



12 South Center Street  
Bensenville, IL 60106

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[www.bensenville.il.us](http://www.bensenville.il.us)

VILLAGE BOARD

March 5, 2024

President  
Frank DeSimone

Board of Trustees  
Rosa Carmona  
Ann Franz  
Marie T. Frey  
McLane Lomax  
Nicholas Panicola, Jr.  
Armando Perez

Village Clerk  
Nancy Flynn

Village Manager  
Evan K. Summers

Mr. Chris McCullough  
829 Brentwood Drive  
Bensenville, Illinois 60106

Re: February 26, 2024 FOIA Request

Dear Mr. McCullough:

I am pleased to help you with your February 26, 2024 Freedom of Information Act ("FOIA"). The Village of Bensenville received your request on February 27, 2024. You requested copies of the items indicated below:

*"1. Any and all records of settlement with Old Republic Surety Company pertaining to settlement as a result of the abandonment of work for the senior center buildout project at Village Hall by Empire Construction."*

*"2. Any and all records of check or electronic deposit or transfer or any other payment from settlement with Old Republic Surety Company as a result of the abandonment of work for the senior center buildout project at Village Hall by Empire Construction."*

Your FOIA is hereby granted in full with the enclosed records.

Checking account numbers and routing numbers have been withheld from disclosure pursuant to Section 7(1)(b) of FOIA.

Pursuant to Section 9 of the FOIA, 5 ILCS 140/9, I am required to advise you that I, the undersigned Freedom of Information Officer, reviewed and made the foregoing determination to deny a portion of your FOIA Request as indicated. Should you believe that this Response constitutes an improper denial of your request, you may appeal such by filing a request for review within sixty (60) days of the date of this letter with the Public Access Counselor of the Illinois Attorney General's Office, Public Access Bureau, 500 South Second Street, Springfield, Illinois 62706; telephone 1-887-299-FOIA; e-mail: [public.access@ilag.gov](mailto:public.access@ilag.gov). You may also have a right of judicial review of the denial under Section 11 of the FOIA, 5 ILCS 140/11.

Do not hesitate to contact me if you have any questions or concerns in connection with this response.

Very truly yours,

  
Corey Williamsen  
Freedom of Information Officer  
Village of Bensenville

1. Any and all records of settlement with Old Republic Surety Company pertaining to settlement as a result of the abandonment of work for the senior center buildout project at Village Hall by Empire Construction.
2. Any and all records of check or electronic deposit or transfer or any other payment from settlement with Old Republic Surety Company as a result of the abandonment of work for the senior center buildout project at Village Hall by Empire Construction.

**RESOLUTION NO. R-138-2023**

**A RESOLUTION OF THE VILLAGE OF BENSENVILLE, DUPAGE AND COOK COUNTIES, ILLINOIS, AUTHORIZING THE VILLAGE MANAGER TO DIRECT LEGAL ACTION AGAINST OLD REPUBLIC SURETY COMPANY BY THE VILLAGE'S SPECIAL COUNSEL AND NEGOTIATE ANY SETTLEMENT**

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**WHEREAS**, the Village of Bensenville, DuPage and Cook Counties, Illinois (the “*Village*”) is a duly organized and existing municipal corporation created under the provisions of the laws of the State of Illinois and under the Illinois Municipal Code, as from time to time supplemented and amended; and

**WHEREAS**, the Village and Empire Construction Company (the “*Empire*”) entered into a contract wherein Empire would act as a general contractor responsible to perform construction work on the senior center buildout project at Village Hall; and

**WHEREAS**, Empire abandoned its work under the contract and ceased its operations and the Village declared Empire in default and terminated the contract; and

**WHEREAS**, pursuant to the contract and Illinois law, Empire secured a performance bond from Old Republic Surety Company guaranteeing payment and performance obligations required under the contract (the “*Bond*”); and

**WHEREAS**, the Village employed the law firm of Watt, Tieder, Hoffar & Fitzgerald LLP to pursue and enforce all its legal rights under the Bond; and

**WHEREAS**, the Bond provides, in part, that once the surety’s obligations are triggered, it must take steps to ensure the completion of the project and if it does not it will be deemed in default of its obligations and the Village is entitled to pursue any available legal remedy against Old Republic Surety Company to protect its interests.

**NOW, THEREFORE, BE IT RESOLVED** by the President and Board of Trustees of the Village of Bensenville, DuPage and Cook Counties, Illinois, as follows:

**Section 1.** That the above recitals and legislative findings are found to be true and correct and are hereby incorporated herein and made a part hereof, as if fully set forth in their entirety.

**Section 2.** The Village Manager is hereby authorized and directed to undertake all necessary discretionary action and further direct special counsel to the Village to pursue all appropriate legal recourse against Old Republic Surety Company as deemed prudent and appropriate by him and to further negotiate settlement of any potential Village claim.

**Section 3.** The officials, officers, employees, attorneys, and consultants of the Village are hereby authorized to take such further actions as are necessary to carry out the intent and purpose of this Resolution.

**Section 4.** If any section, paragraph, clause, or provision of this Resolution shall be held invalid, the invalidity thereof shall not affect any other provision of this Resolution.

**Section 5.** All ordinances, resolutions, motions, or orders in conflict with this Resolution are hereby repealed to the extent of such conflict.

**Section 6.** This Resolution shall be in full force and effect upon its passage, approval and publication as provided by law.

*(Intentionally Left Blank)*

**PASSED AND APPROVED** by the President and Board of Trustees of the Village of Bensenville, Illinois, this 30th day of November 2023.

APPROVED:



Frank DeSimone, Village President

ATTEST:



Nancy Quinn

Nancy Quinn, Village Clerk

Ayes: Carmona, Franz, Panicola, Perez

Nays: None

Absent: Frey, Lomax

## **TENDER AND RELEASE AGREEMENT**

This Tender and Release Agreement (“Agreement”) is made and entered into this 20th day of December, 2023 (“Effective Date”), by and among Old Republic Surety Company (“Surety”), the Village of Bensenville (“Obligee”), and F.H. Paschen S.N. Nielsen & Associates, LLC (“Completion Contractor”) (individually, “Party” and collectively, the “Parties”).

### **RECITALS**

**WHEREAS**, Obligee entered into a contract (“Original Contract”), attached hereto as Exhibit 1, with Empire Construction Company (“Principal”) on or about January 17, 2023, to perform certain work on the construction project commonly known as the 22-044 Senior Center Buildout – Village Hall (“Project”);

**WHEREAS**, on or about February 10, 2023, as required by law and under the terms of the Original Contract, the Principal and Surety made, executed, and delivered to Obligee a performance bond (“Performance Bond”) and payment bond (“Payment Bond”) (collectively referred to as the “Bond”) numbered JCN 7446428 and in the penal sum of \$812,500.00;

**WHEREAS**, Obligee declared Principal in default under the Original Contract and formally terminated Principal on or about June 8, 2023, including Principal’s right to continue its work under the Original Contract, and the Obligee provided Surety notice of the same;

**WHEREAS**, Obligee and Surety have discussed alternative arrangements for performance of the work and completion of the Project;

**WHEREAS**, Obligee and Surety have agreed to a complete and final resolution of the obligations of Surety under the Bond pursuant to which Obligee agrees to accept a contractor to perform the balance of the Original Contract;

**WHEREAS**, Surety has solicited bids for completion of the work for the Project from several contractors;

**WHEREAS**, pursuant to paragraph 5.3 of the performance bond the Surety has tendered Completion Contractor to Obligee to complete the Project and Obligee agrees to accept Completion Contractor;

**WHEREAS**, Obligee advised Surety that **\$473,870.50** is the remaining balance under the Contract (“Contract Balance” or “Balance of the Contract Price”);

**WHEREAS**, the bid of Completion Contractor is in the sum of \$817,146.50;

**WHEREAS**, through execution of this Agreement, Completion Contractor agrees to assumes all obligations of Principal under the Original Contract pursuant to the Completion Contract for a price of \$817,146.50 (“Completion Price”);

**WHEREAS**, Completion Contractor agrees to complete the remaining work under the Original Contract, including all approved change orders, and all other work described in any completion contract for the Completion Price; and,

**WHEREAS**, the term “Completion Contract” is not a separate agreement but means the construction contract between Owner and Completion Contractor, which is comprised of this Agreement and the Original Contract.

**NOW, THEREFORE**, based on the exchange of valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Surety, Obligee, and Completion Contractor agree to the following terms and conditions:

## TERMS

1. Recitals. The above Recitals are contractual and incorporated herein by reference.
2. Balance of Contract Price Held By Obligee. Obligee and Surety acknowledge that the Balance of the Contract Price, as defined by the Performance Bond, being held by the Obligee in connection with the Original Contract is as follows:

Description	Amount
Original Contract Amount	\$812,500.00
Approved Change Orders	(\$62,195.00)
Adjusted Original Contract Amount	\$750,305.00
Payments to Contractor	(\$276,434.50)
<b>Contract Balance</b>	<b>\$473,870.50</b>

3. Tender of Completion Contractor. Pursuant to Paragraph 5.3 of the Performance Bond, Surety hereby tenders to Obligee and Obligee accepts Completion Contractor for the completion of all of the obligations under the Original Contract. Obligee agrees to administer the Original Contract with Completion Contractor in the same manner and upon the same terms as set forth in the Original Contract, except that Obligee agrees to pay Completion Contractor the sum of \$817,146.50 in accordance with the Original Contract and as otherwise agreed to between Obligee and Completion Contractor. Pursuant to Paragraph 7 of the Performance Bond, Surety agrees to pay this Completion Price, plus \$180,000.00 representing a mutually agreed upon settlement of liquidated damages and attorneys' fees, plus \$17,100 representing a mutually agreed upon payment for future warranty work (“Warranty Buy-Out Payment”), minus the Balance of the Contract Price, leaving a deficit of \$540,376.00 after the Contract Balance is exhausted. In connection with this deficit, Obligee and Surety agree that Surety shall pay Obligee the sum of \$540,376.00 (“Surety Payment”) upon the Parties’ execution of this Agreement. The Surety’s Payment is broken down as follows:

Description	Amount
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Completion Price	\$817,146.50
Mutually Negotiated Settlement for Damages per Paragraph 7 of the Performance Bond	\$180,000.00
Mutually Negotiated Settlement for Warranty – Warranty Buy-Out Payment	\$17,100.00
Balance of the Contract Price	(\$473,870.50)
<b>Surety's Payment</b>	<b>\$540,376.00</b>

4. Examination and Investigation. Completion Contractor agrees that it examined the Original Contract and certifies that it is familiar with all of the terms and conditions of the Original Contract, which are incorporated herein by reference, and agrees to be bound by them in their entirety. Completion Contractor diligently investigated and inspected the Project jobsite and is familiar with the jobsite conditions including: any materials available but not yet incorporated into the Project, the nature and status of work previously performed by Principal, if any, and the work remaining to be performed under the Original Contract. Completion Contractor confirms that it has investigated and is informed as to the status and conditions affecting the work to be done and that no representations with respect to same have been made by Surety, Obligee, or any of their representatives. Surety has made no warranties or representations, express or implied, to Completion Contractor with respect to the Original Contract or the Project. Surety has made no representation or warranty regarding any future performance of any subcontractor or supplier, the availability of any leased equipment or facilities, or the availability of any materials supplied or to be supplied to the Project. Completion Contractor considered all of the Original Contract documents and jobsite conditions and observations in reaching its Completion Price.

5. New Bonds. Completion Contractor shall furnish to Obligee performance and payment bonds in the amount of \$817,146.50 issued by a surety meeting the requirements set forth in the Original Contract (“New Bonds”) on the same forms as the Performance Bond and the Payment Bond issued by Surety on behalf of the Original Contractor. Completion Contractor shall furnish the New Bonds to Obligee within five (5) calendar days of the Effective Date of this Agreement. Failure to obtain the bonds required by this Article shall constitute a material breach of this Agreement justifying termination.

6. Insurance. Completion Contractor must comply with all insurance requirements set forth in the Original Contract, with the coverages and in the amounts specified by the Original Contract document. Within five (5) calendar days of the Effective Date of this Agreement, Completion Contractor shall deliver certificates of insurance confirming that the insurances required under the Original Contract have been obtained and that the Obligee and Surety have been named as additional insureds. Failure to obtain this insurance, permitting this insurance to lapse, or failing to provide certificates required by this Article shall constitute a material breach of this Agreement justifying termination. Completion Contractor shall not proceed with any work until the insurances and certificates have been obtained and provided to Obligee and Surety.

7. Prosecution and Time of Work by Completion Contractor. The prosecution of the work will commence no later than five (5) calendar days from Completion Contractor's receipt of

a Notice to Proceed from Obligee or its representatives. Completion Contractor agrees to diligently proceed with and to complete the work in accordance with the terms and conditions of the Completion Contract and shall achieve Substantial Completion, as defined in the Original Contract, within ninety (90) calendar days from receipt of a Notice to Proceed from the Obligee or its representatives. Failure to timely achieve Substantial Completion will result in the assessment of liquidated damages against Completion Contractor and its surety as allowed in the Original Contract. Final completion shall be attained within thirty (30) calendar days from Substantial Completion. Any and all requests for a time extension shall be handled, managed and governed by the terms of the Original Contract.

8. Reduction of Performance Bond Penal Sum and Warranty Buy-Out Payment. Obligee agrees that the penal sum of Surety's Performance Bond is reduced by the Surety Payment. Obligee expressly reserves the right to make future claims against the Performance Bond for the sole purpose of claims related to warranty work, however, the Obligee agrees to first exhaust the Warranty Buy-Out Payment before making a claim against the Performance Bond. If the warranty work cannot be corrected for less than the Warranty Buy-Out Payment, the Obligee may make a claim against the Performance Bond. The Obligee's claim shall contain information related to the defective work, the corrective work and an accounting of the Warranty Buy-Out Payment. The Obligee shall be entitled to retain the Warranty Buy-Out Payment to the extent it is unused. This provision shall survive termination or expiration of this Agreement.

9. Payment Bond to Remain in Effect. Surety's Payment Bond remains in full force and effect for work performed by Principal under the Contract and Surety retains all obligations, rights, and defenses pursuant to the Payment Bond. Surety's Payment Bond shall not apply to or cover Completion Contractor or any of Completion Contractor's subcontractors and/or suppliers for any work performed and/or materials delivered under the Completion Contract, and Surety shall not be a co-surety with Completion Contractor's surety. Surety's Payment Bond obligations run solely to those who performed work, labor, or supplied materials or equipment to the Project on or before June 8, 2023. All payments made by Surety on its Payment Bond, including payments made prior to the Effective Date of this Agreement, shall be credited against and applied to reduce the penal limit of the Payment Bond. Surety shall not be obligated to expend more than the penal limit of its Payment Bond. This provision shall survive termination or expiration of this Agreement.

10. Release of Surety. In consideration for, among other things, the Surety Payment of \$540,376.00 to Obligee, Obligee, for itself, and, but not limited to, its Directors, Officers, Board Members, Trustees, Agents, Successors, Assigns, and with the exception of potential warranty claims as set forth in Paragraph 8 above and the Payment Bond as set forth in Paragraph 9 above, releases, acquires, holds harmless and fully and forever discharges Surety, and, but not limited to, its Directors, Officers, Board Members, Trustees, Agents, Successors, Assigns, Parent, Subsidiaries, Affiliates and Reinsurers, from any and all claims, demands, rights, obligations, causes of action, and/or otherwise of whatever kind or nature, whether known or unknown, past, present, or future under or arising out of the Original Contract, the Principal, Completion Contractor, the Performance Bond, the Project, and Tria Architecture, Inc.'s additional services in the amount of \$54,500. It is acknowledged that Tria Architecture has confirmed that payment of

\$54,500.00 received from the Obligee is full and final payment for their services on the Project. There is no misunderstanding in this regard.

11. Reservation of Surety's Rights. Parties hereto recognize and acknowledge that nothing contained in this Agreement shall alter, amend, affect, or constitute a waiver of: (a) any rights and claims of Surety, whether contractual, at common law, or otherwise, that Surety, or any of its affiliates or reinsurers, may have against any other third-parties not a party to this Agreement; and, (b) any other rights or claims pursuant to written indemnity agreements executed in favor of Surety, or any of its affiliates, by other third-parties not a party to this Agreement, including, but not limited to, such rights as Surety may have against Principal, its principals, and any other corporate or individual indemnitors of Principal.

12. Obligee Liability to Completion Contractor. Completion Contractor agrees to make demand and look solely and exclusively to Obligee in the event of any breach or default by Obligee of this Agreement and/or the Completion Contract.

13. No Modification. This Agreement, and all the documents referenced hereto, constitute the entire understanding between the parties with respect to the subject matter contained herein and cannot be amended or modified except by a writing duly executed by all Parties.

14. Notice. Any notice required to be made under the terms of this Agreement must be in writing and may be delivered by email or by overnight mail, as follows:

To Obligee:

Evan K. Summers, Village Manager  
Village of Bensenville  
12 S. Center St,  
Bensenville, IL 60106  
esummers@bensenville.il.us

With copy to:

Lauren E. Rankins  
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.  
10 S. Wacker Dr., Suite 1100  
Chicago, Illinois 60606  
lrankins@wattieder.com

To Surety:

Lisa Frasier  
Old Republic Surety Company  
18500 W. Corporate Drive, Suite 170  
Brookfield, WI 53045  
LFraser@orsurety.com

With copy to:

Janet Doherty  
The Vertex Companies, LLC  
133 N. Jefferson St., Third Floor  
Chicago, IL 60661  
[jdoherty@vertexeng.com](mailto:jdoherty@vertexeng.com)

With copy to:

Michael J. Weber  
Dinsmore & Shohl LLP  
222 W. Adams, Suite 3400  
Chicago, IL 60606  
[michael.weber@dinsmore.com](mailto:michael.weber@dinsmore.com)

To Completion Contractor:

Mr. Matthew Muir  
F.H. Paschen S.N. Nielsen & Associates, LLC  
5515 N. East River Road  
Chicago, IL 60656  
[mmuir@fhpaschen.com](mailto:mmuir@fhpaschen.com)

15. Choice of Law. This Agreement and any dispute of any nature, any claim, or any suit arising out of either this Agreement and the Original Contract shall be governed by the laws of the State of Illinois in every respect.

16. Construction and Interpretation of the Agreement. This Agreement is fully integrated, and is incorporated documents constitute the complete agreement between the Parties. No prior statements, oral or written, course of dealing or trade usage shall supplement or alter the terms of this Agreement. All discussions and prior agreements are merged herein. This Agreement replaces and supersedes any statements or representations made by the Parties, their consultants, agents and/or attorneys.

17. No Third-Party Rights. Nothing contained in this Agreement is intended to create any rights in favor of, or otherwise in any manner insure to the benefit of, any person or legal entity not a signatory hereto and the Parties hereto reserve all rights, remedies, and defenses they may have against any such person or legal entity not a signatory hereto. This Agreement binds and inures to the benefit of and is enforceable by the successors and assigns of the Parties.

18. Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

19. Review of Agreement. All Parties acknowledge that they had an opportunity to review this Agreement with counsel of their choosing prior to executing same.

20. No Joint Venture or Partnership Created. The relationship between the Parties shall be limited to the performance of this Agreement, which shall be construed and be deemed to be a specific arrangement for the performance of the Project only. Nothing herein contained shall be construed to constitute the Parties as partners or joint ventures or to constitute either as agent of the other.

21. No Admission of Liability. Nothing contained herein shall be deemed an admission of liability on the part of any party to this Agreement.

22. Headings. The headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

23. Numbers. Words shall take precedence over numerals in the event of a discrepancy.

24. Facsimile and Email Signatures. Signatures transmitted by facsimile or email shall be accepted and deemed to be original signatures and shall be binding on the Parties upon signing.

25. Authorization to Execute. Each of the undersigned individuals represents, warrants, and certifies that s/he is authorized to execute this Agreement in the capacity indicated.

**REMAINDER OF PAGE INTENTIONALLY LEFT BLANK**

IN WITNESS THEREOF, the Parties have executed this Agreement on the date(s) appearing below.

**OBLIGEE:**

Village of Bensenville

By: 

Name: Evan X. Summers

Its: Village Manager

Dated: 12-29-2023

**SURETY:**

Old Republic Surety Company

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

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

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

**COMPLETION CONTRACTOR:**

F.H. Paschen S.N. Nielsen & Associates, LLC

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

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

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

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IN WITNESS THEREOF, the Parties have executed this Agreement on the date(s) appearing below.

**OBLIGEE:**

Village of Bensenville

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: \_\_\_\_\_

**SURETY:**

Old Republic Surety Company

By: Lisa Frasier \_\_\_\_\_  
Name: Lisa Frasier \_\_\_\_\_  
Its: Vice President, Claims \_\_\_\_\_  
Dated: 12/28/2023 \_\_\_\_\_

**COMPLETION CONTRACTOR:**

F.H. Paschen S.N. Nielsen & Associates, LLC

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: \_\_\_\_\_

20138971.1 104672.00001

IN WITNESS THEREOF, the Parties have executed this Agreement on the date(s) appearing below.

**OBLIGEE:**

**Village of Bensenville**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: \_\_\_\_\_

**SURETY:**

**Old Republic Surety Company**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Dated: \_\_\_\_\_

**COMPLETION CONTRACTOR:**

**F.H. Paschen S.N. Nielsen & Associates, LLC**

By: John  
Name: Joe Schmitz  
Its: Vice President  
Dated: 1/8/24

20138971.1 104672.00001



## *Legal Counsel.*

DINSMORE & SHOHL LLP  
222 W. Adams Street ^ Suite 3400  
Chicago, IL 60606  
[www.dinsmore.com](http://www.dinsmore.com)

Michael J. Weber  
(312) 775-1742 (direct) ^ (312) 372-6085 (fax)  
[Michael.Weber@Dinsmore.com](mailto:Michael.Weber@Dinsmore.com)

January 10, 2024

### ***DELIVERED MY OVERNIGHT MAIL***

Evan K. Summers  
Village Manager  
Village of Bensenville  
12 South Center St.  
Bensenville, IL 60106

Re: 22-044 Senior Center Buildout – Village Hall

Dear Evan:

I am legal counsel for Old Republic Surety Co. Pursuant to the Tender and Release Agreement entered into by the Village of Bensenville, Old Republic and F.H. Paschen, enclosed is Old Republic's check No. 0125515, payable to the Village of Bensenville, in the amount of \$540,376.00.

Sincerely yours,

DINSMORE & SHOHL LLP

A handwritten signature in black ink, appearing to read "Michael J. Weber".

Michael J. Weber

cc: Lauren E. Rankins (by email)

OLD REPUBLIC SURETY COMPANY

12-5  
750

PAY TO: VILLAGE OF BENSENVILLE

FIVE HUNDRED FORTY THOUSAND THREE HUNDRED SEVENTY-SIX DOLLARS AND NO  
CENTS \$540,376.00

For PER TENDER AND RELEASE AGREEMENT  
Principal EMPIRE CONSTRUCTION COMPANY  
Policy JCN7446428 Claim No. 00068489

Date of loss 6/01/2023

MAIL TO: MICHAEL J. WEBER, ESQ.  
DINSMORE & SHOHL LLP  
222 WEST ADAMS ST. SUITE 3400  
CHICAGO, IL 60606

PAYABLE THROUGH  
BMO HARRIS BANK, NA

AUTHORIZED SIGNATURE

THE ORIGINAL DOCUMENT IS PRINTED ON PAPER WHICH CONTAINS A TRUE WATERMARK - HOLD TO LIGHT TO VIEW