

## **PUMP STATION D-31 DEVELOPMENT AGREEMENT**

This DEVELOPMENT AGREEMENT ("**Agreement**") is made to be effective as of May 27, 2021 (the "**Effective Date**"), by and between CITY OF FORT LAUDERDALE, a municipal corporation of the State of Florida ("**City**"), whose address is 100 North Andrews Avenue, Fort Lauderdale, Florida 33313 and LAS OLAS SMI, LLC, a Delaware limited liability company authorized to do business in the State of Florida ("**Developer**"), whose address is c/o Suntex Marina Investors LLC, 17330 Preston Road, Suite 220A, Dallas, Texas 75252, as follows:

### **ARTICLE 1** **APPOINTMENT AND TERM**

Section 1.1 **Appointment.** On August 23, 2016, Developer's affiliate, Suntex Marina Investors LLC ("**SMI**"), was the sole bidder in response to the City's RFP #264-11791 for the lease, management and development of that certain marina commonly known as the Las Olas Marina (the "**Marina Property**"), and pursuant to City Resolutions, including Resolution No. 16-180, the City Commission selected SMI's proposal in connection with such development. In connection therewith, City engages Developer to develop, on behalf of the City, the upgrade of that certain existing "City of Fort Lauderdale D-31 Pump Station" (the "**Pump Station**") which is located on the Marina Property currently leased by Developer pursuant to that certain Ground Lease Agreement dated April 30, 2018, as amended from time-to-time (collectively the "**Lease**"). Developer's Final Completion (as defined in Section 2.8) of this Agreement shall be a condition precedent to the Commencement Date of the Lease.

#### Section 1.2 **Defined Terms.**

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to such terms in the Lease.

- (a) "**Project**" shall mean the excavation of a new wet well; demolition of the existing Pump Station; design and installation of the new pump station equipment, pumps, controls, generator, air filtration systems, and other equipment as required by City's design and operational criteria; and, upgrades to the water, sewer and other utility connection lines connected thereto and design drawings necessary in connection therewith.
- (b) "**Parties**" shall mean Developer and City, collectively.
- (c) "**Term**" shall mean period of time from the date the development of the Project commences, which shall be such time as Developer receives all applicable necessary and required governmental approvals and authorizations, and ending upon Final Completion of the Project, unless this Agreement is terminated earlier pursuant to the terms and conditions herein.

Section 1.3 **Independent Contractor.** City engages Developer, due to its direct involvement in the Las Olas Marina project, as an independent contractor to provide development services related to the design and construction of the Project. Developer shall be responsible for providing the development services in accordance with the standards set forth in this Agreement. Developer's authority to act on behalf of City is strictly limited to that expressly delegated herein. Nothing herein shall be construed to imply a joint venture, partnership, ownership, or participation by Developer in the Project after Final Completion.

Section 1.4 **Construction Manager At Risk.** Developer shall engage a third-party construction manager at risk, who will be a licensed Florida contractor or otherwise meets any required legal and/or regulatory qualifications, to perform the actual design and construction.

## **ARTICLE 2 DEVELOPMENT**

Section 2.1 **Approved Plans and Specifications.** Developer has submitted to City, and City hereby acknowledges and agrees that the City has reviewed, approved, and confirmed (or taken all steps required to approve and confirm) that certain development plan prepared by Kimley-Horn and Associates, Inc., dated August 7, 2020 (the "***Approved Development Plan***"), which Approved Development Plan includes the plans and specifications ("***Approved Plans and Specifications***") for the Project setting forth a description of the proposed improvements to be included in the Project. The Plans and Specifications are attached as Exhibit A, which have been reviewed and approved by the City's Building Department (ENG-SEW-20020008).

Section 2.2 **Budget.** The costs to develop, construct and deliver the Approved Development Plan, including hard costs, soft costs, costs of oversight of general conditions and general requirements and other expenditures anticipated to be incurred in connection with developing the Project, including but not limited to all funds necessary to pay construction costs, material, labor, design, professional fees, equipment, water/sewer studies, contractor overhead and expenses as well as any bonding, permit fees, financing costs, taxes, and insurance premiums (collectively, the "***Project Costs***"), are estimated (but not guaranteed) to be two million and nine hundred thousand dollars (\$2,900,000) ("***Budget***"), is attached as Exhibit B.

Section 2.3 **Funds for Construction.** In connection with its obligations under the Lease and for the benefit of utilizing the completed Project, Developer agrees to contribute an amount up to and not to exceed four hundred thousand dollars (\$400,000) toward the Project Costs that are included in the Budget ("***Developer Contribution***"). City agrees to contribute an amount up to and not to exceed two million five hundred thousand dollars (\$2,500,000) ("***City Contribution***" and together with Developer Contribution, the "***Total Contribution***"). The Developer Contribution is not to be deemed or construed in any way as a joint venture, partnership, ownership, or participation in the Project.

Section 2.4 **Construction Cost Overages.** City and Developer shall evenly split on a pay-as-you-go basis for Project Costs in excess of the Budget up to two hundred and fifty thousand dollars (\$250,000) (or one hundred and twenty five thousand dollars per party) ("***Overage Cap***"). All costs in excess of the Budget need to be approved by the City in advance of being expended. In the event the Project Costs exceed the Overage Cap, the Parties shall meet and negotiate in good faith to resolve any issues, which may be subject to and require City Commission approval, including but not limited to the payment of all Project Costs in excess of the Overage Cap. The City shall be solely responsible for any City requested, non-regulatory, modifications which result in increases to the Project Costs in excess of the Budget created by a change from the Approved Development Plan.

Section 2.5 **Other Services.** Developer shall provide the following additional services during the period prior to commencement of construction of the Project:

- (a) Provide City with a monthly progress report at the end of each month (the "***Project Schedule***").
- (b) Provide business administration and supervision consistent with good construction practices and as may be required for the Project.

(c) The Parties will work together to obtain all necessary public, including but not limited to all permits required, for the Project, including any State of Florida or ground lessor approvals, city planning, applicable building codes, public works, and building permit approvals. All such applications shall be completed by Developer in the name of City and processed by Developer.

**Section 2.6 Project Administration.** During construction of the Project, Developer shall exercise general management of the Project's construction and in connection therewith shall, without limiting the generality of the foregoing, perform the following duties in respect of the Project:

(a) Determine, upon receipt of an application for payment from the General Contractor, subject to approval by Engineer, the amount due the General Contractor under the General Contract and review and request from payment from the City.

(b) Obtain from the General Contractor all required lien waivers and all other documentation as provided for herein, in the General Contract, and under the provisions of the Florida Construction Lien Law (F.S. Sects. 713.001-713.37).

(c) Assist in preparing such reports as may be required of the General Contractor on the progress of construction, which reports shall not be required more frequently than once per month.

(d) Maintain construction accounts for the Project.

(e) Coordinate the installation of the utilities with the appropriate utility companies.

(f) Provide monthly progress pay applications to the City.

**Section 2.7 Bonds.** If City's building department so requires, City shall cause the Construction Bond described in Section 25-112 of the City of Fort Lauderdale Code of Ordinances to be deposited with the city engineer, with the premium for the bond to be payable directly by the Developer as part of the approved Budget.

**Section 2.8 Final Completion.** For purposes of this Agreement, the "***Final Completion***" of the Project shall be deemed to have occurred on the date when the new pump station facility is operational, all regulatory agencies have approved final inspections and all submittals required hereunder have been delivered, including copies of all transferable warranties. The Parties agree that Developer will cease providing its services upon Final Completion, with the exception of the obligations identified in Section 2.10. Developer's final completion shall be a condition precedent to occupancy of the Leased Premises and to the receipt of either a temporary certificate of occupancy or a final certificate of occupancy.

**Section 2.9 Ownership and Operation of the Project.** The Project shall be solely owned and operated by City. After Final Completion, Developer shall provide a one (1) year warranty limited to construction and design defects (and specifically excluding any maintenance or repairs or issues necessitated by wear and tear). Except for Developer's obligations in connection with such one (1) year warranty period, City will be solely and fully responsible for the complete and full operation, maintenance, and repairs of the Project and Developer shall have no further obligations relating to the Project after Final Completion.

**Section 2.10 Developer's Services.** Developer will hire appropriately licensed third parties to develop and construct the Project and will manage, supervise and coordinate the licensed third parties as

needed to effectuate a complete code and permit compliant Project (the “*Services*”). Developer’s obligations, responsibilities and duties under this Agreement do not include, and Developer is not itself preparing, any design or engineering plans or specifications, or performing any of the construction or directly furnishing any of the materials required for the Project. Developer has engaged and designated Kimley-Horn and Associates, Inc. (“*Engineer*”) as the engineer of record for the Project. Developer will engage Straticon, LLC or another licensed Florida contractor (the “*General Contractor*”) as the general contractor and for the Project. Developer will enter into a separate construction agreement (the “*General Contract*”) with the General Contractor.

Section 2.11 **Limitation of Developer’s Liability.** Developer and Developer’s direct and indirect shareholders, affiliates, members, managers, officers, directors, and employees (“*Related Parties*”) entire liability under this Agreement shall be limited to and shall not exceed the amount of the Total Contribution.

Section 2.12 **Deemed Approval by City.** Whenever Developer shall be required under the terms of this Agreement to obtain the approval of City with respect to a matter, City shall be deemed to have approved such matter if City fails to send Developer written notice of City’s disapproval of such matter within fifteen (15) business days after the date of Developer’s written request to City for seeking City’s approval or consent. This section does not apply to questions or issues pertaining to the City’s permitting process or regulatory requirements that have a defined application, submission, and license/permit issuance process.

### **ARTICLE 3**

#### **CONSTRUCTION FUNDS**

Section 3.1 **Project Costs.** Developer will provide pay applications (each, a “*Payment Application*”) that must be complete for City approval and include all reasonably requested supporting documentation. The City reserves the right to reject incomplete Payment Applications before making any payments for the Project. Developer shall not submit a Payment Application more frequently than once every month and the City will remit payment in accordance with the Florida Prompt Payment Act.

### **ARTICLE 4**

#### **REMEDIES**

Section 4.1 **City Default.** Upon a failure by City to pay any amounts or monetary obligations due and owing to Developer which is not cured within sixty (60) days following receipt of written notice by Developer specifying such default, Developer may, in its sole discretion, (i) elect to suspend/stop all Developer obligations hereunder until such outstanding obligations are paid, or (ii) elect to offset all, or part of, Developer’s obligations owing to City under the Lease, and such election shall not be deemed an event of default under the Lease by City nor shall such election prevent or prohibit Developer from seeking any and all other remedies to which it may be entitled to in equity or at law. Upon a breach of City’s representations and warranties set forth in Section 5.2 below, Developer may, in its sole discretion, elect to suspend/stop all Developer obligations hereunder until such breach is cured, and such election shall not prevent or prohibit Developer from seeking any and all other remedies to which it may be entitled to in equity or at law. Further, if Developer is unable to or fails to, for a reason beyond Developer’s control to obtain: (i) any and all information required for applications related to the Project; or (ii) any and all required permits for the Project; or (iii) any and all necessary and required consents and approvals from any governmental agency with authority over the Project, including without limitation consents or approvals related to the permitting process or technical aspects related to any municipal, county, or other governmental agency regulatory requirements for the Project, Developer may, in its sole discretion elect to suspend/stop all Developer obligations hereunder.

Section 4.2 **No Waiver.** No delay or omission of the non-defaulting party to exercise any right or remedy accruing upon the occurrence of a default or breach hereunder shall impair any such right or remedy, nor shall any such delay or omission be construed to be a waiver of any such right or remedy. The non-defaulting party may waive any right or remedy available to it upon the occurrence of a default, but no such waiver shall extend to or affect the rights or remedies of the non-defaulting party with respect to any other existing or subsequent defaults.

## **ARTICLE 5**

### **REPRESENTATIONS AND WARRANTIES**

Section 5.1 **Developer's Representations and Warranties.** Developer hereby represents and warrants to City as of the date hereof:

(a) That Developer is duly organized and validly existing in the State of Delaware and in good standing under the laws of and is authorized to conduct business in the State of Florida. Developer has full power and authority to execute, deliver and carry out the terms and provisions of this Agreement and has taken all necessary action to authorize the execution, delivery and performance of this Agreement, and this Agreement constitutes the legal, valid and binding obligation of Developer enforceable in accordance with its terms, subject to creditor's rights, bankruptcy and any other equitable principles.

(b) That Developer shall comply with all insurance requirements set forth in the General Contract and/or the contract with the Engineer.

Section 5.2 **City's Representations and Warranties.** City hereby represents and warrants to Developer as of the date hereof:

(a) The Approved Development Plan and the Approved Plans and Specifications have been reviewed and approved by all applicable building construction divisions within the City.

(b) The City, through CAM 21-0035 has waived the City's procurement and bidding requirements for this Agreement.

(c) This Agreement and the Approved Development Plan and the Approved Specifications and Plans shall comply with all applicable statutes, laws, ordinances and rules.

## **ARTICLE 6**

### **MISCELLANEOUS PROVISIONS**

Section 6.1 **Notices.** All notices given hereunder shall be made in writing and given to the addressee at the address specified below. Notices may be given by certified mail, return receipt requested, by overnight delivery, or by electronic delivery, or by hand delivery, and shall be effective upon receipt at the address of the addressee.

Section 6.2 **Assignment.** Developer may assign all of its right, title and interest in and to this Agreement to any affiliate of Developer without the consent of City; provided that such affiliate is not on the Scrutinized Companies list pursuant to Florida law as further defined in Section 6.9.

Section 6.3 **No Third-Party Beneficiaries.** This Agreement is solely for the benefit of the parties hereto and their successors and permitted assigns. No other person shall be deemed to be a third-

party beneficiary of this Agreement or any provision hereof or shall be entitled to enforce any rights hereunder or with respect hereto.

**Section 6.4 Relationship Between Parties.** The relationship of the Parties shall be limited to the Services. Nothing herein shall be deemed to create a partnership or joint venture between the Parties hereto, nor to authorize either of the Parties hereto to act as general agent for the other party. Neither of the Parties hereto shall have the power to borrow money or incur debt on behalf of or in the name of the other party hereto or to use or commit the credit of the other party hereto for any purpose, except as specifically set forth herein.

**Section 6.5 Force Majeure Events.** Except for obligations regarding the payment of money and the maintenance of insurance, whenever a period of time is herein prescribed for action to be taken by City or Developer, neither party shall be liable or responsible for, and there shall be excluded from the computation for any such period of time, any delays due to Force Majeure Events. For purposes hereof, Force Majeure Events shall consist of major incident of inclement weather (including tornado or hurricane), or hostile governmental action, civil commotion, or fire or other casualty, or any other circumstance beyond the reasonable control of City or Developer, as the case may be. If the work shall be stopped or delayed for a period of thirty (30) days or more by City or any other public or governmental authority under the control of City, it shall be deemed a Force Majeure Event.

**Section 6.6 Conflicts; Entire Agreement; Headings.** This Agreement represents the entire Agreement between City and Developer with regard to project management services related to the development of the Project and all prior agreements are superseded hereby. In the event of a conflict between the provisions of this Agreement and the Lease, this Agreement shall control. The headings and captions of various paragraphs of this Agreement are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

**Section 6.7 Governing Law and Waiver of Jury Trial.** This Agreement shall be governed and construed in accordance with the laws of the State of Florida with venue in Broward County, Florida. **THE PARTIES EXPRESSLY AGREE TO WAIVE A TRIAL BY JURY ON ALL ISSUES SO TRIABLE RELATED TO THIS AGREEMENT.**

**Section 6.8 Attorney Fees.** The prevailing party in any litigation shall be entitled to recover all reasonable costs and expenses incurred to enforce this Agreement, determine the duties, obligations or liabilities of the parties under this Agreement, or concerning the meaning, interpretation or enforceability of any provision contained in this Agreement, including reasonable attorneys' expenses, whether incurred during trial or on appeal. For purposes of this Section 6.8, a party will be considered to be the "prevailing party" if: (i) such party initiated the litigation and substantially obtained the relief which it sought (whether by judgment, voluntary agreement or action of the other party, trial or alternative dispute resolution process); (ii) such party did not initiate the litigation and either (A) received a judgment in its favor, or (B) did not receive judgment in its favor, but the party receiving the judgment did not substantially obtain the relief which it sought; or (iii) the other party to the litigation withdrew its claim or action without having substantially received the relief which it was seeking.

**Section 6.9 Scrutinized Companies.** Subject to *Odebrecht Construction, Inc., v. Prasad*, 876 F.Supp.2d 1305 (S.D. Fla. 2012), *affirmed*, *Odebrecht Construction, Inc., v. Secretary, Florida Department of Transportation*, 715 F.3d 1268 (11th Cir. 2013), with regard to the "Cuba Amendment," the Developer certifies that it is not on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or the Scrutinized Companies that Boycott Israel List created pursuant to Section 215.4725, Florida Statutes (2020), as may be amended or revised, and that it is not engaged in a boycott of Israel, and that it does not have business operations in

Cuba or Syria, as provided in Section 287.135, Florida Statutes (2020), as may be amended or revised. The City may terminate this Agreement at the City's option if the Developer is found to have submitted a false certification as provided under subsection (5) of Section 287.135, Florida Statutes (2020), as may be amended or revised, or been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or the Scrutinized Companies that Boycott Israel List created pursuant to Section 215.4725, Florida Statutes (2020), as may be amended or revised, or is engaged in a boycott of Israel or has been engaged in business operations in Cuba or Syria, as defined in Section 287.135, Florida Statutes (2020), as may be amended or revised.

**Section 6.10      Public Records.    IF THE DEVELOPER HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE DEVELOPER'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT CITY CLERK'S OFFICE, 100 NORTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA 33301; PHONE:**

<b>(954)</b>	<b>828-5002;</b>	<b>EMAIL:</b>
<b>PRRCONTRACT@FORTLAUDERDALE.GOV.</b>		

**Developer shall:**

1. Keep and maintain public records that ordinarily and necessarily would be required by the City in order to perform the service.
2. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes (2020), as may be amended or revised, or as otherwise provided by law.
3. Ensure that public records, kept and maintained by Developer, that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Term if the Developer does not transfer the records to the City.
4. Upon completion of this Agreement, transfer, at no cost, to the City all public records in possession of the Developer or keep and maintain public records required by the City to perform the Services. If the Developer transfers all public records to the City upon completion of this Agreement, the Developer shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Developer keeps and maintains public records upon completion of this Agreement, the Developer shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

**[THIS SPACE WAS INTENTIONALLY LEFT BLANK]**

EXECUTED to be effective as of the Effective Date set forth above.

**CITY OF FORT LAUDERDALE,**  
a municipal corporation of the State of Florida

By: 

Christopher J. Lagerbloom  
City Manager

Date: 6-8-21

ATTEST:

By: 

Jeffrey A. Modarelli, City Clerk



APPROVED AS TO FORM:  
ALAIN E. BOILEAU, CITY ATTORNEY

By: 

Rhonda Montoya Hasan  
Assistant City Attorney



WITNESSES:

LAS OLAS SMI, LLC, a Delaware limited liability company authorized to do business in the State of Florida

Eric Metz  
ERIC METZ  
[Witness print/type name]

Judith Stern  
JUDITH STERN  
[Witness print/type name]

By: David Filler  
David Filler, Manager

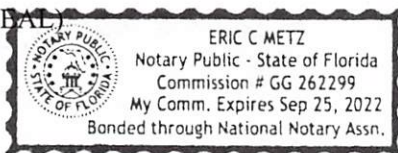
ATTEST:

(CORPORATE SEAL)

STATE OF FLORIDA :  
COUNTY OF BROWARD :

The foregoing instrument was acknowledged before me by means of ☒ physical presence or ☐ online notarization, this 27 day of April, 2021, by David Filler, as Manager for Las Olas SMI, LLC, a Delaware limited liability company authorized to do business in the State of Florida.

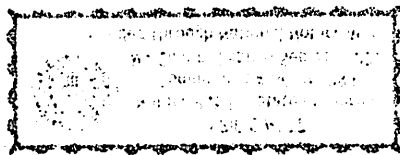
(SEAL)



Eric Metz  
(Signature of Notary Public – State of Florida)

ERIC METZ  
Print, Type or Stamp Commissioned Name of Notary Public)

Personally Known ☒ OR Produced Identification \_\_\_\_\_  
Type of Identification Produced \_\_\_\_\_





COMMISSION AGENDA ITEM  
DOCUMENT ROUTING FORM

Today's Date: May 26, 2021

2L

DOCUMENT TITLE: **MOTION APPROVING A DEVELOPMENT AGREEMENT WITH LAS OLAS SMI, LLC FOR PUMP STATION D-31 RELOCATION AND REPLACEMENT – (COMMISSION DISTRICT 2)**

COMM. MTG. DATE: **04.20.21** CAM #: **21-0029** ITEM #: **CM-11** CAM attached: ☒ YES ☐ NO

Routing Origin: CAO Router Name/Ext: Jen Allen x5036 Action Summary attached: ☒ YES ☐ NO

CIP FUNDED: ☐ YES ☒ NO

Capital Investment / Community Improvement Projects defined as having a life of at least 10 years and a cost of at least \$50,000 and shall mean improvements to real property (land, buildings, or fixtures) that add value and/or extend useful life, including major repairs such as roof replacement, etc. Term "Real Property" include: land, real estate, realty, or real.

1) Dept: TRANS/MOBIL Router Name/Ext: Ben Rogers # of originals routed: 1 Date to CAO: \_\_\_\_\_

2) City Attorney's Office: Documents to be signed/routed? ☒ YES ☐ NO # of originals attached: 2

Is attached Granicus document Final? ☒ YES ☐ NO Approved as to Form: ☒ YES ☐ NO

Date to CCO: 5.26.2021 RHONDA HASAN  
Attorney's Name

[Signature]  
Initials

3) City Clerk's Office: # of originals: 2 Routed to: Donna V./Aimee L./CMO Date: 5/27/2021

4) City Manager's Office: CMO LOG #: May 70 Document received from: \_\_\_\_\_

Assigned to: CHRIS LAGERBLOOM ☐ TARLESHA SMITH ☐ GREG CHAVARRIA ☐  
CHRIS LAGERBLOOM as CRA Executive Director ☐

☐ APPROVED FOR C. LAGERBLOOM'S SIGNATURE ☐ N/A FOR C. LAGERBLOOM TO SIGN

PER ACM: T. Smith (Initial/Date) PER ACM: G. Chavarria (Initial/Date)

☐ PENDING APPROVAL (See comments below)

Comments/Questions: \_\_\_\_\_

Forward 2 originals to ☐ Mayor ☒ CCO Date: 6-8-21

5) Mayor/CRA Chairman: Please sign as indicated. Forward \_\_\_\_\_ originals to CCO for attestation/City seal (as applicable) Date: \_\_\_\_\_

6) City Clerk: Forward \_\_\_\_\_ originals to CAO for **FINAL APPROVAL** Date: \_\_\_\_\_

7) CAO forwards \_\_\_\_\_ originals to CCO Date: \_\_\_\_\_

8) City Clerk: Scan original and forward 1 original to: BEN ROGERS, TRANS & MOBILITY

Attach \_\_\_\_\_ certified Reso # \_\_\_\_\_ ☐ YES ☐ NO

Original Route form to Glynis B./CAO  
TM21-