

CITY OF ALAMEDA RESOLUTION NO. _____

AUTHORIZING THE CITY MANAGER TO: (1) EXECUTE A PROFESSIONAL SERVICES AGREEMENT AND A LICENSE AGREEMENT (THE "AGREEMENTS") WITH XG COMMUNITIES, LLC, A DELAWARE LIMITED LIABILITY COMPANY DBA 5 BARS COMMUNITIES ("5 BARS") EACH FOR A TERM OF FIVE YEARS WITH FOUR FIVE-YEAR EXTENSIONS FOR WIRELESS TELECOMMUNICATIONS FACILITIES CONSULTING, MARKETING AND MANAGEMENT AND SERVICES FOR CITY ASSETS IN EXCHANGE FOR A THIRTY-FIVE PERCENT (35%) SHARE OF GENERATED REVENUE AND (2) EXECUTE AUXILIARY DOCUMENTS AND TO PERFORM ANY AND ALL ACTS NECESSARY OR DESIRABLE TO PERMIT 5 BARS TO PERFORM THE SERVICES

WHEREAS, the use of wireless data communication is growing rapidly and the expectations of continuous data connectivity from residents, businesses, and visitors are on the rise in all segments of society; and

WHEREAS, as Wireless carriers look to densify existing networks, it is estimated that the wireless industry will deploy hundreds of thousands of small cells in urban areas including on public infrastructure such as street lights, city buildings and traffic signal lights; and

WHEREAS, some cities are turning to a public-private partnership model to provide a well-engineered and professionally managed approach to small cell deployment that maximizes the overall benefits to a city's diverse neighborhoods, businesses and telecommunication providers; and

WHEREAS, some of the benefits of a public-private partnership are to: (i) maintain control of City owned assets and generate revenue for the City; (ii) lower visual impact and control aesthetics in the community; (iii) create a long-term solution for wireless connectivity; (iv) reduce visual blight in crowded areas; and (v) maximize the use of underutilized City assets; and

WHEREAS, in February 2016, the City of Sacramento, through a Request for Qualifications (RFQ), invited interested parties to demonstrate their knowledge and expertise in the development of the City's wireless telecommunication infrastructure. 5 BARS was chosen as the most qualified responder bringing extensive industry knowledge and technical expertise to this process; and

WHEREAS, 5 BARS has been awarded a national cooperative contract by the National Intergovernmental Purchasing Alliance; and

WHEREAS, in exchange for the City granting an exclusive license to 5 BARS and a 35% share of revenue generated, 5 BARS will act as the City's third party wireless

administrator who will manage the City's permitting process, coordinate with carriers for the planning, permitting, installation and ongoing maintenance of a seamless municipal wireless system and function as the City's expert technical resource for managing wireless services ("Services"); and

WHEREAS, the Professional Services Agreement may be terminated without cause by either party on ninety (90) days advance written notice, provided that any sublicense under the License Agreement would finish the balance of the then existing five year term; and

WHEREAS, the City Manager or his/her designee will oversee 5 BARS' activities and have final approval of sites, pricing, permits and guidelines for wireless telecommunication facility applications in the City.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Alameda, that the City Council authorizes the City Manager to execute the Professional Services Agreement with attached License Agreement and Right of Entry with 5 BARS substantially in the form attached herto as Exhibit A; and

BE IT FURTHER RESOLVED by the City Council of the City of Alameda, that the City Council hereby delegates to the City Manager the authority to execute auxiliary documents and to perform any and all acts necessary or desirable to consummate the transaction with 5 BARS to permit 5 BARS to perform the Services.

Exhibit A

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.

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

CITY OF ALAMEDA

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

By: _____
Jill Keimach
City Manager

By: _____
Kevin Muldoon
Vice President / General Counsel

Date: _____

Date: _____

Recommended for Approval:

Carolyn Hogg
Information Technology Director

Approved as to Form:

Andrico Q. Penick
Assistant City Attorney

EXHIBIT “A”

LICENSE AGEEMENT

LICENSE AGREEMENT

THIS LICENSE AGREEMENT is made as of the date of the final signature below, by and between the City of Alameda, a municipal corporation, having a mailing address of Alameda City Hall, 2263 Santa Clara Avenue, Room 320, Alameda, CA 94501 ("Licensor") and XG Communities, LLC, a Delaware limited liability company, dba 5 Bars Communities, with an address at 19200 Von Karman Ave, Suite 100, Irvine, CA 92612 ("Licensee") (each a "Party" and collectively the "Parties").

1. **Definitions.**

"Agreement" means this License Agreement.

"Approvals" means all certificates, permits, licenses and other approvals that Licensee must obtain as required by law in order for Licensee or its agents or sublicensees to use the Licensed Properties for the purpose intended by this Agreement.

"Company Facilities" means any and all Small Wireless Telecommunications Facilities to be developed by Licensee on the Licensed Properties.

"Defaulting Party" means the Party to this Agreement that has defaulted as provided for in Section 26 of this Agreement.

"Harmful Interference" means Interference that endangers the functioning of a radio navigation service or of other safety service or seriously degrades, obstructs, or repeatedly interrupts a radio communication service operating in accordance with both International Telecommunications Union Radio Regulations and the regulations of the Federal Communications Commission.

"Hazardous Material" means any substance which is (i) designated, defined, classified or regulated as a hazardous substance, hazardous material, hazardous waste, pollutant or contaminant under any Environmental Law, as currently in effect or as hereafter amended or enacted, (ii) a petroleum hydrocarbon, including crude oil or any fraction thereof and all petroleum products, (iii) PCBs, (iv) lead, (v) asbestos, (vi) flammable explosives, (vii) infectious materials, or (viii) radioactive materials.

"Environmental Law(s)" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Section 9601 et seq., the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6901 et seq., the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq., the Hazardous Materials Transportation Act, 49 U.S.C. Section 5101 et seq., and the Clean Water Act, 33 U.S.C. Section 1251 et seq., as said laws have been supplemented or amended to date, the regulations promulgated pursuant to said laws and any other federal, state or local law, statute, rule, regulation or ordinance that regulates or proscribes the use, storage, disposal, presence, clean-up, transportation or release or threatened release into the environment of Hazardous Material.

“Improvements” means a Small Wireless Telecommunications Facility(ies) installed or caused to be installed by Licensee.

“Interference” means the effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radio communication system, manifested by any performance degradation, misinterpretation, or loss of information.

“License Term” means the term of this Agreement, inclusive of exercised option terms, if any.

“Licensed Premises” or “Licensed Properties” means those portions of Licensors Property described in the sketches, maps, photographs, or other descriptive documents attached hereto as Exhibit “A”, which are subject to this License Agreement.

“Licensee” means 5 Bars Communities a dba of XG Communities, LLC, a Delaware limited liability company.

“Licensee's Notice Address” means 19200 Von Karman Ave, Suite 100, Irvine CA 92612.

“Licensor” means City of Alameda, a municipal corporation.

“Licensor's Notice Address” means Alameda City Hall, 2263 Santa Clara Avenue, Room 320, Alameda, CA 94501; Attn: City Manager.

“Licensor's Properties” means those properties owned by the City.

“Marketing Agreement” means that Professional Services Agreement between the City of Alameda and XG Communities, LLC, dba 5 BARS Communities entered into between the parties to this Agreement on September ___, 2017.

“Micro wireless facility” shall have the meaning established in the Professional Services Agreement, as the meaning may be amended from time to time by State law.

“Non-Defaulting Party” means the Party to this Agreement that has not defaulted as provided for in Section 26 of this Agreement.

“Rent” means sixty-five percent (65%) of the Sublicense Revenue received by Licensee from Sublicenses on new Wireless Telecommunication Facilities constructed on Licensed Property under or pursuant to this Agreement.

“Small cell” shall have the meaning established in the Professional Services Agreement, as the meaning may be amended from time to time by State law.

“Small Wireless Telecommunications Facilities” shall mean small cells and micro wireless facilities as set forth in the Professional Services Agreement.

“Sublicense Revenue” means the total amount of revenue received from any party utilizing the Licensed Properties pursuant to the Professional Services Agreement.

“Sublicensee” means a third party to which Licensee has granted the right to use and occupancy of one or more of the Licensed Properties, subject to the terms and conditions contained herein.

“Wireless Telecommunications Facilities” means the equipment and associated structures needed to transmit and/or receive electromagnetic signals, as defined in paragraph (2) of subdivision (d) of Government Code Section 65850.6. A wireless telecommunication facility typically includes antennas, supporting structures, enclosures and/or cabinets housing associated equipment, cable, access roads and other accessory development.

2. **Licensor's Cooperation.** During the License Term, Licensor shall cooperate with Licensee in its efforts to obtain all of the Approvals. If Licensor elects to replace infrastructure on the Licensed Premises that is unrelated to the delivery of Wireless Telecommunications services, then such replacement shall be accomplished in a manner calculated to minimize interference with the Wireless Telecommunications Facilities on the Licensed Properties. Additionally, Licensor authorizes Licensee and its employees, representatives, agents and consultants to prepare, and submit, file and present on behalf of Licensor, building, permitting, zoning or land-use applications with the appropriate local, state and/or federal agencies necessary to obtain land use changes, special exceptions, zoning variances, conditional use permits, special use permits, administrative permits, construction permits, operation permits and/or building permits. Licensor understands that any such application and/or the satisfaction of any requirements thereof may require Licensor's reasonable cooperation, which Licensor hereby agrees to provide. Licensor shall not knowingly unreasonably interfere with any Approvals pertaining to the authorized Improvements or Licensed Properties or cause them to be in nonconformance with applicable local, state or federal laws. Licensor agrees to execute such documents as may be necessary to obtain and thereafter maintain the Approvals, and agrees to be named as the applicant for said Approvals. The provisions of this Section shall not apply in the event of any dispute between and/or involving Licensor and Licensee. Nothing in this Agreement shall be construed to interfere with Licensor's legislative authority, its ability to act as regulator, or Licensor's police powers.

3. **Term.** The term of this Agreement shall commence on September __, 2017 (“Commencement Date”). The term of this Agreement shall continue for a period of five (5) years with four (4) five (5) year options, each of which is subject to the written mutual consent of the Licensor and Licensee, prior to the expiration of the existing term. At the termination of this Agreement, 5 BARS will cause the removal of all Improvements unless mutually agreed upon by both Parties.

4. **Rent.**

a. Rent. From and after the Commencement Date and effective upon Licensee's receipt of Sublicense Revenue, Licensee shall pay Rent for the each of the Licensed Properties.

b. Sublicenses. Licensee shall exercise discretion as to whether, and on what terms, to sublicense, license or otherwise allow occupancy of the Licensed Properties, subject to the following:

- i. Licensee shall make every reasonable effort to ensure that each proposed Small Wireless Telecommunications Facility will not affect, detract, or impact the operation of existing Licensor facilities. Licensee shall not allow interference with signal control or street lighting devices.
- ii. Licensee shall ensure that each proposed Small Wireless Telecommunications Facility is not dependent on the resources dedicated to Licensor facilities. For example, no Wireless Telecommunication Facility may draw power from Licensor's facilities.
- iii. Licensee may propose new locations for Wireless Telecommunications Facilities to Licensor, and Licensor shall have the final authority to approve or reject said locations.
- iv. In the event of damage, Licensor shall not be obligated to repair or restore the Improvements to normal operating conditions unless Licensor is the primary and direct cause of such damage. For these purposes, "damage" excludes any requirement that such facilities be moved to an alternate location for any legitimate governmental purpose, such as street realignment or widening. As between Licensee and Licensor, Licensee shall bear all other costs incurred to repair, restore, or remove Wireless Telecommunications Facilities.
- v. Licensee shall make every reasonable effort to restore Licensor facilities in a safe and efficient manner, and in no event shall Licensor fail to repair or restore facilities so as to threaten public safety.
- vi. Licensee shall give Licensor fourteen (14) days' notice, or reasonable notice (whichever amount is greater) prior to impacting Licensor facilities in a manner that is beyond the routine maintenance and operation of Wireless Telecommunications Facilities. Licensee shall coordinate the work consistent with direction from the City in an effort to limit the negative impacts of such activities.
- vii. Any sublicense agreement shall include the requirement that the Sublicensee must comply with the terms and conditions of this Agreement.

- viii. Any sublicense agreement shall include a provision substantially consistent with the following, relating to interference with city facilities and communications systems:

Notwithstanding any other provisions this Sublicense Agreement, Sublicensee agrees to operate any and all of its Wireless Telecommunications Facilities in full compliance with the technical standards set forth in the Rules and Regulations of the Federal Communications Commission ("FCC") as codified in 47 C.F.R. and upon notice of non-compliance agree to promptly take all steps necessary to bring its operation into full compliance. Licensee and Sublicensee both recognize and stipulate that City's public safety communications systems are vital to the life, health, and safety of the public safety personnel and of members of the general public, and agree that protecting such systems against harmful interference is an integral responsibility of this Agreement.

Licensee and Sublicensee agree to meet and confer with each other and the City on a case-by-case basis to resolve City's concerns regarding interference or other issues. Sublicensee further agree, and at the request of any Party and/or the City, in the event that additions or changes to Wireless Telecommunications Facilities on the property cause incompatibilities with public safety or City installed communications system(s), or with pre-existing Wireless Telecommunications Facilities located on City's property, such interference shall immediately be stopped.

Licensee and Sublicensee agree that in the event of harmful interference or degradation public safety radio operations, City may require on a case-by-case basis that the use of the interfering Wireless Telecommunications Facility be suspended pending resolution of the cause and cure of such interference or degradation.

The findings of the City's communications engineering representative shall be determinant in declaring harmful interference caused by such non-compliance, and in the event of a dispute the burden of seeking a determination of compliance from the Federal Communications Commissions shall be on the Sublicensee.

These provisions shall be binding on Licensee, Sublicensee, and any successor, assignee, or service provider designated by Licensee and/or Sublicensee.

Licensee may not enter into any sublicense or similar agreement unless Licensor agrees to the terms of such agreement. Licensor may withhold such approval for any reason or no reason, so long as there is no unlawful discrimination as between Wireless Telecommunications

Providers. For example, Licensors may deny a sublicense if Licensors determine the Licensors will not receive sufficient compensation. Licensors may also deny such sublicense if Licensors object to the design of a proposed facility.

c. Accounting/ Adjustments. The parties agree that Licensee may base Rent on Sublicensee agreements, and later make adjustments if overpayments or underpayments occur. In addition to the annual report of revenue required by the Professional Services Agreement, at any time, Licensors may request that Licensee provide an accounting of the Sublicensee Revenue and Rent in such form and content as Licensors may reasonably request.

5. Construction, Engineering, and Other Costs

a. Licensors shall have no financial responsibility for planning, construction, and engineering costs associated with the implementation of this License Agreement.

b. Licensee or any sublicensees shall obtain, and pay for, all required permits or other governmental approvals. For example, Licensee or any sublicensees shall obtain and pay for any required encroachment, excavation, or building permits.

c. Licensee may recover from sublicensees reasonable actual construction costs, installation costs, utilities, or other reasonable actual expenses incurred by Licensee, to the extent said reimbursement does not reduce the rent or other payments to be paid by sublicensees, and such recovered sums shall not be included in the computation of compensation hereunder. Licensee shall include a record of all such payments, in its annual report to Licensors, and shall include all detail support to the reasonable satisfaction of the Licensors.

6. **Licensed Properties; Survey.** Prior to any sublicensing being effective, Licensee shall provide Licensors with a copy of an “as-built” survey for each Licensed Property, which survey shall depict and identify the boundaries of each Licensed Property and any easements of record. If accepted by the CITY, the survey shall appear as Exhibit “A” to this Agreement and shall control in the event of any discrepancies between what is listed on the Asset List and Exhibit “A” hereto.

7. **Access.** Conditioned upon and subject to commencement of the License Term, Licensors grants to Licensee and Licensee's employees, agents, contractors, sublicensees, licensees and their employees, agents and contractors access to land located within Licensors's Property to Licensee, for the purpose of constructing, repairing, maintaining, replacing, demolishing and removing the Improvements upon each Licensed Property as necessary to obtain or comply with any Approvals, provided, however, that access to areas of Licensors's Property which are not included within the Licensed Properties, shall be limited in scope and time so as not to unreasonably interfere with the City's or the public's use of such Licensed Property.

8. **Use of Property.** The Licensed Properties shall be used for the purpose of constructing, maintaining and operating the Improvements and for uses incidental thereto. All Improvements shall be constructed at no expense to Licensor. All Improvements, inclusive of security fences, shall comply with the requirements of the Alameda Municipal Code and all other laws and regulations applicable thereto, and Licensee shall obtain all required and necessary governmental agency Approvals and permits, including any necessary encroachment permits. Licensee will maintain the Licensed Properties in a safe condition. It is the intent of the Parties that Licensee's Improvements shall not constitute a fixture unless otherwise agreed by the Removal of Obstructions. Licensee may request in writing the right to remove obstructions from Licensor's Property, as approved by the Licensor, which approval shall be requested in writing by Licensee and such approval shall not be unreasonably withheld, conditioned or delayed by Licensor; notwithstanding the foregoing the City has unfettered discretion to prevent or regulate the trimming or removal of trees or of pre-existing Wireless Telecommunications Facilities, regulatory signs and signals. Potential obstructions include but are not limited to vegetation, which may encroach upon, interfere with or present a hazard to Licensee's use of the Licensed Properties. Licensee shall dispose of any materials removed. If vegetation is removed, similarly sized vegetation shall be planted in a manner reasonably agreeable to Licensor; Licensor may require that replacement vegetation be drought tolerant. To the extent that there is loss of screening as a result of any such removal, Licensor may require commensurate actions to mitigate the loss of screening.

9. **Hazardous Materials.**

a. Licensee's Obligation and Indemnity. Licensee shall not (either with or without negligence) cause or permit the escape, disposal or release of any Hazardous Materials on or from the Licensed Properties in any manner prohibited by law. Licensee shall indemnify and hold Licensor harmless from and against any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, any and all sums paid for settlement of claims, attorneys' fees, and consultants' and experts' fees) from the release of any Hazardous Materials on the Licensed Properties if caused by Licensee, its officers, employees, agents, assigns, or by a sublicensee or any party acting under color of a sublicense or contract approved by Licensee.

b. Licensor's Obligation and Indemnity. Licensor shall not, with gross negligence or intentional misconduct, cause the escape, disposal or release of any Hazardous Materials on or from Licensor's Property or Licensed Premises in any manner prohibited by law. Licensor shall indemnify and hold Licensee harmless from and against any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, any and all sums paid for settlement of claims, attorneys' fees, and consultants' and experts' fees) from the presence or release of any Hazardous Materials on Licensor's Property or Licensed Properties unless caused by Licensee, its officers, employees agents or assigns, or by a sublicensee or any party acting under color of a sublicense or contract approved by Licensee.

10. **Real Estate Taxes.** To the extent that a possessory interest is deemed created, Licensee acknowledges that notice is and was hereby given to Licensee pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property may subject the Licensee to possessory interest taxes or other taxes levied against Licensee's right to

possession, occupancy or use of any public property and Licensee shall pay all applicable (federal, state, county, city, local) excise, sales, consumer use, possessory interest, or other similar taxes required by law. Licensee agrees to reimburse Licensors for any documented increase in real estate or personal property taxes levied against Licensors' Property that are attributable to the Improvements. Licensee reserves the right to challenge any such assessment, and Licensors agree to reasonably cooperate with Licensee in connection with any such challenge.

11. **Insurance.** At all times during the performance of its Due Diligence Investigation and during the License Term, Licensee, at its sole expense, shall obtain and keep in force the required insurance as set forth in the attached Exhibit "C". Licensors shall be entitled to coverage at the maximum policy limits carried by Licensee for the required insurance, which shall at no time be less than the required amounts set forth in the attached Exhibit "C" to this Agreement. The insurance provisions shall be separate and independent from the indemnification and defense provisions between the Licensee and Licensors and shall not in any way limit the applicability, scope or obligations of the indemnification defense provisions in Section 14.

12. **Indemnification.**

a. Licensee shall indemnify, defend, and hold harmless Licensors, 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 the activities undertaken pursuant to this Agreement, except to the extent arising from or caused by the gross negligence or willful misconduct of Licensors, its elected and appointed officials, officers, employees, agents, or contractors. Licensors shall promptly notify Licensee of any claim, action or proceeding covered by this Section 14(a).

This duty to indemnify, defend, and hold harmless Licensors, 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 Licensee, and not the responsibility of the Licensors.

b. **Right to Audit.** During the term of this Agreement, Licensee shall maintain originals, or when originals are not available copies, of all records, books, papers and documents relating to this Agreement and all accompanying agreements between Licensee and Sublicensees. At all reasonable times, Licensee shall allow Licensors to have access to, examine, copy, and audit such records, to the extent they exist. Additionally, Licensors may at any time access and/or examine, copy and audit records, books, papers and documents relating to or evidencing Licensee's efforts to obtain sublicenses as such records, books, papers and documents may or may not exist in the normal course of Licensee's business, including but not limited to access to and audit of information pertaining to the identities of the Sublicensees whom Licensee has attempted to sublicense the Licensed Properties. City shall not disclose documents which Licensee has expressly marked as proprietary, confidential or a trade secret, except as required

by the California Public Records Act, court order, or other applicable law. If City receives a public records request for such documents, Licensor shall provide Licensee five (5) days' prior notice of the City's intent to disclose such documents. Licensee may petition a court to prevent said disclosure, and City will not object to such petition.

13. **Waiver of Claims and Rights of Subrogation.** All policies of property insurance carried by either Party for the Improvements, Licensor's Property or the Licensed Properties shall include a clause or endorsement denying to the insurer rights by way of subrogation against the other Party to the extent rights have been waived by the insured before the occurrence of injury or loss. Nothing in this section shall require Licensor to obtain property insurance policies on any property, including the Improvements. Licensor's self-insurance fund shall not be treated as a policy of insurance under this Agreement.

14. **Eminent Domain.** If Licensor receives notice of a proposed taking by eminent domain of any part of the Licensed Properties, Licensor will notify Licensee of the proposed taking within twenty one (21) business days of receiving said notice. If eminent domain is exercised as to any particular Licensed Property, portion thereof, Improvement or facility, either Party may: (i) declare this Agreement terminated as to that Licensed Property, portion thereof, Improvement or facility and thereafter neither Party will have any liability or obligation hereunder other than payment of Rent for so long as Licensee remains in physical possession of the Licensed Property(ies); or (ii) remain in possession of that portion of the Licensed Premises that will not be taken, in which event there shall be an equitable adjustment in Rent if the taking of a portion of the Licensed Property(ies) results in removal or inoperability of Improvement(s).

15. **Sale of Property.** If during the License Term, Licensor sells all or part of Licensor's Property, of which some or all of the Licensed Properties is a part, and such sale is not subject to this Agreement, then Licensee shall be entitled to move the Improvements to a feasible alternate location at Licensor's sole and reasonable cost, with execution of a new License Agreement for the alternate location.

16. **Surrender of Property.** Upon expiration or termination of this Agreement, Licensee shall, within a reasonable time, but in no event later than six (6) months after expiration or termination, remove all above and below ground Improvements and all related equipment and/or infrastructure not owned or accepted by Licensor and restore the Licensed Premises to its original condition, without, however, being required to replace any trees or other plants lawfully removed, or alter the then existing grading.

17. **Recording.** Licensee shall have the right to record a memorandum of the Agreement with the County Recorder's Office. Licensor shall execute and deliver each such memorandum, for no additional consideration, promptly upon Licensee's request.

18. **Licensor's Covenant of Title.** Licensor covenants that Licensor holds the legal right to Licensor's Property and each of the Licensed Properties (which may include easements) and has full authority to enter into and execute this Agreement.

19. **Interference with Licensee's Business.** Licensee shall have the exclusive right to construct, install and operate Small Wireless Telecommunications Facilities on the Licensed

Properties, except to the extent that Licensor elects to construct, install and operate such facilities for its own use, and except for any pre-existing Wireless Telecommunications Facilities on the Licensed Premises. Except as herein provided, Licensor agrees that it will not permit the construction, installation or operation on the Licensed Properties of (i) any additional Small Wireless Telecommunications Facilities or (ii) any equipment or device that unreasonably interferes with Licensee's use of the Licensed Properties for a Small Wireless Telecommunications Facility; provided, however, that installations or collocations that are permitted by law without Licensor's approval shall not be deemed a violation of this section or this Agreement. Each of the covenants made by Licensor in this Section is a covenant running with the land for the benefit of the Licensed Properties.

20. **Quiet Enjoyment.** Licensor covenants that Licensee, on paying Rent and performing the covenants of this Agreement, shall peaceably and quietly have, hold and enjoy the Licensed Properties, subject to City's right to upgrade its own facilities, to widen and repair its streets, to engage in street realignment, and similar conduct as deemed necessary by its Public Works Director, City Manager or City Council. In the event that any such public works project is deemed necessary, Licensor shall provide reasonable notice to Licensee to allow Licensee or its sublicensee to remove and preserve any Improvement. At such time as the Public Works Director deems appropriate, the Improvement may be reinstalled within the Licensed Property affected by the public works project, or to a feasible alternate location agreed upon by the Parties. In connection with removal and reinstallation of Improvements as a result of a public works project, Licensee shall bear all costs incurred to repair, restore, remove or reinstall Improvements. Licensee is aware that infrastructure in the public right of way is subject to being damaged by motor vehicles, bicycles, pedestrians, vandals, taggers, graffiti, earthquakes, storms, winds, other weather events, criminal activity, and Acts of God. Licensor shall not be responsible for any damage to, destruction of, or loss of use of any Improvements as a result of any of the enumerated causes or any other cause beyond Licensor's control.

21. **Title Insurance.** Licensee, at Licensee's option, may obtain title insurance on each of the Licensed Properties at Licensee's sole cost and expense. Licensor shall cooperate with Licensee's efforts to obtain title insurance by executing documents or obtaining requested documentation as required by the title insurance company.

22. **Default.**

a. Notice of Default; Cure Period. If there is a default by Licensor or Licensee (the “**Defaulting Party**”) with respect to any of the provisions of this Agreement or Licensor's or Licensee's obligations under this Agreement, the other Party (the “**Non-Defaulting Party**”) shall give the Defaulting Party written notice of such default. After receipt of such written notice, the Defaulting Party shall have thirty (30) days in which to cure any monetary default and sixty (60) days in which to cure any non-monetary default, provided however, that any default by Licensee which impairs the City's public safety communications or otherwise threatens public safety shall be cured immediately, or if it cannot be cured, the conduct causing the impairment or threat shall be immediately ceased. The Defaulting Party shall have such extended periods as may be required beyond the sixty (60) day cure period to cure any non-monetary default if the nature of the cure is such that it reasonably requires more than sixty (60) days to cure, and the Defaulting Party commences the cure within the sixty (60) day period and

thereafter continuously and diligently pursues the cure to completion. The Non-Defaulting Party may not maintain any action or effect any remedies for default against the Defaulting Party unless and until the Defaulting Party has failed to cure the same within the time periods provided in this Section.

b. Consequences of Licensee's Default. If Licensee is in default beyond the applicable periods set forth above in Section 26(a), Licensors may, at its option, upon written notice: (i) terminate the License, require Licensee to promptly vacate the Licensed Properties and be relieved from all further obligations under this Agreement; (ii) require the Rent to be paid up to the date of complete removal and (iii) take any actions that are consistent with Licensors' rights, up to and including assuming some or all of the sublicenses; and (iv) sue for injunctive relief; (v) require payment amount reasonably expended by Licensors as a result of such default. In no event shall Licensee be liable to Licensors for indirect or speculative damages in connection with or arising out of any default.

c. Consequences of Licensors' Default. If Licensors is in default beyond the applicable periods set forth above in Section 26(a), Licensee may, at its option, upon written notice: (i) terminate the License, vacate the Licensed Properties and be relieved from all further obligations under this Agreement; (ii) take any actions that are consistent with Licensee's rights; (iii) sue for injunctive relief, and/or (iv) set-off from Rent any amount reasonably expended by Licensee as a result of such default. In no event shall Licensors be liable to Licensee for indirect or speculative damages in connection with or arising out of any default.

23. **Force Majeure.** If an event or condition constituting a "force majeure"- including, but not limited to, an act of God, labor dispute, civil unrest, epidemic, or natural disaster-prevents or delays either Party from performing or fulfilling an obligation under this Agreement, said Party is not in Default, under Section 26 of this Agreement, of the obligation. A delay beyond a Party's control automatically extends the time, in an amount equal to the period of the delay, for the Party to perform the obligation under this Agreement. The Licensors and Licensee shall prepare and sign an appropriate document acknowledging any extension of time under this Section.

24. **Applicable Law.** This Agreement and the performance thereof shall be governed, interpreted, construed and regulated 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. The parties agree that the venue for any litigation regarding this Agreement shall be in the courts of the County of Alameda, State of California.

25. **Assignment, Sublicense, Licensing and Encumbrance.** Licensee 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. Licensee 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 Licensee

to a bank, trust company or other financial institution without prior written consent. The foregoing notwithstanding, Licensee may enter into sublicenses or other authorizations (“**Sub-Authorizations**”) to allow a third party to utilize and operate from the Licensed Properties, so long as such third party is a provider of services that utilizes Small Wireless Telecommunications Facilities and Licensee receives Rent for such use of such facilities. Sub-Authorizations shall require the consent of Licensor to the terms of the Sublicense or Sub-Authorization.

26. Miscellaneous.

a. Entire Agreement. Licensor and Licensee agree that this Agreement, together with the Professional Services Agreement [and executed right of entry], contain all of the agreements, promises and understandings between Licensor and Licensee with regard to the Licensed Properties. No oral agreements, promises or understandings shall be binding upon either Licensor or Licensee in any dispute, controversy or proceeding at law. Any addition, variation or modification to this Agreement shall be void and ineffective unless made in writing and signed by the parties hereto.

b. Captions. The captions preceding the Sections of this Agreement are intended only for convenience of reference and in no way define, limit or describe the scope of this Agreement or the intent of any provision hereof.

c. Construction of Document. Licensor and Licensee acknowledge that this document shall not be construed in favor of or against the drafter by virtue of said Party being the drafter and that this Agreement shall not be construed as a binding offer until signed by Licensee.

d. Notices. All notices hereunder shall be in writing and shall be given by (i) established national courier service which maintains delivery records, (ii) hand delivery, or (iii) certified or registered mail, postage prepaid, return receipt requested. Notices are effective upon receipt, or upon attempted delivery if delivery is refused or if delivery is impossible because of failure to provide reasonable means for accomplishing delivery. The notices shall be sent to Licensor at Licensor's Notice Address and to Licensee at Licensee's Notice Address.

e. Partial Invalidity. If any term of this Agreement is found to be void or invalid, then such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.

f. IRS Form W-9. If necessary, Licensor agrees to provide Licensee with a completed IRS Form W- 9, or its equivalent, upon execution of this Agreement and at such other times as may be reasonably requested by Licensee. In the event the Property is transferred, the succeeding Licensor shall have a duty at the time of such transfer to provide Licensee with a completed IRS Form W-9, or its equivalent, and other related paperwork to effect a transfer in Rent to the new Licensor. Licensor's failure to provide the IRS Form W-9 within thirty (30) days after Licensee's request shall be considered a default and Licensee may take any reasonable action necessary to comply with IRS regulations including, but not limited to, withholding applicable taxes from Rent payments.

g. Termination for Convenience. In addition to any rights either Party may have for termination for cause, Licensors, in its sole and absolute discretion, may terminate this Agreement without cause on ninety (90) days' prior notice to Licensee of its intent to terminate. If Licensors exercise this right to terminate without cause, Licensors will continue to receive Rent and Licensee shall continue to receive Sublicense Revenue pursuant to Section 4 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. Licensee shall not enter into any new sublicense agreements after it receives Licensors' notice of termination, unless Licensee can demonstrate to the satisfaction of Licensors that such sublicense application was pending prior to Licensee's receipt of the Licensors' notice of termination.

h. 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.

i. Payment to Alameda Municipal Power (AMP) for Electrical Services. Licensee shall cause its sublicensees to install a separate electric line to be run to their telecommunication. Licensee shall cause its sublicensees to pay all electricity costs directly to Alameda Municipal Power (AMP). Neither Licensee nor its sublicensees shall use CITY's electricity to power its equipment. Licensee 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.

27. **Supremacy Clause.** If during the Term of the Professional Services Agreement between the City and 5 BARS, there is a conflict between the provisions of this License Agreement and the Professional Services Agreement, the Parties hereby agree that the provisions of the Professional Services Agreement shall prevail.

28. **Operating Memorandum.** 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, Licenser and Licensee having read the foregoing and intending to be legally bound hereby, have executed this Agreement as of the day and year this Agreement is fully executed.

CITY OF ALAMEDA

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

By: _____
Jill Keimach
City Manager

By: _____
Kevin Muldoon
Vice President / General Counsel

Date: _____

Date: _____

Recommended for Approval:

Carolyn Hogg
Information Technology Director

Approved as to Form:

Andrico Q. Penick
Assistant City Attorney

EXHIBIT “B”

RIGHT OF ENTRY AGEEMENT

RIGHT OF ENTRY AGREEMENT

This Right of Entry Agreement (“**Agreement**”) is made as of the date of the final signature below, by and between the City of Alameda, a municipal corporation, having a mailing address of Alameda City Hall, 2263 Santa Clara Avenue, Room 320, Alameda, CA 94501 (“**Grantor**”) and XG Communities, LLC, a Delaware limited liability company, dba 5 Bars Communities with an address at 19200 Von Karman Ave, Suite 100, Irvine, CA 92612 (“**Grantee**”). Grantor and Grantee are sometimes collectively referred to as “Parties” or individually as “Party.”

RECITALS

- A. Grantor has property rights to that certain real property (the “**Property**”).
- B. Grantor and Grantee have entered into that certain “Professional Services Agreement Between the City of Alameda and 5 Bars Communities” dated September __, 2017 (“Professional Services Agreement”) pursuant to which Grantee has agreed to provide certain consulting, marketing, and management services relating to the placement of Wireless Telecommunications Facilities on some or all of the Property.
- C. Pursuant to the Professional Services Agreement, Grantor and Grantee have agreed to enter into this Agreement to that Grantee may enter upon the Property, upon 24 hour written notice to Grantor, to inspect, conduct, perform and examine soil borings, drainage testing, material sampling, surveys and other geological or engineering tests or studies of the Property, to apply for and obtain all licenses and permits required for Grantee's use of the designated Property from all applicable governmental or regulatory entities, and to do those things on or off the designated Property that, in the sole opinion of Grantee, are necessary to determine the physical condition of the designated Property, the environmental history of the designated Property, and the feasibility or suitability of the designated Property for Grantee's use (“**Due Diligence Investigation**”).

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions contained herein, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, the Parties agree as follows:

AGREEMENT

1. **Right of Entry.** Grantor hereby grants to Grantee and its agents, employees, contractors, subcontractors, and volunteers non-exclusive permission to enter over and across, as well as to use the Property as is reasonable and necessary, for the express purpose of conducting, at Grantee's sole expense, the Due Diligence Investigation. (The above-described activities are collectively referred to hereafter as the “Work”).
2. **Term.** The Right of Entry granted pursuant to Section 1, above, shall be for a limited term, commencing as of the date of this Agreement and expiring upon the expiration or earlier termination of the Professional Services Agreement.

3. **Entry at Own Risk; No Duty to Warn.** Grantee and its agents, employees, contractors, subcontractors, and volunteers shall access, enter and use the Property at their own risk and peril. Grantor shall have no duty to inspect the Property (or any portion thereof) and no duty to warn of any latent or patent defect, condition or risk which may exist on the Property.

4. **Liens.** Grantee shall not permit to be placed against the Property, or any part thereof, any mechanics', materialmen' s, contractors' or other liens (collectively, the “Liens”) arising out of the acts or omissions of the Grantee or its agents, employees, contractors, subcontractors, or volunteers hereunder. Grantee hereby indemnifies and agrees to hold the Grantor and the Property free and harmless from all liability for any and all such Liens, together with all costs and expenses, including, but not limited to, attorneys' fees and court costs reasonably incurred by Grantor in connection therewith.

5. **Hazardous Substances.** Grantee and its agents, employees, contractors, subcontractors, and volunteers shall not use, store or transport or allow the use, storage or transportation of any hazardous substances on or onto the Property.

6. **Restoration of the Property.** Except to the extent otherwise contemplated by this Agreement, Grantee shall, at its own cost and expense, restore the Property to the same condition in which it was prior to Grantee's entry.

7. **Indemnification by Grantee.** Except to the extent otherwise provided below, Grantee agrees to defend, hold harmless and indemnify Grantor from and against any and all, claims, demands, actions, and causes of action for injury or death of any person, or damages to property, arising out of or resulting from the use or access of the Property by the Grantee or its agents, employees, contractors, subcontractors, and volunteers pursuant to this Agreement. Notwithstanding the foregoing, the Grantee shall have no obligation to indemnify Grantor from a pre-existing condition at the Property where Grantee timely notified Grantor of the pre-existing condition after Grantee learns of the condition, or from the gross negligence or willful misconduct of Grantor.

8. **Authority to Execute.** Grantor warrants and represents to Grantee that it has legal rights to use the Property and may execute and approve this Agreement and no permission or consent of any other person is required to approve this Agreement.

9. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns.

10. **Entire Agreement.** Grantor and Grantee agree that this Agreement, together with the Professional Services Agreement and the License Agreement dated August 15, 2017, contain all of the agreements, promises and understandings between Licensor and Licensee with regard to the Licensed Properties. No oral agreements, promises or understandings shall be binding upon either Licensor or Licensee in any dispute, controversy or proceeding at law. Any addition, variation or modification to this Agreement shall be void and ineffective unless made in writing and signed by the parties hereto.

11. **Severability.** If any provision of this instrument, or the application thereof to any person or circumstances, is found to be invalid, the remainder of the provisions of this instrument, or the

application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

12. **Permits.** Prior to beginning any work, Licensee, at its sole expense, shall obtain all necessary permits (e.g. encroachment, traffic control, excavation) to use the Licensed Properties as permitted under this Agreement.

13. **All Expenses To Be Borne by Licensee.** Licensee shall bear any and all costs and expenses associated with the rights granted to Licensee to use the Licensed Properties, or any unforeseen costs or expenses incurred by the City relating to Licensee's use of the Licensed Properties in the performance of this Agreement.

14. **Hours of Operation.** The hours of operation that Licensee shall be permitted to conduct its project shall comply with the Municipal Code.

15. **Governing Law.** This Agreement shall be governed in accordance with 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.

16. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute a single agreement.

[Remainder of Page Intentionally Left Blank]

In WITNESS WHEREOF, the Parties have signed this Right of Entry Agreement on the dates indicated below.

CITY OF ALAMEDA

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

By: _____
Jill Keimach
City Manager

By: _____
Kevin Muldoon
Vice President / General Counsel

Date: _____

Date: _____

Recommended for Approval:

Carolyn Hogg
Information Technology Director

Approved as to Form:

Andrico Q. Penick
Assistant City Attorney

EXHIBIT “C”

INSURANCE REQUIREMENTS

INSURANCE REQUIREMENTS

Without limiting 5 BARS' indemnification obligations, 5 BARS shall procure and maintain and shall cause all contractors, subcontractors and sublicensees to procure and maintain (5 BARS, contractors and/or sublicensees shall be referred to hereinafter, as the context dictates, as "**Contractor**"), prior to any activities on City Property in connection with the Agreement for the duration of the Agreement and any applicable sublicense entered into under and/or pursuant to the Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by Contractor, and/or any of its agents, representatives, or employees.

Minimum Limits of Insurance

The policies and amounts of insurance required of Contractor shall be no less than the following:

1. Comprehensive General Liability Insurance which affords coverage at least as broad as Insurance Services office "occurrence" form CG 00 01 including completed operations and contractual liability, with limits of liability of not less than \$1,000,000 per occurrence and \$2,000,000 annual aggregate for liability arising out of Contractor's performance of this Agreement. The limits shall be provided by either a single primary policy or combination of policies. If limits are provided with excess and/or umbrella coverage the limits combined with the primary will equal the minimum limits set forth above. If written with an aggregate, the aggregate shall be double the each occurrence limit. Such insurance shall be endorsed to: (a) name the City and employees, representatives, officers and agents as additional insured for claims arising out of Contractor's performance of this Agreement; and (b) provide that the insurance is primary and non-contributing with any other valid and collectible insurance or self-insurance available to City. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement.
2. Automobile Liability Insurance with a limit of liability of not less than \$1,000,000 each occurrence and \$1,000,000 annual aggregate. The limits shall be provided by either a single primary policy or combination of policies. If limits are provided with excess and/or umbrella coverage the limits combined with the primary will equal the minimum limits set above. Such insurance shall include coverage for all "owned," "hired" and "non-owned" vehicles or coverage for "any auto." Such insurance shall be endorsed to: (a) name the City and employees, representatives, officers and agents as additional insured for claims arising out of Contractor's performance of this Agreement; and (b) provide that the insurance is primary and non-contributing with any other valid and collectible insurance or self-insurance available to City. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement.
3. Workers Compensation Insurance in accordance with the Labor Code of California (including Labor Code section 3700 and 3800) and covering all employees of Contractor providing any service in the performance of this Agreement. Such insurance shall be endorsed to waive the insurer's right of subrogation against the City and employees, representatives, officers and agents. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement, unless the insurance carrier is the State of

California Insurance Fund (“**SCIF**”) and the endorsement numbers 2570 and 2065 are referenced on the certificate of insurance. The City, its officers and employees shall not be responsible for any claims in law or equity occasioned by failure of the Contractor to comply with this section.

4. Professional Liability Insurance with minimum limits of \$1,000,000 each claim. Covered professional services shall include all work performed under this Agreement and delete any exclusion that may potentially affect the work to be performed. Contractor shall provide to Licensor and to the City a Certificate(s) of Insurance evidencing such coverage together with copies of the required policy endorsements no later than five (5) business days prior to commencement of any work to be performed under this Sublicense and at least fifteen (15) business days prior to the expiration of any policy. Coverage shall not be suspended, voided, cancelled, reduced in coverage or in limits, non-renewed, or materially changed for any reason, without thirty (30) days prior written notice thereof given by the insurer to the City by U.S. mail, or by personal delivery, except for nonpayment of premiums, in which case ten (10) days prior notice shall be provided.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration and defense expenses.

Other Insurance Provisions

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The City, its officers, officials, employees and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; premises owned, occupied or used by the Contractor; or automobiles owned, leased or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers, officials, employees or volunteers.
2. For any claims related to this project, the Contractor's insurance coverage shall be primary insurance as respects the City, its officers, employees and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees or volunteers.
4. The Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
6. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement. Insurance policies shall not be in compliance if they include any limiting provision or endorsement that has not been submitted to the City for approval. Further, all additional insured endorsements shall not: (1) be limited to "ongoing operations"; (2) exclude "contractual liability"; (3) restrict coverage to "sole" liability of Sublicensee; (4) contain any other exclusion contrary to this Sublicense.

Acceptability for Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, authorized to do business in the State of California, or otherwise allowed to place insurance through surplus lines brokers under applicable provisions of the California Insurance or any federal law, unless otherwise acceptable to the City.

Verification of Coverage

Contractor shall furnish the City with original endorsements effecting coverage required by this clause. The endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. The endorsements are to be on forms provided by the City. All endorsements are to be received and approved by the City before work commences. As an alternative to the City's forms, the Contractor's insurer may provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

Subcontractors

5 BARS shall be responsible for causing any and all contractors and subcontractors in connection with this Agreement to maintain the same types and limits of coverage in compliance with this Agreement, including naming the City as an additional insured to the contractor's or subcontractor's policies. Contractor shall include all subcontractors as insured under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

* * * * *

I, the undersigned, hereby certify that the foregoing Resolution was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the 5th day of September, 2017, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 6th day of September, 2017.

Lara Weisiger, City Clerk
City of Alameda

APPROVED AS TO FORM:

Janet C. Kern, City Attorney
City of Alameda