

PROFESSIONAL SERVICES AGREEMENT BETWEEN THE CITY OF ALAMEDA AND
XG COMMUNITIES, LLC A DELAWARE LIMITED LIABILITY COMPANY ("5 BARS")
FOR WIRELESS TELECOMMUNICATIONS FACILITIES CONSULTING, MARKETING
AND MANAGEMENT SERVICES FOR CITY ASSETS

This Professional Services Agreement ("**Agreement**") is made and entered into on September ___, 2017 (the "**Effective Date**") between the City of Alameda ("**CITY**") and XG Communities, LLC Delaware limited liability company doing business as 5 BARS Communities ("**5 BARS**"), each a "**PARTY**" and collectively the "**PARTIES**", with reference to the following facts and intentions, which the PARTIES agree are true and correct to the best of their knowledge and belief:

BACKGROUND

- A. CITY is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City.
- B. 5 BARS is a limited liability company formed under the laws of Delaware.
- C. 5 BARS offers master planning services and tools that merge technical expertise on coverage needs with surveys of existing and forecasted wireless coverage conditions. 5 BARS evaluates that information to identify existing municipal assets that can meet wireless coverage needs.
- D. 5 BARS provides planning tools so that subscribing municipal corporations may access the information and identify intelligent options and solutions for the processing of applications for wireless telecommunications facilities on a real time basis.
- E. Subject to the terms of this Agreement, CITY desires to engage 5 BARS to provide wireless consulting, management and development services related to the use of specified CITY assets for the purpose of planning and implementing a marketing plan for Wireless Telecommunications Facilities (as that term is defined in Section 2, below), as further described herein.
- F. Subject to the terms of this Agreement, CITY desires to engage 5 BARS to manage CITY owned underutilized assets on terms that maximize revenue and minimize planning impacts and visual blight.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing background, which is incorporated into the operative provisions of this Agreement by this reference, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the PARTIES AGREE as follows:

1. **Term.** This Agreement shall be effective on the date it is executed by all PARTIES and shall be in effect for an initial term of five (5) years, with four (4) five year renewals subject to the written mutual consent of the PARTIES. The full potential term of the Agreement is twenty-five (25) years (“**Agreement Term**”).

2. **Scope and Nature of Services.** 5 BARS shall provide the services described in this section (“**Services**”) for the purposes of 5 BARS's planning, marketing, sublicensing, development, maintenance, and/or operation of certain tower(s), pole(s), building(s), street furniture, and related assets (“**City Asset(s)**”), which 5 BARS proposes to locate or cause to be located on property owned or controlled by the CITY (“**City Property**”) for the purposes of promoting, transmitting or facilitating wireless communication via Small Cell or Micro- Wireless facilities. “**Small cell**” means a wireless telecommunications facility, as defined in paragraph (2) of subdivision (d) of Government Code Section 65850.6 (“**Wireless Telecommunications Facility**”).

“**Small cell**” includes a micro wireless facility, but does not include the following:

- (i) Wireline backhaul facility, which is defined to mean a facility used for the transport of communications data by wire from wireless facilities to a network.
- (ii) Coaxial or fiber optic cables that are not immediately adjacent to or directly associated with a particular antenna or collocation.
- (iii) Wireless facilities placed in any historic district listed in the National Park Service Certified State or Local Historic Districts or in any historical district listed on the California Register of Historical Resources or placed in coastal zones subject to the jurisdiction of the California Coastal Commission.
- (iv) The underlying vertical infrastructure.

The definition of “**Small cell**” may be amended hereafter as provided in State Law.

“**Micro wireless facility**” means a small cell that is no larger than 24 inches long, 15 inches in width, 12 inches in height, and that has an exterior antenna, if any, no longer than 11 inches.

“**Right of Way**” means any city controlled right of way and any city controlled public utility easement.

Small Cells, including Micro wireless facilities will hereafter be referred to as “**Small Wireless Telecommunications Facilities**”. CITY in its sole discretion shall identify a list of City Assets which 5 BARS may sublicense to Wireless Service Providers or otherwise cause the installation of Small Wireless Telecommunications Facilities (“**Asset List**”). 5 BARS may not sublicense to Wireless Service Providers or otherwise cause the installation of any Wireless Telecommunications Facilities on City Assets which are not on the Asset List. At any time CITY may add or remove any asset from the Asset List upon notification to 5 BARS in writing.

a. **Consulting Services.** Within 180 days of the effective date of this Agreement, and every year thereafter, 5 BARS shall provide CITY the following consulting services at no cost to CITY: a comprehensive radio frequency (“**RF**”) analysis, which will, among other things,

(i) describe, using state-of-the-art metrics, the current state of wireless coverage within CITY's jurisdiction for each major wireless telecommunications carrier, (ii) identify key areas of multiple wireless broadband service provider coverage needs (“**Coverage Needs**”), (iii) identify potentially available City Assets (whether identified on the Asset List or not) that would satisfy or partially satisfy Coverage Needs, and (iv) provide RF modeling to show how the selection of additional sites for Wireless Telecommunications Facilities will address Coverage Needs. The items referred to in clauses (i), (ii), and (iii) from the preceding sentence are hereinafter referred to as the “**Master Plan**” while the items referred to in clauses (i), (ii), (iii), and (iv) in the preceding sentence are hereinafter referred to as the “**Consulting Services**”. The Master Plan shall also include an RF benchmark survey, capacity and density analysis. This work includes preparing interference studies, terrain profile data and preparation of a base map. Wireless Marketing proposals must be tailored to meet the unique needs of individual carriers. Wireless Master Plan documents and data must be provided to the City in its native electronic file format.

As part of the Consulting Services, 5 BARS shall create and maintain a wireless asset inventory, upload all City owned asset inventory into City's GIS database. 5 BARS will prepare marketing proposals for individual carriers which the City must review and pre-approve before solicitation to carriers. 5 BARS will act as the main point of contact with carriers through the marketing process and into the sublicensing and long-term maintenance and repair of the Small Wireless Telecommunication Facilities. 5 BARS will respond to resident questions and concerns regarding Small Wireless Telecommunication Facilities and will ensure the maintenance and proper repair for each site.

To ensure CITY is capitalizing on opportunities to improve wireless broadband service to the community, for the duration of the Agreement Term, 5 BARS shall also provide, on a quarterly basis, a written update summarizing investments, technology changes, gross receipts, financial gains and provider plans, and on an annual basis, ongoing RF analysis with reports, feasibility analysis, pricing and fee recommendations, form factor and aesthetic policy development, technology refresh and advancement updates, and other consultation specific to wireless broadband service providers, unless 5 BARS and CITY mutually and expressly agree to waive the annual ongoing study. The Consulting Services may be used by CITY for the enhancement and evolution of the Master Plan.

b. **Marketing Services.** At no cost to CITY, 5 BARS shall market the Master Plan to wireless carriers, cable companies, internet service providers (ISPs), street light providers, and Internet of Things (“**IoT**”) companies, (“**Wireless Services Providers**”) to obtain their feedback and interest in locating and/or collocating Small Wireless Telecommunications Facilities on any existing and/or proposed site(s) included in the Master Plan. CITY grants 5 BARS the exclusive right to market, license and sublicense, and construct upon, at 5 BAR's sole cost and expense, those City Assets which are on the Asset List (the “**Listed Assets**”) for the development of Small Wireless Telecommunications Facilities. 5 BARS shall market the Master Plan to all Wireless Services Providers equally, and without any discrimination and/or favoritism between Wireless Services Providers, with a goal of ensuring that residents, visitors, and businesses within CITY's jurisdiction receive the maximum benefit of all available services from all existing wireless services providers.

c. **Management Services.** During the Agreement Term, 5 BARS may at any time request in writing that CITY add City Assets to the Asset List. City may approve or deny such request for any reason or no reason and CITY shall notify 5 BARS of such determination in writing. If the City agrees to add items to the Asset list, the PARTIES shall enter into a License Agreement as to the City Assets to be added to the Asset List in a form that is substantially consistent with the form set forth in Exhibit "A" to this Agreement.

d. **Installation.** Upon Wireless Facilities. For the purpose of sublicensing Small Wireless Telecommunications Facilities, 5 BARS or an affiliate of 5 BARS, at no cost to CITY, shall construct or cause the construction of Small Wireless Telecommunications Facilities on the properties subject to a License Agreement ("Licensed Properties"), and sublicense the Licensed Properties (either as improved with Small Wireless Telecommunications Facilities, or subject to improvement with Small Wireless Telecommunications Facilities) in accordance with the terms of this Agreement and a license agreement to be executed for each Listed Asset (provided, however, that a single license agreement may be utilized for multiple or all sites that are the subject of this Agreement). 5 BARS understands and acknowledges that CITY shall have total discretion on whether to approve any license or sublicense and its terms. 5 BARS further understands and acknowledges that it must comply (or cause compliance) with and receive (or cause receipt of) all necessary entitlements and permits from CITY, including but not limited to complying (or causing compliance) with CITY's ordinance governing Wireless Telecommunications Facilities, all applicable building codes and public works requirements (including obtaining any necessary encroachment permits or permits to block traffic), as well as complying (or causing compliance) with and receiving (or causing receipt of) all necessary and applicable permits from any other regulatory agency, before 5 BARS undertakes (or causes the undertaking of) any construction on a City Asset.

e. **Exclusions.** Notwithstanding anything in this Agreement to the contrary, this Agreement does not do any of the following:

- (i) Require or allow 5 BARS to market, license, sublicense, and/or construct Wireless Telecommunications Facilities on City Assets that are not Listed Assets.
- (ii) Grant any rights to 5 BARS regarding macro-cell site development or deployment of anything other than Small Wireless Telecommunication Facilities.
- (iii) Grant any rights to 5 BARS regarding Small Cell Wireless Facilities agreements between the CITY and Wireless Service Providers which exist at the time of execution of this Professional Services Agreement.
- (iv) Require or allow the provision of Services by 5 BARS for facilities licensed to any municipal, county, district, agency, state or Federal government for stations in the Private Land Mobile Radio Services, Maritime Radio Services, Aviation Radio Services, other stations designated for Homeland Security or Law Enforcement communications or the circuits necessary to support such facilities ("**Excluded Services**"). This Agreement shall not limit, control, or govern the provision of the Excluded Services.

(v) Grant any rights to 5 BARS for facilities for high speed data transmission, pursuant to any future agreement(s) between the City and the Corporation for Education Network Initiatives in California ("CENIC") whether for commercial or non-commercial purposes and whether through fiber, wireless or by any other means.

3. **Telecommunications Ordinance Revision.** The PARTIES acknowledge that within one hundred eighty (180) days after the Effective Date, 5 BARS will provide CITY with recommended revisions to its telecommunications ordinance, and will attend any related Planning Commission or City Council meetings as requested by City staff, and assist in preparing related staff reports. City Staff will consider in good faith whether 5 BARS' recommendations should be taken to the City Council for its consideration.

4. **Right of Entry Agreement.** If the PARTIES enter into a License Agreement that substantially conforms to the form attached as Exhibit "A" with respect to the Licensed Properties, CITY and 5 BARS shall enter into a mutually agreeable Right of Entry Agreement to allow 5 BARS and its employees, agents, contractors, engineers, and surveyors to enter the Licensed Properties. The Right of Entry Agreement shall authorize 5 BARS to determine, at its own cost, the physical condition of the Licensed Property, the environmental history of the Licensed Property, and the feasibility or suitability of the designated Licensed Property for 5 BARS' use ("**Due Diligence Investigation**"). Activities conducted in connection with 5 BARS' Due Diligence Investigation shall be at the sole expense and cost of 5 BARS. The PARTIES may also enter into a Right of Entry Agreement for any Listed Asset prior to approval of a License Agreement. The proposed form of Right of Entry Agreement is attached hereto and incorporated by reference herein as Exhibit "B".

5. **CITY-Owned Wireless Telecommunications Facilities and CITY Licenses.** CITY shall retain ownership of all CITY leases, licenses, and other agreements in existence as of the Effective Date with wireless providers. CITY shall retain ownership of any Wireless Telecommunications Facilities CITY subsequently develops (or allows to be developed) on City Property for CITY's own non-commercial use, and any facility on property not on the Asset List. 5 BARS and/or its sublicensees shall own the Small Wireless Telecommunications Facilities developed on Listed Assets pursuant to this Agreement, except to the extent that such facilities or supportive structures become fixtures or are granted to and accepted by CITY, and except to the extent that the Small Wireless Telecommunications Facilities cannot be removed from City Assets without causing irreparable damage to such City Assets. CITY leases, licenses, and other agreements in existence as of the Effective Date and any CITY owned/developed Wireless Telecommunications Facilities in existence as of the Effective Date shall not be subject to this Agreement and/or any accompanying agreements between CITY and 5 BARS, unless specifically designated otherwise in writing.

6. **Compensation.**

a. **65% (CITY) / 35% (5 BARS) Revenue Shares.** For Licensed Assets which do not have any pre-existing Wireless Telecommunications Facilities on the effective date of this Agreement, and which are marketed by 5 BARS consistent with this Agreement, CITY shall be entitled to sixty-five percent (65%) of revenue received pursuant to this Agreement.

b. **75% (CITY) / 25% (5 BARS) Revenue Shares.** For Licensed Assets which have at least one pre-existing Wireless Telecommunications Facility on the effective date of this Agreement, and which are marketed by 5 BARS consistent with this Agreement, CITY shall be entitled to seventy-five percent (75%) of revenue received pursuant to this Agreement which is a result of the addition of one or more Wireless Telecommunications Facilities to the site of a CITY-owned Wireless Telecommunications Facility.

c. **Reports.** 5 BARS shall annually provide reports reflecting all revenue generated within the CITY, and all payments made to City and to 5 BARS.

7. **Construction, Engineering, and Other Costs.** CITY shall have no financial responsibility for planning, construction, and engineering costs associated with the implementation of this Agreement. 5 BARS may recover from Wireless Service Providers reasonable actual construction costs, installation costs, utilities, or other reasonable actual expenses incurred by 5 BARS, to the extent said reimbursement does not reduce the rent or other payments to be paid by Wireless Service Providers, and such recovered sums shall not be included in the computation of Compensation hereunder. 5 BARS shall include a record of all such payments, in its annual report to CITY, and shall include all detail support to the reasonable satisfaction of the CITY.

8. **Default.** If there is a default by either PARTY to this Agreement, the PARTY claiming a default of any term or condition of this Agreement shall provide the defaulting PARTY with written notice of the default pursuant to the provisions contained in Section 15(h) of this Agreement. After receipt of such notice, the defaulting PARTY shall have thirty (30) days in which to cure the default. If a non-monetary default reasonably requires more than a thirty (30) day cure period, the defaulting PARTY shall have such extended period provided that the defaulting PARTY commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion, except that in no event shall the cure period exceed 90 days. Subject to and without limiting the foregoing, the PARTIES agree that a failure by 5 BARS to diligently market the Master Plan in accordance with Section 2(b), above, shall constitute a default under this Section 8; provided, however, that 5 BARS shall have the right to appeal a determination of default for failure to comply with Section 8 to the CITY's City Council, in which case: (i) the appeal shall be heard within sixty (60) days of the filing of the appeal, and (ii) the determination of default and the obligation to cure shall be stayed while the appeal is pending.

9. **Right to Audit.** During the Term of this Agreement 5 BARS shall maintain originals, or when originals are not available copies, of all records, books, papers and documents relating to this Agreement and all accompanying License Agreements between the PARTIES. At all reasonable times, the PARTIES shall allow each other to have access to examine, copy, and audit such records to the extent that they exist. Additionally CITY may at any time access and/or examine, copy and audit records, books, papers and documents relating to or evidencing 5 BARS' efforts to obtain sublicenses as such records, books, papers and documents may or may not exist in the normal course of 5 BARS' business. Even after termination of this Agreement, 5 BARS shall continue to maintain any documents which are deemed to be subject to the Public Records Act, for the minimum period required by law.

10. **Indemnification.** 5 BARS shall indemnify, defend, and hold harmless CITY, its elected and appointed officials, officers, employees, agents, and contractors, from and against liability, claims, demands, losses, damages, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense, to the extent directly or proximately resulting from 5 BARS' activities undertaken pursuant to this Agreement, except to the extent arising from or caused by the gross negligence or willful misconduct of CITY, its elected and appointed officials, officers, employees, agents, or contractors. CITY shall promptly notify 5 BARS of any claim, action or proceeding covered by this Section 10. This duty to indemnify, defend, and hold harmless CITY, its elected and appointed officials, officers, employees, agents, and contractors applies to, among other things, situations where it is alleged that prevailing wages were required to be but were not properly paid. Notwithstanding anything in this Agreement to the contrary, these responsibilities shall be solely the responsibility of 5 BARS, and not the responsibility of the CITY.

11. **Insurance.** At the time 5 BARS signs and delivers this Agreement to CITY, as well as at all times during the Agreement Term, 5 BARS shall maintain, at a minimum, the required insurance as set forth in the attached Exhibit "C" to this Agreement. CITY shall be entitled to coverage at the maximum policy limits for the required insurance maintained by 5 BARS, which shall at no time be less than the amounts required set forth in the attached Exhibit "C" to this Agreement. This Agreement's insurance provisions shall be separate and independent from the indemnification and defense provisions of Section 10 of this Agreement and shall not in any way limit the applicability, scope or obligations of the indemnification defense provisions in Section 10.

12. **Compliance With Local Ordinances.** 5 BARS shall comply with all CITY ordinances pertaining to Wireless Telecommunications Facilities as they may be amended from time to time, and all such additional CITY regulations that are consistent with such ordinances (such ordinances and regulations are collectively referred to hereinafter as the "**Ordinance**").

13. **Intellectual Property.**

a. **Ownership of Services.** 5 BARS retains all right, title, and interest in any of its underlying software, subject to the limitations set forth in this Agreement.

b. **License.** 5 BARS hereby grants to CITY a limited, non-exclusive, non-transferable, non-sublicensable license to use the Services for the purposes of offering, promoting, managing, tracking, the development and use of Wireless Telecommunications Facilities. This license shall continue beyond the Agreement Term to the extent and for the time necessary to allow CITY to fully comply with the Public Records Act and the CITY's adopted records retention policy.

c. **Exclusivity.** During the Agreement Term, 5 BARS will be the sole and exclusive provider of Services as defined in this Agreement, subject to the CITY's right to withhold the marketing of assets not on Asset List. CITY expressly understands and agrees that the exclusivity set forth in this Agreement is consideration in exchange for the pricing and other benefits being provided to CITY hereunder.

d. **Additional CITY Commitments.** CITY acknowledges that 5 BARS will provide CITY with licensed software containing proprietary and intellectual property. CITY shall: (i) not unlawfully copy, modify, transfer, display, share, or use any portion of the licensed software; (ii) not contest or do or aid others in contesting or doing anything which impairs the validity of any proprietary or intellectual property rights, title, or interest of 5 BARS in and to any software 5 BARS provides to CITY; (iii) not engage in any activity that unlawfully interferes with or disrupts 5 BARS' provision of the Services; and (iv) use the Services exclusively for authorized and legal purposes.

14. **Governing Law.** This Agreement shall be governed by the laws of the State of California without regard to any choice of law rules which may direct the application of laws of another jurisdiction. Any suits brought pursuant to this Agreement shall be filed with the courts of the County of Alameda, State of California.

15. **Termination.** In addition to any rights either PARTY may have for termination for cause, CITY, in its sole and absolute discretion, may terminate this Agreement without cause on ninety (90) days' prior notice to 5 BARS of its intent to terminate. If CITY exercises this right to terminate without cause, the CITY and 5 BARS will continue to receive revenue pursuant to Section 6 of this Agreement to the extent it would otherwise be entitled to receive compensation, up to the end of the then existing Term as if no termination had occurred, but not thereafter. 5 BARS shall not enter into any new sublicense agreements after it receives CITY's notice of termination, unless 5 BARS can demonstrate to the satisfaction of the CITY that such sublicense application was pending prior to 5 BARS' receipt of the CITY's notice of termination.

16. **General Provisions.**

a. **Independent Contractor.** 5 BARS shall, during the Agreement Term, be construed as an independent contractor and not an employee of CITY. This Agreement is not intended to nor shall it be construed to create an employer-employee relationship, a joint venture relationship, or to allow CITY to exercise discretion or control over the professional manner in which 5 BARS performs the services which are the subject matter of this Agreement; however, the services to be provided by 5 BARS shall be provided in a manner consistent with all applicable standards and regulations governing such services. 5 BARS shall pay all salaries and wages, workers compensation, unemployment insurance, employer's social security taxes, and all taxes relating to employees and shall be responsible for all applicable withholding taxes.

b. **Authorizations.** All individuals executing this Agreement on behalf of the respective PARTIES certify and warrant that they have the capacity, and have been duly authorized to so execute this Agreement on behalf of the entity so indicated.

c. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

d. **Entire Agreement and Amendment.** This Agreement captures all terms, agreements, and understandings of the PARTIES and supersedes any prior promises, representations, agreements, warranties or undertakings by any of the PARTIES, either oral or

written, of any character or nature binding except as stated herein. This Agreement may be modified, altered or amended only by an instrument in writing, executed by the PARTIES to this Agreement, and by no other means. Each PARTY waives its right to claim, contest or assert that this Agreement was modified, canceled, superseded or changed by any oral agreement, course of conduct, waiver or estoppel.

e. **Good Faith.** The PARTIES agree to exercise their reasonable best efforts and utmost good faith to effectuate all the terms and conditions of this Agreement, and to execute such further instruments and documents as are necessary or appropriate to effectuate all of the terms and conditions of this Agreement.

f. **Assignment.** 5BARS shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of the City Manager. 5 BARS shall submit a written request for consent to transfer to the City Manager at least thirty (30) days in advance of the desired transfer. The City Manager may consent or reject such request in his/her sole and absolute discretion. Any attempt to assign this Agreement without said consent shall be null and void, and any assignee, sublessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money against the City under this Agreement may be assigned by 5BARS to a bank, trust company or other financial institution without prior written consent.

g. **Discrimination.** 5 BARS shall not discriminate because of race, color, creed, religion, sex, marital status, pregnancy, sexual orientation, gender identity, gender expression, age, national origin, ancestry, or disability, as defined and prohibited by applicable law, in the recruitment, selection, training, utilization, promotion, termination or other employment related activities. 5 BARS affirms that it is an equal opportunity employer and shall comply with all applicable federal, state and local laws and regulations.

h. **Notices.** All notices, approvals, acceptances, demands and other communication required or permitted under this Agreement, to be effective, shall be in writing and, unless otherwise provided herein, shall be deemed validly given on the date either: (1) personally delivered to the address indicated below; or (2) on the third business day following deposit, postage prepaid, using certified mail, return receipt requested, in any U.S. Postal mailbox or at any U.S. Post Office; or (3) one business day after the dispatch date by overnight delivery service; or (4) on the date of transmission by facsimile to the number provided below. All notices, demands, or requests shall be addressed to the following:

If to the City to: City of Alameda
Alameda City Hall, Rm 320
2263 Santa Clara Avenue
Alameda, CA 94501
Attn: City Manager
Telephone: 510-747-4700
Facsimile: 510-865-1498
Email: lkeimach@alamedaca.gov

With a copy to: City of Alameda
Alameda City Hall, Rm 280
2263 Santa Clara Avenue
Alameda, CA 94501
Attn: City Attorney
Telephone: 510-747-4752
Facsimile: 510-865-4028
Email: jkern@alamedacityattorney.org

If to 5 BARS: XG Communities, LLC dba
5 BARS Communities
19200 Von Karman Ave, Suite 100
Irvine, CA 92612
Attn: Kevin Muldoon, VP & General Counsel
Phone: 949-514-4617
Fax: 949-266-9160

With a copy to: Rutan & Tucker, LLP
611 Anton Blvd., 14th Floor
Costa Mesa, CA 92626
Phone: 714-641-5100
Fax: 714-546-9035

Any PARTY may change its address by giving the other PARTIES written notice of its new address as provided above.

i. **Successors.** This Agreement shall be binding on and shall inure to the benefit of the PARTIES and their respective successors.

17. **Waiver.** No waiver of any provision of this Agreement, or consent to any action, shall constitute a waiver of any other provision of this Agreement, or consent to any other action. No waiver or consent shall constitute a continuing waiver or consent or commit a PARTY to provide a waiver or consent in the future except to the extent specifically stated in writing. No waiver shall be binding unless executed in writing by the PARTY making the waiver, based on a full and complete disclosure of all material facts relevant to the waiver requested.

18. **Prevailing Wages.** To the extent applicable, each contractor or subcontractor performing construction work (“**Work**”) for 5 BARS or any Wireless Service Provider on or about CITY Property shall pay no less than the prevailing wage for the Work as set by the Department of Industrial Relations (“DIR”). In addition, each contractor or subcontractor shall comply with all applicable labor laws and regulations.

19. **Payment to Alameda Municipal Power (AMP) for Electrical Services.** 5 BARS shall cause its sublicensees to install a separate electric line to be run to their telecommunication. 5 BARS shall cause its sublicensees to pay all electricity costs directly to Alameda Municipal Power (AMP). Neither 5 BARS nor its sublicensees shall use CITY’s electricity to power its equipment. 5 BARS shall cause its sublicensees to make good faith efforts to negotiate a flat rate

(unmetered) with AMP to avoid above ground metering facilities where practicable. Should a sublicensee be unable to secure a flat rate service from AMP then a pole mounted smart meter may be used with written approval by the City Engineer. Telecommunication Facilities shall have a master cutoff switch installed which will allow power shut down to the equipment in case of emergencies.

20. **Supremacy Clause**. If during the Term of this Agreement, there is a conflict between the provisions of this Professional Services Agreement and the License Agreement, the PARTIES hereby agree that the provisions of the Professional Services Agreement shall prevail.

21. **Operating Memoranda**. The PARTIES acknowledge that the provisions of this Agreement require a close degree of cooperation, and that new information and future events may demonstrate that changes are appropriate with respect to the details of performance of the PARTIES under this Agreement. The PARTIES desire, therefore, to retain a certain degree of flexibility with respect to the details of performance of those items covered in general terms under this Agreement. If and when, from time to time during the term of this Agreement, the PARTIES find that refinements or adjustments regarding details of performance are necessary or appropriate, they may effectuate such refinements or adjustments through a memorandum (individually, an "**Operating Memorandum**", and collectively, "**Operating Memoranda**") approved by the PARTIES which, after execution, shall be attached to this Agreement as addenda and become a part hereof. Operating Memoranda that implement the provisions of this Agreement or that provide clarification to existing terms of this Agreement may be executed on the City's behalf by its City Manager, or the City Manager's designee, without action or approval of the City Council, provided such Operating Memoranda do not change material terms of this Agreement or extend the Term of this Agreement.

[Remainder of Page Intentionally Left Blank]

In WITNESS WHEREOF, the PARTIES have signed this Professional Services Agreement on the dates indicated below.

CITY OF ALAMEDA

By: _____
Jill Keimach
City Manager

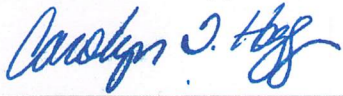
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**XG COMMUNITIES, LLC dba 5 BARS
COMMUNITIES**

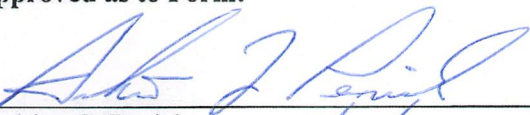
By: _____
Kevin Muldoon
Vice President / General Counsel

Date: 8/20/17

Recommended for Approval:


Carolyn Hogg
Information Technology Director

Approved as to Form:


Andrico Q. Penick
Assistant City Attorney