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## COMMISSION MEMORANDUM

TO: Honorable Mayor and Members of the City Commission

FROM: Raul J. Aguila, City Attorney 

DATE: February 12, 2020

SUBJECT: **A RESOLUTION OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, APPROVING, FOLLOWING SECOND READING/PUBLIC HEARING, A SECOND AMENDMENT TO THE DEVELOPMENT AGREEMENT DATED JANUARY 9, 2019, BETWEEN THE CITY AND SOUTH BEACH HEIGHTS I, LLC, 500 ALTON ROAD VENTURES, LLC, 1220 SIXTH, LLC AND KGM EQUITIES, LLC, AS ASSIGNED TO TCH 500 ALTON, LLC, BY ASSIGNMENT OF DEVELOPMENT AGREEMENT DATED AS OF SEPTEMBER 27, 2019 (THE "DEVELOPER"), FOR THE DEVELOPMENT OF THE PROPERTIES LOCATED AT 500 ALTON ROAD, 630 ALTON ROAD, 650 ALTON ROAD, 1220 6TH STREET, 659 WEST AVENUE, 701 WEST AVENUE, 703 WEST AVENUE, 711 WEST AVENUE, 721 WEST AVENUE, 723 WEST AVENUE, 727 WEST AVENUE AND 737 WEST AVENUE (COLLECTIVELY, THE "DEVELOPMENT SITE"), AS AUTHORIZED UNDER SECTION 118-4 OF THE CITY CODE, AND SECTIONS 163.3220 – 163.3243, FLORIDA STATUTES, WHICH SECOND AMENDMENT PROVIDES, AMONG OTHER TERMS AND CONDITIONS, FOR: (1) SETTLEMENT OF THE DISPUTE ARISING FROM THE BOARD OF ADJUSTMENT'S RULING, DATED NOVEMBER 1, 2019, ALLOWING THE EXCLUSION OF COVERED STAIRS, ELEVATOR SHAFTS, MECHANICAL CHUTES AND CHASES FROM THE CALCULATION OF FLOOR AREA FOR THE PROJECT; (2) A REDUCTION OF THE MAXIMUM NUMBER OF RESIDENTIAL UNITS PERMITTED ON THE DEVELOPMENT SITE, FROM 410 UNITS TO A MAXIMUM OF 330 UNITS; (3) APPROVAL OF THE FINAL PLANS FOR THE 3.0 ACRE PUBLIC PARK THAT DEVELOPER SHALL CONSTRUCT ON BEHALF OF THE CITY, AT ITS SOLE COST AND EXPENSE; (4) EXPEDITED TIMEFRAMES FOR THE DEVELOPER TO COMPLETE CONSTRUCTION OF THE 3.0 ACRE PUBLIC PARK AND TO CONVEY OWNERSHIP OF THE PARK SITE TO THE CITY; (5) APPROVAL OF THE FINAL PLANS FOR THE 5<sup>TH</sup> STREET PEDESTRIAN BRIDGE PROJECT, WHICH DEVELOPER SHALL CONSTRUCT ON CITY'S BEHALF (THE "PEDESTRIAN BRIDGE PROJECT"), AND (6) APPROVAL OF THE FINAL BRIDGE PROJECT BUDGET, SUBJECT TO A MAXIMUM CITY CONTRIBUTION FOR BRIDGE PROJECT COSTS.**

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The Commission Memorandum that accompanies this Agenda item includes a summary of the agreed-upon changes made since First Reading of the proposed Second Amendment to the Development Agreement, along with a discussion of several pending material issues that the Developer and the City had not resolved as of the agenda print date. These unresolved issues may require City Commission input and direction.

Since the release of the February 12, 2020 City Commission agenda, the Developer and the City have continued their extensive discussions in an effort to resolve the pending issues.

An updated version of the Second Amendment, including an updated version of the Final Approved Park Plans and Final Bridge Project Plans, is attached hereto as **Exhibit "A."**

The negotiated Second Amendment not only provides for the settlement of the litigation and the parties' dispute concerning the floor area calculation for the Project, but improves the City's position with respect to the Project, the Park Project, and the Bridge Project. The key provisions of the Second Amendment are as follows:

- Expediting the timelines for the conveyance of the Park Site to the City and the completion of construction of the Park Project; and
- Reducing the Project density, from a maximum of 410 residential units to 330 units; and
- Confirming Developer's contribution for all Bridge Project costs in excess of City's Maximum Contribution of \$9,610,000, with such Developer contribution anticipated to exceed \$2 million; and
- Strengthening the security provided to the City, via an irrevocable Letter of Credit, to cover both the Developer's Park Project and Bridge Project financial obligations; and
- Providing for Developer's indemnification of the City for any third-party claims in connection with the Project, including any matter related to the Second Amendment; and
- Achieving a dismissal with prejudice of the City's Petition, and mutual releases of all claims; and
- Allowing the exclusion of the Elements from the calculation of floor area for the Project, provided there is no change to the height or floor plate to the Tower for the Project, and further provided that Developer covenants to not seek any future increase to the height or floor plate for the Tower.

As noted in the Commission Memorandum accompanying this Agenda Item, the remaining pending issues, which are denoted as "open issues" within the text of the Second Amendment itself, are discussed in greater detail in the Commission Memorandum that accompanies this Agenda Item (see pages 714-715 of the Agenda Book). The remaining items include:

1. The scope of the covenant not to sue and applicability to certain specified projects affiliated with Developer and/or its principals (Item No. 2, p. 714 of Agenda);
2. The scope of the Developer's indemnification of the City (Item No. 3, p. 714 of Agenda)
3. Developer's request to eliminate provision in the Development Agreement for a \$750,000 credit to the City, in the event third-party consents for the 10<sup>th</sup> Street to 12<sup>th</sup> Street baywalks are not obtained (Item No. 4, p. 715 of Agenda); and
4. Developer's reimbursement of City's costs incurred with regard to the BOA Appeal, the Petition, and the Second Amendment (Item No. 5, p. 715 of Agenda).

# **Exhibit “A”**



## **SECOND AMENDMENT TO DEVELOPMENT AGREEMENT**

**THIS SECOND AMENDMENT TO DEVELOPMENT AGREEMENT** is made as of this \_\_\_\_\_ day of February, 2020 (this "Second Amendment") by and between the **CITY OF MIAMI BEACH**, a Florida municipal corporation (the "City"), and **TCH 500 Alton, LLC**, a Delaware limited liability company ("Developer") (the City and Developer, each a "Party" and collectively, the "Parties").

### **RECITALS**

A. City and 500 ALTON ROAD VENTURES, LLC, a Delaware limited liability company, 1220 SIXTH, LLC, a Delaware limited liability company, SOUTH BEACH HEIGHTS I, LLC, a Delaware limited liability company, and KGM EQUITIES, LLC, a Delaware limited liability company entered into that certain Development Agreement, dated as of January 9, 2019, pursuant to Sections 163.3220-163.3243, Florida Statutes (the "Florida Local Government Development Agreement Act") and Section 118-4 of the City's Code (the "Development Agreement"), which Development Agreement is recorded in Official Records Book 31323, Page 2781 in and of the Public Records of Miami-Dade County, Florida, as assigned to TCH 500 Alton, LLC, pursuant to that certain Assignment and Assumption of Development Agreement dated as of September 27, 2019 and recorded in Official Records Book 31627, Pages 1177-1182 in and of the Public Records of Miami-Dade County, Florida.

B. The Development Agreement provides, among other terms, the City's and Developer's respective responsibilities and agreement to coordinate and cooperate in the planning, scheduling and approval of the design, development and construction of a mixed use residential and commercial project (the "Project") on the Development Site (as that term is defined in the Development Agreement), and a 3.0 acre public park to be conveyed to the City (the "Park Project").

C. On July 17, 2019, the Mayor and City Commission of the City approved a First Amendment to the Development Agreement, delineating the terms and conditions for Developer to develop, permit, design and construct a pedestrian bridge over and across 5th Street and West Avenue, to connect the baywalks south of 5th Street with the Development Site (the "First Amendment"), which First Amendment was dated as of December 18, 2019.

D. On November 1, 2019, the City's Board of Adjustment heard an appeal filed by Developer, and voted to reverse an administration determination of the Planning Director ("Determination"), with respect to the inclusion of the following building elements in floor area calculations for the Project in accordance with the City Code: (1) voids to accommodate elevator shafts; (2) voids to accommodate mechanical/ventilation/trash shafts; and (3) voids to accommodate stairwells, including voids to accommodate stairwells within accessory garages (the "BOA Appeal"). On or about December 3, 2019, the City appealed the Board of Adjustment ruling reversing the Planning Director's Determination to the Eleventh Judicial Court in and for Miami-Dade County, and filed a Writ for Petition of Certiorari in Case No. 19-323 AP-01 (the "Action").

E. The Parties desire to resolve their dispute relating to the BOA Appeal and the Action, and desire to amend the Development Agreement and First Amendment thereto, to accomplish the terms and conditions outlined herein.

F. In Resolution No. 2020-\_\_\_\_\_, the Mayor and City Commission approved this Second Amendment, following two (2) duly noticed public hearings in compliance with Section 163.3225 of the "Act," having determined that it is in the City's best interest to address the issues covered by the Development Agreement, as amended, in a comprehensive manner.

**NOW, THEREFORE**, in consideration of the foregoing, the mutual covenants and conditions contained in this Second Amendment, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties to this Second Amendment, intending to be legally bound, agree to amend the Development Agreement, as amended, by the following additions (indicated by underlining and deletions indicated by ~~strikethroughs~~), as follows:

1. **Incorporation of Recitals.** The parties warrant and represent that the foregoing recitals are accurate and correct and incorporate them into this Second Amendment.

2. **Interpretation.**

- (a) Capitalized terms used but not otherwise defined in this Second Amendment shall have the same meaning given to such terms in the Development Agreement or the First Amendment thereto, unless otherwise specifically indicated or unless the context clearly indicates to the contrary.
- (b) The words "hereof", "herein" and "hereunder" and words of similar import when used in this Second Amendment shall refer to this Second Amendment as a whole and not to any particular provision of this Second Amendment. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation". References herein to "days" shall mean calendar days unless otherwise expressly provided. Unless the context in which used herein otherwise clearly requires, "or" has the inclusive meaning represented by the phrase "and/or". Defined terms include in the singular number the plural and in the plural number the singular.

## **PART I – THE PROJECT AND PARK PROJECT**

3. **Amendment to Section 3 of Development Agreement.**

- (a) Section 3.7 of the Development Agreement is amended as follows:

3.7. "Closing" shall mean the formal exchange of documents between the parties, as further described in Paragraph 9 of this Agreement. ~~The Closing shall occur on a date set by the Developer, not later than four (4) years following the Effective Date, on not less than ten (10) Business Days prior written notice to the City, provided the Developer has satisfied:~~

~~(a) the “Hazardous Substance Environmental Contingency” (as more specifically defined below) as to the entire Park Site; and (b) subparagraphs 17(a) and (c) of this Agreement with respect to “Phase 1” of the Park Project (as more specifically defined below). If the Developer fails to schedule the Closing within four (4) years following the Effective Date, then the Developer shall be in default of this Agreement, unless the Closing is extended in writing by mutual agreement of the Developer and the City, with such extension being subject to the prior approval of the City Commission. The Closing shall occur on a date set by the Developer, which shall not be later than June 1, 2020, on not less than ten (10) Business Days prior written notice to the City; or, if DERM has not issued an approved Remedial Action Plan for the Park Site as of the then scheduled Closing Date, then on such later date as may be set by the City Manager on written notice to the Developer not less than five (5) Business Days prior to such then scheduled Closing Date, should the City Manager elect to extend the Closing until after the issuance of a DERM-approved Remedial Action Plan for the Park Site. If the Closing is extended by the City Manager, then: (a) the City Manager shall promptly issue a letter to the City Commission apprising the City Commission of the status of the Closing including the new Closing Date; and (b) any further extensions of the Closing by the City Manager shall be treated in the same manner as set forth above.~~

- (b) Section 3.15 of the Development Agreement is amended as follows:

**“Environmental Contingency”** shall mean the remediation of the Park Site, as further described in subparagraphs 6(c)(i) through ~~(iv)~~ (iii) of this Agreement.

- (c) Section 3.25(c) of the Development Agreement is amended as follows:

(c) The uses permitted on the Development Site shall have a maximum of: (i) ~~330~~ 410 residential units (including multi-family residential units, single-family detached units, townhomes, condominiums, and apartments), with up to a total of nine (9) or three percent (3%) of such residential units, whichever is less, consisting of “Amenity Guest Apartment Units” available for use (on a daily, weekly or monthly basis) only by the owners, tenants and/or residents of the multi-family residential tower in which such residential units are located and the relatives, guests and invitees of such owners, tenants and/or residents (with no advertisements or listings of such Amenity Guest Apartment Units for rental by the general public, and no activity or operation of such Amenity Guest Apartment Units that would require a hotel license or public lodging establishment license by the State of Florida Department of Business and Professional Regulation); and (ii) 15,000 square feet of retail uses. Except with respect to the Amenity Guest Apartment Units (which

may be rented, leased, used and/or occupied on a daily, weekly or monthly basis), the Developer acknowledges and agrees that, as part of the consideration to the City for the vacation of the City Parcel and for entering into this Agreement, any agreements for the rental, lease, sub-lease, use or occupancy of residential units within the Development Site for periods of less than six (6) months and one (1) day shall be expressly prohibited with respect to (xi) all residential units that are part of a condominium form of ownership and owned by person or entities other than the Developer, and (xii) ninety percent (90%) of the residential units owned by the Developer; provided, however, any agreements for the rental, lease, sub-lease, use or occupancy with respect to ten percent (10%) of the residential units owned by the Developer for periods of less than thirty (30) days shall be expressly prohibited. If any of the residential units in the multi-family residential tower are developed and sold as a condominium, then the limitations set forth in this subparagraph 3.25(c) shall be expressly incorporated in the Declaration of Condominium to which such residential units are subjected. Developer covenants that it will not seek any increase to the maximum height of 519 feet or maximum floor plate of 13,800 sq. ft. for the multi-family residential tower for the Project.

- (d) Section 3.30 of the Development Agreement is hereby amended as follows:

3.30 "World-class" shall mean, with respect to the Park Project, the same or substantially similar standard of physical and operational quality for the facilities, landscaping and associated infrastructure as the following parks as of the Effective Date: Millennium Park, Chicago, Illinois; South Point Park, Miami Beach, Florida; and Soundscape Park, Miami Beach, Florida. ~~The world-class standard shall be conclusively deemed satisfied upon the issuance of the "Park Zoning Approval" (as more specifically defined below).~~

**4. Amendment to Section 6 of the Development Agreement.** Section 6 of the Development Agreement is hereby amended as follows:

- (a) Section 6(c) of the Development Agreement is amended as follows:

(i) ~~If the Developer Environmental Assessments and/or any timely delivered City Environmental Assessments identifies any arsenic within the Park Site that is in violation of any environmental laws, rules, regulations or standards applicable to the use of the Park Site as a public municipal park in the City of Miami Beach, then the Developer shall deliver to the City on or before Closing a bond, letter of credit, or similar security reasonably acceptable to the City in an amount equal to the cost of remediating the Park Site for such arsenic (the "Arsenic Surety").~~

(ii)(i) If the Developer Environmental Assessments and/or any timely delivered City Environmental Assessments identifies any hazardous substance (other than



arsenic) within the Park Site that is in violation of any environmental laws, rules, regulations or standards applicable to the use of the Park Site as a public municipal park in the City of Miami Beach, then the Developer shall remediate the Park Site for such hazardous substances ~~prior to Closing~~ prior to conveying the completed Park Project to the City (the "**Hazardous Substance Environmental Contingency**").

~~(iii)~~ (ii) If the Developer Environmental Assessments and/or any timely delivered City Environmental Assessments identifies any arsenic within the Park Site that is in violation of any environmental laws, rules, regulations or standards applicable to the use of the Park Site as a public municipal park in the City of Miami Beach, then the Developer shall remediate the Park Site for such arsenic prior to conveying the completed Park Project to the City. ~~If the Developer fails to remediate the Park Site for arsenic prior to conveying the completed Park Project to the City, and such failure is not cured by Developer within any applicable notice and cure period, then the City may draw on the Arsenic Surety for the purpose of remediating the Park Site for such arsenic.~~

(iv) (iii) For purposes of this Agreement, the term "**remediate**" (and words derivative thereof or of similar import such as "**remediation**") shall mean all actions necessary to obtain regulatory closure of the remediation at issue with conditions from Miami-Dade County Department of Regulatory and Economic Resources – Division of Environmental Resources Management ("**DERM**") and/or any other agency, department or governmental authority having jurisdiction over such remediation (any other agency, department or governmental authority having jurisdiction over such remediation is referred to herein as an "**Applicable Environmental Agency**"). Such conditional closure shall allow for recordation of a covenant in favor of Miami-Dade County and/or any other Applicable Environmental Agency against title to the Park Site that provides for implementation of an approved engineering control (such as a clean soil cap) and, if necessary, prohibits use of groundwater for consumption or irrigation. In addition, the Developer may also, in its sole and absolute discretion, elect to remediate in full or in part by seeking approval from DERM and/or any other Applicable Environmental Agency of "**Alternative Cleanup Target Levels**" or by conducting source removal. In the event that the Developer elects to pursue conditional closure for soils on the Park Site based in part or in full on the use of an engineering control, the Developer shall be required to obtain approval from DERM and/or any other Applicable Environmental Agency of an "**Engineering Control Plan**" with respect to such engineering control. The Developer's obligations under this Paragraph 6 (i.e., satisfaction of the Hazardous Substance Environmental Contingency and/or satisfaction of the Environmental Contingency (as applicable)) shall be deemed complete upon issuance by DERM and/or any other Applicable Environmental Agency of correspondence indicating that no further remediation is required with respect to the Park Site. Prior to Closing, the Developer shall have the right to execute and record any and all agreements, documents and/or instruments against title to the Park Site in connection with its remediation of the Park Site. After Closing, the City shall



promptly execute and deliver to the Developer (and the Developer shall have the right to thereafter record against title to the Park Site) any and all agreements, documents and/or instruments requested by the Developer in connection with its remediation of the Park Site, subject to the City's right to approve any such agreements, documents and/or instruments, which approval shall not be unreasonably withheld, conditioned or delayed.

**5. Amendment to Section 8 of the Development Agreement.** Section 8 of the Development Agreement is hereby amended as follows:

8 Prerequisites to Building Permits. The Developer acknowledges that until the effective date of the Vacation Resolution and the Closing, the City remains the owner of the City Parcel, and that no application for a Building Permit for the residential component of the Project may lawfully be approved without the City's joinder to such application while the City is the owner of the City Parcel. The City shall not join any application for a Building Permit for the residential component of the Project, and shall not join the Covenant in Lieu of Unity of Title (and therefore no Building Permit for the residential component of the Project may be issued), until after the effective date of the Vacation Resolution and the Closing (including the execution and/or delivery of all items in subparagraphs 9(a)-(k) of this Agreement). Subject to the immediately preceding two (2) sentences with respect to the residential component of the Project, and subject to the issuance of the Building Permit for the Park Project, the Developer shall have the right to apply for a phased Building Permit for the Project, the first phase of which may include either the commercial or the residential component of the Project, or both the commercial and the residential components of the Project, at any time during the Term of this Agreement ; ~~provided, however, if the Developer fails to obtain a Building Permit for the commercial component of the Project located north of 6<sup>th</sup> Street within six (6) months after Closing, then the Developer shall sod such commercial area of the Project located north of 6th Street in accordance with Paragraph 14 of this Agreement.~~

**6. Amendment to Section 9 of the Development Agreement.** Section 9(f) of the Development Agreement is hereby amended as follows:

(f) Developer will deliver, ~~at its election, either:~~

(i) ~~— a written tri-party agreement among Developer, the City and the lender providing a construction loan for the construction of the Park Project (the "Park Lender"), in form and substance reasonably acceptable to the City (the "Recognition Agreement"), pursuant to which the Park Lender agrees, among other terms, to (A) fund the then remaining "Park Construction Amount" (as hereinafter defined) directly to the City in the event of any "Park Related Default" (as hereinafter defined) by Developer under this Agreement which is not cured by Developer within any~~

~~applicable notice and cure period, (B) fund the then remaining Park Construction Amount by way of monthly draws pursuant to the draw procedure set forth in the construction loan documents, and (C) fund such then remaining Park Construction Amount directly to the City pursuant to (A) and (B) above, notwithstanding that the Developer may be in default of its construction loan with the Park Lender; or~~

(ii) a letter of credit (the "Letter of Credit") in an amount equal to the Park Construction Amount (as hereinafter defined), which Letter of Credit (A) is unconditional, irrevocable, and payable to City on sight at an office of the issuing financial institution in a single draw equal to the then remaining Park Construction Amount, (B) is in form and content reasonably acceptable to the Developer and the City, and (C) shall contain an "evergreen" provision which provides that the Letter of Credit is automatically renewed on an annual basis (unless the issuer delivers sixty (60) days' prior written notice of cancellation to City) until the Park Project has been completed and accepted by the City, and which the City shall have the right to present for payment in accordance with its terms in the event (Y) of any Park Related Default by Developer under this Agreement which is not cured by Developer within any applicable notice and cure period, or (Z) the Developer fails to provide the City with any renewal or replacement letter of credit complying with the terms of this Agreement at least thirty (30) days prior to the expiration of the then-current Letter of Credit where the issuer of such Letter of Credit has advised the City of its intention not to renew the same.

(iii) For purposes of this Agreement, the term: (A) "Park Construction Amount" shall mean an amount equal to one hundred percent (100%) of the then remaining cost to complete the construction of ~~Phase 2 and Phase 3~~ of the Park Project based on the budget of a guaranteed maximum price contract for or which includes the construction of the Park Project (i.e., the cost to construct the Park Project based on the Final Approved Park Plans, as initially set forth in the budget of a guaranteed maximum price contract for or which includes the construction of the Park Project, less any amounts paid towards the construction of the Park Project); and (B) "Park Related Default" shall mean any of (Y) the failure of the Developer to construct the Park Project in accordance with the terms and conditions of this Agreement and/or (Z) institution of any foreclosure proceeding by any lender (including without limitation any mezzanine lender) of Developer or any of its members with respect to the Project. If the Developer elects to deliver the Letter of Credit, then the The Developer shall have the right to reduce the amount of the same Letter of Credit to reflect the then remaining cost to substantially complete the Park Project Park Construction Amount on a calendar quarter basis by delivering to the City Manager documentation supporting such reduction (including, at a minimum, a completion certificate by the "Park Contractor" (as

hereinafter defined), certifying the percentage completion of the Park Project based on the schedule of values set forth in the "Park Construction Contract" (as hereinafter defined). The City shall: (AA) cooperate with the Developer in reducing the amount of the Letter of Credit (including, without limitation, promptly providing an original instruction letter, duly signed by the City Manager (or his or her designee), authorizing the applicable financial institution to reduce the amount of the Letter of Credit and otherwise complying with any requirements of the issuer of the Letter of Credit in reducing the amount of the same) as and when requested by the Developer in accordance with this sub-section 9(f)(ii)); and (BB) promptly after its acceptance of the completed Park Project, return the Letter of Credit to the Developer, together with an original instruction letter, duly signed by the City Manager (or his or her designee), authorizing the applicable financial institution to cancel the Letter of Credit and otherwise comply with any requirements of the issuer of the Letter of Credit to canceling the same.

(iii) Following any Park Related Default, the City shall have the right, but not the obligation, to draw all funds under the Letter of Credit. The right to draw funds under the Recognition Agreement or Letter of Credit (as applicable) shall be the City's sole and exclusive remedy with respect to a Park Related Default, other than the failure of the Developer to remediate the Park Site in accordance with subparagraphs 6(e)(i) through (iv) of this Agreement. If As soon as the City draws any funds under the Recognition Agreement or Letter of Credit (as applicable), then all conditions precedent to the issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part) shall be deemed satisfied, and the Developer shall have the right to apply for a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part) whether or not construction of the Park Project has been completed or accepted by the City, in which case, the City's issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for Project (whether in whole or in part) shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the Project (or such part thereof for which a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion is sought).

(iv) If the Park Lender refuses to enter into a Recognition Agreement for any reason whatsoever, or if the form or substance of the Recognition Agreement is not reasonably acceptable to the City, then the Developer shall be required to deliver the Letter of Credit in lieu of the Recognition Agreement. If the City draws funds under the Letter of Credit and there are any excess funds remaining after the City completes construction of the Park Project, the City shall return any such excess funds to the

Developer promptly after the City completes such construction of the Park Project. In addition, to the fullest extent permitted by law, the City shall indemnify and hold the Developer harmless from and against any and all damages, losses, liabilities, fees, cost and expense (including attorneys' fees, costs and expenses) that the Developer may pay, sustain or incur as a result of the Letter of Credit being lost or presented by any person or entity other than the City. This paragraph shall survive the expiration or any earlier termination of this Agreement.

**7. Amendment to Section 12 of Development Agreement.** Section 12 of the Development Agreement is hereby amended as follows:

12(a) Except as expressly set forth in this Agreement, Developer shall be solely responsible for the design, permitting and construction of the Park Project, at the Developer's sole cost and expense. The Developer shall execute a contract for the design of the Park Project pursuant to the Park Zoning Approval with a Florida licensed architecture/engineering firm (the "Park Design Contract"), unless the Developer elects to execute a design-build contract for the Park Project pursuant to the Park Zoning Approval as provided below. The Developer shall execute a contract for the construction of the Park Project pursuant to the Park Zoning Approval with a Florida licensed contractor (the "Park Contractor"), or, alternatively, the Developer may, in its sole and absolute discretion, execute a design-build contract with the Park Contractor for the design and construction of the Park Project pursuant to the Park Zoning Approval, which contract may be a stand-alone construction or design-build contract with a guaranteed maximum price for the Park Project, or an addendum to or component of a construction or design-build contract related to both the Project and the Park Project (the "Park Construction Contract"). The Park Design Contract and Park Construction Contract shall, among other things: (a) require that the City to be named as an additional or named insured on all insurance coverages required by the Park Design Contract and Park Construction Contract and under which the Developer is an additional or named insured; ~~(e)~~ (b) require that the City be named a co-obligee under ~~any~~ the payment and performance bonds ~~(if any)~~ required by Park Construction Contract, as provided below; ~~(d)~~ (c) be assignable to the City in the event of a default by the Developer under the Park Design Contract, Park Construction Contract or this Agreement (which assignment shall include, with respect to the Park Design Contract, an assignment or express right to use the plans, specifications and drawings for the Park Project), as provided below; ~~(d)~~ (e) contain usual and customary warranties by the Park Contractor (including a warranty against defective workmanship for a period of not less than one year following substantial completion of the Park Project); ~~(e)~~ (f) name the City as an intended third-party beneficiary with respect to all warranties included in the Park Design Contract and Park Construction Contract; and ~~(f)~~ (g) provide the City with the same indemnification protections as



afforded the Developer under the Park Design Contract and Park Construction Contract. Except as expressly specified in this Agreement, in no event shall City be responsible for paying or otherwise reimbursing the Developer or the Park Contractor for any costs to design, develop or construct the Park Project.

(b) The final proposed plans for the design of the Park Project are hereby approved by the City Commission, in its proprietary capacity, and attached as Exhibit "A" to the Second Amendment of this Agreement (the "Final Approved Park Plans"). Upon execution of the Second Amendment to this Agreement, the Final Approved Park Plans are conclusively deemed to satisfy the World-class standard. Any changes to scope, or value engineering, following the City Commission's approval of the Final Approved Park Plans, shall be subject to the City Manager's prior review and approval. Any proposed modifications to the Final Approved Park Plans shall be indicated by "ballooning," highlighting, blacklining or describing such modifications in reasonable detail. Within ten (10) Business Days after receipt of the same, the City Manager shall review and either (i) approve the proposed modifications, (ii) reject the proposed modifications, or (iii) notify the Developer of the City Manager's election to present the proposed changes to the City Commission for its consideration at its next regularly scheduled City Commission meeting. Neither the City Manager nor the City Commission shall have the obligation to approve any changes in scope or value engineering of the Final Approved Park Plans that he/they deem, in his/their respective sole and reasonable discretion, to be material. In the event that either the City Manager or the City Commission, as applicable, does not approve changes deemed to be material, such decision shall be binding on the Developer, and Developer shall be obligated, at its sole cost and expense, to construct the Park Project in accordance with the Final Approved Park Plans.

~~After the issuance of the Park Zoning Approval, Developer shall prepare construction documents for the Park Project and, upon completion of the same, the Developer shall submit them to the City Manager for the sole and limited purpose of verifying that the Park Project set forth therein is substantially in accordance with the Park Zoning Approval. The City Manager shall review and either approve or reject such construction documents within ten (10) Business Days after receipt of the same. If the City Manager fails to approve or reject such construction documents within such ten (10) Business Day period, then such construction documents shall be deemed approved by the City Manager. However, if the City Manager timely rejects such construction documents, it shall give the specific and detailed reasons for such rejection; in which event, the Developer shall revise the construction documents for the Park Project so that they are substantially in accordance with the Park Zoning Approval and then re-submit them to the City Manager pursuant to the foregoing process until such construction documents have been or are deemed to~~



have been approved by the City Manager (such construction documents, once approved or deemed approved by the City Manager, are referred to herein as the "**Approved Park Plans**").

~~Prior to commencement of any construction of the Park Project, the Developer shall submit to the City Manager any proposed modifications to the Approved Park Plans (which shall be indicated by "ballooning," highlighting, blacklining or describing such modifications in reasonable detail) for the sole and limited purpose of verifying that the Park Project set forth therein is substantially in accordance with the Park Zoning Approval. The City Manager shall review and either approve or reject the proposed modifications within ten (10) Business Days after receipt of the same. If the City Manager fails to approve or reject such proposed modifications within such ten (10) Business Day period, then such proposed modifications shall be deemed approved by the City Manager. However, if the City Manager timely rejects such proposed modifications, it shall give the specific and detailed reasons for such rejection; in which event, the Developer shall revise the proposed modifications so that they are substantially in accordance with the Park Zoning Approval and then re-submit them to the City Manager pursuant to the foregoing process until such proposed modifications have been or are deemed to have been approved by the City Manager (such proposed modifications, once approved or deemed approved by the City Manager, shall become part of the "**Approved Park Plans**"). Any dispute regarding the City Manager's rejection of the construction documents or any proposed modification thereof must be resolved prior to the commencement of the construction of the Park Project and, in the event of any such dispute, all time periods set forth in this Agreement shall be tolled until the dispute is resolved by the Developer and the City.~~

(c) Prior to the issuance of the Building Permit for the Park Project, Developer shall execute, and shall cause its architect/engineer and the Park Contractor each to execute an assignment of the Park Design Contract and Park Construction Contract, as applicable, in the form of assignment attached as Exhibit "B" to the Second Amendment to this Agreement.

(d) Prior to the issuance of the Building Permit for the Park Project, Developer shall require the Park Contractor to provide a performance bond and a payment bond for the Park Project, in the forms attached as Exhibit "C" to the Second Amendment to this Agreement in an amount equal to the Park Construction Amount, which performance bond and payment bond shall each name the City as co-obligee.

(e) After the issuance of a Building Permit for the Park Project, the Developer shall construct, at its sole cost and expense, the Park Project

substantially in accordance with the Park Zoning Approval and Final Approved Park Plans.

(f) Developer covenants and agrees to expend a minimum of \$8,000,000 for the total design, permitting and construction of the Park Project in accordance with the Final Approved Park Plans. In no event shall Developer expend less than the Park Construction Amount (as defined herein) to complete the Park Project. Promptly after the full execution of the Park Construction Contract, the Developer shall provide a copy of the same to the City (the cost of the Park Project as set forth in the Park Construction Contract is referred to herein as the "Park Construction Amount"), and the City Manager (or his or her designee) shall have the right to review the Park Construction Contract (including quantities, unit prices, and other supporting information set forth therein for the components of the work) for the limited purpose of verifying that the Park Construction Contract covers all work required for the construction of the Park Project in accordance with the Final Approved Park Plans.

(g) Notwithstanding the foregoing, the Developer shall be solely liable for all costs in excess of the Park Construction Amount (if any) as may be necessary to complete construction of the Park Project in accordance with the Final Approved Park Plans, unless the City exercises its remedy for a Park Related Default and draws on the Letter of Credit for the then-remaining Park Construction Amount, in which event the City shall then be solely liable for all fees, costs and expenses in excess of the Park Construction Amount (if any) as may be necessary to complete construction of the Park Project in accordance with the Final Approved Park Plans.

**8. Amendment to Section 14 of the Development Agreement.** Section 14 of the Development Agreement is hereby amended as follows:

14. Developer shall submit full building permit plans for the entire Park Project within ninety (90) days following City Commission approval of the Second Amendment to this Agreement. Developer shall diligently pursue the issuance of a full building permit for, and shall commence construction of, the Park Project (clearing, grubbing, and/or drainage improvements) not later than thirty (30) days following the City's issuance of the Building Permit for the Park Project. The City agrees to expedite its review of the full building permit plans for the Park Project.

Upon issuance of the Building Permit for the Park Project, Developer shall thereafter diligently pursue the completion of the Park Project, and shall complete construction of the entire Park Project not later than the earlier of (a) thirty-six (36) months after the issuance of the Building Permit for the Park Project or (b) forty-eight (48) months following the execution of the Second Amendment to this Agreement (such earlier date, the "Park

Completion Outside Date”). There shall be no tolling of the Park Completion Outside Date except for Unavoidable Delays (as defined herein) that directly impede the progress of construction of the Park Project.

For purposes of this Section 14, “Unavoidable Delays” means a delay that (a) directly impacts the critical path activity delineated in the construction schedule for the Park Project, (b) is beyond the reasonable control of Developer, and (c) is not due to a negligent or intentional act, error or omission of Developer. Subject to the foregoing criteria, “Unavoidable Delay” may include events such as delays in securing the permits for the prosecution of the Park Project (provided that Developer is pursuing same in good faith and with diligence), war, civil insurrection, riot, fires, epidemics, sabotage, explosions, embargo restrictions, shortages of materials, quarantine restrictions, transportation accidents, strikes, floods, hurricanes or tornadoes, earthquakes, or other acts of God which prevent performance. “Unavoidable Delay” shall not include technological impossibility, failure of equipment supplied by Developer or any contractor, receipt of and incorporation of defective materials into the Park Project, shortage of funds, failure of suppliers to deliver equipment and materials except where such failure is itself the result of an Unavoidable Delay. If two or more separate events of Unavoidable Delay are concurrent with each other, Developer shall only be entitled to an extension of time for each day of such concurrent critical path delay, and Developer shall not be entitled to double recovery thereon. For illustration purposes only, if two events of Unavoidable Delay are concurrent for two days, Developer shall only receive an extension of time, if at all, of a total of two days, and not four days. In no event shall Developer’s financial condition constitute an “Unavoidable Delay, nor shall any delay arising from Developer’s default under the Development Agreement constitute an “Unavoidable Delay” with respect to Developer’s obligations hereunder. The times for performance set forth in this Second Amendment shall be extended to the extent performance is delayed by Unavoidable Delay; provided that Developer notifies the City in writing not later than twenty-one (21) days after the occurrence of such Unavoidable Delay of the occurrence thereof. Failure to provide timely notice, as set forth herein, shall be a waiver of any claim by the Developer alleging an Unavoidable Delay.

Developer and City agree and hereby reaffirm the obligation of Developer to diligently prosecute completion of the work for the Park Project. Accordingly, the prompt delivery of the Park Project to the City is, and remains, a primary inducement and consideration for the City to enter into the Development Agreement, as amended, and the issuance of a Building Permit for the Park Project shall be a non-waivable condition precedent to

the issuance of the Building Permit for the residential components of the Project.

The Developer shall complete the construction of the Park Project (subject to such conditions for completion of each Phase of the Park Project as further described in subparagraph 14(e) below) in accordance with the following phased construction schedule:

~~(a) — the Developer shall complete construction of that portion of the Park Project depicted as Phase 1 on Exhibit “Z” attached hereto and incorporated herein by this reference within the earlier of (i) eighteen (18) months following the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved (by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), or (ii) thirty (30) months after the Effective Date;~~

~~(b) — the Developer shall (i) commence construction (consisting of clearing, grubbing, erection of construction fencing and/or drainage improvements) of that portion of the Park Project depicted as Phase 2 on Exhibit “Z” attached hereto and incorporated herein by this reference within forty eight (48) months after the issuance of the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved (by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), and (ii) complete construction of Phase 2 of the Park Project no later than eighteen (18) months following the commencement of construction of Phase 2 of the Park Project; and~~

~~(c) — the Developer shall complete that portion of the Park Project depicted as “Phase 3” on Exhibit “Z” attached hereto and incorporated herein by this reference within ninety six (96) months after the Effective Date.~~

During the construction of the Project and the Park Project, the City shall provide the following construction staging, storage, use and construction parking accommodations to the Developer and the Park Contractor at no cost or expense to the Developer or the Park Contractor, except as provided herein: (wx) the closure of 6th Street for a period of thirty (30) months after the issuance of the Building Permit for the residential component of the Project for use by the Developer and the Park Contractor as a staging area/lay-down yard in connection with the construction of the Project and the Park Project, provided, however, that during such period when 6th Street is closed, the Developer shall construct, and make



available for use by the general public, an alternate pedestrian pathway between West Avenue and Alton Road in a location determined by the Developer in its sole discretion south of 8th Street; ~~(x) the right to use Phase 3 of the Park Project as a staging area/lay-down yard in connection with the construction of the Project and the Park Project until construction of Phase 3 of the Park Project commences;~~ (y) the right to permit, develop, construct, install and operate construction, leasing and/or sales trailers, and improvements related thereto, on Phase 3 of the Park Project until construction of Phase 3 of the Park Project commences; and (zy) subject to the "Not-To-Exceed Amount (as more specifically defined below), two hundred (200) parking passes in the City owned garage located at 1100 5th Street, Miami Beach (the "City Garage") for the period beginning on the date the Building Permit for the residential components of the Project is issued for use by the Developer and the Park Contractor (and their respective employees and sub-contractors), until such time as the Not-To-Exceed Amount has been expended. For purposes of this Agreement, and in consideration ~~for the phased construction schedule~~ for the completion of the Park Project set forth in this Paragraph 14, the City shall budget and appropriate, from the City's General Fund, the necessary funds to pay the Parking Department for monthly parking passes at the then-prevailing standard rates, up to an aggregate not-to-exceed amount of \$600,000.00 (the "Not-To-Exceed Amount"). Once the Not-To-Exceed Amount has been expended by the City, the Developer and/or the Park Contractor shall be solely responsible for the cost of all monthly parking passes for the City Garage issued to it by the City, or making other parking arrangements for the Developer and the Park Contractor (and their respective employees and sub-contractors) at the Developer and the Park Contractor's sole discretion.

~~Completion of each phase of the Park Project shall occur when (aa) the City Manager (or the City Manager's designee) has certified, in the City's proprietary capacity as owner of the Park Site), that the Park Project has been constructed substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans; (bb) the Developer has obtained one or more temporary certificates of occupancy, final certificates of occupancy, and/or certificates of completion that individually or collectively encompass such phase of the Park Project, and (cc) all improvements that comprise such phase of the Park Project (the "Park Improvements") have been conveyed to and accepted by the City through a bill of sale; and, Completion of the entire Park Project shall occur when (xx) the City Manager (or the City Manager's designee) has certified, in the City's proprietary capacity as owner of the Park Site), that the Park Project has been constructed substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans; (yy) the Developer has obtained one or more temporary certificates of occupancy, final certificates of occupancy, and/or certificates of completion that~~



individually or collectively encompass the entire Park Project, and (zz) all ~~Park Improvements~~ improvements that comprise the entire Park Project (the "Park Improvements") have been conveyed to and accepted by the City through a bill of sale.

~~If the Developer has not commenced site work (consisting of clearing, grubbing, erection of construction fencing and/or drainage improvements) for Phase 1 of the Park Project within eighteen (18) months following the issuance of the Park Zoning Approval and the expiration of all appeal periods to such issuance with no appeals to such issuance having been filed (or, in the event an appeal is filed, the same has been resolved (by judgement, settlement or otherwise) on terms and conditions acceptable to the Developer in its sole and absolute discretion), then the Developer shall sod the entire Park Site promptly after the expiration of such time period and keep and maintain such sod until such time as the Developer commences construction of the Project (or any part thereof) and/or the Park Project (or any part thereof). [If the Developer has not poured the concrete foundation for the multi-family residential tower to be constructed on the Development Site within twelve (12) months after Phase 1 and Phase 2 of the Park Project have been completed and accepted by the City, then the Developer shall sod Phase 3 of the Park Project promptly after the expiration of such time period and keep and maintain such sod until such time as the Developer commences construction of the multi-family residential tower on the Development Site.] If the Developer has not obtained a Building Permit for the commercial component of the Project located north of 6<sup>th</sup> Street within six (6) months after Closing, then the Developer shall sod such commercial area of the Project located north of 6<sup>th</sup> Street promptly after the expiration of such time period and keep and maintain such sod until such time as Developer commences construction of such commercial area of the Project located north of 6<sup>th</sup> Street.~~

**9. Deletion of Exhibit "Z" of the Development Agreement.** Exhibit "Z" to the Development Agreement, which depicted the former phasing plan for the Park Project, is hereby deleted, as the entire Park Project shall be constructed at the same time (as provided in Section 7 of this Second Amendment, amending the provisions of Section 14 of the Development Agreement).

**10. Replacement of Exhibits "P" and "Q" of the Development Agreement.** Exhibit "P" to the Development Agreement, which depicts the Future Pedestrian Pathway Parcel providing pedestrian access across the area of the Project outside of the public right of way south of 6<sup>th</sup> Street is hereby replaced by Exhibit "G" to this Second Amendment. Exhibit "Q" to the Development Agreement, the Future Pedestrian Pathway Parcel Easement Agreement providing for perpetual public access over the Future Pedestrian Pathway Parcel, is hereby replaced by Exhibit "H" to this Second Amendment.

**11. Amendment to Section 17 of the Development Agreement.** Section 17 of the Development Agreement is amended as follows:

17. Conditions Precedent to Issuance of Certificate of Occupancy or Temporary Certificate of Occupancy for the Project. The Developer acknowledges that conveyance of the Park Site and the completion of the Park Project and the conveyance of the Park Improvements to the City are additional and essential consideration for the City's vacation of the City Parcel. Except as otherwise provided in this Agreement, the Developer shall not apply for, and the City shall not issue, any temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (in whole or in part) until the following has occurred:

(a) The Developer shall have completed construction of the Park Project substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans (as evidenced by the issuance of one or more temporary certificates of occupancy, final certificates of occupancy or certificates of completion that individually or collectively encompass the entire Park Project);

(b) Developer shall have designed and constructed, at Developer's sole cost and expense, the "Future Pedestrian Bridge Platform" (as more specifically defined below).

(c) The Developer shall have satisfied the Environmental Contingency; and

(d) The Developer shall have conveyed the Park Improvements to the City through a bill of sale. The City shall be obligated to accept such bill of sale for the Park Improvements if the Park Project has been completed substantially in accordance with the Park Zoning Approval and the Final Approved Park Plans (as evidenced by the issuance of one or more temporary certificates of occupancy, final certificates of occupancy or certificates of completion for the Park Project that individually or collectively encompass the entire Park Project) and the Environmental Contingency has been satisfied.

Provided however, and notwithstanding anything to the contrary contained in this Agreement, subparagraphs 17(a) and (d) above shall be deemed satisfied, and the Developer shall have the right to apply for a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion for the Project (whether in whole or in part), if the City draws any funds under the ~~Recognition Agreement or~~ Letter of Credit (as applicable) as provided in subparagraph 9(f)(iii) of this Agreement, in which case, the City's issuance of a temporary certificate of occupancy, final certificate of occupancy, and/or certificate of completion

for Project (whether in whole or in part) shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the Project.

Notwithstanding anything in this Agreement to the contrary, the Developer shall have the right: (a) prior to the conveyance or completion of the Park Project, to (i) permit, develop, construct, install and operate construction trailers, leasing trailers and sales trailers, and improvements related thereto, on the Property, and (ii) apply for any temporary certificate of occupancy, final certificate of occupancy and/or certificate of completion for any such trailer or related improvements, and the City's issuance thereof shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over such trailers and related improvements; and (b) after the conveyance of the Park Site ~~and satisfaction of subparagraphs 17(a) and (c) of this Agreement with respect to Phase 1 and Phase 2 of the Park Project,~~ to apply for any temporary certificate of occupancy, final certificate of occupancy and/or certificate of completion for any commercial component of the Project on the Development Site north of 6th Street, and the City's issuance thereof shall only be subject to such regulatory approvals that may be required by any agencies having jurisdiction over the commercial component of the Project.

12. **Amendment to Section 18 of the Development Agreement.** Section 18(d) of the Development Agreement is hereby [deleted in its entirety] [amended as follows]:

**[OPEN ISSUE FOR CITY COMMISSION DIRECTION: AS DEVELOPER IS NOW RESPONSIBLE FOR ALL BRIDGE PROJECT COSTS IN EXCESS OF CITY'S MAXIMUM CONTRIBUTION, DEVELOPER HAS REQUESTED DELETION OF CREDIT TO THE CITY IN THE AMOUNT OF \$750,000 FOR THE BRIDGE PROJECT, BUT SOLELY IF THE THIRD-PARTY CONSENTS FOR THE 10<sup>TH</sup> – 12<sup>TH</sup> STREET BAYWALKS CANNOT BE OBTAINED. IF THE CONSENTS FOR THE BAYWALKS ARE OBTAINED, DEVELOPER'S OBLIGATION TO CONSTRUCT THE BAYWALKS SHALL REMAIN UNCHANGED.]**

**Developer's proposed language:**

(d) If the City is unable to obtain the Baywalk Permits within forty-eight (48) months after the Effective Date, ~~and: (i) the City awards the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount not less than \$10,000,000.00 prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project, then the Developer shall provide the City with a credit in the amount of \$750,000.00 to be applied against the Developer's~~

~~construction of the 5th Street Pedestrian Bridge Project.; or (ii) the City fails to award the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount of approximately \$10,000,000.00 (with the final amount subject to negotiation thereof) prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project, then (A) the Developer shall have no obligation to provide the City with any credit against the Developer's construction of the 5th Street Pedestrian Bridge Project whatsoever, and (B) the Developer shall have no obligation to construct any of the Baywalk Improvements whatsoever.~~

**City's proposed language:**

(d) If the City is unable to obtain the Baywalk Permits within forty-eight (48) months after the Effective Date and: ~~(i) the City awards the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount not less than \$10,000,000.00 prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project, then the Developer shall provide the City with a credit in the amount of \$750,000.00 to be applied against the City's Maximum Contribution for Developer's construction of the 5th Street Pedestrian Bridge Project.; or (ii) the City fails to award the Developer a contract for the construction of the 5th Street Pedestrian Bridge Project in an amount of approximately \$10,000,000.00 (with the final amount subject to negotiation thereof) prior to date on which the Developer applies for the initial Building Permit for the Project or the Park Project, then (A) the Developer shall have no obligation to provide the City with any credit against the Developer's construction of the 5th Street Pedestrian Bridge Project whatsoever, and (B) the Developer shall have no obligation to construct any of the Baywalk Improvements whatsoever.~~

**13. Amendment to Section 26 of the Development Agreement.** Section 26(b) of the Development Agreement is hereby amended as follows:

(b) This Agreement shall run for an initial term of eight (8) years from the Effective Date (the "Term"); provided, however, if the Developer completes construction of ~~Phase 1, Phase 2 and Phase 3~~ of the Park Project ~~within the time periods set forth in subparagraph 14(a) through (c) of this as provided in Section 14 of this Agreement,~~ then the Term shall automatically be extended (without the need of any notice to or consent of the City, or being subject to any public hearing) for an additional seventeen (17) years (so that the Term of this Agreement shall be a total of twenty-five (25) years from the Effective Date). Except for the automatic seventeen (17) year extension of the Term set forth above (which does not require any consent of the City or public hearing): (i) the Term of this Agreement may be extended only by the mutual consent of the City and



the Developer subject to a public hearing pursuant to Section 163.3225, Florida Statutes; and (ii) consent to any extension of this Agreement is within the sole discretion of each party to this Agreement. No notice of termination shall be required by either party upon the expiration of this Agreement, and after the expiration of this Agreement the parties shall have no further obligations under this Agreement, except for those obligations that expressly survive the expiration of this Agreement.

**14. Amendment to Section 31 of the Development Agreement.** Section 31 of the Development Agreement is hereby amended as follows:

(a) Section 31(b) of the Development Agreement is hereby amended as follows:

(b) If, within ninety-six (96) months after the Effective Date on or before the Park Completion Outside Date, the requirements of subparagraphs 17(a) through (d) have not been or deemed to have been satisfied.

(b) Section 31 is hereby amended to include the following subsection (f) thereto:

(f) Any breach by Developer of any terms or provisions of the Settlement Agreement.

**15. Amendment to Section 32 of the Development Agreement.** Section 32 of the Development Agreement is hereby amended to include the following clause (g) to the definition of Material Event of Default set forth therein:

(g) any breach of any term or provision of the Settlement Agreement.

**16. Amendment to Section 43 of Development Agreement.** Section 43 is hereby amended as follows:

43. Transfer and Assignment. The Developer shall not be entitled to assign or transfer this Agreement or any of the rights and obligations hereunder prior to the satisfaction or deemed satisfaction of the conditions set forth in subparagraphs 17(a) through (d) of this Agreement without the prior written consent of the City (which consent may be withheld, conditioned or delayed in the sole and absolute discretion of the City), except as hereinafter provided. The Developer shall have the right at any time and from time to time to sell, transfer and convey all or any portion of the Property to any person or entity (a "**Subsequent Owner**") and assign and transfer this Agreement and the rights and obligations hereunder in whole or in part to any Subsequent Owner in connection with such sale, transfer or conveyance of the Property or any portion thereof without the prior consent or approval of the City, provided that a "Galbut Entity" (as more specifically defined below) shall at all times (a) hold, directly or indirectly, not less than a 10% ownership interest in the Development Site, (b) serve, directly or indirectly, as a manager of the



entity that is developing the Project and the Park Project, and (c) exercise, directly or indirectly, day-to-day operational control of the entity as the manager of the entity that is developing the Project and the Park Project; provided, further, that this Agreement and the rights and obligations hereunder can be assigned and transferred to any lender, lender designee or non-lender affiliated purchaser (any of the foregoing being referred to herein as a "**Foreclosure Purchaser**") who acquires the Property or any portion thereof through a foreclosure sale or deed-in-lieu of foreclosure without the prior consent or approval of the City. Direct and indirect owners of Developer shall also be entitled to pledge their direct and indirect ownership interests in Developer to one or more lenders, and any such lender, its designee and a non-lender affiliated purchaser (any of the foregoing being referred to herein as a "**Mezzanine Foreclosure Purchaser**") shall be permitted to acquire all or any portion of the direct and/or indirect ownership interests in Developer through foreclosure of any such pledge or acceptance of an assignment-in-lieu of foreclosure without the prior consent or approval of the City.

This Paragraph 43 and the restrictions, limitations and prohibitions contained herein shall automatically terminate, extinguish and be of no further force or effect immediately upon the earlier of the following events to occur ~~(y)~~ (a) the satisfaction or deemed satisfaction of the conditions set forth in subparagraphs 17(a) through (d) of this Agreement, or ~~(z)~~ (b) the acquisition of the Property or any portion thereof by any Foreclosure Purchaser through a foreclosure sale or deed-in-lieu of foreclosure; or (c) the acquisition of all or any portion of the direct and/or indirect ownership interests in Developer by any Mezzanine Foreclosure Purchaser through foreclosure of any such pledge or acceptance of an assignment-in-lieu of foreclosure whereupon, the Developer, any Subsequent Owner and/or any Foreclosure Purchaser or Mezzanine Foreclosure Purchaser shall have the absolute and unconditional right to sell, transfer and convey all or any portion of the Property to any person or entity and to assign and transfer this Agreement and the rights and obligations hereunder in whole or in part to any person or entity in connection with such sale, transfer or conveyance of the Property or any portion thereof without the prior consent or approval of the City whether or not a Galbut Entity ~~(aa)~~ holds, directly or indirectly, any ownership interest in the Development Site, ~~(bb)~~ serves, directly or indirectly, as a manager of the entity that is developing the Project and the Park Project, or (c) exercises, directly or indirectly, day-to-day operational control of the entity as the manager of the entity that is developing the Project or the Park Project. Any assignee or transferee (including, any Subsequent Owner or Foreclosure Purchaser) shall assume all remaining obligations of the Developer under this Agreement at the time of such assignment or transfer of this Agreement. For purposes of this Paragraph 43, the term "**Galbut Entity**" shall mean: ~~(ww)~~ (a) Russell Galbut; ~~(xx)~~ (b) any spouse, child, grandchild, brother, sister, niece, nephew or first cousin of Russell Galbut, or of any

combination of the foregoing; ~~(yy)~~ (c) any trust established for the benefit of Russell Galbut, or any spouse, child, grandchild, brother, sister, niece, nephew or first cousin of Russell Galbut, or of any combination of the foregoing; and/or ~~(zz)~~ (d) any entity owned, directly or indirectly, one hundred percent (100%) by Russell Galbut, or any spouse, child, grandchild, brother, sister, niece, nephew or first cousin of Russell Galbut, or any trust established for the benefit of Russell Galbut, or any spouse, child, grandchild, brother, sister, niece, nephew or first cousin of Russell Galbut, or of any combination of the foregoing.

**17. Amendment to Section 44 of Development Agreement.** Section 44 is hereby amended as follows:

44 Force Majeure and Third Party Challenges. All time periods set forth in this Agreement and in any approval or permit issued in connection with the Project ~~and/or the Park Project~~ will be tolled due to force majeure events (including, without limitation, strikes, lockouts, acts of God, hurricanes and severe weather, and other causes beyond the control of either party), and due to delays in obtaining permits and approvals from governmental agencies, and during the pendency of any "Lawsuit" (as hereinafter defined) and any unexpired appeal period thereof, and during any dispute between the Developer and the City with respect to the construction documents for the Park Project under Paragraph 12 of this Agreement. In the event that a third party unrelated to or unaffiliated with the City or the Developer institutes any action, suit or proceeding relating to the Project and/or the Park Project, including, without limitation, any action, suit or proceeding challenging the validity or issuance of the Vacation Resolution, this Agreement, the Land Development Regulation Amendments, the Project Zoning Applications, the Project Zoning Approvals, the Park Zoning Application, the Park Zoning Approval, ~~or~~ any Building Permit, and/or any claims challenging any approvals that may be provided by the City pertaining to the floor area for the Project, or otherwise alleging the applicability of any law or ordinance to the Project (including, without limitation, the City Charter) (in each instance as it relates specifically to the Project, including any related appeals, a "Lawsuit"), then the Developer shall defend any such Lawsuit at its sole cost and expense using legal counsel reasonably acceptable to the City. The Developer shall further indemnify and hold the City harmless from and against all actual damages, losses, liabilities, fees, cost and expense (including attorneys' fees, costs and expenses) of any and every kind arising out of or relating to any such Lawsuit. This paragraph shall survive the expiration or any earlier termination of this Agreement.

If a Lawsuit is commenced prior to the vacation and conveyance of the City Parcel as contemplated by this Agreement, then the City shall not be required to effectuate such vacation and conveyance of the City Parcel until thirty (30) days after the Lawsuit has been completed and finally

disposed of (by judgement, settlement or otherwise) on terms and conditions acceptable to Developer in its sole and absolute discretion; provided, however, if the Lawsuit is still pending more than sixty (60) months after it has been commenced, then either party, at its option, may from and after the expiration of such sixty (60) month period and while the Lawsuit remains unresolved, elect to terminate the transaction contemplated by this Agreement by delivering a written notice of termination to the other party, whereupon the Vacation Resolution shall be rescinded and this Agreement shall be terminated, and the City and the Developer shall have no further obligation and/or liability to each other hereunder.

**18. No City Warranty or Representation.**

City has not made, does not make and will not make, and Developer has not relied upon, any representation or warranty, express or implied, as to any requirement under any law or ordinance including, without limitation, the City Charter, relating to the resolution of the disputed floor area issues or the implementation of any settlement of disputed floor area issues, through any approval provided by the City for the Project including, without limitation, any clarifying amendment that may be required to the City's Land Development Regulations as to the definition of floor area or the applicability thereof ("Clarifying LDR Amendment"). Developer expressly assumes all risks with respect to any of the foregoing matters.

**19. Settlement and Mutual Release; Waiver of Consequential Damages.**

- (a) The City and Developer hereby agree to a mutual release of all claims either party may have relating to the BOA Appeal and the Action and the subject matter thereof. Within five (5) days following the effective date of the Clarifying LDR Amendment and this Second Amendment, and as a condition subsequent thereto, the Developer and the City shall execute a settlement agreement for the mutual releases outlined herein, the form of which agreement is attached hereto as Exhibit "D," which settlement agreement will be contingent upon the Clarifying LDR Amendment including an applicability clause that allows the Project to proceed based on the Board of Adjustment's November 1, 2019 interpretation excluding the Elements from the calculation of floor area. Within five (5) days after the effective date of the settlement agreement, the City and Developer shall, along with counsel, execute a stipulation for dismissal with prejudice of the BOA Appeal and the Action in accordance with the settlement agreement.
- (b) Developer, on behalf of itself and each of its members and David Martin (individually) and Russell Galbut (individually) and each owner of any of the Identified Properties (as hereinafter defined) in which either or both of David Martin or Russell Galbut has any direct or indirect ownership interest (collectively, the "Developer Covenant Parties"), hereby unconditionally covenants and agrees that neither Developer nor any of the Developer Covenant

Parties will: (a) seek to exclude the Elements from the calculation of floor area for any of the Identified Properties based on the Board of Adjustment's November 1, 2019 interpretation excluding the Elements from the calculation of floor area; or (b) commence any action, suit or proceeding against the City (including, without limitation, any agency or regulatory body of the City) seeking to exclude the Elements from the calculation of floor area for any of the Identified Properties. For purposes of this paragraph, the term "Identified Properties" shall mean and be limited to the following four (4) properties: (v) 1212 Lincoln Road; (w) 100 Lincoln Road (the Decoplage); (x) 1501 Collins Avenue (the Bancroft Hotel); and (y) 7145 Carlyle Avenue. [OPEN ISSUE; Developer does not agree to extend covenant to 1501 Collins Ave. or 7145 Carlyle Ave.]

- (c) Notwithstanding any provision to the contrary contained in the Development Agreement, as amended, in no event shall either party be liable to the other party (or any other person) for any indirect, special, consequential, exemplary, punitive damages, economic damages, lost profits or similar damages in connection with the Project. This provision is not intended to, and does not modify, Section 7(h) of Amendment No. 1 or the City's rights to pursue actual damages as set forth in the Development Agreement, as amended.
- (d) Developer agrees to pay up to [~~\$125,000~~][\$270,000] of the City's administrative and professional fees and costs (including, without limitation, legal fees) associated with the BOA Appeal, the Action, the Clarifying LDR Amendment, and this Second Amendment. The foregoing obligation does not and shall not be interpreted to limit in any manner any of the indemnities of the Developer pursuant to the Development Agreement, the First Amendment or this Second Amendment. [OPEN ISSUE; CITY REQUESTS REIMBURSEMENT OF \$270,000]

## **20. DRB Administrative Determinations.**

City agrees to provide Developer with expedited administrative review of certain specified Developer-proposed changes to the zoning approvals for the Project, Park Project, and/or Bridge Project to the extent the Planning Director determines, in his sole discretion, that such changes may be approved administratively. For the avoidance of doubt, no contract term is, nor shall any such term be deemed to be, an abrogation of the Planning Director's discretion. Subject to the administrative determinations referenced above, within five (5) days following the effective date of the settlement agreement described herein, Developer shall voluntarily dismiss with prejudice the separate pending DRB appeal pertaining to the surface parking adjacent to the commercial component for the Project. The City's administrative determinations will survive the expiration, discharge, or any early termination of this Second Amendment. In the event that an action, suit, or proceeding with respect to the Project invalidates approvals that may be provided by the City pertaining to the floor area for the Project based on Board of Adjustment's November 1, 2019 interpretation, the administrative determinations shall be deemed modified to adjust the floor area of the Project accordingly.



**21. Satisfaction of Condition Set Forth in Section 11 of Development Agreement Relating to the Bridge Project.**

The Parties acknowledge and agree that the City Commission awarded the Bridge Project contract to Developer on July 17, 2019, via approval of the First Amendment to the Development Agreement, and that such approval was provided by the City Commission prior to the date on which the Developer applied for the initial Building Permit for the Project or the Park Project. Accordingly, pursuant to Section 11 of the Development Agreement and notwithstanding any provision to the contrary in the Development Agreement, as amended, Developer shall be solely responsible for the payment of all applicable City Impact Fees (as such term is defined in Section 11 of the Development Agreement) for the Project and Park Project at the time the Developer applies for such initial Building Permit.

**PART II - 5<sup>th</sup> STREET PEDESTRIAN BRIDGE PROJECT**

**22. Amendment to Section 2 of the First Amendment to the Development Agreement.**  
Section 2(a) of the First Amendment is hereby amended as follows:

“City Contingency” means that separate fund in the amount of \$360,000 **Zero Dollars (\$0.00)** established outside of the Construction Contract but within the Final Bridge Project Budget which will be made available to the Developer with the City Manager’s consent, which shall not be unreasonably withheld, to fund the Bridge Project Design Costs, Developer’s Direct Costs and hard construction costs of the Bridge Project after the exhaustion of the Developer Contingency in accordance herewith. Any unused City Contingency remaining at the completion of the Bridge Project shall accrue solely to the City.

“Maximum City Contribution” means the maximum amount of \$9,250,000 **\$9,610,000** to be contributed by the City towards the Bridge Project Design Costs, the Developer’s Direct Costs and the hard construction costs of the Bridge Project, plus the City Contingency solely to the extent made available by the City Manager in accordance herewith.

**23. Approval of Final Bridge Project Plans.** Notwithstanding any other provision to the contrary in the First Amendment, the Parties hereby agree as follows:

- (a) The City Commission hereby approves the Final Bridge Project Plans, a copy of which is attached hereto as Exhibit “E.” The Parties re-affirm that the Daniel Buren design for the Bridge Project, as previously approved by the City Commission on July 17, 2019 as part of the Bridge Project Concept Plan, and as subsequently approved by the City’s Design Review Board, in DRB File No. 19-0385 is a material inducement and consideration for the City to enter into the Development Agreement, as amended. The bridge alignment and access may be modified as necessary to remove utility conflicts and comply with City or State permitting requirements, so long as the overall design (including the Daniel Buren design elements) remains consistent with the Final Bridge Project Plans,

and provided, however, that any modifications to the Final Approved Bridge Plans shall be subject to review and approval by the City Manager, in the City Manager's sole discretion (or by the City Commission, as provided in Section 19 of the First Amendment).

- (b) The City Commission hereby approves the Final Bridge Project Budget, a copy of which is attached hereto as Exhibit "F".
- (c) Developer covenants to expend the minimum of the amount established as the Final Bridge Project Budget, to complete the Bridge Project in accordance with the Final Bridge Project Plans.
- (d) Except for inspection costs for which City is responsible under the First Amendment, and any Scope Changes for which the City is responsible pursuant to Section 10(b) of the First Amendment, notwithstanding anything to the contrary set forth in the First Amendment or this Second Amendment, Developer is and shall be solely responsible for all costs of completion of the Bridge Project in accordance with the Final Bridge Project Plans in excess of the Maximum City Contribution (which excess costs include without limitation, Bridge Project Design Costs and Developer's Direct Costs) (the "Developer's Bridge Contribution"), **whether or not such excess costs are identified in the Final Bridge Project Budget.**
- (e) Within thirty (30) days after the execution of the Construction Contract for the Bridge Project in accordance with the First Amendment, Developer shall provide City with an irrevocable letter of credit in favor of the City, in the amount equal to the Developer's Bridge Contribution (the "Bridge Project Letter of Credit") (which security shall be subject to reduction on the same terms as specified above with respect to the Letter of Credit for the Park Project and shall be issued on the same terms as specified above with respect to the Letter of Credit for the Park Project provided that the City's right to draw shall be conditioned solely upon an Event of Default under the First Amendment).

**24. Amendment to Section 7(e) of the First Amendment to Development Agreement.**  
Section 7(e) of the First Amendment is hereby amended as follows:

~~(e) ——— Target Substantial Completion Date. Developer shall endeavor to achieve Substantial Completion of the Bridge Project by April 30, 2020 (the "Target Substantial Completion Date"); provided, however, that failure to achieve the Target Substantial Completion Date shall not constitute an event of default under this First Amendment. [Intentionally Omitted.]~~

**25. Amendment to Section 16(a) of the First Amendment to Development Agreement.**  
Section 16(a) of the First Amendment is hereby amended to include the following subsection (xiv):

(xiv) Institution of any foreclosure proceeding by any lender (including without limitation any mezzanine lender) of Developer or any of its members with respect to the Project, which Default shall not be subject to any cure period pursuant to Section 16(c) hereof and shall conclusively and immediately be an "Event of Default" for all purposes hereof.

**26. Amendment to Section 16(d) of the First Amendment to Development Agreement.** Section 16(d) of the First Amendment is hereby amended to include the following subsection (vi):

(vi) Draw funds under the Bridge Project Letter of Credit.

### **PART 3 – GENERAL PROVISIONS**

**27. Ratification.** Except as modified by this Second Amendment, the Development Agreement and First Amendment shall otherwise remain unmodified and in full force and effect and the parties ratify and confirm the terms of the Development Agreement as modified by the First Amendment and this Second Amendment. City and Developer certify to each other that they have no offsets, defenses, or claims with respect to their obligations under the Development Agreement, as amended. All references in future agreements to the Development Agreement shall mean the Development Agreement, as modified by the First Amendment and this Second Amendment.

**28. Purchase and Sale Agreement.** The Development Agreement approved the execution of a Purchase and Sale Agreement ("PSA") between City and Developer relating to the conveyance of the Park Site to the City, which PSA was included as Exhibit "M" to the Development Agreement and executed by the Parties on or about June 28, 2019. The City Manager shall have the delegated authority to execute an amendment to the PSA, subject to form approval of the amendment by the City Attorney, for the limited purpose of conforming the PSA to the provisions of this Second Amendment.

**29. Entire Agreement.** The Development Agreement, as amended by the First Amendment and this Second Amendment, and the Purchase and Sale Agreement dated June 28, 2019 represents the entire agreement between the parties with respect to the subject matter hereof and thereof.

**30. Benefit and Binding Effect.** This Second Amendment shall be binding upon and inure to the benefit of the parties to this Second Amendment, their legal representatives, successors, and permitted assigns.

**31. Amendment.** This Second Amendment may not be changed, modified, or discharged in whole or in part except by an agreement in writing signed by both parties to this Second Amendment.

**32. Severability.** In the event either Party terminates the First Amendment in accordance with the provisions therewith, then the provisions of Part II of this Second Amendment shall be null and void. For the avoidance of doubt, termination of the First Amendment (and Part II of this Second Amendment, relating to the Bridge Project) shall not in any respect operate to

terminate, modify, amend or affect any other of the respective rights and obligations of the parties under the Development Agreement, as otherwise amended, all of which shall continue to be in full force and effect.

**33. Conflict.** In the event of any conflict between the terms of the Development Agreement and this Second Amendment, this Second Amendment shall control. In the event of any conflict between the terms of the First Amendment and this Second Amendment, this Second Amendment shall control.

*[Signatures commence on following page]*



**EXECUTION BY THE CITY**

IN WITNESS WHEREOF, the City and Developer intending to be legally bound have executed this First Amendment to Development Agreement as of the day and year first above written.

WITNESSES:

**CITY OF MIAMI BEACH, FLORIDA,** a  
municipal corporation of the State of Florida

\_\_\_\_\_  
Print Name:\_\_\_\_\_

By:\_\_\_\_\_  
Dan Gelber, Mayor

\_\_\_\_\_  
Print Name:\_\_\_\_\_

ATTEST:

By:\_\_\_\_\_ [SEAL]  
Rafael Granado, City Clerk

**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

RD For      2-11-20  
City Attorney      Date

STATE OF FLORIDA      )  
   )ss:  
COUNTY OF MIAMI-DADE      )

The foregoing instrument was acknowledged before me, by means of ☐ physical presence or ☐ online notarization, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by Dan Gelber, as Mayor, and Rafael Granado, as City Clerk of the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation of the State of Florida, on behalf of such municipal corporation. They are personally known to me or produced valid Florida driver's licenses as identification

My commission expires:

\_\_\_\_\_  
Notary Public, State of Florida  
Print Name:\_\_\_\_\_

**EXECUTION BY DEVELOPER**

WITNESSES:

**TCH 500 Alton, LLC**, a Delaware limited liability company

\_\_\_\_\_  
Print Name:\_\_\_\_\_

By:\_\_\_\_\_  
Name/Title

\_\_\_\_\_  
Print Name:\_\_\_\_\_

ATTEST:

By:\_\_\_\_\_  
\_\_\_\_\_, Secretary

[CORPORATE SEAL]

STATE OF FLORIDA                    )  
  )ss:  
COUNTY OF MIAMI-DADE         )

The foregoing instrument was acknowledged before me, by means of ☐ physical presence or ☐ online notarization, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, as \_\_\_\_\_, and \_\_\_\_\_, as Secretary, of \_\_\_\_\_, a \_\_\_\_\_, on behalf of such \_\_\_\_\_. They are personally known to me or produced valid Florida driver's licenses as identification.

My commission expires:

\_\_\_\_\_  
Notary Public, State of Florida  
Print Name:\_\_\_\_\_

**List of Second Amendment Exhibits**

- Exhibit "A"    Final Approved Park Plans
- Exhibit "B"    Form of Assignment Agreement for Park Design Contract and Park Construction Contract
- Exhibit "C"    Forms of Performance Bond and Payment Bond
- Exhibit "D"    Form of Settlement Agreement
- Exhibit "E"    Final Bridge Project Plans
- Exhibit "F"    Final Bridge Project Budget
- Exhibit "G"    Future Pedestrian Pathway Parcel
- Exhibit "H"    Future Pedestrian Pathway Parcel Easement Agreement

**Exhibit "A" - Final Approved Park Plans**





PARK RENDERED PLAN

**ARQUITECTONICA**  
7800 Oak Avenue Miami, FL 33133  
7 305.372.1812 F 305.372.1179

TCH 500 ALTON, LLC

PROPOSED REVISION TO  
APPROVED DESIGN REVIEW SET  
500-600-700 ALTON ROAD  
MIAMI BEACH, FL 33139

GROUND LEVEL RENDERED PLAN

DATE:  
01/13/2020

L1-100

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T 305.375.1812 F 305.372.1175

TCH 500 ALTON, LLC

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500-600-700 ALTON ROAD  
MIAMI BEACH, FL 33139

PARK RENDERED ENL, PLAN

DATE:  
01/13/2020

L4-101

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NOTE: FOR DOG PARK EQUIPMENT DETAILS, REFER TO SHEET LS-116

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500-600-700 ALTON ROAD  
MIAMI BEACH, FL 33139

DOG PARK/LAWN ENLARG.PLAN

DATE:  
01/13/2020

L4-102





NOTE: FOR PLAYGROUND EQUIPMENT DETAILS, REFER TO SHEET LS-114 AND LS-115

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 2600 Oak Avenue, Miami, FL 33133  
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PLAYSCAPE ENLARGEMENT PLAN

DATE:  
 01/13/2020

L4-103

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NOTE: FOR FITNESS EQUIPMENT DETAILS, REFER TO SHEET LS-112 AND LS-113

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2900 Oak Avenue Miami, FL 33133  
T: 305.272.1812 F: 305.272.1179

TCH 500 ALTON, LLC

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MIAMI BEACH, FL 33139

FITNESS ENLARGEMENT PLAN

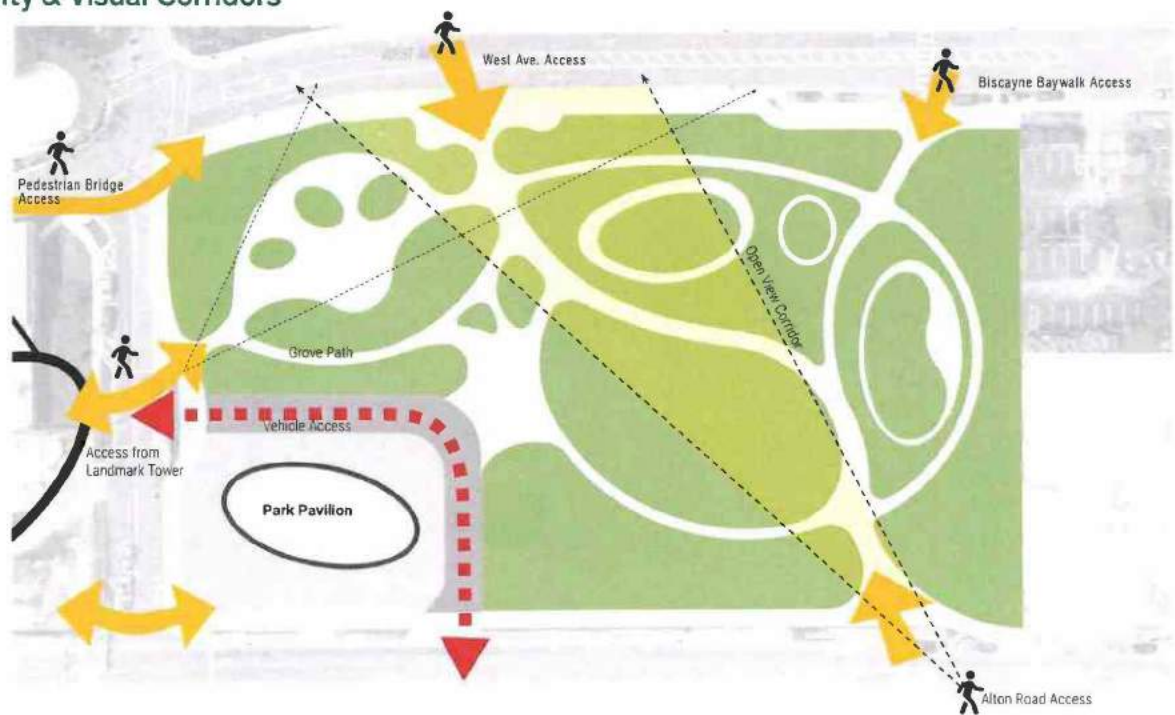
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01/13/2020

L4-104

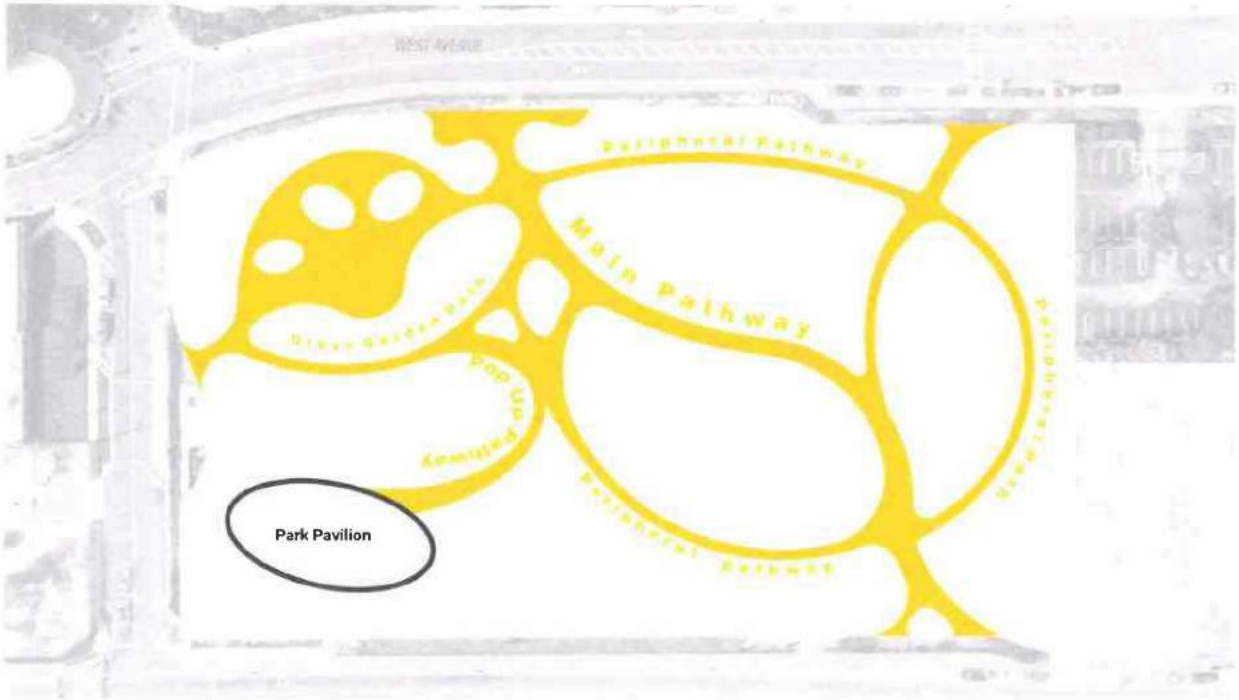
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# Enhanced Access Points

Connectivity & Visual Corridors



## Circulation Path Structure



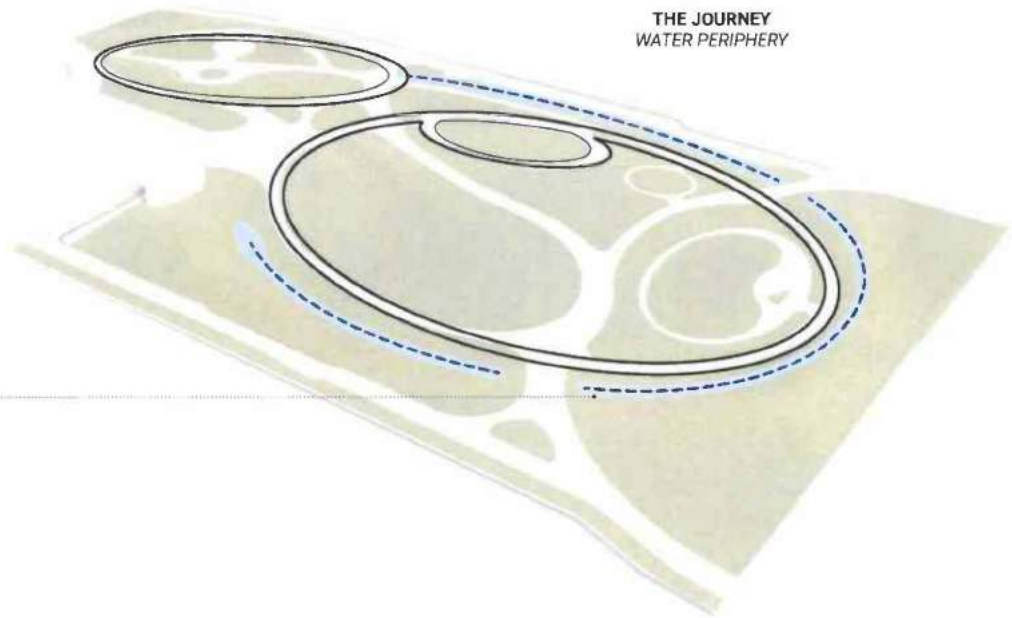
# Stormwater Management

Dry River as an Experience



The Dray River for Stormwater Collection

THE JOURNEY  
WATER PERIPHERY





# Stormwater Management

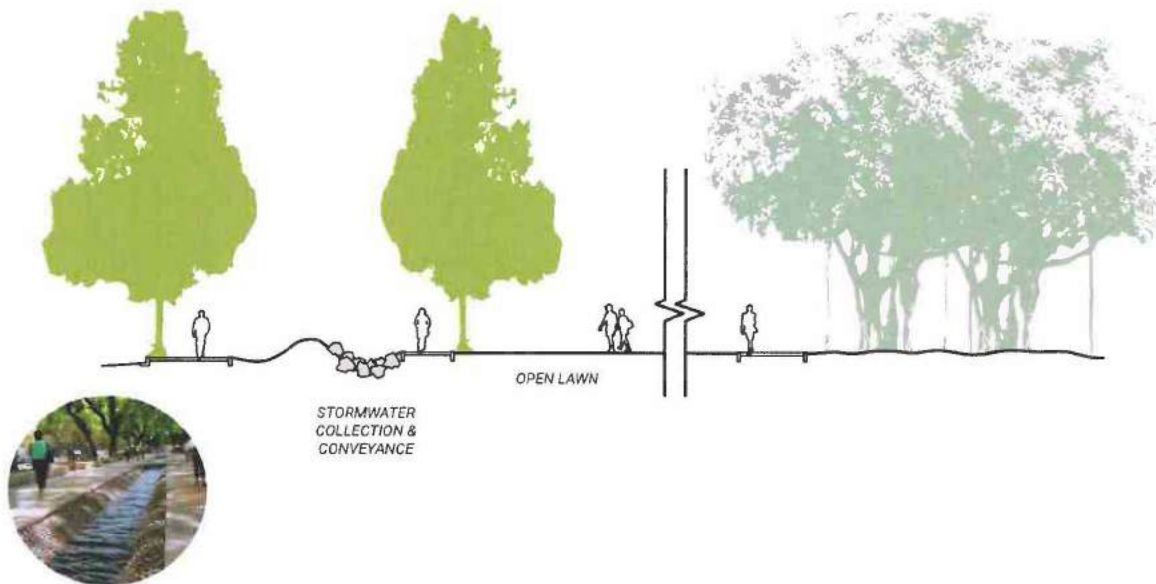
## Water Detention on Site





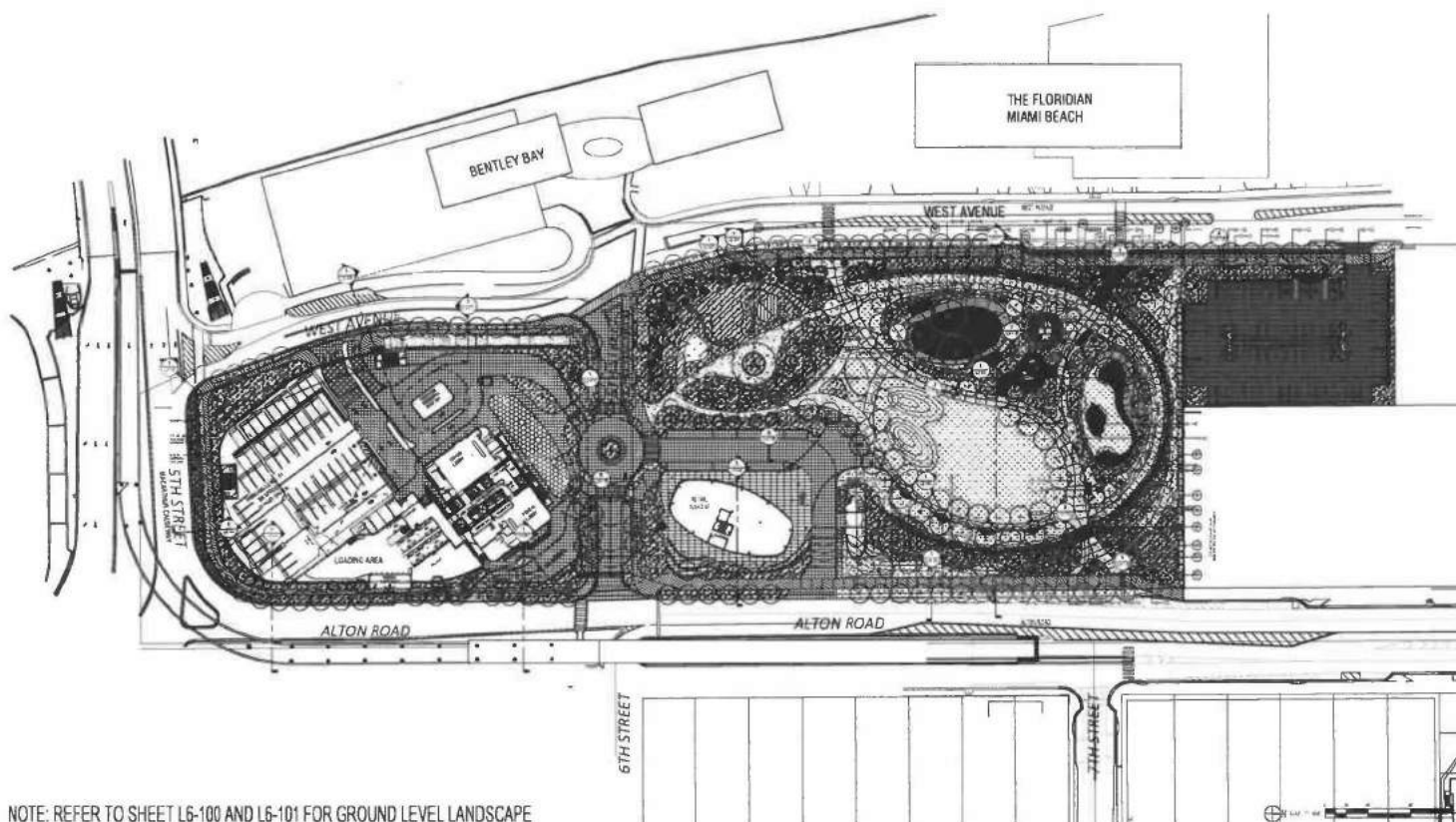
# Perimeter Water Collection

Optimizing Topography



The Dray River for Stormwater Collection

Provided By: Aquitectonica/GEO



NOTE: REFER TO SHEET L6-100 AND L6-101 FOR GROUND LEVEL LANDSCAPE SCHEDULES

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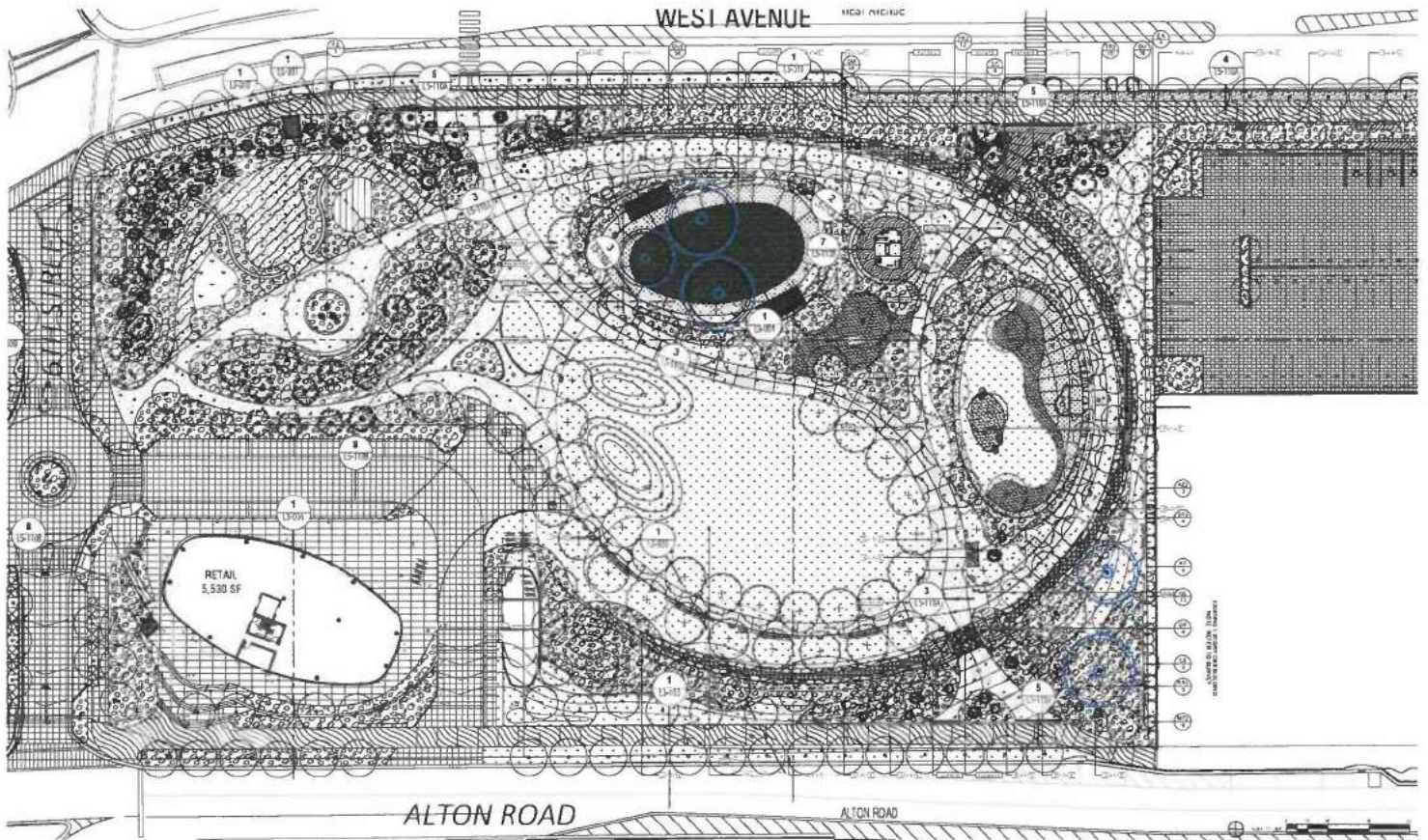
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GROUND LEVEL LANDSCAPE PLAN

DATE:  
01/13/2020

L1-110

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# **ARQUITECTONICA**

2900 Old Andrew, Miami, FL 33133  
7.305.375.1472 F.305.375.1175

TCH 500 ALTON, LLC

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MIAMI BEACH, FL 33138

PARK ENLARGEMENT PLAN

DATE:  
01/13/2020

L4-111

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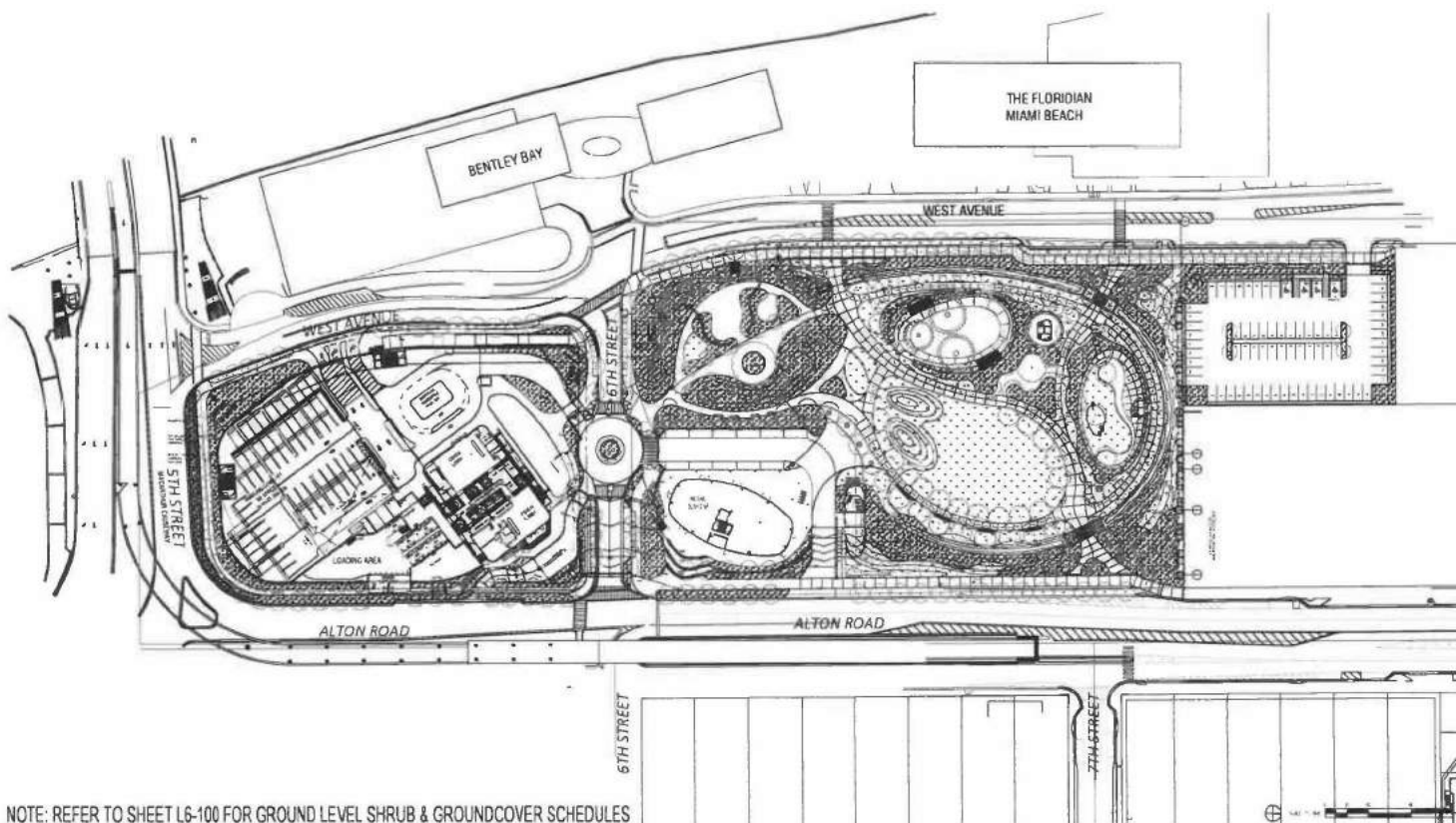




NOTE: REFER TO SHEET L6-100 FOR GROUND LEVEL TREE SCHEDULE

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NOTE: REFER TO SHEET L6-100 FOR GROUND LEVEL SHRUB & GROUND COVER SCHEDULES

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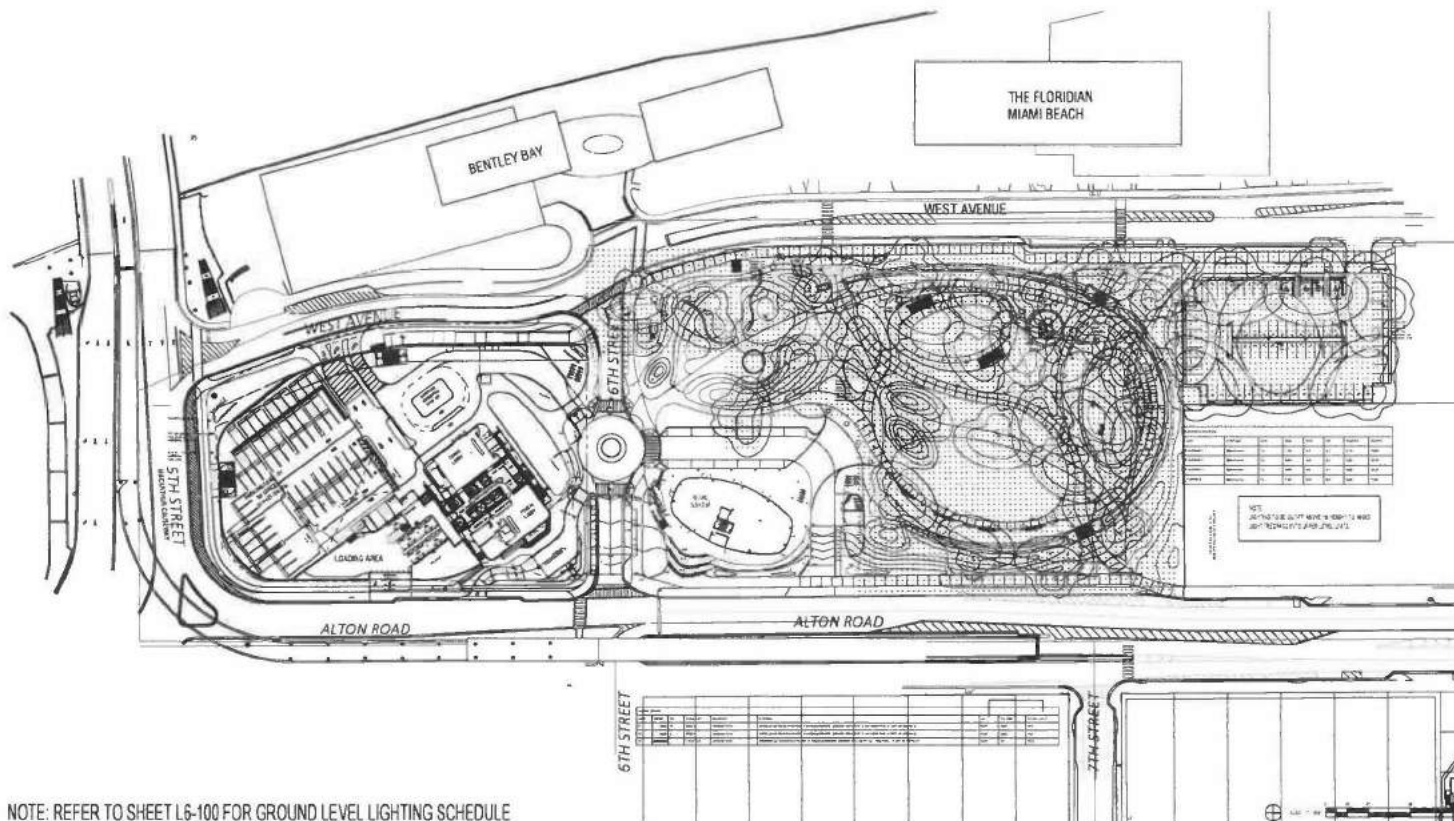
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GROUND LEVEL SHRUB PLAN

DATE:  
01/13/2020

L1-130

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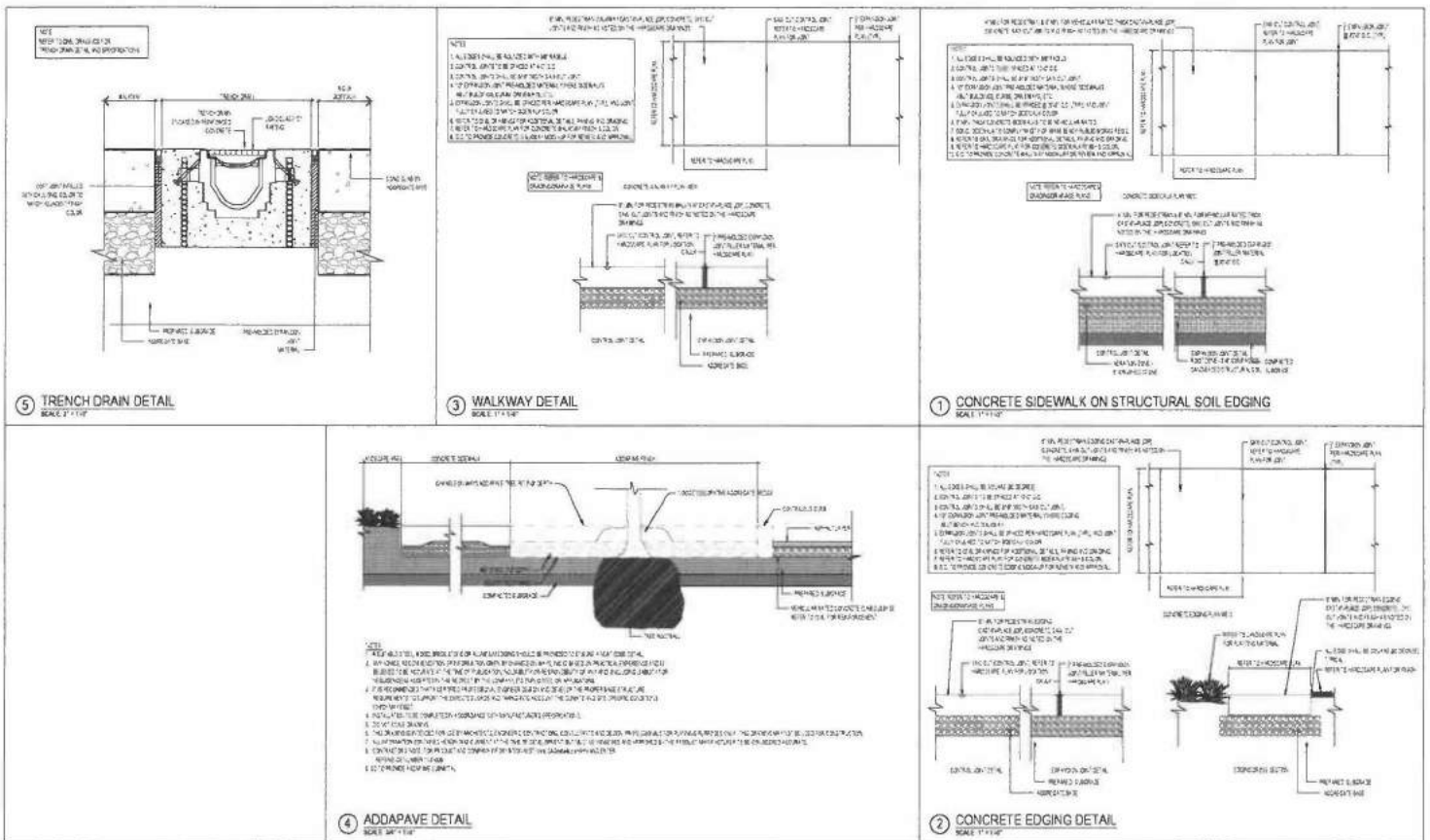
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GROUND LEVEL LIGHTING PLAN

DATE:  
01/13/2020

L1-140

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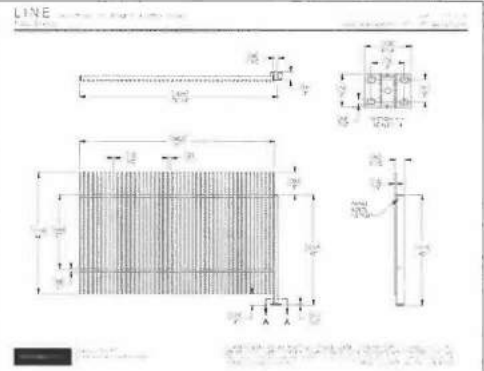
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HARDSCAPE DETAILS

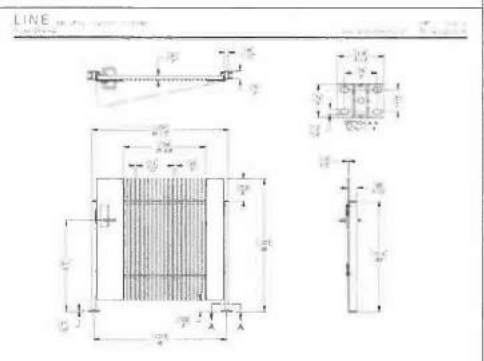
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L5-110A

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① LINE FENCE FOR PARK (4' HIGH) EXAMPLE  
SCALE: 1/4" = 1'-0"



② LINE GATE EXAMPLE  
SCALE: 1/4" = 1'-0"

NOTE: FOR ILLUSTRATIVE PURPOSES ONLY

ARQUITECTONICA  
2800 Oak Avenue, Miami, FL 33133  
T 305.372.1812 F 305.372.1175

TCH 500 ALTON, LLC

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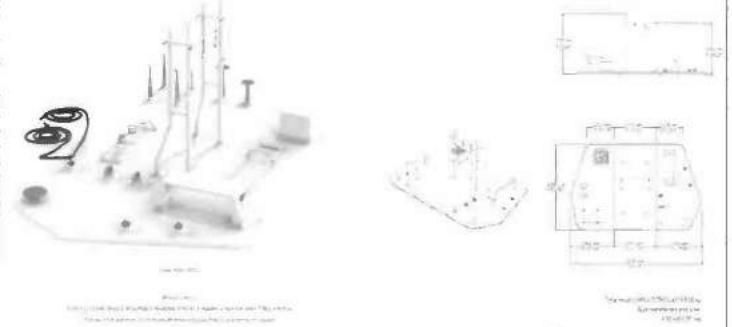
HARDSCAPE DETAILS

DATE:  
01/13/2020

L5-111

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MYIS E-JOINT



① FITNESS EQUIPMENT CONCEPT  
SCALE: N/A

NOTE: FOR ILLUSTRATIVE PURPOSES ONLY

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T 305.370.1812 F 305.370.1115

TCH 500 ALTON, LLC

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MIAMI BEACH, FL 33139

FITNESS EQUIPMENT

DATE:  
01/13/2020

L5-112

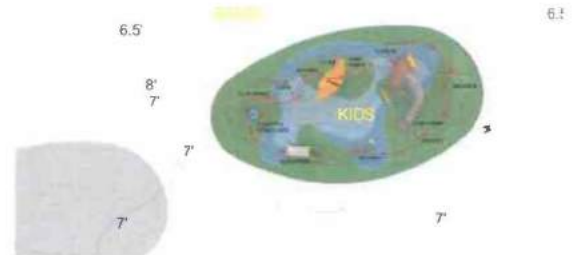
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③ MONSTRUM PLAYGROUND EQUIPMENT CONCEPT  
SCALE: 1/8"

## FLOW OF PLAY



① MONSTRUM PLAYGROUND EQUIPMENT CONCEPT PLAN  
SCALE: 1/8"

## PLAY FEATURES



② MONSTRUM PLAYGROUND EQUIPMENT CONCEPT  
SCALE: 1/8"

NOTE: FOR ILLUSTRATIVE PURPOSES ONLY

**ARQUITECTONICA**  
2900 Oak Avenue, Miami, FL 33133  
T 305.372.1812 F 305.372.1173

TCH 500 ALTON, LLC

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APPROVED DESIGN REVIEW SET  
500-600-700 ALTON ROAD  
MIAMI BEACH, FL 33139

PLAYGROUND IMAGES (MAIN CHOICE)

DATE:  
01/13/2020

L5-114

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### **SCOPE OF WORK FOR THE PARK**

- Develop 3 acres into a park for the benefit of city residents
- The park will provide different areas to include fitness equipment, open green spaces, benches, drinking fountains, outdoor living rooms enclosed with landscaping and children's play area.
- Provide landscape to encourage habitat areas for pollinators, including at least 70% of plants and trees to be native.
- Provide lighting to limit backlight, up light and glare, within temperature ranges in accordance with City safety requirements, including but not limited to light poles, lighted bollards and landscaping lighting.
- Provide at least 5,000 square feet area to be for a dog park.
- Provide a playground area with perimeter shade trees for residents and children
- Provide two (2) trellis structures which facilitate shade areas close the playground area.
- Provide a playground equipment manufactured by Monstrum (or equivalent) made mostly of wood and warranted for durability and low maintenance.
- Provide a fitness station over a resilient rubber surface.
- A stormwater management system capable of retaining and disposing runoff in accordance with the City of Miami Beach as well as the F-DOT design storm requirements.
  - Miami-Dade County RER (DERM) 5-Year, 1-Hour 3.2" rainfall storm
  - Miami-Dade County RER (DERM) 5-Year, 24-Hour, 6" rainfall storm
  - City of Miami Beach 10-Year, 24-Hour, 8.75" rainfall storm (which includes a 1.25 factor of safety)
  - F-DOT 100-Year, 24-Hour, 13" rainfall storm
- The storm management system will promote the cleaning of the first disposal from the lift station to the bay.
- A bio-swale will be provided to contain part of the stormwater and to work as part of the stormwater management system.
- Provide a 25,000-gallon cistern to capture runoff during storm events and provide reuse opportunity to irrigate planting.

- Provide five interconnected wells for the sole use to improve the performance storm water runoff quality from the existing pump station.
- A perimeter swale will be constructed to contain storm and irrigation runoff water on the property.
- Exposed shell concrete will be used in most of the hardscape finishes all over the park.
- A path or wellness loop to promote users to move about the park throughout the different areas surrounded by landscaping.
- Relocate the perimeter sidewalk into the property of the park and create a green area between the sidewalk and curb.
- Information and education signage to be installed to inform and inspire the public about resilience and sustainability efforts being made in the property.
- [Parties finalizing whether or to what extent to include a shade canopy over playground or portion thereof]

**Exhibit "B"**

**Form of Assignment Agreement for Park Design Contract and Park Construction Contract**

**ASSIGNMENT OF CONSTRUCTION AGREEMENTS**

**FOR VALUE RECEIVED**, the undersigned TCH 500 ALTON, LLC, a Delaware limited liability company ("Developer"), as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date") assigns to THE CITY OF MIAMI BEACH, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida (the "City"), pursuant to that certain Development Agreement by and between the City and Developer dated as of January 9, 2019, which Development Agreement is recorded in Official Records Book 31323, Page 2781 in and of the Public Records of Miami-Dade County, Florida, as assigned to TCH 500 Alton, LLC, pursuant to that certain Assignment and Assumption of Development Agreement dated as of September 27, 2019 and recorded in Official Records Book 31627, Pages 1177-1182 in and of the Public Records of Miami-Dade County, Florida, and as amended by the First Amendment to Development Agreement, dated as of December 18, 2019, and the Second Amendment to Development Agreement, dated as of \_\_\_\_\_, 2020 (as amended, collectively, the "Development Agreement"), all of Developer's right, title and interest under all existing and future general contractor's agreements, architect's agreements, engineers' agreements, or any other agreements for the provision of labor, materials, services or supplies, as amended, between Developer and any other person or entity (collectively, the "Construction Agreements") relating to the construction of the Park Project, as defined and described in the Development Agreement. The Construction Agreements include, but are not limited to, that certain construction contract between Developer and \_\_\_\_\_ ("Contractor") dated \_\_\_\_\_, as amended, that certain architect's agreement between Developer and \_\_\_\_\_, a \_\_\_\_\_ ("Architect"), dated \_\_\_\_\_, as amended, and that certain engineer's agreement between Developer and \_\_\_\_\_, a \_\_\_\_\_ ("Engineer"), dated \_\_\_\_\_, as amended.

**THIS ASSIGNMENT OF CONSTRUCTION AGREEMENTS** ("Assignment") constitutes a present and absolute assignment to the City as of the Effective Date; provided, however, that for so long as no Park Related Default (as defined in the Development Agreement) has occurred under the Development Agreement and until the earlier of (i) termination of the Development Agreement, (ii) City's exercise of its remedy for a Park Related Default as provided in the Development Agreement, or (iii) final completion of the Park Project ("Final Completion"), the City grants Developer a license to use all Construction Agreements for completion of the Park Project in accordance with the Development Agreement. Upon the occurrence of (a) a Park Related Default under the Development Agreement, or (b) the termination of the Development Agreement, or (c) Final Completion, the City may, in the City's sole discretion, give notice to any of Contractor, Architect, Engineer and/or any other party to a Construction Agreement of the City's intent to enforce the rights of Developer under the applicable Construction Agreement and may initiate or participate in any legal proceedings respecting the enforcement of said rights. Developer acknowledges that solely by accepting this Assignment, the City does not assume any of Developer's obligations under the Construction Agreements.



Developer represents and warrants to the City, as of the Effective Date, that (a) all Construction Agreements entered into by Developer are in full force and effect and are enforceable in all material respects in accordance with their terms and no default, or event which would constitute a default after notice or the passage of time, or both, exists with respect to any of the Construction Agreements, (b) all copies of the Construction Agreements delivered to the City are true, complete and correct as of the date of this Assignment, and (c) Developer has not assigned any of Developer's rights under the Construction Agreements other than to the City. Developer shall deliver to the City true, complete and correct copies of all Construction Agreements entered into after the date hereof, promptly upon execution thereof.

Developer agrees (a) to pay and perform all obligations of Developer under the Construction Agreements, (b) to enforce the full and prompt performance of all obligations of any other person or entity under the Construction Agreements, (c) except as otherwise may be permitted under the Development Agreement, not to materially modify the existing Construction Agreements nor to enter into any future Construction Agreements without the City's prior written approval, which will not be unreasonably withheld, and (d) not to further assign, for security or any other purposes, Developer's rights under the Construction Agreements without the City's prior written consent.

Unless otherwise defined herein, capitalized terms used in this Assignment shall have the meanings attributed to such terms in the Development Agreement. This Assignment shall be governed by, and construed and enforced in accordance with the laws of the State of Florida, without regard to conflicts of laws. Except as otherwise expressly provided under the terms and conditions herein, the terms of this Assignment shall bind and inure to the benefit of the heirs, executors, administrators, nominees, successors and assigns of the parties hereto. All exhibits, schedules, riders and other items attached hereto are incorporated into this Assignment by such attachment for all purposes.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, Developer intending to be legally bound has executed this Assignment as of the date first written above.

DEVELOPER:

TCH 500 ALTON, LLC,  
a Delaware limited liability company

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

Name:

Title:

## CONSENT

**THIS CONSENT** ("Consent") is made by \_\_\_\_\_ ("Contractor"), this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to and for the benefit of THE CITY OF MIAMI BEACH, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida (the "City"), with agreement by TCH 500 Alton, LLC, a Delaware limited liability company ("Developer").

Contractor and Developer have entered into that certain \_\_\_\_\_ dated \_\_\_\_\_, 20\_\_\_\_ (the "Construction Agreement"), providing for [construction] [design] [engineering] of the Park Project, as defined in that certain to Development Agreement by and between the City and Developer dated as of January 9, 2019, which Development Agreement is recorded in Official Records Book 31323, Page 2781 in and of the Public Records of Miami-Dade County, Florida, as assigned to TCH 500 Alton, LLC, pursuant to that certain Assignment and Assumption of Development Agreement dated as of September 27, 2019 and recorded in Official Records Book 31627, Pages 1177-1182 in and of the Public Records of Miami-Dade County, Florida, and as amended by the First Amendment to Development Agreement, dated as of December 18, 2019, and the Second Amendment to Development Agreement, dated as of \_\_\_\_\_, 2020 (as amended, collectively, the "Development Agreement").

Developer has assigned the Construction Agreement to the City pursuant to the Assignment of Construction Agreements (the "Assignment") to which this Consent is attached.

The City has required, as a condition of the Development Agreement, as amended, that Contractor execute this Consent. NOW THEREFORE, Contractor agrees as follows:

1. Contractor represents and warrants to the City, that the Construction Agreement is in full force and effect and is enforceable in all material respects in accordance with its terms and no default, or event which would constitute a default after notice or the passage of time, or both, exists with respect to the Construction Agreement.

2. Contractor agrees that if, at any time, the City elects to undertake or cause the completion of construction of the Park Project in accordance with the Construction Agreement and gives Contractor written notice of such election (an "Election Notice"), then, so long as the City assumes and performs the payment obligations of Developer under the Construction Agreement accruing from and after the date of the Election Notice, then Contractor shall continue to perform its obligations under the Construction Agreement in accordance with the terms thereof for the benefit and account of the City in the same manner as if performed for the benefit of account of Developer in the absence of the Assignment. Unless and until the City expressly assumes the obligations of Developer under the Construction Agreement (and then only to the extent the same arise from and after such assumption), the City shall not be a party to the Construction Agreement and will in no way be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

3. Contractor further agrees that, in the event of a breach by Developer of the Construction Agreement, Contractor will give written notice to the City at the address shown

below its signature of such breach. Unless and until the City expressly assumes the obligations of Developer under the Construction Agreement (and then only to the extent the same arise from and after such assumption), the City shall not be a party to the Construction Agreement and will in no way be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

4. [Contractor further agrees that Contractor shall not enter into any amendment to the Construction Agreement in violation of the terms of the Development Agreement.] **[APPLICABLE TO CONSTRUCTION CONTRACT]**

5.

a. Contractor agrees, notwithstanding anything to the contrary contained herein, that upon an event of default by Developer resulting in a termination of the Development Agreement, or City's exercise of its remedy for a Park Related Default as provided in the Development Agreement,, until and unless the City gives Contractor an Election Notice, the Construction Agreement may be terminated for any or no reason at the election of the City and the City shall not be responsible to any party for any claims of any nature whatsoever arising or which may arise in connection with the Construction Agreement.

b. [Additionally, if requested by the City in writing, Contractor will continue as the general contractor for construction of the Park Project for up to thirty (30) days after such termination or City's exercise of its remedy for a Park Related Default under the Development Agreement (the "Transition Period") on the same terms and conditions as set forth in the Construction Agreement, provided that Contractor is paid by the City in accordance the Construction Agreement for all work, labor and materials rendered pursuant to the Construction Agreement performed during the Transition Period; and] **[APPLICABLE TO CONSTRUCTION CONTRACT]**

c. [Subject to Contractor's receipt of the payments prescribed by Section 5.b. above, Contractor will engage in reasonable, good faith efforts to cooperate with any other general contractor selected by the City in order to assure a smooth transition, including, without limitation, delivering to the City or its designee copies of all project records in Contractor's possession or control that Developer is entitled to obtain under the terms of the Construction Agreement.] **[APPLICABLE TO CONSTRUCTION CONTRACT]**

6. Nothing in this Consent shall supersede or modify any provisions of the Construction Agreement as between Developer and Contractor. By its joinder in the execution of this Consent, Developer agrees that any action by Contractor in accordance with the terms hereof shall not constitute a violation by Contractor of any term of the Construction Agreement or of any obligation Contractor has or may have to Developer. For instance, in the event the City terminates the Construction Agreement as provided in Section 5 hereof, Developer shall remain liable for all amounts due Contractor in accordance with the applicable termination provisions of the Construction Agreement.



7. This Consent shall be governed by, and construed and enforced in accordance with, the laws of the State of Florida. Each of the undersigned parties hereby knowingly, voluntarily and intentionally, after opportunity for consultation with independent counsel, waives its right to trial by jury in any action or proceeding to enforce or defend any rights or obligations under or arising in connection with this Consent.

8. Contractor warrants and represents that it has no knowledge of any prior assignment(s) of any interest in the Construction Agreement.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, Contractor intending to be legally bound has executed this Consent as of the date first written above.

CONTRACTOR:

\_\_\_\_\_, a \_\_\_\_\_

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

Name:

Title:

Contractor's Address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DEVELOPER:

TCH 500 ALTON, LLC,  
a Delaware limited liability company

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

Name:

Title:

Developer's Address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CITY:

CITY OF MIAMI BEACH, FLORIDA,  
a municipal corporation of the State of Florida

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

Name:

Title:

ATTEST:

By: \_\_\_\_\_ [SEAL]

City's Address:  
City of Miami Beach, City Hall  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Manager

With a copy to:  
City of Miami Beach, City Hall  
1700 Convention Center Drive  
Miami Beach, Florida 33139  
Attention: City Attorney

**Exhibit "C"**  
**Forms of Performance Bond and Payment Bond**

**FORM OF PERFORMANCE BOND**

By this Bond, We \_\_\_\_\_ as Principal, whose principal business address is \_\_\_\_\_, as the [Contractor] under the agreement dated \_\_\_\_\_, 20\_\_\_\_, between Principal and the [Developer Entity] (hereinafter referred to as "Developer") for the construction of the Park Project on behalf of the City of Miami Beach, Florida ("City") (which agreement and the other Contract Documents referenced therein are hereinafter referred to as "Contract"), the terms of which Contract are incorporated by reference in its entirety into this Bond, and \_\_\_\_\_, a corporation, whose principal business address is \_\_\_\_\_ as Surety, are bound to Developer, as co-obligee, and City, as co-obligee, in the sum of \_\_\_\_\_ U.S. dollars (\$\_\_\_\_\_), for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Performs all the work under the Contract, including but not limited to guarantees, warranties and the curing of latent defects, said Contract being made a part of this Bond by reference, and at the times and in the manner prescribed in the Contract; and
2. Pays Developer and City all losses, damages, expenses, costs and attorney's fees, including appellate proceedings, that Developer and City sustains as a result of default by Principal under the Contract, including but not limited to a failure to honor all guarantees and warranties or to cure latent defects in the work or materials within the time period provided in Section 95.11(2)(b), Florida Statutes; and
3. Performs the guarantee of all work and materials furnished under the Contract for the time specified in the Contract, including all warranties and curing all latent defects within the time period provided in Section 95.11(2)(b), Florida Statutes;

then this bond is void; otherwise it remains in full force.

Surety specifically assumes liability for any and all damages, including but not limited to liquidated damages set forth in the Contract, arising from Principal's default of the Contract, as well as all latent defects uncovered in the work of the Principal after final acceptance of the work by the City.

If no specific periods of warranty are stated in the Contract for any particular item or work, material or equipment, the warranty shall be deemed to be a period of one (1) year from the date of final acceptance by the City; provided, however, that this limitation does not apply to suits



seeking damages for latent defects in materials or workmanship, such actions being subject to the limitations found in Section 95.11(2)(b), Florida Statutes.

Whenever the Principal shall be, and is declared by Developer to be, in default under the Contract, Developer having performed Developer's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

(1) Complete the Contract in accordance with its terms and conditions; or

(2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if Developer elects, upon determination by City, Developer and Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Developer, and make available as work progresses (even though there should be a default or a succession of defaults under the Contract or Contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract Price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the Contract Price" as used in this paragraph, shall mean the total amount payable by Developer to Principal under the Contract and any amendments thereto, less the amount properly paid by Developer to Principal.

The Surety hereby waives notice of and agrees that any changes in or under the Contract and compliance or noncompliance with any formalities connected with the Contract or the changes does not affect Surety's obligation under this Bond.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Developer and City named herein. Any action under this Bond must be instituted in accordance with the notice and time limitations provisions prescribed in Section 255.05(2), Florida Statutes.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

WITNESSES:

\_\_\_\_\_  
(Name of Corporation)

\_\_\_\_\_  
Secretary

(CORPORATE SEAL)

By: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print Name and Title)

Countersigned by Resident  
Florida Agent of Surety

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[attach copy of Agent's ID card  
Issued by Fla. Ins. Commissioner]

[Atty in fact power of atty must be attached]

INSURANCE COMPANY:

By: \_\_\_\_\_  
Attorney-in-Fact

Address:

\_\_\_\_\_  
(Street)

\_\_\_\_\_  
(City/State/Zip Code)

Telephone No.: \_\_\_\_\_

## FORM OF PAYMENT BOND

By this Bond, We \_\_\_\_\_ as Principal, whose principal business address is \_\_\_\_\_, and whose telephone number is \_\_\_\_\_, as the [Contractor] under the agreement dated \_\_\_\_\_, 20\_\_\_\_, between Principal and the [Developer entity] (hereinafter referred to as "Developer") for the construction of the Park Project on behalf of the City of Miami Beach, Florida ("City") (which agreement and the other Contract Documents referenced therein are hereinafter referred to as "Contract"), the terms of which Contract are incorporated by reference in its entirety into this Bond, and \_\_\_\_\_, a corporation, whose principal business address is \_\_\_\_\_ as Surety, are bound to Developer, as co-obligee, and City, as co-obligee, in the sum of \_\_\_\_\_ U.S. dollars (\$\_\_\_\_\_), for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if the Principal:

1. Promptly makes payments to all claimants, as defined by Florida Statute 255.05(1), providing Principal with labor, materials, or supplies, used directly or indirectly by Principal in the prosecution of the work provided for in the Contract, and in the times and in the manner prescribed in the Contract; and
2. Pays Developer and City all losses, damages, expenses, costs and attorney's fees including appellate proceedings, that Developer and City sustain because of a failure by Principal to make any payments required under the Contract;

then this bond is void; otherwise it remains in full force.

A claimant shall have a right of action against the Principal and the Surety for the amount due it. Such action shall not involve the Developer or City in any expense.

A claimant, except a laborer, who is not in privity with Principal and who has not received payment for its labor, materials, or supplies shall, within forty-five (45) days after beginning to furnish labor, materials, or supplies for the prosecution of the work, furnish to Principal a notice that he intends to look to the bond for protection. A claimant who is not in privity with Principal and who has not received payment for its labor, materials, or supplies shall, within ninety (90) days after performance of the labor or after complete delivery of the materials or supplies, deliver to Principal and to the Surety, written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment.

No action for the labor, materials, or supplies may be instituted against Principal or the Surety unless both of the above-referenced notices have been given. Any action under this Bond must be instituted in accordance with the notice and time limitations prescribed in Section 255.05(2), Florida Statutes.

The Surety hereby waives notice of and agrees that any changes in or under the Contract Documents and compliance or noncompliance with any formalities connected with the Contract or the changes does not affect the Surety's obligation under this Bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Principal

ATTEST:

\_\_\_\_\_  
(Name of Corporation)

\_\_\_\_\_  
(Secretary)

By:

\_\_\_\_\_  
(Signature)

(Corporate Seal)

\_\_\_\_\_  
(Print Name and Title)

\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Countersigned by Resident  
Florida Agent of Surety

INSURANCE COMPANY:

By:

\_\_\_\_\_  
Attorney-in-Fact

Address:

\_\_\_\_\_  
(Street)

\_\_\_\_\_  
(City/State/Zip Code)

\_\_\_\_\_  
[attach copy of Agent's ID card  
Issued by Fla. Ins. Commissioner]

[Atty in fact power of atty must be attached]

Telephone No.: \_\_\_\_\_



**Exhibit "D"**  
**Form of Settlement Agreement**

**SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS**

This Settlement Agreement and Release of All Claims (the "**Settlement Agreement**") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2020, by **TCH 500 Alton, LLC**, a Delaware limited liability company ("**Developer**"), and the **City of Miami Beach**, a Florida municipal corporation (the "**City**") (each, a "**Party**" and collectively, the "**Parties**").

The Parties agree and stipulate to the following:

**RECITALS**

1. City and 500 ALTON ROAD VENTURES, LLC, a Delaware limited liability company, 1220 SIXTH, LLC, a Delaware limited liability company, SOUTH BEACH HEIGHTS I, LLC, a Delaware limited liability company, and KGM EQUITIES, LLC, a Delaware limited liability company entered into that certain Development Agreement, dated as of January 9, 2019, pursuant to Sections 163.3220-163.3243, Florida Statutes (the "Florida Local Government Development Agreement Act") and Section 118-4 of the City's Code (the "Development Agreement"), which Development Agreement is recorded in Official Records Book 31323, Page 2781 in and of the Public Records of Miami-Dade County, Florida, as assigned to TCH 500 Alton, LLC, pursuant to that certain Assignment and Assumption of Development Agreement dated as of September 27, 2019 and recorded in Official Records Book 31627, Pages 1177-1182 in and of the Public Records of Miami-Dade County, Florida.
2. The Development Agreement provides, among other terms, the City's and Developer's respective responsibilities and agreement to coordinate and cooperate in the planning, scheduling and approval of the design, development and construction of a mixed use residential and commercial project (the "**Project**") on the Development Site (as that term is defined in the Development Agreement), and a 3.0 acre public park to be conveyed to the City (the "**Park Project**");
3. On July 17, 2019, the Mayor and City Commission of the City approved a First Amendment to the Development Agreement, delineating the terms and conditions for Developer to develop, permit, design and construct a pedestrian bridge over and across 5th Street and West Avenue, to connect the baywalks south of 5th Street with the Development Site (the "**First Amendment**"), which First Amendment was dated as of December 18, 2019;
4. On November 1, 2019, the City's Board of Adjustment heard an appeal filed by Developer, and voted to reverse an administration determination of the Planning Director ("**Determination**"), with respect to the inclusion of the following building elements in floor area calculations for the Project in accordance with the City Code: (1) voids to accommodate elevator shafts; (2) voids to accommodate mechanical/ventilation/trash shafts; and (3) voids

to accommodate stairwells, including voids to accommodate stairwells within accessory garages (the "BOA Appeal"). On or about December 3, 2019, the City appealed the Board of Adjustment ruling reversing the Planning Director's Determination to the Eleventh Judicial Court in and for Miami-Dade County, and filed a Writ for Petition of Certiorari in Case No. 19-323 AP-01 (the "Action").

5. The Parties desire to resolve their dispute relating to the BOA Appeal and the Action, and desire to amend the Development Agreement and First Amendment thereto, to accomplish the terms and conditions outlined herein.
6. In Resolution No. 2020-\_\_\_\_\_, the Mayor and City Commission approved the Second Amendment and this Settlement Agreement, following two (2) duly noticed public hearings in compliance with Section 163.3225 of the "Act," having determined that it is in the City's best interest to address the issues covered by the Development Agreement, as amended, in a comprehensive manner.
7. In Ordinance No. 2020-\_\_\_\_\_, the Mayor and City Commission enacted an amendment to the City's Land Development Regulations, clarifying the areas of a building that count toward the maximum floor area limitations and reaffirming the City's longstanding application of the definition of floor area as including (1) voids to accommodate elevator shafts; (2) voids to accommodate mechanical/ventilation/trash shafts; and (3) voids to accommodate stairwells, including voids to accommodate stairwells within accessory garages (the "Clarifying LDR Amendment").
8. The Clarifying LDR Amendment contained an applicability clause to effectuate the settlement of the BOA Appeal and the Action, by providing that the foregoing "shall not apply to the development site that is the subject of an appeal granted by the Board of Adjustment prior to the effective date of this Ordinance that (i) authorized the exclusion from floor area calculations of voids in elevator shafts, mechanical/ventilation/trash shafts, and stairwells; and (2) does not result in a change to the height or floor plate of the residential tower of the proposed development."

**NOW, THEREFORE**, based on the above and in consideration of mutual covenants and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the following:

1. The foregoing recitals are true and correct and are incorporated herein by reference.
2. Exclusion of Certain Elements from Calculation of Floor Area for the Project. Subject to the terms and conditions of the Second Amendment to Development Agreement, and in accordance with the Clarifying LDR Amendment, the Parties agree that the Developer will have the right to exclude (1) voids to accommodate elevator shafts; (2) voids to accommodate mechanical/ventilation/trash shafts; and (3) voids to accommodate stairwells, including voids to accommodate stairwells within accessory garages from the calculation of floor area for the Project, provided that the foregoing does not result in a change to the height or floor plate of the residential tower for the Project.

3. Release by the Developer. Except for performance required under the Settlement Agreement and the Second Amendment, the Developer, on behalf of itself and each of its members (direct and indirect), principals, affiliates, subsidiaries, directors, officers, managers, employees, attorneys, successors and assigns (collectively, the "Developer Parties"), hereby forever releases and discharges the City, including without limitation any agency or regulatory body of the City, and its elected officials, employees, agents and representatives (collectively, the "City Parties"), from each and every right, claim, debt, cause of action, demand, suit, liability, or right of action of any nature whatsoever, whether asserted or unasserted, known or unknown, relating to or arising from the subject matter of the BOA Appeal and the Action or the Allegations of the BOA Appeal and the Action, and all facts or alleged evidence that were or could have been brought in those proceedings by the City or the Developer, and the interpretation of the City's Land Development Regulations to exclude the (1) voids to accommodate elevator shafts; (2) voids to accommodate mechanical/ventilation/trash shafts; and (3) voids to accommodate stairwells, including voids to accommodate stairwells within accessory garages (collectively, (1)-(3), the "Elements") from the calculation of floor area.
4. Release by the City. Except for performance required under the Development Agreement, as amended, and this Settlement Agreement and in conjunction with and subject to the dismissal of the BOA Appeal and the Action in accordance with Section 6 hereof, the City hereby forever releases and discharges the Developer from each and every right, claim, debt, cause of action, demand, suit, liability, or right of action of any nature whatsoever, whether asserted or unasserted, known or unknown, involving, relating to or arising from the subject matter of the BOA Appeal and the Action or the allegations of the BOA Appeal and the Action, and all facts or alleged evidence that were or could have been brought in those proceedings by the City or the Developer, and the interpretation of the City's Land Development Regulations to exclude the Elements from the calculation of floor area for the Project.
5. Covenant Not to Sue. Developer, on behalf of itself and each of its members and David Martin (individually) and Russell Galbut (individually) and each owner of any of the Identified Properties (as hereinafter defined) in which either or both of David Martin or Russell Galbut has any direct or indirect ownership interest (collectively, the "Developer Covenant Parties"), hereby unconditionally covenants and agrees that neither Developer nor any of the Developer Covenant Parties will: (a) seek to exclude the Elements from the calculation of floor area for any of the Identified Properties based on the Board of Adjustment's November 1, 2019 interpretation excluding the Elements from the calculation of floor area; or (b) commence any action, suit or proceeding against the City (including, without limitation, any agency or regulatory body of the City) seeking to exclude the Elements from the calculation of floor area for any of the Identified Properties. For purposes of this paragraph, the term "Identified Properties" shall mean and be limited to the following four (4) properties: (v) 1212 Lincoln Road; (w) 1501 Collins Avenue (the Bancroft Hotel); (x) 100 Lincoln Road (the Decoplage); and (y) 7145 Carlyle Avenue. **[OPEN ISSUE; Developer does not agree to extend covenant to 1501 Collins Ave or 7145 Carlyle Ave]**

6. Dismissal of the BOA Appeal and the Action. In conjunction with the completion of this Settlement Agreement, within five (5) days after the City and Developer have executed the Second Amendment and this Settlement Agreement, the City and Developer shall, along with counsel, execute a stipulation for dismissal with prejudice of the BOA Appeal and the Action, along with any other pleadings which may be required to effectuate the dismissal with prejudice of the BOA Appeal and the Action, inclusive of all claims asserted therein, and without recovery of attorneys' fees or costs, except as expressly provided in the Second Amendment.
7. Predecessors, Successors, and Assigns. All persons or business entities granting releases hereby include any assignee, predecessor in interest, or successor in interest of the respective grantor. All persons or business entities released hereby include any predecessor in liability or successor in liability for the released liability.
8. Representations and Warranties. It is acknowledged that Developer and City have read this Settlement Agreement and have consulted with their respective legal counsel, or knowingly chose not to consult legal counsel, before executing same; the Parties have relied upon their own judgment and/or that of their respective legal counsel in executing this Settlement Agreement and have not relied on or been induced by any representation, statement or act by any other Party except for the recitals contained herein, which each Party acknowledges and agrees are specific representations by such Party; each Party enters into the Settlement Agreement voluntarily, with full knowledge of its significance; and the Settlement Agreement is in all respects complete and final. The Parties warrant and represent that (a) each is the sole owner of the Parties' respective rights and claims against any of the other parties, and they have not assigned, transferred, or conveyed any rights or claims they may have against any of the other parties to any other person or entity; and (b) each of the parties has full power and authority to enter into and perform this Settlement Agreement without the consent of or duty to notify any other person, entity, or regulatory authority. Developer, on behalf of itself and each of the Developer Parties, covenants and agrees that it will not take or permit any of the Developer Parties to take any action to intentionally frustrate the purpose of this Settlement Agreement. City, on behalf of itself and each of the City Parties, covenants and agrees that it will not take or permit any of the City Parties to take any action to intentionally frustrate the purpose of this Settlement Agreement.
9. Legal Fees and Costs. Each of the Parties shall pay its own respective costs and attorneys' fees incurred with respect to the BOA Appeal and the Action and this Settlement Agreement, except as provided in the Second Amendment.
10. Entire Settlement Agreement. This Settlement Agreement constitutes the entire settlement with respect to the subject matter addressed herein and supersedes any prior written and/or verbal agreements between the Parties.
11. Amendments. This Settlement Agreement may not be orally modified. This Settlement Agreement may only be modified in a writing signed by all of the Parties.



12. Preparation of Settlement Agreement and Construction. This Settlement Agreement has been prepared jointly by each of the Parties, with a full opportunity for the Parties to negotiate its terms. Accordingly, any rule of law or legal decision that would require interpretation of any ambiguities in this Settlement Agreement against the Party that has drafted it is not applicable and is hereby waived.
13. Waiver and Modification. The failure of the Parties to insist, in any one or more instances, upon the strict performance of any of the covenants of this Settlement Agreement, or to exercise any option herein contained, shall not be construed as a waiver, or a relinquishment for the future of such covenant or option, but shall continue and remain in full force and effect.
14. Further Necessary Actions. To the extent that any document is required to be executed by any party to effectuate the purposes of this Settlement Agreement, the party will execute and deliver such document to the requesting party.
15. Counterparts. This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one in the same instrument. A copy of this Settlement Agreement transmitted by facsimile shall be deemed an original.
16. Binding Agreement. This Settlement Agreement is binding on the Parties hereto and the Parties agree to execute any and all documents necessary and consistent with applicable law, to ratify, confirm, and perform the terms and provisions of this Settlement Agreement. The terms of this Settlement Agreement shall be binding on and inure to the benefit of the Parties, their legal representatives, members, constituents, successors, assigns, subsidiaries and affiliates, and shall supersede all prior discussions, negotiations and agreements among the Parties, concerning the terms of this Settlement Agreement.
17. Jurisdiction and Choice of Law. This Settlement Agreement shall be construed, enforced and interpreted in accordance with the laws of the State of Florida. By this Settlement Agreement, Developer and City submit to the jurisdiction of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida for any action to enforce or interpret this Settlement Agreement.
18. Severability. In the event any provision, term or condition of this Settlement Agreement, on behalf of either Party hereto shall be inapplicable, invalid, illegal or unenforceable in any respect, the remainder of this Settlement Agreement and application of such provisions, terms or conditions shall not be effected thereby, and shall be enforced to the fullest extent permitted by law.
19. City's Sovereign Immunity. Nothing contained in this Settlement Agreement is intended to, or shall be construed as, a waiver of the City's sovereign immunity as provided under the laws of the State of Florida.



20. No Third-Party Beneficiaries. The Parties expressly acknowledge that it is not their intent to create or confer any rights or obligations in or upon any third person or entity under this Settlement Agreement. None of the Parties intend to directly or substantially benefit a third party by this Settlement Agreement. The Parties agree that there are no third party beneficiaries to this Settlement Agreement and that no third party shall be entitled to assert a claim against any of the Parties based upon this Settlement Agreement. Nothing herein shall be construed as consent by an agency or political subdivision of the State of Florida to be sued by third parties in any manner arising out of this Settlement Agreement, or other obligations, whether known or unknown to the Parties.

The Parties approve the above terms and voluntarily enter into this Settlement Agreement to settle the BOA Appeal and the Action between them as provided herein, and as of the date first entered above.

**[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]**

IN WITNESS WHEREOF, the Parties have set their hands and seals on the day and date first written above:

**TCH 500 Alton, LLC**, a Delaware limited liability company

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

Title: \_\_\_\_\_

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

The foregoing instrument was acknowledged before me, by means of ☐ physical presence or ☐ online notarization this \_\_\_\_\_ day of \_\_\_\_\_, 2020, by \_\_\_\_\_, \_\_\_\_\_ of **TCH 500 Alton, LLC**, a Delaware limited liability company, on behalf of said company, who is personally known to me or who has produced \_\_\_\_\_ (type of identification).

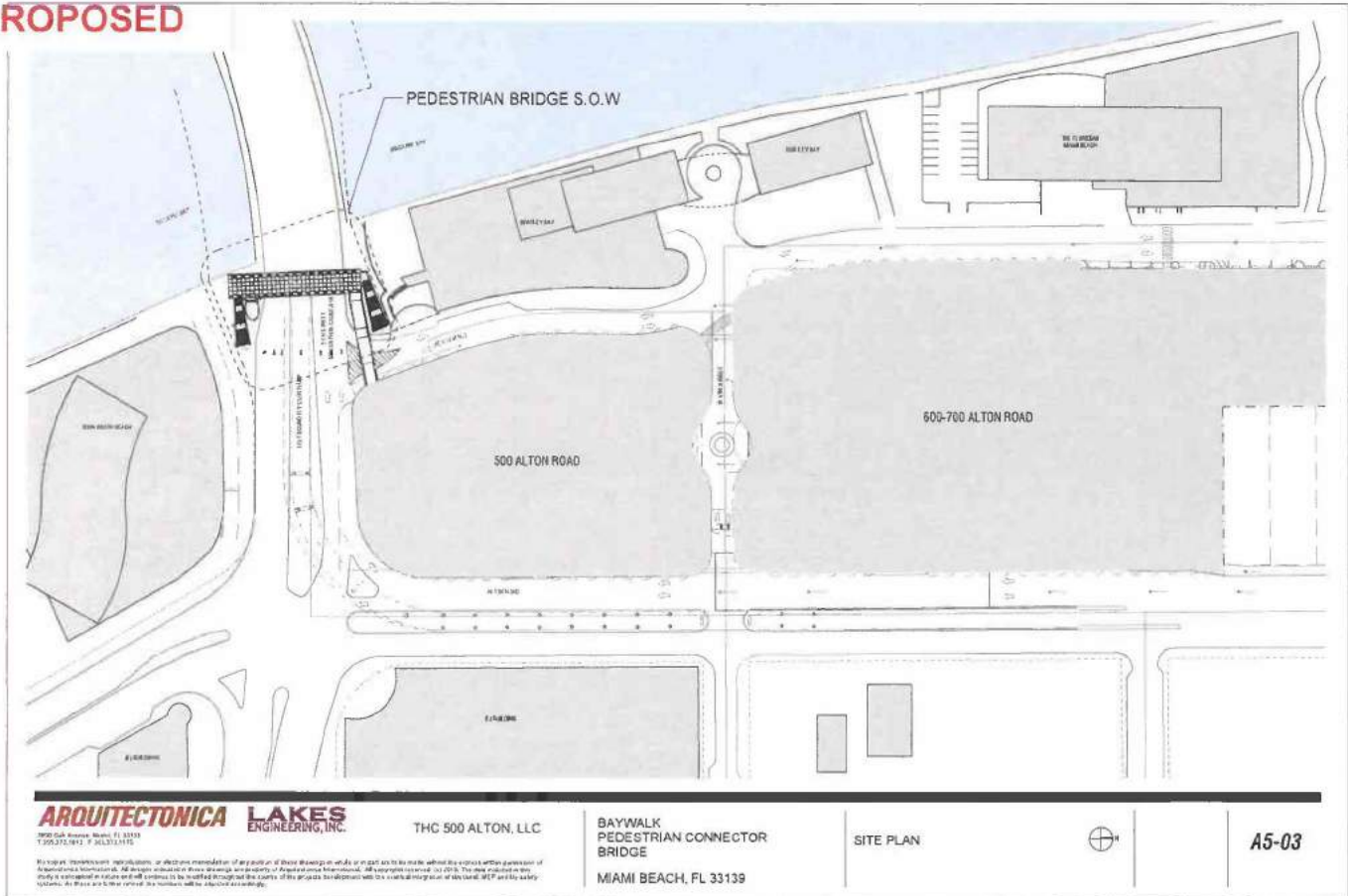
Name: \_\_\_\_\_  
(Print Name) \_\_\_\_\_

Notary Public – State of Florida  
My Commission Expires: \_\_\_\_\_

By: \_\_\_\_\_  
Name: Dan Gelber  
Title: Mayor

**Exhibit “E” - Final Bridge Project Plans**

**PROPOSED**



**ARQUITECTONICA LAKES**  
ENGINEERING, INC.

3950 Lake Avenue, Miami, FL 33133  
T: 305.372.1812 F: 305.372.1115

THC 500 ALTON, LLC

BAYWALK  
PEDESTRIAN CONNECTOR  
BRIDGE

MIAMI BEACH, FL 33139

SITE PLAN



A5-03

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PEDESTRIAN CONNECTOR  
BRIDGE

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DATE:  
07/08/2019

**A5-06**

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2020 Lake Avenue, Miami, FL 33133  
T 305.372.1577 F 305.372.1176

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DATE:  
07/08/2019

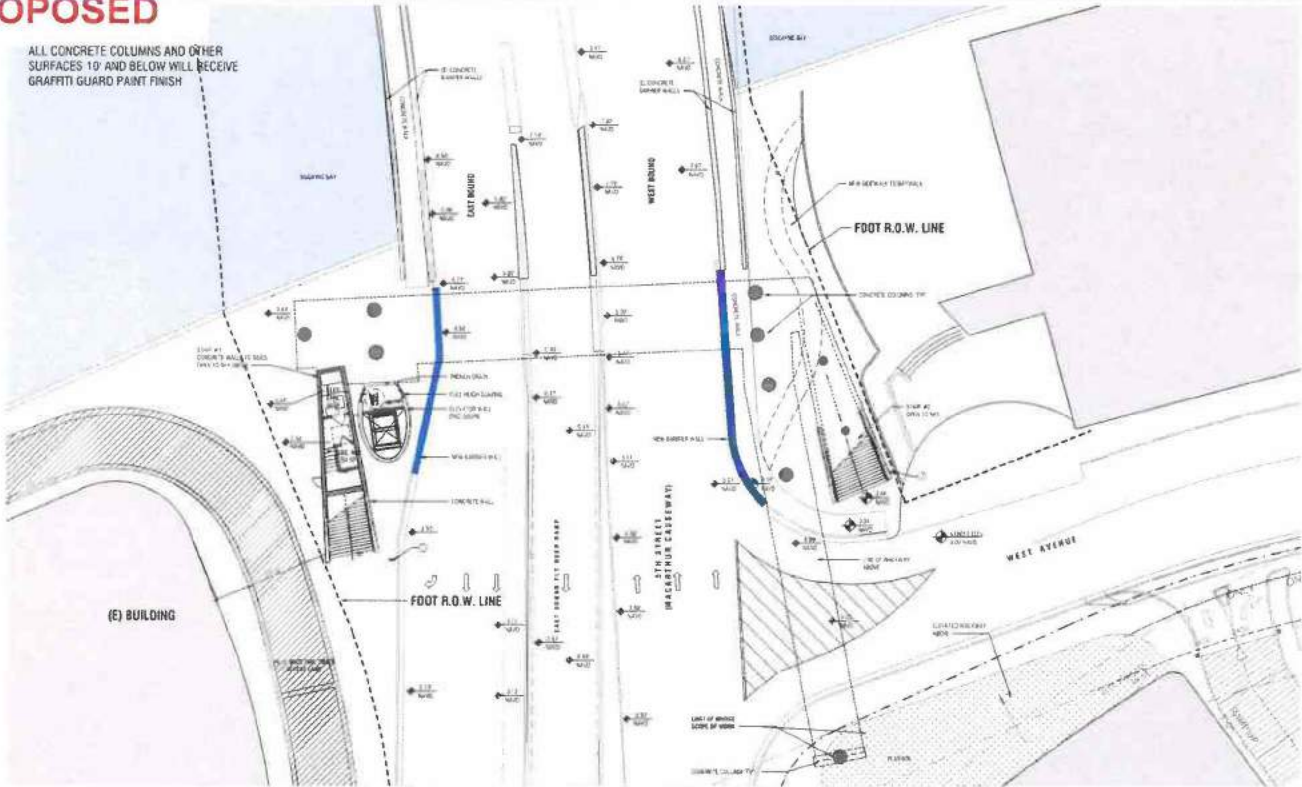
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# PROPOSED

ALL CONCRETE COLUMNS AND OTHER SURFACES 10' AND BELOW WILL RECEIVE GRAFFITI GUARD PAINT FINISH



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BRIDGE - LEVEL 1 PLAN



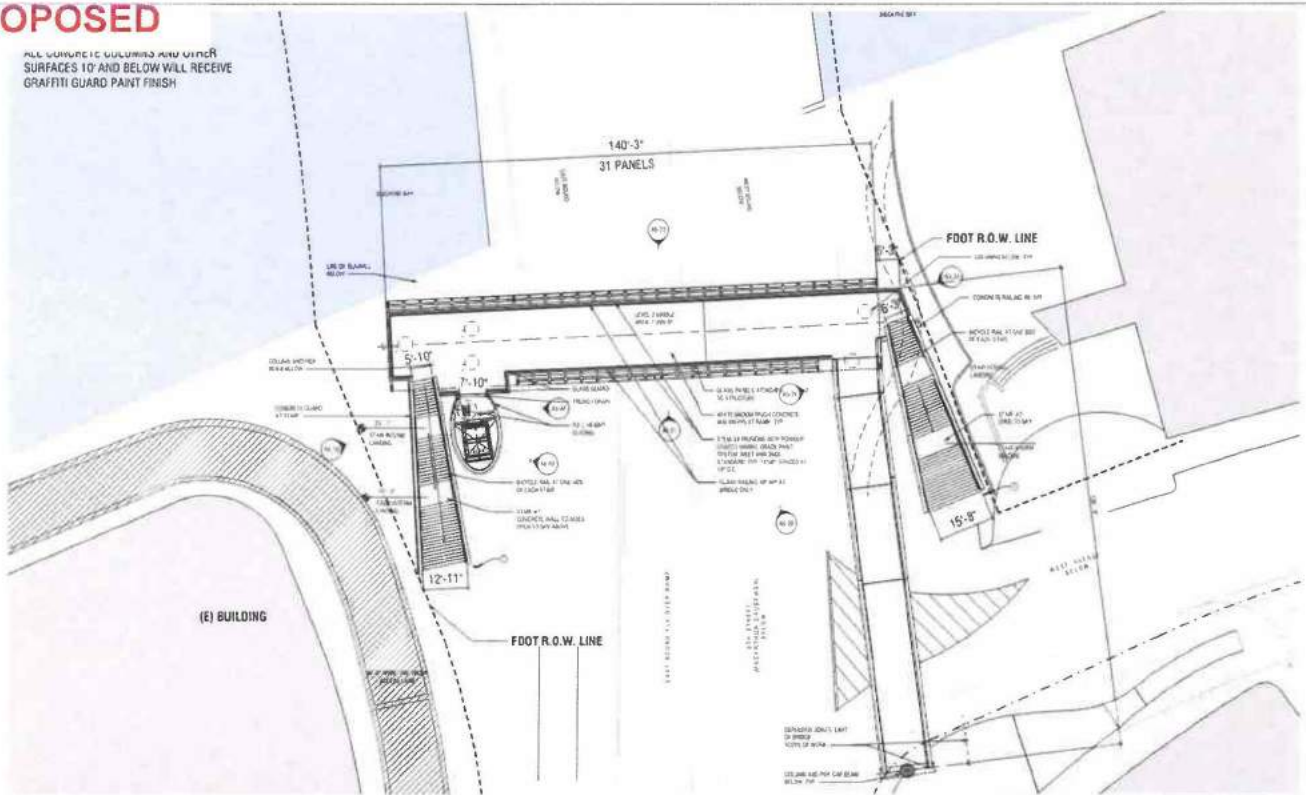
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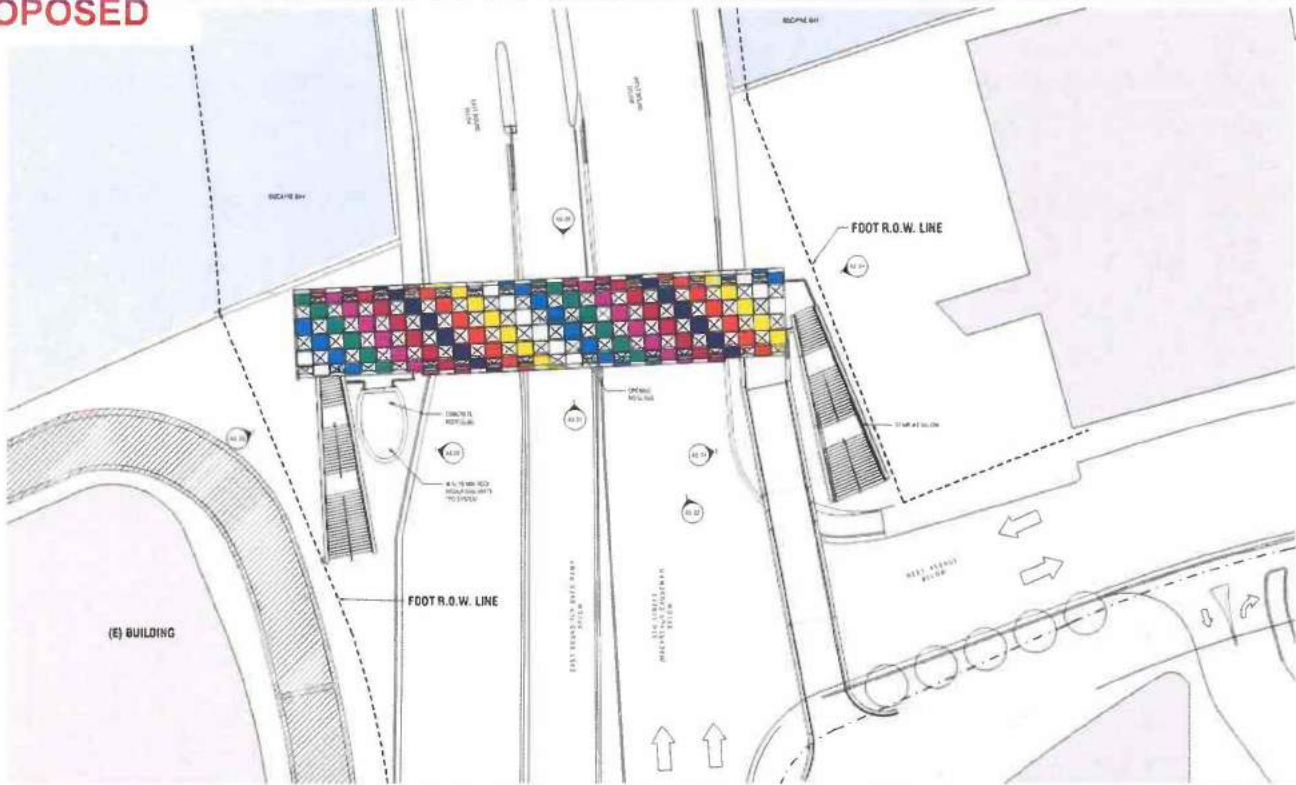
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A5-17

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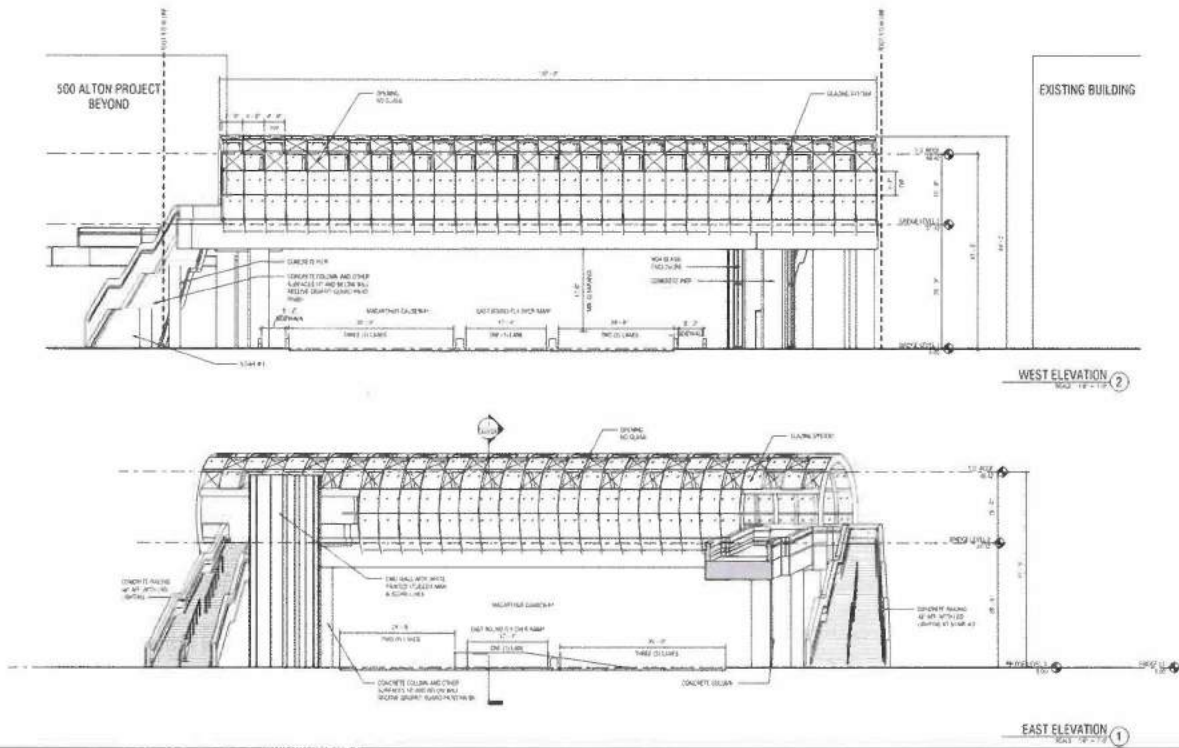
BRIDGE - ROOF LEVEL RENDERED  
PLAN

A5-19

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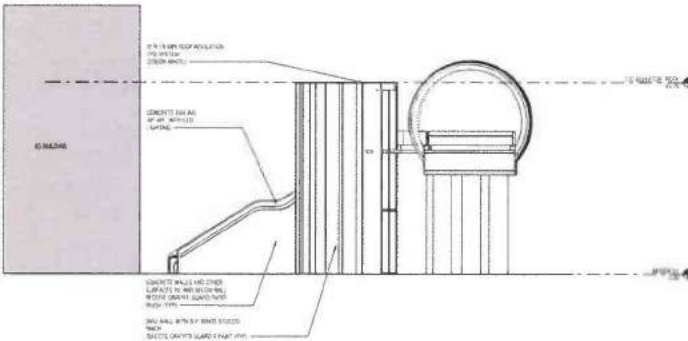


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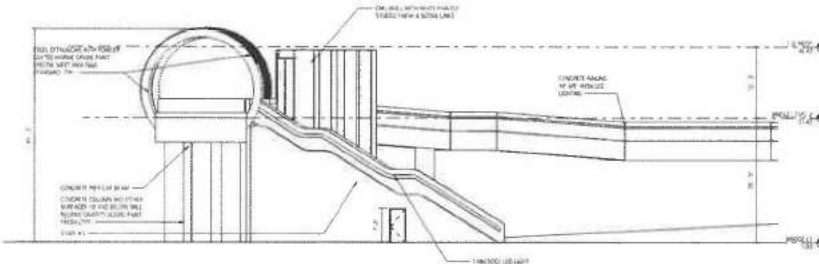
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# PROPOSED



NORTH ELEVATION OF STAIR AND ELEVATOR DRB



SOUTH ELEVATION OF STAIR AND ELEVATOR DRB

900 Old American Museum Pl., 3rd Fl.  
P.O. Box 372, 1612 P.O. Box 372, 1612

THC 500 ALTON, LLC

BAYWALK  
PEDESTRIAN CONNECTOR  
BRIDGE  
MIAMI BEACH, FL 33139

BRIDGE - ELEVATIONS

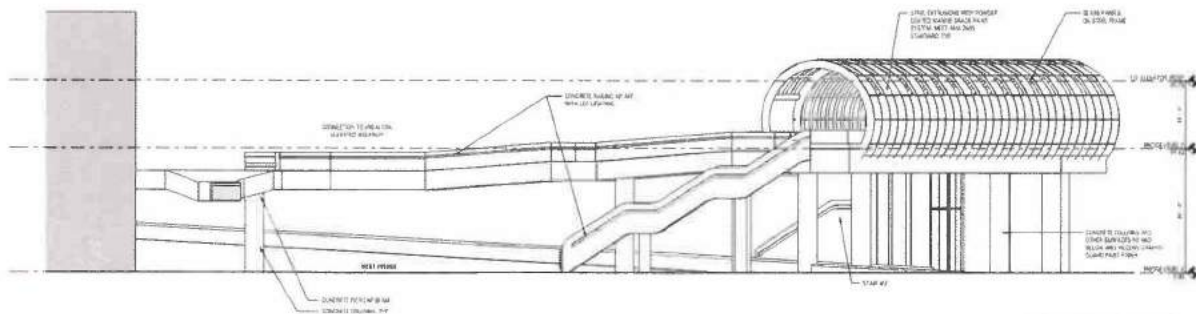


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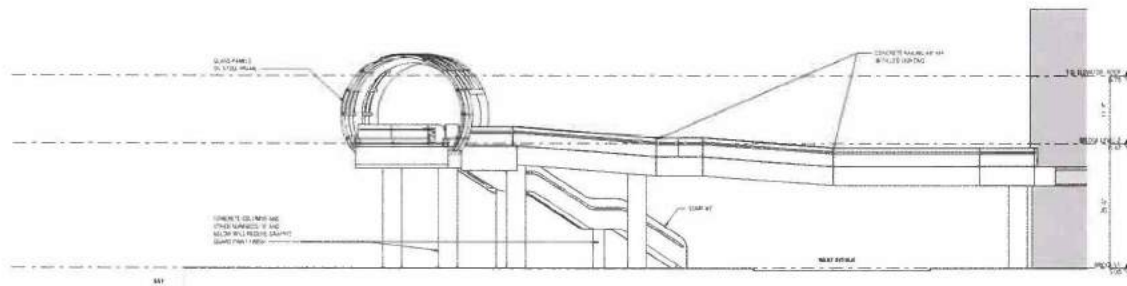
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# PROPOSED



NORTH ELEVATION OF BRIDGE (1)



SOUTH ELEVATION OF BRIDGE (2)

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BRIDGE - ELEVATIONS



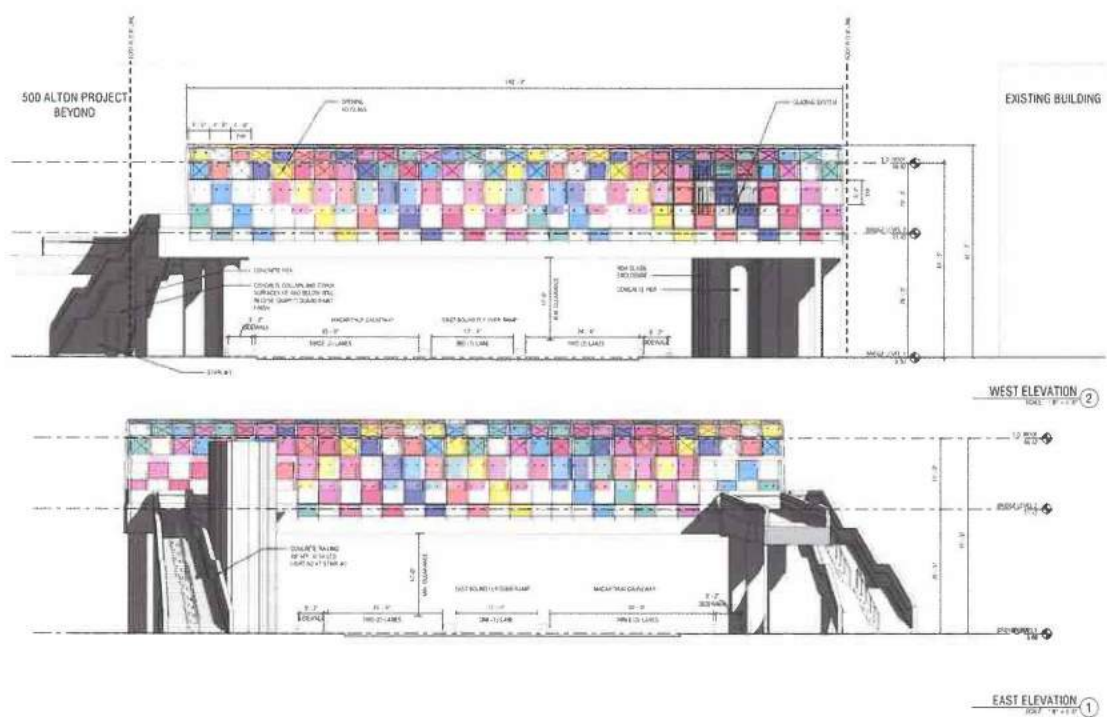
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Source: *U.S. Census Bureau*.



## PROPOSED



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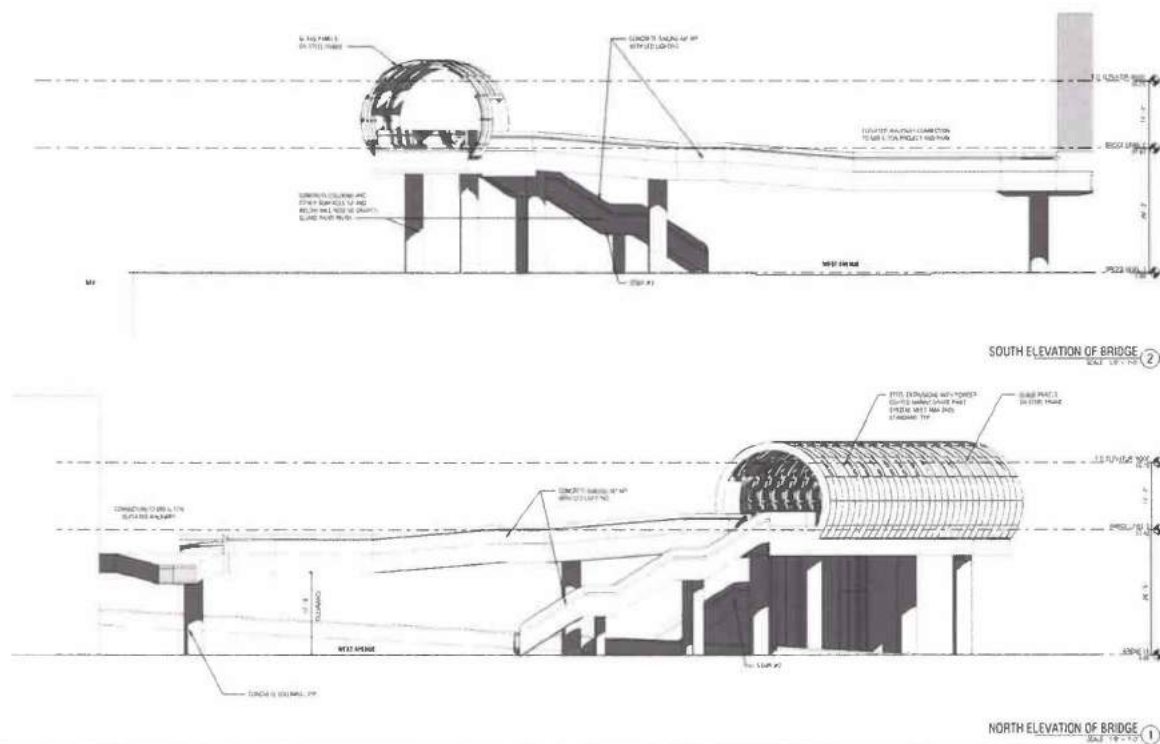
BRIDGE - RENDERED ELEVATIONS

A5-25

Source: *U.S. Census Bureau, 1997*



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BRIDGE - RENDERED ELEVATIONS



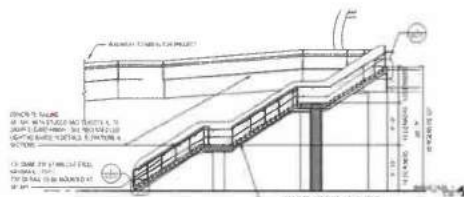
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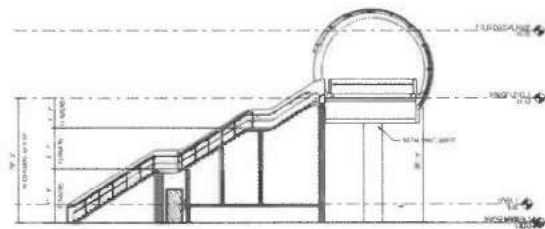
Page 40 of 40



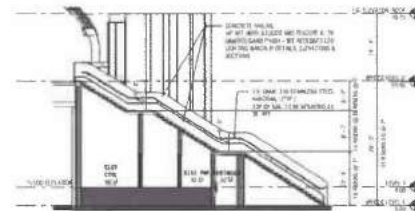
# PROPOSED



STAIR #2 SECTION 1



STAIR #1 SECTION 2



STAIR #1 SECTION 3

**ARQUITECTONICA LAKES**  
ENGINEERING, INC.

2400 Lake Avenue, Suite 201, Fort Lauderdale, FL 33304  
754.552.1111 • 754.552.1111

THC 500 ALTON, LLC

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MIAMI BEACH, FL 33139

STAIR SECTIONS



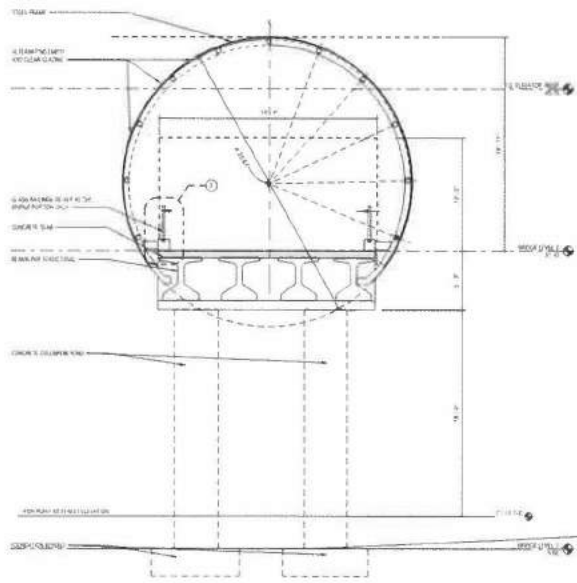
A5-28

Scale: 1/4" = 1'-0"

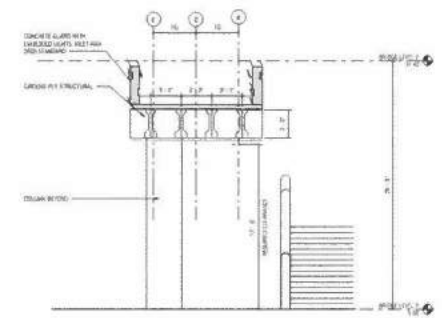




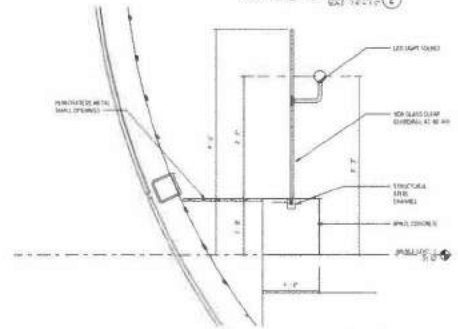
# PROPOSED



CROSS SECTION AT BRIDGE 1  
SCALE: 1" = 10'



SECTION AT WEST AVE DBR  
SCALE: 1" = 10'



GUARDRAIL DETAIL AT BRIDGE DBR  
SCALE: 1" = 10'

**ARQUITECTONICA LAKES**  
ENGINEERING, INC.

THC 500 ALTON, LLC

BAYWALK  
PEDESTRIAN CONNECTOR  
BRIDGE  
MIAMI BEACH, FL 33139

BRIDGE SECTION



A5-29

PROPOSED



**ARQUITECTONICA**

**LAKES**  
ENGINEERING, INC.

**ARQUITECTONICA** CEO  
THC 500 ALTON, LLC

2500 Old Andrew Road, FL 33133

1-305-270-1812, F-305-255-1415

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**BAYWALK  
PEDESTRIAN CONNECTOR  
BRIDGE**

MIAMI BEACH, FL 33139

GROUND LEVEL RENDERED PLAN

07/08/19

L1-100

PROPOSED



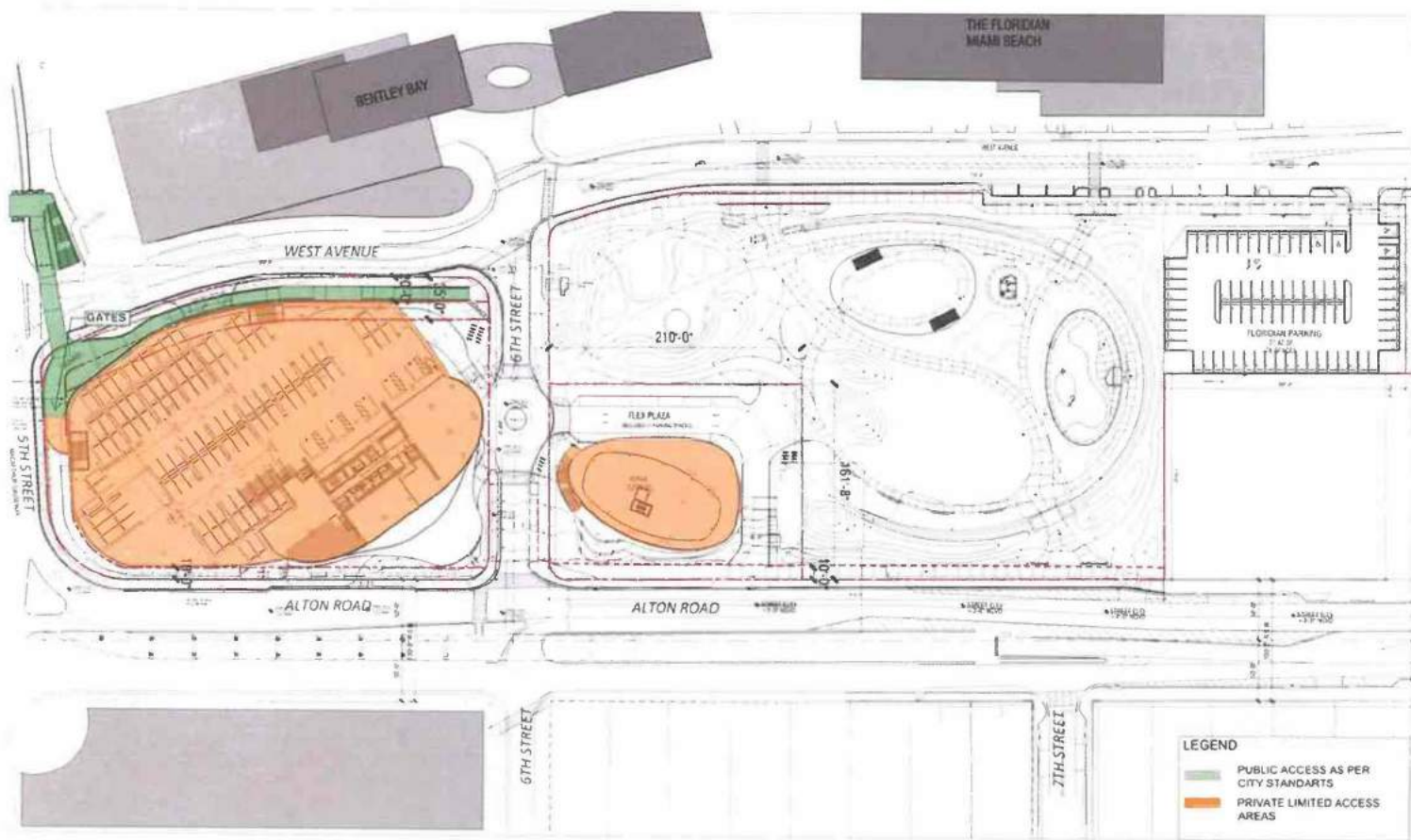
**Exhibit “F” - Final Bridge Project Budget**

## BAYWALK CONNECTOR BRIDGE BUDGET

<b>MAJOR CONSTRUCTION COSTS</b>	<b>BUDGET</b>	<b>REVISED BUDGET</b>	<b>DELTA</b>	<b>Notes</b>
Structure Construction Costs	\$ 5,869,900	\$ 6,771,429	\$ 901,529	
Artwork Construction Costs	\$ 1,000,000	\$ 1,200,000	\$ 200,000	
Utility Work(water main, etc.)		\$ 600,000	\$ 600,000	
Hard Cost Contingency	\$ 343,495	\$ 428,571	\$ 85,076	
<b>Total Construction Costs</b>	<b>\$ 7,213,395</b>	<b>\$ 9,000,000</b>	<b>\$ 1,786,605</b>	
<b>DEVELOPER DIRECT COSTS</b>				
Electrical Relocation / Utility Relocation	\$ 175,000	\$ -	\$ (175,000)	included in const costs
<b>Construction Inspection</b>				
CEI Inspection/Materials Testing	\$ 390,000	\$ 550,000	\$ 160,000	per revised estimate
CEI Reimbursables	\$ 19,500	\$ 27,500	\$ 8,000	
<b>Administrative</b>				
Legal	\$ 120,000	\$ 120,000	\$ -	
Procurement Facilitation	\$ 59,490	\$ 75,000	\$ 15,510	
Insurance	\$ 200,000	\$ 200,000	\$ -	
<b>Municipal &amp; Permits</b>				
City of Miami Beach Permits	\$ 3,500	\$ 3,500	\$ -	
FDOT Permits	\$ 1,000	\$ 1,000	\$ -	
Miscellaneous Permits	\$ 7,500	\$ 7,500	\$ -	
Peer Review	\$ 5,000	\$ 5,000	\$ -	
Administrative Fee	\$ 400,000	\$ 400,000	\$ -	
Owner Direct Contingency	\$ 49,050	\$ 49,475	\$ 426	
<b>Total Owner Direct</b>	<b>\$ 1,430,040</b>	<b>\$ 1,438,975</b>	<b>\$ 8,936</b>	
<b>BRIDGE DESIGN COSTS</b>				
<b>Architectural &amp; Engineering</b>				
Architecture & Landscape	\$ 402,000	\$ 402,000	\$ -	
Lighting Consultant	\$ 50,000	\$ 70,000	\$ 20,000	updated per actual fee
Bridge Engineering	\$ 420,000	\$ 480,000	\$ 60,000	add service for utility/design change
Surveyor	\$ 4,405	\$ 4,405	\$ -	
Elevator Consultant	\$ 6,500	\$ 6,500	\$ -	
A&E Reimbursables	\$ 44,145	\$ 52,845	\$ 8,700	
<b>Artwork/Skin Consultant</b>				
Art Consulting	\$ 197,500	\$ 197,500	\$ -	
Soft Cost Contingency	\$ 56,278	\$ 60,663	\$ 4,385	
<b>Total Soft Costs</b>	<b>\$ 1,180,778</b>	<b>\$ 1,273,913</b>	<b>\$ 93,135</b>	
<b>Total Bridge Project Developer Costs</b>	<b>\$ 9,824,212</b>	<b>\$ 11,712,888</b>	<b>\$ 1,888,676</b>	
<b>City Expenses: City Inspector / Geotech/ IPO</b>	<b>\$ 390,000</b>	<b>\$ 390,000</b>	<b>\$ -</b>	
<b>City Owner's Contingency</b>	<b>\$ 360,000</b>	<b>\$ 360,000</b>	<b>\$ -</b>	
<b>City Total</b>	<b>\$ 750,000</b>	<b>\$ 750,000</b>	<b>\$ -</b>	
<b>Total Bridge Project Budget</b>	<b>\$ 10,574,212</b>	<b>\$ 12,462,888</b>	<b>\$ 1,888,676</b>	
<b>Total Budget Cap</b>	<b>\$ 10,000,000</b>			
<b>Total Development Expenses</b>	<b>\$ 12,462,888</b>			
<b>Outstanding Balance</b>	<b>\$ (2,462,888)</b>			



**Exhibit "G"**  
**Future Pedestrian Pathway Parcel**



**Exhibit "G"**

**Exhibit "H"**  
**Future Pedestrian Pathway Parcel Easement Agreement**

This instrument was prepared by:

Name: Raul J. Aguila, City Attorney.  
Address: City of Miami Beach  
1700 Convention Center Drive, 4<sup>th</sup> Floor  
Miami Beach, Florida 33139

---

**EASEMENT AGREEMENT**  
**(Pedestrian Pathway – 500 Block)**

THIS EASEMENT AGREEMENT (the "**Agreement**"), is made this \_\_\_\_ day of \_\_\_\_\_, 201\_\_, by I, having an address of ~~2200 Biscayne Boulevard, Miami, Florida 33137~~ 2665 South Bayshore Drive, Coconut Grove, Florida 33133 (the "**Owner**") in favor of the City of Miami Beach, a Florida municipal corporation (the "**City**").

WITNESSETH:

**WHEREAS**, the Owner holds fee simple title to that certain real property more specifically described on **Exhibit "A"** attached hereto and incorporated herein by this reference (the "**Property**");

**WHEREAS**, the real property more specifically described on **Exhibit "B"** attached hereto and incorporated herein by this reference (the "**Easement Area**") is contained within the Property; and

**WHEREAS**, the Owner seeks to grant a perpetual non-exclusive easement upon, over and across the Easement Area in favor of the City for the "**Easement Purpose**" (as hereinafter defined).

**NOW THEREFORE**, in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto intending to be legally bound hereby agree as follows:

1. Recitals. The above recitals are true and correct and by this reference are hereby incorporated into the body of this Agreement as if fully set forth herein.

2. Grant of Easement. Subject to the rights reserved herein, the Owner hereby grants to the City a perpetual, non-exclusive and irrevocable easement upon, over and across the Easement Area for the purpose of unrestricted ingress and egress by the general public for

pedestrian travel (the "**Easement Purpose**"); ~~provided, however, and notwithstanding anything to the contrary contained in this Agreement, the Owner reserves the right to install gates, barricades and other security measures within the Easement Area to prohibit the Easement Purpose with respect to that portion of the Easement Area generally located east of the "Pedestrian Bridge Platform" (as hereinafter defined) and as more specifically described on Exhibit "C" attached hereto and incorporated herein by this reference during the hours of 11:00 P.M. through sunrise on every day of the week.~~

3. Pedestrian Bridge Platform. The Owner and the City hereby acknowledge and agree that: (a) the City intends (but is not obligated) to design and construct at its sole cost and expense a pedestrian bridge over and across West Avenue and 5<sup>th</sup> Street (such pedestrian bridge, together with all related improvements, are referred to herein collectively as the "**Pedestrian Bridge**"); (b) the eastern end of the Pedestrian Bridge is to connect to that portion of the Easement Area more particularly described on **Exhibit "C"** attached hereto and incorporated herein by this reference (the "**Pedestrian Bridge Platform**"); and (c) subject to the rights reserved herein, the Owner hereby grants to the City a perpetual, non-exclusive and irrevocable right to connect and attach the Pedestrian Bridge to the Pedestrian Bridge Platform, subject to the Owner's prior review and written approval (which approval shall not be unreasonably withheld, conditioned or delayed) of the Pedestrian Bridge and the methods of its connection and attachment to the Pedestrian Bridge Platform. ~~If the City elects to construct the Pedestrian Bridge and connect and attach the same to the Pedestrian Bridge Platform, the City hereby acknowledges and agrees that: (x) all fees, costs and expenses associated with the Pedestrian Bridge and its connection and attachment to the Pedestrian Bridge Platform (including, without limitation, the design, permitting, construction, installation, operation, use, maintenance, repair and replacement thereof) shall be paid in full by the City; (y) the design and construction of the Pedestrian Bridge and its connection and attachment to the Pedestrian Bridge Platform shall be performed and completed by the City (i) in a good and workmanlike manner, (ii) free from liens and defects, and (iii) in full compliance with all laws, rules, regulations, ordinances, codes and other requirements of governmental and quasi-governmental authorities having jurisdiction; and (z) upon final completion of the Pedestrian Bridge and its connection and attachment to the Pedestrian Bridge Platform, the City shall (i) remove all debris, equipment and materials from the Easement Area, (ii) fill, compact, grade and otherwise restore the Easement Area to substantially the same condition as existed prior to commencement of such work, including harmonizing the soil levels within the Easement Area and the lands adjacent thereto, and (iii) keep and maintain Pedestrian Bridge and its connection and attachment to the Pedestrian Bridge Platform (and all parts and components thereof) in good condition, repair and working order at all times.~~ Notwithstanding anything to the contrary contained in this Agreement, except for the Pedestrian Bridge and the parts and components related to its connection and attachment to the Pedestrian Bridge Platform, the Owner shall be solely responsible for keeping and maintaining the Pedestrian Bridge Platform in good condition, repair and working order.

4. Miscellaneous.

4.1 This Agreement shall be governed by, enforced and construed under the laws of the State of Florida. Venue for all actions, litigation and/or other proceedings arising out of this Agreement shall be exclusively in Miami-Dade County, Florida. The parties hereby

knowingly and voluntarily waive the right to a trial by jury of any claim, controversy or disputed matter between them arising under, out of or in connection with this Agreement. The prevailing party in any action, litigation or other proceeding that is based on any claim, controversy or other disputed matter arising under, out of or in connection with this Agreement shall recover from the non-prevailing party all fees, costs and expenses (including, without limitation, reasonable attorneys' fees and costs through all trial, appellate and post-judgment levels and proceedings) incurred by the prevailing party in such action, litigation or other proceeding.

4.2 The parties hereby acknowledge and agree that each has had an opportunity to be represented by or consult with independent legal counsel and that any rule of construction which provides that ambiguities are to be construed against the drafter shall not apply in the interpretation or construction of this Agreement. If any term, provision or portion of this Agreement is for any reason held to be invalid, illegal or unenforceable by a court of competent jurisdiction, then such term, provision or portion of this Agreement shall be given it nearest valid, legal and enforceable meaning, or construed as deleted, whichever such court may determine, and the same shall not invalidate the remaining terms, provisions and/or portions of this Agreement, which remaining terms, provisions and portions of this Agreement will remain in full force and effect.

4.3 This Agreement includes all exhibits attached hereto. This Agreement, together with all such exhibits, contains the entire agreement and understanding between the parties relating to the subject matter of this Agreement, and all prior or contemporaneous terms, covenants, conditions, representations, warranties, statements, agreements and understandings made by or on behalf of the parties, whether oral or written, are merged herein.

4.4 This Agreement may not be amended, modified or terminated except by a written instrument executed by the Owner and the City through its Public Works Director, or his designee, or the successor administrative officer with jurisdiction over the matter, and which is recorded in the Public Records of Miami-Dade County, Florida. This Agreement shall inure to the benefit of and shall be binding upon the parties and their respective successors and assigns.

4.5 The failure of any party to insist in any one or more instances upon strict performance of any term, covenant, condition or other provision of this Agreement will not be construed as a waiver or relinquishment of the future enforcement of such term, covenant, condition or other provision of this Agreement.

4.6 Wherever appropriate in this Agreement, the singular shall be deemed to refer to the plural and the plural to the singular, and pronouns of each gender shall be deemed to comprehend either or both of the other genders. The section and paragraph headings in this Agreement are for convenience only and shall not affect the meaning, interpretation or scope of the terms or provisions set forth therein.

4.7 This Agreement may be executed in multiple counterparts, each of which individually shall be deemed an original, but when taken together shall be deemed to be one and the same Agreement.



4.8 This Agreement shall never be construed as a conveyance in any manner whatsoever of fee simple title to any portion of the Property or the Easement Area; it being intended by the parties that this Agreement conveys only an easement interest with respect to the Easement Area for the specific uses and purposes set forth herein.

4.9 All of the rights, easements and interests herein created and granted are and shall be limited to and utilized solely for the uses and purposes expressly set forth herein. Notwithstanding anything to the contrary contained in this Agreement, the Owner hereby expressly reserves the right to use and grant others the right to use any and all portions of the Property owned by it (including, without limitation, any and all portions of the Easement Area) so long as such use by the Owner and/or others does not prohibit the City from engaging in the Easement Purpose granted to it under this Agreement.

4.10 This Agreement and the rights, easements and interests herein created and granted shall only become effective upon the recordation of this Agreement in the Public Records of Miami-Dade County. This Agreement and the rights, easements and interests herein created and granted shall run with the land, and shall be binding on all persons holding title to said lands.

5. Notice. All notices, demands, requests or other communications which may be or are required to be given, served, or sent by either the Owner or the City pursuant to this Agreement shall be in writing and addressed as follows:

If to Owner:

David Martin  
c/o Terra Group  
2665 S Bayshore Drive, Suite 1020  
Miami, FL 33133

AND

2200 Biscayne Boulevard  
Miami, Florida 33137  
Attn: David Smith

With a copy to:

2200 Biscayne Boulevard  
Miami, Florida 33137  
Attn: Michael Sheitelman

AND

Graham Penn, Esq.  
Bercow Radell Fernandez Larkin & Tapanes, PLLC  
200 S. Biscayne Blvd., Suite 850  
Miami, FL 33131

If to the City:

City of Miami Beach  
Attn: City Manager  
1700 Convention Center Drive, 4th Floor

Miami Beach, Florida 33139

With copies to:

City of Miami Beach  
Attn: Public Works Director  
1700 Convention Center Drive, 4th Floor  
Miami Beach, Florida 33139

Each party may designate by notice in writing a new address to which any notice, demand, request or communication may thereafter be so given, served or sent.

6. Solely to the extent and limits permitted by Section 768.28 of the Florida Statutes, and without waiving any rights or defenses therein, the City shall indemnify, defend and hold the Owner harmless from and against all claims, demands, causes of action, suits, losses, damages, liabilities, liens, judgments, fees, costs, expenses and other charges (including, without limitation, reasonable attorneys' fees and costs through all trial, appellate and post judgment levels and proceedings) (collectively, the "**Claims**") commenced, incurred and/or paid by or against any of the Owner to the extent the Claims arise from: (a) the willful misconduct or negligent use of the Easement Area by the City or any successor, assign and/or grantee thereof expressly approved by the City Commission; (b) the design, construction, installation, operation, use, maintenance, repair and/or replacement of, or the failure to properly design, construct, install, operate, use, maintain, repair and/or replace, the Pedestrian Bridge by the City or any successor, assign and/or grantee thereof expressly approved by the City Commission; and (c) any default, breach or violation of any term, covenant, condition or provision of this Agreement by the City or any successor, assign and/or grantee thereof expressly approved by the City Commission. Notwithstanding anything to the contrary contained in this Agreement: (y) nothing in this Agreement shall impair, limit or prohibit any rights or remedies the Owner has against any person or entity using or occupying the Easement Area under, through or as an assignee or grantee of the City; and (z) the obligation of the City to indemnify, defend and hold the Owner harmless as set forth herein shall not apply to the extent any such Claims arise from the negligence or willful misconduct of the Owner or any successor, assign and/or grantee thereof.

7. The Owner shall indemnify, defend and hold the City harmless from and against all Claims commenced, incurred and/or paid by or against the City to the extent the Claims arise from the design, construction, installation, operation, use, maintenance, repair and/or replacement of, or the failure to properly design, construct, install, operate, use, maintain, repair and/or replace, the Pedestrian Bridge Platform by the Owner. Notwithstanding anything to the contrary contained in this Agreement, the obligation of the Owner to indemnify, defend and hold the City harmless as set forth herein shall not apply to the extent any such Claims arise from the negligence or willful misconduct of the City or any successor, assign and/or grantee thereof.

APPROVED

\_\_\_\_\_  
Public Works Director

\_\_\_\_\_  
Date

APPROVED AS TO  
FORM & LANGUAGE

\_\_\_\_\_

\_\_\_\_\_

City Attorney

Date

[EXECUTION PAGES TO FOLLOW]

IN WITNESS WHEREOF, the Owner has caused these presents to be signed, sealed executed and acknowledged on \_\_\_\_ day of \_\_\_\_\_, 20\_\_, in its name by its proper officials.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_

STATE OF FLORIDA                    )  
  ) SS:  
COUNTY OF MIAMI-DADE        )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 201\_\_ by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_, on behalf of the company. He is personally known to me or has produced \_\_\_\_\_ as identification and who did/did not take an oath.

\_\_\_\_\_

NOTARY PUBLIC  
Typed or printed Name of Notary  
My Commission expires:  
Serial No., if any \_\_\_\_\_

Exhibit A

Legal Description of Property



Exhibit B

Legal Description of Easement Area