

Prepared by and return to:

Steven D. Rubin, Esq.
200 West Palmetto Park Road
Suite 301
Boca Raton, Florida 33432

EASEMENT FOR UTILITIES AND AGREEMENT

THIS EASEMENT FOR UTILITIES AND AGREEMENT ("Easement Agreement") is executed and made this _____ day of _____, 20__ by TKC CLXXVIII, LLC, a North Carolina Limited Liability Company, with an address of 5935 Carnegie Boulevard, Suite 200, Charlotte, North Carolina 28209, hereinafter called "TKC" and CITY OF DELRAY BEACH, a Florida Municipal Corporation, a political subdivision of the State of Florida, whose address is 100 N.W. 1st Avenue, Delray Beach, Florida 33444, hereinafter called "City".

RECITALS

- A. TKC is the fee simple owner of the real property commonly known as Delray Square, and more particularly described in the attached Exhibit "A" (the "Shopping Center Land");
- B. The City has previously been granted easement rights in the Shopping Center Land for the purpose of access, construction, maintenance, repair, replacement, and operation of water and sewer mains and pipes, and related equipment and facilities, and storm water and drainage systems (the "City Easement Rights"). The City Easement Rights include those described, designated, and granted in that certain Plat of Delray Square II, recorded in Plat Book 82, Page 63-64, of the Public Records of Palm Beach County, Florida (the "Platted Easement");
- C. TKC, its successors and assigns, intends to redevelop and improve the Shopping Center Land, and such redevelopment will require the relocation of existing City water and sewer mains and pipes, and related equipment and facilities, and storm water and drainage systems which are now located on and under the Shopping Center Land and which are now maintained and operated by City pursuant to the City Easement Rights (the "Existing City Utilities"). TKC is now solely responsible for the operation, maintenance, repair, and replacement of certain sewer pipes, storm water, and drainage systems located on, under, and across portions of the

Shopping Center Land (the "Private Utilities"), and during construction of the improvements to the Shopping Center Land, and thereafter, TKC shall remain solely responsible to maintain, repair, replace, and operate the Private Utilities. In addition, TKC will relocate some of the Private Utilities during construction. The present location of the Private Utilities on and under the Shopping Center Land is shown in the drawing prepared by Kimley Horn, revised June 1, 2016, and is attached hereto as Exhibit "B" ;

D. City has agreed that TKC may encroach upon the City's Platted Easement rights when TKC constructs improvements on portions of the Shopping Center Land under which the City has installed a portion of the Existing City Utilities, provided, in part, that at no time during TKC's construction of the improvements, any person or entity that is serviced by the Existing City Utilities or the Private Utilities on the Shopping Center Land has any disruption in water, sewer, or storm water service such that the level of utility service is less than that presently provided by the City and TKC, respectively, or as required by law;

E. To further induce the City to allow TKC to encroach upon the Platted Easement, TKC is willing to grant to the City a temporary blanket easement which will encumber the entire Shopping Center Land, and after TKC's construction of the improvements on the Shopping Center Land are complete, but before the City issues the final certificate of occupancy for the Publix building located on the Shopping Center Land, TKC will grant (i) permanent utility easements in favor of the City encumbering specific locations on the Shopping Center Land which will allow the City to install, operate, maintain, and repair water and sewer mains and pipes, and related equipment and facilities, and storm water and drainage systems on, across, under, upon, and in the Shopping Center Land; (ii) permanent easements for Private Utilities on, across, under, upon, and in the Shopping Center Land; and (iii) permanent easements for the relocated Existing City Utilities and Private Utilities.

F. These Recitals are true and correct and they are incorporated into this Easement Agreement.

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and the mutual promises contained herein, TKC and City agree as follows:

1. TKC does hereby grant, bargain, sell, alienate, remise, release, convey and confirm unto City a non-exclusive temporary easement and right-of-way (the "Temporary Easement") to install, construct, operate, maintain, repair, replace and remove pipes and mains, and related equipment and facilities, constituting the underground water distribution system, gravity sewer collection system, storm water lines and facilities, lift stations and sewer force mains and all other equipment and appurtenances as may be necessary or convenient for the operation of the underground water, sewer, storm water, and sewer utility services which must be maintained and operated by the City pursuant to applicable City Ordinances and Codes over, under, in, across, and upon the real property legally described in Exhibit "A" which is attached hereto (a/k/a the Shopping Center Land); to have and to hold, unto City, its successors and assigns, for the purposes aforesaid. Even though City has the authority under the

Temporary Easement to install and maintain storm water mains and pipes, prior to commencement of, during, and subsequent to the expiration of the term of the Temporary Easement, TKC, at its sole cost and expense, shall be responsible for the installation, maintenance, repair, operation, and replacement of the Private Utilities, in accordance with all applicable law, in a good and workmanlike manner, and in compliance with good engineering practices and standards. The Temporary Easement shall terminate when all of the following conditions have been satisfied: (i) TKC has completed construction of the improvements on the Shopping Center Land; (ii) TKC has conveyed or dedicated to the City permanent easements which will replace the Platted Easements for the newly installed public utilities and relocated Existing City Utilities; (iii) TKC has conveyed and granted permanent easements for the relocated and newly installed Private Utilities; and (iv) the City has issued the final certificate of occupancy for the Publix building which is located on the Shopping Center Land. When TKC completes construction of the improvements on the Shopping Center Land, TKC shall submit proposed permanent easement instruments to the City which shall be subject to the approval, in form and substance, by the City Attorney, which will replace the Platted Easements for the newly installed public utilities and relocated Existing City Utilities, and the newly installed and relocated Private Utilities.

2. From the commencement and during construction of the improvements to the Shopping Center Land by TKC, the City will issue a temporary certificate of occupancy for the Publix building which is located on the Shopping Center Land (with a final certificate of occupancy for the Public building to be issued, at City's discretion, after completion of such building), and the City will permit TKC to encroach upon the Existing City Utilities by allowing TKC to build improvements on the Shopping Center Land under which the Existing City Utilities are presently located, and to install new water, sewer, and storm water mains, pipes, and related equipment and facilities, provided:

a. TKC, at its sole cost and expense, shall perform or cause to be performed any and all maintenance, repairs, and replacements to be made to the Existing City Utilities, Private Utilities, and the water, sewer, and storm water mains, pipes and related equipment and facilities that TKC will install during construction of the improvements to the Shopping Center Land (the "New Utilities"), as may be necessary or appropriate from time to time to keep the Existing City Utilities, Private Utilities, and New Utilities in good condition and repair, so that at no time during TKC's construction of the improvements or installation of the New Utilities, any person or entity that is serviced by the Existing City Utilities or the Private Utilities on the Shopping Center Land has any disruption or cessation of, or interference with water, sewer, or storm water service such that the level of utility service is less than that presently provided by the City and TKC, respectively, or as required by law. TKC's maintenance and repair obligation includes, without limitation, the responsibility to promptly repair or replace any portion of the Existing City Utilities, the Private Utilities, or New Utilities which might be damaged during construction. City shall have no obligation to maintain, repair, or replace, any portion of the Existing City Utilities, Private Utilities, or New Utilities, and shall have no obligation to pay or reimburse TKC for any portion of the costs and expenses TKC incurs in its maintenance, repair, or replacement of the Existing City Utilities, Private Utilities, or New Utilities. For any and all maintenance, repairs, and replacements or other work to be constructed or performed by TKC hereunder, TKC shall take any and all safety measures reasonably required to protect the persons and property of City and invitees of City from

accidental death, injury, or damage caused by or resulting from the construction or performance of any such work. TKC shall purchase and maintain "all risk" property damage insurance including flood and wind up to the full replacement cost of the Existing City Utilities. All insurance policies required by this Section shall (i) have an A.M. Best rating of at least A-/VII, (ii) shall provide for a least thirty (30) days written notice by TKC, or its insurer(s) to the City of any cancellation, intent to non-renew, or material reduction or change in insurance coverage; and (iii) name the City as an additional insured. Should TKC fail to maintain, repair or replace any portion of the Existing City Utilities, Private Utilities, or New Utilities as required hereunder, in addition to any remedy City may have, City after not less than ten (10) days prior written notice to TKC to cure the default (except no notice shall be required in the event of an emergency), may, but it is not obligated to, to perform all necessary construction, repair, maintenance, replacement and operating work and may assess TKC for the cost of said work. TKC shall pay the cost of said work within thirty (30) days after assessment by City. The assessment, plus interest thereon at eighteen percent (18.0%) per annum shall be lien against the Shopping Center Land. The lien shall attach and shall be effective upon recording of a notice thereof in the Public Records of Palm Beach County, Florida, but its priority shall relate back to the date on which this Easement Agreement is recorded. The lien rights granted herein will not affect the easements and other rights granted herein to the City, and such rights shall continue in full force and effect. Such lien may be foreclosed in the same manner as a mortgage and in accordance with law. Reimbursement of such work costs, expenses, and interest shall also be the personal obligation of TKC at the time the costs and expenses are incurred, and may be collected by the City accordingly. All work performed by TKC on the Existing City Utilities, Private Utilities, and New Utilities shall be performed only by properly licensed Florida, Palm Beach County, and Delray Beach contractors and in compliance with all applicable building codes and zoning ordinances. Every contractor performing the work shall be reasonably insured and without cost to City, insured for any claim arising out of the work, and that City will be indemnified and held harmless for any claims that may arise out of the work.

3. TKC shall not cause the disconnection of or damage to the Existing City Utilities or the Private Utilities until the new Utilities are operational and have been installed in accordance with all applicable governmental regulations and codes, and with the plans approved by the City.

4. After the City approves the form and substance of the permanent easements for the replacement and relocation of the Platted Easements, the Private Utilities, and the New Utilities, and said permanent easements have been recorded and have record priority as required by this Easement Agreement and applicable law, City shall endeavor to abandon, release, or waive the Platted Easements of record which no longer contain any Existing City Utilities.

5. TKC warrants that it is seized of the Shopping Center Land and has the authority and right to convey the easements (including without limitation, the permanent easements for the relocated and newly installed water, sewer, and storm water mains, pipes and related equipment and facilities) described herein to the City free and clear of all liens and

encumbrances and that City shall have quiet enjoyment of the easements created hereunder, and shall defend any and all claims against the City.

6. This Agreement is a covenant running with the land and shall be binding upon and shall inure to the benefit of the heirs, legal personal representatives, successors and assigns of the parties hereto.

7. In connection with any litigation, arbitration, or dispute arising out of this Easement Agreement, each party shall bear its own attorneys' fees and costs.

8. This Easement Agreement supersedes any and all understandings and agreements between the Parties hereto whether oral or written, and this Easement Agreement represents the entire agreement between the parties hereto with respect to the subject matter hereof. No representations or inducements made prior hereto which are not included and embodied in this Easement Agreement shall be of any force and effect. This Easement Agreement may be amended, altered or modified only by a written agreement executed by the parties.

9. Any dispute relating to this Easement Agreement shall only be filed in a court of competent jurisdiction in Palm Beach County, Florida, and each of the parties to this Easement Agreement submits itself to the jurisdiction of such court.

10. The parties agree to execute all future instruments and take all further action that may be reasonably required by any party to fully effectuate the terms and provisions of this Easement Agreement and the transactions contemplated herein.

11. In the event any term or provision of this Easement Agreement is determined by appropriate judicial authority to be illegal or otherwise invalid, such provision shall be given its nearest legal meaning, or be construed as deleted as such authority determines, and the remainder of this Easement Agreement shall be construed to be in full force and effect.

12. No breach of the provisions of this Easement Agreement shall entitle any party to cancel, rescind or otherwise terminate this Easement Agreement or the applicability to it. In the event of a breach, or attempted or threatened breach, of any obligation of this Easement Agreement, the other party(ies) shall be entitled forthwith to obtain an injunction to specifically enforce the performance of such obligation, acknowledging the inadequacy of legal remedies the irreparable harm which would be caused by any such breach being hereby acknowledged and/or to relief by all other available legal and equitable remedies from the consequences of such breach. At its option and in addition to any other available remedy it may have in the event of a default by TKC of this Easement Agreement, the City may withhold, revoke, or deny approval of TKC's plans, permits, or certificates of occupancy with respect to the redevelopment of the Shopping Center Land.

13. **Waiver of Trial by Jury. IT IS MUTUALLY AGREED BY AND BETWEEN CITY AND TKC THAT THE RESPECTIVE PARTIES HERETO SHALL, AND THEY HEREBY DO, WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR**

COUNTERCLAIM BROUGHT BY EITHER OF THE PARTIES AGAINST THE OTHER ON ANY MATTER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT, THE RELATIONSHIP OF CITY AND TKC HEREUNDER, OR THE USE OF THE SHOPPING CENTER LAND, OR BY ANY COURSE OF CONDUCT OR COURSE OF DEALING.

14. Governmental Functions.

a. The parties agree that this Agreement shall not constitute a waiver of any portion of the City of Delray Beach's Code of Ordinances, Land Development Regulations, or any other applicable law, code, or regulation, and that TKC shall comply with all applicable statutes, codes, regulations, and ordinances that apply to TKC's performance of its obligations pursuant to this Easement Agreement.

b. To the extent approval or permission must be obtained from the City of Delray Beach, such approval or permission shall be granted or denied in accordance with applicable governmental regulations, rules, laws, and ordinances, and no person shall have any vested rights.

c. The City has not waived its sovereign immunity and the limits of tort liability set forth in F. S. §768.28(5), as may be amended from time to time. Nothing contained in this subparagraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Florida Statutes, Section 768.28; and

d. Any action by City shall be without prejudice to, and shall not constitute a limit or impairment or waiver of, or otherwise affect the City's right to exercise its discretion in connection with its governmental or quasi-governmental functions.

15. Nothing contained in this Easement Agreement shall be construed so as to confer upon any other party the rights of a third party beneficiary.

16. This Easement Agreement shall be construed and interpreted in accordance with Florida law and shall not be more strictly construed against one party than against the other by virtue of the fact that it may have been physically prepared by one party or by its attorneys, all parties (and their respective attorneys, where applicable) having participated in the negotiation of this Easement Agreement.

17. All notices under this Easement Agreement shall be mailed to the parties at the following respective addresses:

To TKC:

TKC CLXXVIII, LLC
5935 Carnegie Boulevard, Suite 200
Charlotte, North Carolina 28209
Attn: Kenneth R. Beuley

With a Copy to:

Moore & Van Allen, PLLC
100 N. Tryon Street, Suite 4700
Charlotte, North Carolina 28202
Attn: Jeffrey W. Glenney, Esq.

To City: City Manager
City of Delray Beach
100 N. W. 1st Avenue
Delray Beach, Florida 33444

With a Copy to:

City Attorney
City of Delray Beach
200 N. W. 1st Avenue
Delray Beach, Florida 33444

All notices, consents or other instruments or communications provided for under this Easement Agreement shall be in writing, signed by the party giving the same, and shall be deemed properly given and received (a) when actually delivered and received personally, by messenger service, or by fax or telecopy delivery; (b) on the next business day after deposited to delivery in an overnight courier service such as Federal Express; or (c) three (3) business days after deposit in the United States mail, by registered or certified mail with return receipt requested. All notices or other instruments shall be transmitted with delivery or postage charges prepaid, addressed to the parties at the address above for the party(s) or to such other address as such party(s) may designate by written notice to the other party (s).

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IN WITNESS WHEREOF, the parties hereto have hereunto set their hand and seals on
this _____ day of _____, _____.

ATTEST:

By: _____
City Clerk

CITY OF DELRAY BEACH, FLORIDA

By: _____
Cary D. Glickstein, Mayor

Witness Signature

Print Name of Witness

Witness Signature

Print Name of Witness

Approved as to Form and Legal Sufficiency:

By: _____
City Attorney

TKC CLXXVIII, LLC, a North Carolina
Limited Liability Company

By: [Signature]

Title: Authorized Member

[Signature]
Witness Signature

Brian Kreefer
Print Name of Witness

[Signature]
Witness Signature

Eric Larson
Print Name of Witness

STATE OF North Carolina
COUNTY OF Mecklenburg

The foregoing instrument was acknowledged before me this 27 day of February,
2016 by Kenneth R. Beuley, Authorized Member, of TKC CLXXVIII,
LLC, a North Carolina Limited Liability Company, on behalf of the corporation. He/She is
personally known to me/or has produced Known to me (as identification).

Signature of Notary Public



EXHIBIT "A"

DELRAY SQUARE I PARCEL:

A parcel of land in the Northwest 1/4 of the Southwest 1/4 of Section 13, Township 46 South, Range 42 East, Palm Beach County, Florida, more particularly described as follows:

BEGINNING at the intersection of the East line of said Northwest Quarter of the Southwest Quarter of Section 13 and the North right of way of a 106 foot roadway known as State Road 806 (Delray West Road); thence North 00°00'37" East, along the East line of said Northwest 1/4 of Southwest 1/4 a distance of 628.05 feet; thence North 89°20'11" West, a distance of 248.34 feet; thence North 00°00'37" East a distance of 85.84 feet; thence North 89°20'11" West, a distance of 159.97 feet; thence South 41°15'13" East, a distance of 22.20 feet; thence South 47°00'37" West, a distance of 105.02 feet; thence South 51°20'57" West, a distance of 81.15 feet; thence South 69°09'07" West, a distance of 57.35 feet; thence South 85°45'52" West, a distance of 122.3 feet; thence North 68°26'53" West, a distance of 38.30 feet; thence South 89°46'20" West, a distance of 260.06 feet; thence South 00°00'53" West, a distance of 267.75 feet; thence South 89°46'20" West, a distance of 123.8 feet; thence South 00°00'20" West, a distance of 22.06 feet; thence South 89°47'05" West, a distance of 182.96 feet; thence South 00°57'59" East, a distance of 53.68 feet; thence North 89°39'49" East, a distance of 413.68 feet; thence continue North 89°39'49" East, a distance of 204.24 feet; thence South 00°00'37" West, a distance of 217.00 feet; thence North 89°39'49" East, a distance of 162.75 feet; thence South 89°20'11" East, a distance of 530.28 feet to the POINT OF BEGINNING.

LESS the West 10 feet as additional right of way for Military Trail and the South 7 feet as additional right of way for Delray West Road (State Road 806).

LESS AND EXCEPT therefrom the following described parcel of land in the North 1/2, of the Southwest 1/4, of the Northwest 1/4, of the Southwest 1/4, of Section 13, Township 46 South, Range 42 East, Palm Beach County, Florida, more particularly described as follows:

BEGINNING at a point in the South line of the North 1/2 of the Southwest 1/4 of the Northwest 1/4 of the Southwest 1/4 of said Section 13; said point being 216.52 feet East of, as measured along said South line, the West line of said Section 13; thence North 00°00'20" East, parallel to the East line of said Section 13 a distance of 22.06 feet; thence North 89°46'20" East, a distance of 123.8 feet; thence South 00°00'53" West, a distance of 22.08 feet; thence South 89°47'05" West, a distance of 123.8 feet to the POINT OF BEGINNING.

ALSO LESS AND EXCEPT therefrom a parcel of land in the Northwest 1/4 of the Southwest 1/4 of Section 13, Township 46 South, Range 42 East, Palm Beach County, Florida, more particularly described as follows:

COMMENCING at the intersection of the East line of said Northwest 1/4 of Southwest 1/4 of Section 13 and the North right of way line of a 106 foot road way known as State Road 806 (Delray West Road) run North 00°00'37" East, along said East line, 7.00 feet; thence run North 89°20'11" West, 51.00 feet; thence run North 00°39'49" East, 71.00 feet to the PLACE OF BEGINNING; thence run North 89°20'11" West, 94.25 feet; then run North 00°00'37" East,

90.00 feet; thence run South 89°20'11" East, 94.25 feet; thence run South 00°00'37" West, 90.00 feet to the POINT OF BEGINNING.

ALSO LESS AND EXCEPT therefrom a parcel of land in the Northwest 1/4 of the Southwest 1/4 of Section 13, Township 46 South, Range 42 East, Palm Beach County, Florida, more particularly described as follows:

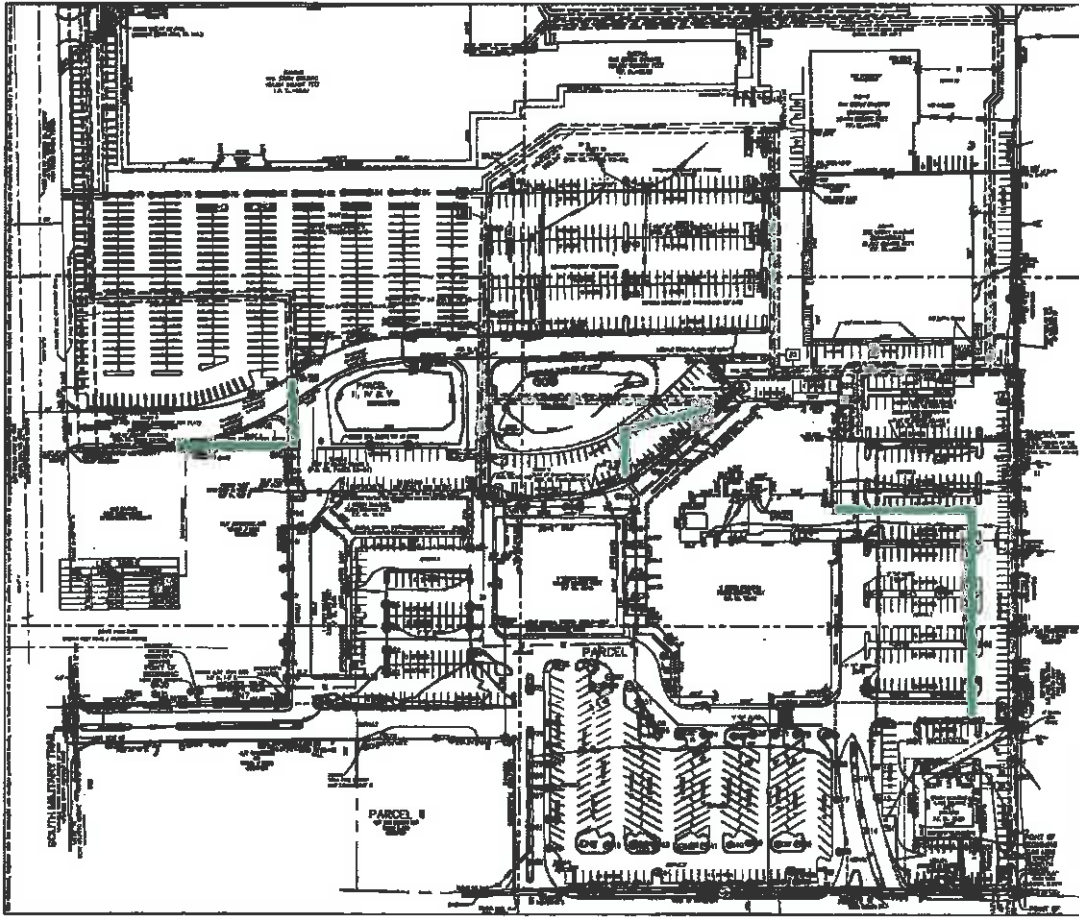
COMMENCING AT THE INTERSECTION OF THE EAST LINE OF SAID NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 13 AND THE NORTH RIGHT OF WAY OF A 106 FOOT ROADWAY KNOWN AS STATE ROAD 806 (DELRAY WEST ROAD); THENCE N89°20'11"W SAID NORTH RIGHT-OF-WAY LINE, A DISTANCE OF 414.58 FEET TO A POINT ALONG SAID LINE, SAID POINT BEING THE POINT OF BEGINNING; THENCE CONTINUE ALONG SAID LINE, A DISTANCE OF 115.70 FEET; THENCE S89°39'49"W ALONG SAID LINE, A DISTANCE OF 162.75 FEET; THENCE N00°00'37"E, A DISTANCE OF 9.42 FEET; THENCE S89°46'39"E, A DISTANCE OF 90.54 FEET; THENCE S89°49'33"E, A DISTANCE OF 113.89 FEET; THENCE S89°52'11"E, A DISTANCE OF 74.10 FEET; THENCE S00°39'49"W, A DISTANCE OF 8.94 FEET TO THE POINT OF BEGINNING.

DELRAY SQUARE II PARCEL:

All of Tract 2 and Tract 5 of the Plat of Delray Square II, according to the plat thereof as recorded in Plat Book 82, Pages 63 through 64, of the public records of Palm Beach County, Florida; together with ingress and egress easement over Tract 4 according to the plat of Delray Square II recorded in Plat Book 82, Pages 63 through 64, of the public records of Palm Beach County, Florida.

EXHIBIT "B"

PRIVATE UTILITIES LOCATION



LEGEND:

FPL EASEMENT
WATER EASEMENT

Kimley-Horn

DELRAY SQUARE
EXISTING
EASEMENT
EXHIBIT

SHEET NUMBER

