

Meeting Date: December 17, 2019

<input checked="" type="checkbox"/> Consent	<input type="checkbox"/> Regular
<input type="checkbox"/> Ordinance	<input type="checkbox"/> Public Hearing

## **I. EXECUTIVE BRIEF**

Recommended By: MB Army Wolf 11/15/19  
Department Director Date

Approved By: VC Baker 11/26/19  
County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

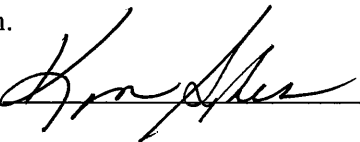
Fiscal Years	2020	2021	2022	2023	2024
Capital Expenditures					
Operating Costs					
External Revenues					
Program Income (County)					
In-Kind Match (County)					
NET FISCAL IMPACT	0.00	0.00	0.00	0.00	0.00
# ADDITIONAL FTE POSITIONS (Cumulative)					

Is Item Included in Current Budget: Yes ☒ No ☐  
Does this item include the use of federal funds? Yes ☐ No ☒

Budget Account No:  
Fund \_\_\_\_\_ Dept \_\_\_\_\_ Unit \_\_\_\_\_ Object \_\_\_\_\_  
Fund \_\_\_\_\_ Dept \_\_\_\_\_ Unit \_\_\_\_\_ Revenue Source \_\_\_\_\_

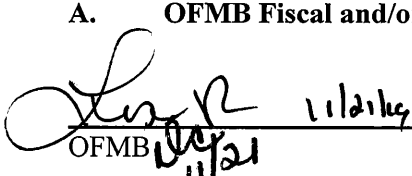
B. Recommended Sources of Funds/Summary of Fiscal Impact:


There is no fiscal impact to this item.

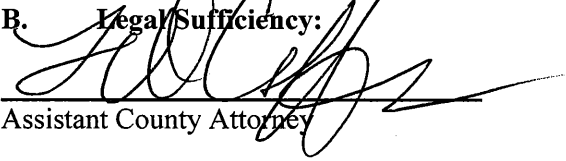
C. Departmental Fiscal Review: 

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development Comments:

  
OFMB 11/21/21

  
Contract Development and Control 11/25/19

B. Legal Sufficiency:   
Assistant County Attorney

C. Other Department Review:  
\_\_\_\_\_  
Department Director

This summary is not to be used as a basis for payment.

## **AIR SPACE LICENSE AND INDEMNITY AGREEMENT**

THIS AGREEMENT made this \_\_\_\_ day of \_\_\_\_\_, 2019 (the "Effective Date") by and between Palm Beach County, a political subdivision of the State of Florida, by and through its Board of Commissioners ("Owner") and 1370 South Ocean, LLC a Florida limited liability company with an address of 95 North County Road, Palm Beach, FL 33480 ("1370 South Ocean").

WHEREAS, Owner is the fee simple owner of certain real property and improvements located thereon, located at 205 N. Dixie Hwy., 401 N. Dixie Hwy., and 421 3<sup>rd</sup> St., West Palm Beach, Florida ("the Property");

WHEREAS, 1370 South Ocean is the Property Manager for the construction project located at 550 Quadrille Blvd., West Palm Beach, FL 33401, more commonly known as the One West Palm Project ("the Project");

WHEREAS, the Project abuts the Property and, during the construction of the Project, 1370 South Ocean's construction manager and contractors will require the use of a tower crane or cranes (collectively, the "Crane") in the performance of the construction work for the Project, the boom of which Crane will be required to swing over the Property into the air space of the Property (the "Air Space");

WHEREAS, 1370 South Ocean has notified Owner of its intended use of the Air Space above the Property in order to utilize the Crane for the construction of the Project, and the Owner has agreed to said use, on the condition that 1370 South Ocean provides and maintains suitable and adequate protections for safety, indemnification and insurance which will protect Owner from losses which may result from such activities, as delineated herein;

NOW, THEREFORE, in consideration of the foregoing covenants, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Recitals. The recitals set forth above are true and correct and incorporated herein by reference.
  2. License. Owner hereby grants 1370 South Ocean a non-exclusive license to utilize the Air Space above the Property for the purpose of maintaining and swinging the arc and boom of the Crane to move materials onto the project, within the radius parameters as depicted in Exhibit A attached hereto; provided, however, that (i) in no event shall 1370 South Ocean or 1370 South Ocean's contractors, subcontractors, employees or express agents, be allowed, at any time, to swing any live load, as defined as material being hoisted, over any portion of the Owner's Property; (ii) in no event shall the boom (or jib) or counter-boom (or jib) enter or be located less than 120 feet above the natural grade of Owner's Property or less than 40 feet above any improvements on the Owner's Property; (iii) in the use of the license provided hereby, 1370 South Ocean shall coordinate with Owner with respect to Owner's use of the Owner's Property, and shall operate the Crane and manage the swing radius of the boom (jib) and counter-boom (jib) of the Crane in a manner that does not unreasonably interfere with Owner's use of the Owner's Property or cause damage to Owner's Property or any improvements thereon; (iv) 1370 South Ocean shall permit only personnel who are trained and qualified according to standards set forth by the National Commission for the Certification of Crane Operators to operate, supervise and signal any crane used pursuant to this Agreement; and (v) 1370 South Ocean shall cease all use of the License and shall dismantle and remove all cranes used pursuant to this Agreement as soon as it is commercially feasible to do so in connection with the completion of the Project and in any event prior to the termination of the License (provided, for avoidance of doubt, that 1370 South Ocean or 1370 South Ocean's contractors, subcontractors, employees or express agents shall not have the right to use the ground level of the Owner's Property for the purpose of dismantling the Crane). All cost and liabilities associated with the use of the License shall be borne by 1370 South Ocean.
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3. Term. This non-exclusive license shall commence upon execution by both parties (the "Effective Date") and shall continue for a period of forty-eight (48) months (the "Term").
  4. Safety Plan. 1370 South Ocean shall submit to Owner a written safety plan governing the use of the Crane, the manufacturer's documentation regarding the structural integrity of the Crane being used, and the means and methods under which it is intended such Crane will be operated under while swinging over the Property. Reasonable comments, recommendations and requests by the Owner with respect to the use of the Crane shall be accommodated and incorporated into 1370 South Ocean's safety plan, as submitted to Owner, where commercially and financially practical/reasonable.
  5. Hurricane Action Plan. The parties recognize that the presence of a crane and other hoisting equipment during hurricane season poses serious concerns for public safety. 1370 South Ocean shall provide Owner with wind ratings for the Crane and a detailed action plan for proper protection of the Crane during a hurricane, which shall include the protective measures to be taken (disassembly, tie down supports, removing rigging, etc.), when protective measures will begin to be implemented before an impending storm, and what testing and inspections will be undertaken post hurricane to ensure the safety of the Crane. Reasonable comments, recommendations and requests by the Owner with respect to the safety of the Crane during a storm shall be accommodated and incorporated into 1370 South Ocean's Hurricane Action Plan, where commercially and financially practical/reasonable.
  6. Insurance. Prior to any occupation or use of the Air Space over the Property, and at all times thereafter, 1370 South Ocean shall provide to Owner proof of valid, in-force liability insurance, including Commercial General Liability with limits of at least Five Million Dollars (\$5,000,000.00) per occurrence, combined single limit for property damage and bodily injury. The Commercial General Liability policy shall be endorsed to include Palm Beach County Board of County Commissioners as an Additional Insured, and shall be endorsed to include upstream parties with a CG 20 38 04 13. Further, 1370 South Ocean shall provide to Owner, as a condition precedent to occupation or use of the Airspace over the Property the following insurance: Proof of professional Liability insurance for the Construction Manager with limits of at least Five Million Dollars (\$5,000,000.00) per claim. Proof of Commercial General Liability insurance for the Construction Manager, General Contractor, Crane Owner, Crane Operator involved in the Project. The sum of available limits between the Construction Manager, General Contractor, Crane Owner and Crane operator shall be at least Fifteen Million Dollars (\$15,000,000.00) per occurrence, combined single limit for property damage and bodily injury. Each party's Commercial General Liability policy shall be endorsed to provide coverage for upstream parties with a CG 20 38 04 13 or equivalent endorsement, and include 1370 South Ocean and Palm Beach County Board of County Commissioners as Additional Insureds. An umbrella or excess policy may be used to satisfy the required minimum limits. If the umbrella or excess policy that does not provide coverage on a pure and true follow-form basis, such policy shall be endorsed to include 1370 South Ocean and Palm Beach County Board of County Commissioners as Additional Insureds. The availability of coverage shall in no way limit 1370 South Ocean's liability.
  7. Indemnification. 1370 South Ocean shall indemnify, protect, defend and hold the Owner free and harmless at all times from and against any and all claims, liability, expenses, losses, costs, fines, citations, court judgments, insurance claims, penalties, consequential damages (Including restoration costs due to damage to Owner's Property, including finding and renting comparable space for Owner's operations during the restoration period), fees and damages (including attorney's fees at trial and appellate levels) and causes of action of every kind and character against, or in which Owner is named or joined, for any damage to property or the environment, bodily injury (including death) or any other
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claim arising in Tort, contract, or otherwise, incurred or sustained by any person or entity, arising out of, or incident to, or in connection with:

- a 1370 South Ocean's or its contractors, subcontractors, employees, any Crane operator, or agents who are permitted to access and use the Air Space above Owner's Property as part of the Project;
- b 1370 South Ocean's performance, non-performance or purported performance under this Agreement;
- c The assembly, erection, operation, manufacture, maintenance, repair, dismantlement, and/or operation and use of the Crane as part of the Project;
- d 1370 South Ocean's indemnification and defense obligations under this section shall arise regardless of any assertion or finding that Owner is liable by reason of a non-delegable duty.

In the event Owner shall be made a party to any litigation commenced against 1370 South Ocean or by 1370 South Ocean against any third party which relates to the Crane, then 1370 South Ocean shall protect and defend and hold Owner harmless and pay all costs and reasonable attorney's fees incurred by Owner in connection with such litigation, and any appeals thereof.

1370 South Ocean recognizes the broad nature of this indemnification provision and specifically acknowledges that Owner would not have entered into this Agreement without 1370 South Ocean's agreement to indemnify Owner and further acknowledges the receipt of good and valuable separate consideration provided by Owner in support hereof in accordance with the laws of the State of Florida.

The provisions of this Section shall survive expiration or termination of this Agreement.

- 8. No Limitation. Except as otherwise provided herein, 1370 South Ocean agrees that the rights granted to 1370 South Ocean hereunder shall in no way or manner limit, adversely impact in a material fashion, or restrict the right of Owner to use, improve, renovate or erect additional improvements on the Owner's Property in accordance with applicable law, or otherwise use the air rights associated with the Owner's Property.
  - 9. Maintenance and Repair. In the event that 1370 South Ocean damages the Property, Owner shall complete the necessary repairs at 1370 South Ocean's expense, provided that repair costs incurred must be commercially reasonable based on the nature and extent of the work required.
  - 10. Contact Numbers. 1370 South Ocean agrees to provide a list of emergency numbers to Owner and its authorized representatives to contact prior to commencement of any activities in the Air Rights over the Property.
  - 11. Termination. This Agreement may only be terminated by the earliest to occur of the following:
    - a Cessation of 1370 South Ocean's use of the Crane over the Property and 1370 South Ocean notifying Owner in writing that it no longer requires the use of the Crane over the Property;
    - b Mutual written agreement of the parties;
    - c Expiration of the insurance required by Section 6 without proof to Owner of renewal within 24 hours of expiration;
    - d If a serious operator or equipment safety failure occurs which impacts Owner's Property, including, but not limited to, material falling from the crane onto Owner's property, and 1370 South Ocean
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and Owner are unable to agree on implementation of remedial or corrective actions to prevent further occurrences, or

e. The expiration of the Term.

12. Entire Agreement. This Agreement constitutes an integrated agreement and incorporates all prior agreements, discussions, whether verbal or written, between and among the parties. This Agreement may only be modified by a written amendment signed by all parties hereto.
13. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which when taken together shall constitute one and the same instrument.
14. Governing Law and Venue. This Agreement shall be interpreted and construed with the laws of the State of Florida and venue shall be in a state court of competent jurisdiction in Pam Beach County.
15. Notice. All notices required in this Contract shall be sent by certified mail, return receipt requested, hand delivery or other delivery service requiring signed acceptance. If sent to the Owner, notices shall be addressed to:

FDO Director  
2633 Vista Parkway  
West Palm Beach, FL 33411  
Fax: (561) 233-0206

with a copy to:

Palm Beach County  
Attn: County Attorney  
301 North Olive Avenue  
West Palm Beach, FL 33401  
Fax: (561) 355-6461

If to 1370 South Ocean at:

1370 South Ocean, LLC  
95 North County Road  
Palm Beach, FL 33480

with a copy to:

LKLS+G  
Attn: Stuart Grossman  
201 South Biscayne Boulevard  
22<sup>nd</sup> Floor  
Miami, FL 33131  
E-mail: [sig@lklsg.com](mailto:sig@lklsg.com); [bds@lklsg.com](mailto:bds@lklsg.com)

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16. Nondiscrimination. The Owner is committed to assuring equal opportunity in the award of contracts and complies with all laws prohibiting discrimination. Pursuant to Palm Beach County Resolution R2017-1770, as may be amended, 1370 South Ocean warrants and represents that throughout the term of the Agreement, including any renewals thereof, if applicable, all of its employees are treated equally during employment without regard to race, color, religion, disability, sex, age, national origin, ancestry, marital status, familial status, sexual orientation, gender identity or expression, or genetic information. Failure to meet this requirement shall be considered default of the Agreement.
17. Subcontracting. 1370 South Ocean may not assign any rights, responsibilities or obligations of this License Agreement.
18. Palm Beach County Office of the Inspector General. Pursuant to Palm Beach County Code, Sections 2-421 through 2-440, as amended, Palm Beach County's Office of Inspector General is authorized to have the power to review past, present and proposed County contracts, transactions, accounts and records. The Inspector General's authority includes, but is not limited to, the power to audit, investigate, monitor, and inspect the activities of entities contracting with the County, or anyone acting on their behalf, in order to ensure compliance with contract requirements and to detect corruption and fraud. Failure to cooperate with the Inspector General or interfering with or impeding any investigation shall be a violation of Palm Beach County Code, Section 2-421 through 2-440, and punished pursuant to Section 125.69, Florida Statutes, in the same manner as a second degree misdemeanor.
19. No Third Party Beneficiary. No provision of this License Agreement is intended to, or shall be construed to, create any third party beneficiary or to provide any rights to any person or entity not a party to this License Agreement, including but not limited to any citizen or employees of the Owner and/or 1370 South Ocean.

**REMAINDER OF PAGE INTENTIONALLY LEFT BLANK**  
**SIGNATURE PAGE TO FOLLOW**

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the day and year first above written.

ATTEST:

SHARON R. BOCK  
CLERK & COMPTROLLER


LICENSOR: PALM BEACH COUNTY, a political subdivision  
of the State of Florida

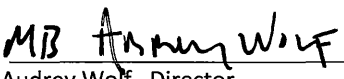
By: \_\_\_\_\_  
Deputy Clerk

By: \_\_\_\_\_, Mayor

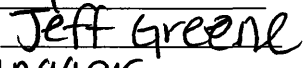
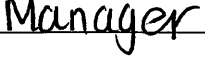
APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

APPROVED AS TO TERMS AND CONDITIONS:

By:  \_\_\_\_\_  
Dep. County Attorney

By:  \_\_\_\_\_  
Audrey Wolf, Director  
Facilities Development & Operations

LICENSEE: 1370 South Ocean, LLC  
a limited liability corporation of the State of Florida

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



## Swing Radius of the Boom and Counter-Boom over Owner's Property



