraded, or otherwise altered) from or within the Local Government ROW or Other ROW, the Local Government, notwithstanding any language to the contrary in any applicable permit or franchise agreement, and prior to any such relocation by FPL, shall provide FPL with a substitute location, satisfactory to FPL, obtain any easements that may be necessary, and shall pay FPL for the costs of any such relocation, adjustment or rearrangement, now or in the future. Local Government shall reimburse FPL for all costs to locate, expose, protect or support the Facilities, whether underground or above ground, in the event of future construction or excavation in close proximity to the Facilities, when such services are required by Local Government or other agency with control over the Local Government ROW or Other ROW. Local Government shall use its best efforts in any design and construction of its future road improvement projects to avoid or mitigate the necessity of relocating or adjusting the Facilities in Local Government ROW and, to the extent reasonably practicable, in Other ROW.

Nothing herein shall preclude Local Government from obtaining reimbursement for any and all costs requiring FPL to relocate or rearrange any of its Facilities from that entity which initiated the requirement for the relocation or rearrangement of the Facilities, excluding only other agencies which own or have jurisdiction over the ROW; provided, however, Local Government's seeking of such reimbursement shall in no way relieve Local Government from its payment obligations to FPL hereunder.

4. **Abandonment or Sale of Local Government ROW.** If the Local Government desires to subsequently abandon or discontinue use of the Local Government ROW, and ownership of the land is transferred to a private party, the Local Government, as a condition of and prior to any such sale, abandonment, or vacation, shall grant FPL an easement satisfactory to FPL for the Facilities then existing within the ROW or require the transferee to so grant FPL an easement satisfactory to FPL at the time of transfer. If ownership of the Local Government ROW is transferred to another public entity, that public entity shall take the ROW subject to the terms and conditions of this Agreement.



5. **Term.** This Agreement shall remain in effect for as long as FPL or any successor or assign owns or operates the Facilities placed in the ROW.

6. **Title and Ownership of Underground Facilities.** Title and ownership of Facilities installed by FPL as a result of this Agreement shall, at all times, remain the property of FPL.

7. **Conversion Outside ROW.** In the event that the FPL Facilities are not, for any reason other than the sole error of FPL or its contractors, constructed within the ROW, Local Government shall grant or secure, at Local Government's sole cost and expense, new easements or ROW grants for the benefit of FPL for the placement of the Facilities in these areas, and shall secure subordinations of any mortgages affecting these tracts to the interest of FPL.

8. **Agreement Subject to FPL's Electric Tariff.** This Agreement is subject to FPL's electric tariff, including but not limited to the general rules and regulations for electric service and the rules of the Florida Public Service Commission, as may be revised, amended or supplemented from time to time.

9. **Venue; Waiver of Jury Trial.** This Agreement shall be enforceable in Palm Beach County, Florida, and if legal action is necessary by either party with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Palm Beach County, Florida. By entering into this Agreement, FPL and the Local Government expressly waive any rights either party may have to a trial by jury of any civil litigation related to or arising out of this Agreement. This Agreement shall be construed in accordance with the laws of the State of Florida.

10. **Attorney Fees.** In the event it becomes necessary for either party to institute or defend legal proceedings as a result of the failure of the other party to comply with the terms, covenants, or provisions of this Agreement, each party in such litigation shall bear its own cost and expenses incurred and extended in connection therewith, including, but not limited to attorneys' fees and court costs through all trial and appellate levels.

11. **Assignment.** The Local Government shall not assign this Agreement without the written consent of FPL.

12. **Recording.** This Agreement shall be adopted by the Local Government and maintained in the official records of Local Government for the duration of the term of this Agreement. This Agreement also shall be recorded in the Official Records of the County in which the Underground Facilities are located, in the place and in the manner in which deeds are typically recorded.

13. **Conflict Between Terms of Permit or Franchise Agreement.** In the event of a conflict between the terms of this Agreement and any permit or franchise agreement entered into by Local Government and FPL, the terms of this Agreement shall control.

14. **Notice.** Any notice, instruction or other communication to be given to either party hereunder shall be in writing and shall be hand delivered, telecopied, sent by Federal Express or a comparable overnight service or by U. S. registered or certified mail, with return receipt requested and postage prepaid to each party at their respective addresses set forth below:

As to Local Government:

City of Delray Beach c/o City Manager  
100 NW 1st Ave.  
Delray Beach, FL 33444

With copies to:

City Attorney  
200 NW 1st Ave.  
City of Delray Beach, FL 33444

As to FPL:

FPL  
700 Universe Blvd.  
Juno Beach, FL 33408  
Attn: FPL, Legal Department

15. **Authority.** The person signing this Agreement is duly authorized to execute this Agreement, and represents that he or she was duly authorized to do so on the date he or she executed this Agreement.

**[Signatures appear on following pages]**

IN WITNESS WHEREOF, Florida Power & Light Company and Local Government have executed this Agreement on the date first set forth above.

For **LOCAL GOVERNMENT:**

**CITY OF DELRAY BEACH,**  
a Florida municipal corporation

By: \_\_\_\_\_  
(signature)

Name: \_\_\_\_\_  
(print or type)

Title: \_\_\_\_\_  
(print or type)

By: \_\_\_\_\_  
(signature)

Name: \_\_\_\_\_  
(print or type)

Title: \_\_\_\_\_  
(print or type)

Approved as to Terms and Conditions: \_\_\_\_\_  
(signature/title)

Approved as to Form and Legal Sufficiency: \_\_\_\_\_  
(signature/title)

For **FPL**

**FLORIDA POWER & LIGHT COMPANY,**  
a Florida corporation

By: \_\_\_\_\_  
(signature)

Name: \_\_\_\_\_  
(print or type)

Title: \_\_\_\_\_  
(print or type)