

**WIRELESS MARKETING AGREEMENT BETWEEN
THE CITY OF FRESNO
AND 5 BARS COMMUNITIES A DBA OF XG COMMUNITIES, LLC.**

This Wireless Marketing Agreement (Agreement) is made and entered into on _____ (the Effective Date) between the City of Fresno (City) and 5 Bars Communities a dba of XG Communities, LLC., a Delaware limited liability company (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 formed under the laws of the State of California, operating under its charter.
- 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. In October 2016, City invited interested parties to demonstrate their knowledge and expertise for a Gigabit Wireless and/or Wired/Fiber System. A review committee invited responders who met the requirements specified in the RFQ to participate in an oral interview. 5 Bars was chosen as a qualified responder.
- F. City desires to engage 5 Bars to provide wireless consulting, management and development services related to the use of 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.
- G. City desires to engage 5 Bars to proactively market 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 years, with four five-year renewals subject to the written mutual consent of the Parties. Upon sixty days' written notice to 5 Bars, City may, without cause and without prejudice to any other right or remedy of City, elect to terminate this Agreement. In such case, the City shall not pay damages,

costs, or other payment due to 5 Bars except for any percentage payment due to 5 Bars for any agreements approved by Council on a date prior to date of termination of agreement.

2. **Scope and Nature of Services.** 5 Bars shall provide the services described in this section (Services) for the purposes of 5 Bars' planning, marketing, sublicensing, development, maintenance, and/or operation of certain tower(s), pole(s), building(s), fiber, conduit(s), data room(s), street furniture, and any structure(s) or object(s) of any kind or character not particularly mentioned herein (City Asset(s)), which 5 Bars proposes to locate or cause to be located on City Property and within City Right of Way for the purposes of promoting, transmitting or facilitating wireless communication of telephone or data or any other means (Wireless Telecommunications Facilities). City in its sole discretion shall identify a list (Asset List) of City Assets to be included in services provided by 5 Bars. City shall elect to add or remove one or more assets from the Asset List at any time and notify 5 Bars in writing.

a. **Consulting Services.** 5 Bars shall provide City the following consulting services at no cost to City: identify available City Assets that would satisfy or partially satisfy Coverage Needs, provide pricing and fee recommendations, form factor and aesthetic policy development, technology refresh and advancement updates, and other consultation specific to wireless broadband service providers.

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 on any existing and/or proposed site(s) included in the Master Plan. City grants 5 Bars the exclusive right to market, license, sublicense, and construct upon, at 5 Bars' sole cost and expense, City Assets for the development of 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. Upon entering into a license agreement (attached as **Exhibit A**) for the development of Wireless Telecommunications Facilities with one of the wireless carriers or any of the Wireless Services Providers, 5 Bars shall deliver the following number of sites by the end of each year:

- i. a total of 255 sites within year 1
- ii. a total of 340 sites within year 2
- iii. a total of 408 sites within year 3
- iv. a total of 510 sites within year 4
- v. a total of 680 sites within year 5

c. **Management Services.** During the Agreement Term, 5 Bars may at any time request in writing that City make City Assets available for the

development of Wireless Telecommunications Facilities. Upon a determination of approval, City shall notify 5 Bars of such determination in writing, and shall offer to enter into a license with 5 Bars, which license shall be in a form that is substantially consistent with the form set forth in **Exhibit A** to this Agreement. Thereafter, 5 Bars or an affiliate of 5 Bars, at no cost to City, shall construct or cause the construction of the Wireless Telecommunications Facilities, and sublicense the City Assets (either as improved with Wireless Telecommunications Facilities, or subject to improvement with Wireless Telecommunications Facilities) in accordance with the terms of this Agreement and a license agreement to be executed for each designated City 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 the final determination as to whether to move forward with the execution of a license and/or other agreement of substantially equivalent purpose (or an amendment to any such license and/or other agreement) for any existing structure (e.g., rooftop, existing City owned tower, etc.). 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, as well as comply (or cause compliance) with and receive (or cause 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.

d. **Exclusions.**

i. This Agreement shall not require or allow 5 Bars to market, license, sublicense, and/or construct Wireless Telecommunications Facilities on City Assets that are not on the Asset List.

ii. City Assets intended for direct-marketing by the City for macro-cell site development are identified in writing by the City (City Marketed Assets). City Marketed Assets shall be marketed, if at all, directly by the City only; marketing rights for such assets shall not be granted, delegated, or contracted to any third party.

iii. This Agreement shall not 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 by City.

e. It is further mutually understood and agreed by and between the PARTIES hereto that inasmuch as 5 Bars represents to City that 5 Bars and its subcontractors, if any, are skilled in the profession and shall perform in

accordance with the standards of said profession necessary to perform the Services agreed to be done by it under this Agreement, the City relies upon the skill of 5 Bars and any subcontractors to do and perform such services in a skillful manner and 5 Bars agrees to thus perform the services and require the same of any subcontractors. Therefore, any acceptance of such services by the City shall not operate as a release of 5 Bars or any subcontractors from said professional standards.

3. **Telecommunications Ordinance Revision.** Within 180 days after the Effective Date, City shall reasonably consider revisions to its telecommunications ordinance to specify that the City's review of Wireless Telecommunications Facilities that are (i) on City Assets, and (ii) subject to a license agreement that substantially conforms to the form attached as **Exhibit A**, will be accomplished exclusively through the licensing process described in this Agreement.

4. **Right of Entry Agreement.** 5 Bars shall have the right to analyze the suitability of the City Property designated by the City for 5 Bars' intended use. The City and 5 Bars shall enter into a Right of Entry Agreement for 5 Bars and its employees, agents, contractors, engineers, and surveyors to have the right to enter upon City Property, upon reasonable written notice to City, to inspect, conduct, perform and examine soil borings, drainage testing, material sampling, surveys and other geological or engineering tests or studies of City Property, to apply for all licenses and permits required for 5 Bars' use of the designated City Property from all applicable governmental or regulatory entities, and to do those things on or off the designated City Property that, in the sole opinion of 5 Bars, are necessary to determine the physical condition of designated City Property, the environmental history of the designated City Property, and the feasibility or suitability of the designated City 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 Right of Entry Agreement shall grant 5 Bars access to the designated City Property for a defined and specific period of time as set forth in the Right of Entry 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 located within City's jurisdictional boundaries. City shall retain ownership of any Wireless Telecommunications Facilities City subsequently develops on property owned or leased by City for City's own non-commercial use. 5 Bars and/or its sublicensees shall own the Wireless Telecommunications Facilities developed on City Assets pursuant to this Agreement. 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. **Seventy-five percent (75%) City and twenty-five percent (25%)**

5 Bars Revenue Shares. City shall be entitled to 75% of recurring gross payments that are:

i. Received by 5 Bars from sublicensees on new Wireless Telecommunications Facilities that are on City Assets licensed to 5 Bars pursuant to this Agreement; or

ii. Received by 5 Bars as a result of the addition of one or more Wireless Telecommunications Facilities to the site of a City-owned Wireless Telecommunications Facility that was constructed prior to the Effective Date of this Agreement.

b. The City shall pay 5 Bars \$15 for each new site installed or attachment in the City's right-of-way by 5 Bars or its sublicensees.

i. 5 Bars shall deduct the \$15 fee from the City's gross revenue payments.

c. **Reports.** Annual reports reflecting the revenue generated to City will be provided by 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 construction costs, installation costs, utilities, or other expenses incurred by 5 Bars, to the extent said reimbursement does not reduce the rent to be paid by Wireless Service Providers, and such recovered sums shall not be included in the computation of compensation hereunder. 5 Bars shall require Wireless Service Providers to furnish and install an electrical sub-meter for all improvements to measure the electricity used by the Wireless Service Providers.

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 Paragraph 16(i) of this Agreement. After receipt of such notice, the defaulting Party shall have thirty days in which to cure any monetary default and sixty days in which to cure a non-monetary default. If a non-monetary default reasonably requires more than a sixty-day cure period, the defaulting Party shall diligently pursue cure to completion and shall request additional time to cure from the non-defaulting party. The non-defaulting party shall not unreasonably withhold approval of additional time to cure. 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 Paragraph 2(b), above, shall constitute a default under this Paragraph 8 with no damages, costs, or other payment due to 5 Bars except for any percentage payment due to 5 Bars for any agreements approved by Council on a date prior to date of termination of agreement.

9. **Right to Audit.** During the Term of this Agreement the Parties 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. Additionally, 5 Bars shall allow City, and City shall have the right, at any time, to have access to and 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.

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 9.

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. 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.** Subject to Section 3 above, 5 Bars shall comply with all City ordinances pertaining to Wireless Telecommunications Facilities, and all such additional City regulations that are consistent with such ordinances (such ordinances and regulations are collectively referred to as the Ordinance).

13. **Intellectual Property.**

a. **Ownership of Services.** 5 Bars retains all right, title, and interest in any 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 during the term of this Agreement to use the Services for the purposes of offering, promoting, managing, tracking, the development and use of Wireless Telecommunications Facilities

c. **Exclusivity.** During the term of this Agreement, 5 Bars will be the sole and exclusive provider of services as defined as Services in this Agreement, subject to the City's right to directly market City Marketed Assets. 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 it is using licensed software containing propriety and intellectual property and shall: (i) not

copy, modify, transfer, display, share, or use any portion of the licensed software except as expressly authorized in this Agreement or in the applicable documentation; (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; (iii) not engage in any activity that interferes with or disrupts 5 Bars' provision of the Services; and (iv) use the Services exclusively for authorized and legal purposes, consistent with all applicable laws, regulations, and the rights of others.

14. Governing Law and Venue. This Agreement shall be governed by the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno County, California.

15. Confidential Information and Ownership of Documents.

a. Any reports, information, or other data prepared or assembled by 5 Bars pursuant to this Agreement shall not be made available to any individual or organization by 5 Bars without the prior written approval of the Administrator. During the term of this Agreement, and thereafter, 5 Bars shall not, without the prior written consent of the City, disclose to anyone any Confidential Information. The term Confidential Information for the purposes of this Agreement shall include all proprietary and confidential information of the City, including but not limited to business plans, marketing plans, financial information, materials, compilations, documents, instruments, models, source or object codes and other information disclosed or submitted, orally, in writing, or by any other medium or media. All Confidential Information shall be and remain confidential and proprietary in the City.

b. Any and all writings and documents prepared or provided by 5 Bars pursuant to this Agreement are the property of the City at the time of preparation and shall be turned over to the City upon expiration or termination of the Agreement. 5 Bars shall not permit the reproduction or use thereof by any other person except as otherwise expressly provided herein.

c. If 5 Bars should subcontract all or any portion of the services to be performed under this Agreement, 5 Bars shall cause each subcontractor to also comply with the requirements of this Section 5.

d. This Section shall survive expiration or termination of this Agreement.

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 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, employer's social security taxes, unemployment insurance and similar 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. **Cooperative Purchasing.** City acknowledges and agrees that it has followed all applicable purchasing and procurement procedures in entering into this Agreement, and that 5 Bars shall have the right and ability to offer this Agreement as a template for cooperative or piggybacking purchasing agreements with other public agencies which, to the extent allowed by California or applicable State law and the ordinances and regulations of those other public agencies, may serve as a basis to forego competitive procurement processes for such future agreement(s). As used in this article, "public agency" includes, but is not limited to, the federal government or any federal department or agency, this state, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, or any joint powers authority formed pursuant to this article by any of these agencies. In furtherance of the foregoing, 5 Bars agrees other public agencies may purchase additional items on the same terms as are set forth in this Agreement. To the extent 5 Bars enters into such subsequent agreement(s), this Agreement shall be construed to contain an express "Assignment" clause that provides for the assignment of all or part of the specified deliverables and/or provided, however, that City shall not be a signatory, obligee, beneficiary, or third party beneficiary under such future agreements with other public agencies. 5 Bars shall remit monthly to City a 2% revenue share of all gross revenues received from subsequent agreements executed with public agencies that benefit from this Agreement.

d. **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.

e. **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.

f. **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.

g. **Assignment.** 5 Bars may assign this Agreement to a person or entity with demonstrated capacity to carry out 5 Bars' obligations under this Agreement after receiving written City consent. 5 Bars shall provide any information requested or necessary for City to determine whether the proposed assignee has the capacity to fulfill 5 Bars obligations under this Agreement. 5 Bars shall provide thirty days prior written notice of such assignment to City.

h. **Discrimination.** 5 Bars shall not discriminate because of race, color, creed, religion, sex, marital status, sexual orientation, 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.

i. **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 e-mail to the number provided below. All notices, demands, or requests shall be addressed to the following:

City: _____

Phone: _____
Fax: _____

With a copy to:

Phone: _____
Fax: _____

5 Bars: Kevin Muldoon, VP & General Counsel
5 Bars Communities
19200 Von Karman Ave, Suite 100
Irvine, CA 92612
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.

j. **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.

[Signatures follow on the next page.]

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, on the day and year first above written.

“LICENSOR”
CITY OF FRESNO,
A California municipal corporation

By: _____

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By: _____
Brandon Collet Date
Deputy City Attorney

ATTEST:
YVONNE SPENCE, CMC
City Clerk

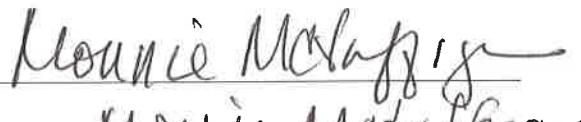
By: _____
Deputy

“LICENSEE”
5 BARS COMMUNITIES A DBA OF XG
COMMUNITIES, LLC
A Delaware Limited Liability Company

By: 

Name: KEVIN MULDOON

Title: VP & GENERAL COUNSEL
(If corporation or LLC, Board Chair,
Pres. or Vice Pres.)

By: 

Name: Monice McAffigan

Title: President
(If corporation or LLC, CFO,
Treasurer, Secretary or Assistant
Secretary)

EXHIBIT A
LICENSE AGREEMENT

THIS LICENSE AGREEMENT is made as of the date of the final signature below, by and between the City of Fresno, a municipal corporation, having a mailing address of 2600 Fresno Street, Fresno, CA 93721 (Licensor) and 5 Bars Communities a dba of XG Communities, LLC., a Delaware limited liability company, with an address at 19200 Von Karman Ave, Suite 100, Irvine, CA 92612 (Licensee).

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 Premises for the purpose intended by this Agreement.

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

"City Facilities" means any and all existing facilities, inclusive of but not limited to all buildings and improvements owned by and under the possession and control of Licensor, including but not limited to utility poles, lamp posts, other utility facilities, fences, gates, and all roof tops of all such buildings, facilities and/or improvements.

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

"Easement" and "Utility Easement" have the meanings set forth in Section 7 of this Agreement.

"Harmful Interference" means Interference that endangers the functioning of a radio navigation service or of other safety services 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 Wireless Telecommunications Facility(ies).

"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.

"Licensed Premises " means those portions of Lessor's Property described in the sketches attached hereto as **Exhibit A**.

"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 93612.

"Lessor" means City of Fresno, a municipal corporation.

"Lessor's Notice Address " means 2600 Fresno Street, Fresno, CA 93721.

"Lessor's Properties" means those properties (each of which is a subject of this License Agreement),

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

"Rent" means _____ % of recurring Sublicense Revenue received by Licensee from Sublicensees on new Wireless Telecommunications Facilities constructed on Licensed Premises under or pursuant to this Agreement.

"Sublicensee Revenue" means the total amount of rent (excluding any reimbursement from Sublicensee(s) of taxes, construction costs, installation costs, utilities, or other expenses incurred by Licensee to the extent said reimbursement is not an offset of rent to be paid by Sublicensee(s)) paid to Licensee by all Sublicensee(s) using each of the Licensed Premises, whether pursuant to a license or other similar agreement as modified, renewed, or assigned.

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

"Subscription Agreement" means the Wireless Marketing Agreement Regarding Licenses and Sublicenses of Publicly-Owned Properties Pertaining to Wireless Telecommunications Facilities, between Lessor and Licensee, dated May ___, 2017.

"Wireless Telecommunications Facilities" means the equipment and associated structures needed to transmit and/or receive electromagnetic signals. A wireless telecommunication facility typically includes antennas, supporting structures, enclosures and/or cabinets housing associated equipment, cable, access roads and other accessory development.

2. Lessor's Cooperation. During the Lease Term, Lessor shall: (i) cooperate with Licensee in its efforts to obtain all of the Approvals and (ii) take no action that

would adversely affect any of the Licensed Premises; provided, however, that 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 infrastructure on the Licensed Premises. Licensor acknowledges that Licensee's ability to use each of the Licensed Premises is contingent upon Licensee obtaining and maintaining the Approvals. 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 cooperation, which Licensor hereby agrees to provide. Licensor shall not knowingly do or permit anything that will interfere with or negate any Approvals pertaining to the Improvements or Licensed Premises 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.

3. Subdivision. In the event that a subdivision of Licensor's Property is legally required to license the any of the Licensed Premises to Licensee, Licensor agrees to seek subdivision approval at Licensee's expense.

4. Term. The Term of this Agreement shall commence on _____, 20____ (Commencement Date) and continue until the license for each Licensed Premise listed in **Exhibit B** has expired. The term of each License listed in **Exhibit B** shall begin on the commencement date listed for such Licensed Premises on **Exhibit B**, and shall continue for a period of five years with four five-year options subject to the written mutual consent of the Licensor and Licensee. Upon sixty days' written notice to 5 Bars, City may, without cause and without prejudice to any other right or remedy of City, elect to terminate this Agreement. In such case, the City shall not pay damages, costs, or other payment due to 5 Bars except for any percentage payment due to 5 Bars for any agreements approved by Council on a date prior to date of termination of agreement.

5. 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 Premises.

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

i. Licensee shall make every reasonable effort to ensure that each proposed Wireless Telecommunications Facility will not affect, detract, or

impact the operation of existing Licensor facilities, particularly traffic signal control and street lighting devices.

ii. Licensee shall ensure that the proposed Wireless Telecommunications Facility is not dependent on the resources dedicated to Licensor facilities.

iii. Licensee shall 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 Wireless Telecommunications Facility to normal operating conditions unless Licensor is the primary and direct cause of such damage. As between Licensee and Licensor, Licensee shall bear all other costs incurred to repair or restore Wireless Telecommunications Facilities; provided, however, the Licensee may allocate its responsibility under this sentence to a third party, including a Sublicensee.

v. Licensee shall make every reasonable effort to restore Licensor facilities in a safe and efficient manner. Licensor shall not be held responsible for lack of revenue during the down time.

vi. Licensee shall give Licensor reasonable notice (or no less than fourteen days) prior to impacting Licensor facilities in a manner that is beyond the routine maintenance and operation of Wireless Telecommunications Facilities.

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 in Sublicense Agreement, Sublicensee agrees to operate any and all of its Wireless Telecommunications Facilities on the Property 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 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 the City on a case-by-case basis, 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 the City's installed communications system(s).

Licensee and Sublicensee agree that in the event of harmful interference or degradation to City's public safety radio operations, City may require on a case-by-case basis that the use of the interfering Wireless Telecommunications Facility be suspended upon reasonable notice by the City to Licensee and the applicable Sublicensee 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.

This procedure shall not be invoked unless absolutely necessary.

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

- ix. Except as specified in this Section 5(b), Lessor shall not unreasonably interfere with Licensee's discretion relating to the terms of subleases, licenses or the grants of occupancy of the Licensed Premises.
- x. Upon termination of this Agreement all leases, licenses, subleases, and subleases shall be assigned and/or transferred to Lessor.

c. Accounting/Adjustments. The parties hereto acknowledge that all information needed to calculate Rent may, from time to time, not be readily available. Accordingly, the parties agree that Licensee may base Rent on Sublicensee agreements, and later make adjustments if overpayments or underpayments occur. At any time, Lessor may request that Licensee provide an accounting of the Rent in such form and content as Lessor may reasonably request.

6. Construction, Engineering, and Other Costs.

- a. Lessor shall have no financial responsibility for planning, construction, and engineering costs associated with the implementation of this License Agreement.
- b. Licensee may recover from Sublicensee's taxes, construction costs, installation costs, utilities, or other expenses incurred by Licensee, to the extent said reimbursement is not an offset of rent to be paid by Sublicensee(s), and such recovered sums shall not be included in the computation of Rent.

c. Licensee shall require Sublicensee to furnish and install an electrical sub-meter for all improvements to measure the electricity used by the Wireless Service Providers.

7. Licensed Premises; Survey. Licensee has provided Lessor with a copy of an "as-built" survey for each Licensed Premises, which shall depict and identify the boundaries of each Licensed Premises and the Easements. The description of the each Licensed Premises set forth in **Exhibit A** shall control in the event of any discrepancies.

8. Access. Conditioned upon and subject to commencement of the License Term, Lessor grants to Licensee and Licensee's employees, agents, contractors, sublicensees, licensees and their employees, agents, and contractors access to land located within Lessor's Property to Licensee, for the purpose of constructing, repairing, maintaining, replacing, demolishing and removing the facility to be located upon each Licensed Premises as necessary to obtain or comply with any Approvals (the Access License). Licensee may request and Lessor shall not unreasonably deny or withhold the granting of an alternate Utility License either to Licensee or directly to the public utility at no cost and in a location acceptable to Licensee and the public utility. The Access Licenses and Utility Licenses (collectively, the Access/Utility Licenses) shall be utilized for the purposes provided during the License Term and thereafter for a reasonable period of time necessary for Licensee to remove the Improvements.

9. Use of Property. The Licensed Premises and the Access/Utility Licenses 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 Lessor. All Improvements, inclusive of security fences, shall comply with the requirements of the Fresno Municipal Code and all other laws and regulations applicable thereto, and Licensee shall obtain all required and necessary governmental agency Approvals and permits. Licensee will maintain the Licensed Premises in a safe condition. It is the intent of the parties that Licensee's Improvements shall not constitute a fixture.

a. Maintenance and Operation. At its sole cost and expense, Licensee shall construct, install, and maintain Wireless Telecommunication Facilities on Lessor's Properties in accordance and conformity with all applicable laws, policies, guidelines, and contractual obligations to Lessor. Lessor shall not be responsible for any cost of maintaining or operating any Wireless Telecommunication Facility. If the Lessor elects, in its sole discretion, to remove or relocate the pole, Licensee shall promptly remove and reinstall its Wireless Telecommunication Facility, at no cost to Lessor. In the event of a pole relocation, the Lessor shall provide thirty days' notice to Licensee. Lessor shall not be responsible for any damage to any Wireless Telecommunication Facility in the event that a pole falls or is knocked down. Nor shall Lessor be responsible for any damage to Licensee's Wireless Telecommunication Facilities caused by a pole removal or relocation.

10. Removal of Obstructions. Licensee has the right to remove obstructions from Lessor's Property, as approved by the Lessor, which approval shall be requested in writing by Licensee and shall not be unreasonably withheld, conditioned or delayed by Lessor. 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 Premises or the Access/Utility Licenses. Licensee shall dispose of any materials removed.

11. 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 Premises in any manner prohibited by law. Licensee shall indemnify and hold Lessor 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 Premises if caused by Licensee or persons acting under Licensee.

b. **Lessor's Obligation and Indemnity.** Lessor shall not (either with or without negligence) cause or permit the escape, disposal or release of any Hazardous Materials on or from Lessor's Property or Licensed Premises in any manner prohibited by law. Lessor 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 Lessor's Property or Licensed Premises unless caused by Licensee or persons acting under Licensee. Licensee agrees that this Agreement shall in no way act to abrogate or waive any immunities available to Lessor under the Tort Claims Act of the State of California.

12. 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. Licensee shall pay all applicable (federal, state, county, city, local) excise, sales, consumer use, possessory interest, or other similar taxes required by law that are levied upon this Agreement or upon Licensee's services under this Agreement. Licensee agrees to reimburse Lessor for any documented increase in real estate or personal property taxes levied against Lessor's Property that are directly attributable to the Improvements. Lessor agrees to provide Licensee any documentation evidencing the increase and how such increase is attributable to Licensee's use. Licensee reserves the right to challenge any such assessment, and Lessor agrees to cooperate with Licensee in connection with any such challenge.

13. 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**. The insurance provisions shall be separate and independent from the indemnification and defense provisions between the Licensee and Lessor and shall not in any way limit the

applicability, scope or obligations of the indemnification defense provisions in Section 14.

14. Indemnification.

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

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 (subject to Licensee's right to reasonably redact such records, books, papers and documents to the extent they are proprietary, represent confidential information, or constitute trade secrets). At all reasonable times, Licensee shall allow Lessor to have access to, examine, copy, and audit such records, 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 Premises.

15. Waiver of Claims and Rights of Subrogation. The parties hereby waive any and all rights of action for negligence against the other on account of damage to the Improvements, Lessor's Property or to the Licensed Premises resulting from any fire or other casualty of the kind covered by property insurance policies with extended coverage, regardless of whether or not, or in what amount, such insurance is carried by the parties. All policies of property insurance carried by either party for the Improvements, Lessor's Property or the Licensed Premises 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.

16. Eminent Domain. If Lessor receives notice of a proposed taking by eminent domain of any part of the Licensed Premises or the Access/Utility Licenses, Lessor will notify Licensee of the proposed taking within five days of receiving said notice and Licensee will have the option to: (i) declare this Agreement null and void 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 Premises; or (ii) remain in possession of that portion of the Licensed Premises and Access/Utility Licenses that will not be taken, in which event there shall be an equitable adjustment in Rent on account of the portion of the Licensed Premises and Access/Utility Licenses so taken.

17. Right of First Refusal. If, during the License term, Licensor receives an offer to purchase, make a loan, or give any consideration in exchange for any of the following interests in all or a portion of any of the Licensed Premises: (i) fee title, (ii) a perpetual or other easement, (iii) a lease, (iv) any present or future possessory interest, (v) any or all portions of Licensor's interest in this Agreement including rent, or (vi) an option to acquire any of the foregoing, Licensor shall provide written notice to Licensee of said offer (Licensor's Notice). Licensor's Notice shall include the prospective buyer's name, the purchase price being offered, any other consideration being offered, the other terms and conditions of the offer, the due diligence period, the proposed closing date and, if a portion of Licensor's Property is to be sold, a description of said portion. Licensee shall have a right of first refusal to purchase, at its election and on the terms and conditions as in Licensor's Notice, a fee simple interest in Licensor's Property or the Licensed Premises or a perpetual easement for the Licensed Premises. If the Licensor's Notice is for more than the Licensed Premises, Licensee shall have the option of purchasing the property subject to Licensor's Notice in its entirety, or in the alternative, negotiating with the proposed purchaser to acquire a perpetual easement in only the Licensed Premises. If Licensee does not exercise its right of first refusal by written notice to Licensor given within thirty days, Licensor may sell the property described in the Licensor's Notice. If Licensee declines to exercise its right of first refusal, then this Agreement shall continue in full force and effect and Licensee's right of first refusal shall survive any such conveyance.

18. Sale of Property. If during the Lease Term, Licensor sells all or part of Licensor's Property, of which the Licensed Premises is a part, then such sale shall be subject to this Agreement.

19. Surrender of Property. Upon expiration or termination of this Agreement, Licensee shall, within a reasonable time, remove all above and below ground Improvements and restore the Licensed Premises to its original condition, without, however, being required to replace any trees or other plants removed, or alter the then existing grading.

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

21. Licensor's Covenant of Title. Licensor covenants that Licensor holds good and marketable fee simple title to Licensor's Property and each of the Licensed Premises and has full authority to enter into and execute this Agreement. Licensor further covenants that there are no encumbrances or other impediments of title that might interfere with or be adverse to Licensee.

22. Interference with Licensee's Business. Licensee shall have the exclusive right to construct, install and operate Wireless Telecommunications Facilities that emit radio frequencies on Licensor's Property. Licensor agrees that it will not permit the construction, installation or operation on Licensor's Property of (i) any additional wireless telecommunications facilities or (ii) any equipment or device that interferes with Licensee's use of the Licensed Premises for a Wireless Telecommunications Facility.

Each of the covenants made by Lessor in this Section is a covenant running with the land for the benefit of the Licensed Premises.

23. Quiet Enjoyment. Lessor covenants that Licensee, on paying Rent and performing the covenants of this Agreement, shall peaceably and quietly have, hold and enjoy the Licensed Premises and Access/Utility Licenses.

24. Mortgages. This Agreement, Licensee's interest in the Licensed Premises and the Access/Utility Licenses shall be subordinate to any mortgage given by Lessor which currently encumbers the Licensed Premises, provided that any mortgagee shall recognize the validity of this Agreement in the event of foreclosure. In the event that the Licensed Premises is or shall be encumbered by such a mortgage, Lessor shall obtain and furnish to Licensee a mutually agreed upon non-disturbance agreement for each such mortgage, in recordable form. If Lessor fails to cooperate in providing any Licensee requested non-disturbance agreement, Licensee may withhold and accrue, without interest, the Rent until such time as Licensee receives all such documentation.

25. Title Insurance. Licensee, at Licensee's option, may obtain title insurance on each of the Licensed Premises and Access/Utility Licenses at Licensee's sole cost and expense. Lessor shall cooperate with Licensee's efforts to obtain title insurance by executing documents or obtaining requested documentation as required by the title insurance company. If Lessor fails to provide the requested documentation reasonably necessary to Licensee for Licensee to obtain title insurance within thirty days of Licensee's request, Licensee, at Licensee's option, may withhold and accrue, without interest, the Rent until such time as Licensee receives all such documentation.

26. Default.

a. **Notice of Default; Cure Period.** If there is a default by Lessor or Licensee (the Defaulting Party) with respect to any of the provisions of this Agreement or Lessor'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 days in which to cure any monetary default and sixty days in which to cure any non-monetary default. If a non-monetary default reasonably requires more than a sixty-day cure period, the Defaulting Party shall diligently pursue cure to completion and shall request additional time to cure from the Non-Defaulting Party. The Non-Defaulting Party shall not unreasonably withhold approval of additional time to cure. 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.** Lessor acknowledges that under the terms of this Agreement, Licensee has the right to terminate this Agreement at any time upon 180 days' written notice to Lessor. Accordingly, in the event that Lessor maintains any action or effects any remedies for default against Licensee resulting in Licensee's dispossession or removal, (i) the Rent shall be paid up to the date of such physical dispossess or removal and (ii) Lessor shall be entitled to recover from Licensee, in lieu of any other damages,

as liquidated, final damages, a sum equal to six months' Rent which shall be calculated at the highest value of the Rent which is in effect on the date of default and for the six-month period thereafter. In no event shall Licensee be liable to Lessor for indirect or speculative damages in connection with or arising out of any default.

c. **Consequences of Lessor's Default.** If Lessor 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 Lease, vacate the Licensed Premises and be relieved from all further obligations under this Agreement; (ii) perform the obligation(s) of Lessor specified in such notice, in which case any expenditures reasonably made by Licensee in so doing shall be deemed paid for the account of Lessor and Lessor agrees to reimburse Licensee for said expenditures upon demand; (iii) take any actions that are consistent with Licensee's rights; (iv) sue for injunctive relief, and/or (v) set-off from Rent any amount reasonably expended by Licensee as a result of such default.

27. 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 the Lessor or the Licensee (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 Lessor and Licensee shall prepare and sign an appropriate document acknowledging any extension of time under this Section.

28. Applicable Law. This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State where the Licensed Premises is located. The parties agree that the venue for any litigation regarding this Agreement shall be the state where the Licensed Premises is located.

29. Assignment, Sublease, Licensing and Encumbrance. Lessee may assign this Agreement to a person or entity with demonstrated capacity to carry out Lessee's obligations under this Agreement. Lessee shall provide 30 days' prior written notice of such assignment to Lessor. Lessee may enter into subleases, licenses, or other authorizations (Sub-Authorizations) to allow a third party to utilize and operate from the Leased Premises, so long as such third party is a provider of services that utilize Wireless Telecommunications Facilities. Sub-Authorizations shall not require the consent of Lessor.

30. Miscellaneous.

a. **Entire Agreement.** Lessor and Licensee agree that this Agreement, together with that certain Consulting Services Agreement Regarding Wireless Master Planning and Memorandum of Understanding and Agreement Regarding Licenses and Sublicenses of Publicly-Owned Properties Pertaining to Wireless Telecommunications Facilities between Lessor and Licensee, contain all of the agreements, promises and understandings between Lessor and Licensee with regard to the Licensed Premises. No oral agreements, promises or

understandings shall be binding upon either Lessor 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.** Lessor 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 Lessor at Lessor'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.** Lessor 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 Lessor 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 paper work to affect a transfer in Rent to the new Lessor. Lessor's failure to provide the IRS Form W-9 within thirty 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.

[Signatures follow on the next page.]

IN WITNESS WHEREOF, Lessor 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.

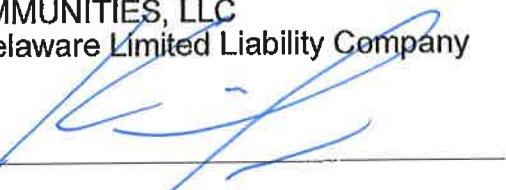
"LESSOR"
CITY OF FRESNO,
A California municipal corporation

By: _____

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

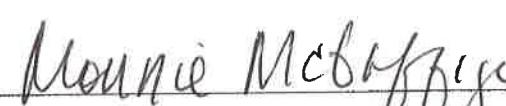
By: _____
Brandon Collet
Deputy City Attorney

"LICENSEE"
5 BARS COMMUNITIES A DBA OF XG
COMMUNITIES, LLC
A Delaware Limited Liability Company

By: 

Name: Kevin Moldover

Title: VP & General Counsel
(If corporation or LLC, Board Chair,
Pres. or Vice Pres.)

By: 
Name: Monnie McCalligan
Title: President
(If corporation or LLC, CFO,
Treasurer, Secretary or Assistant
Secretary)

ATTEST:
YVONNE SPENCE, CMC
City Clerk

By: _____
Deputy

EXHIBIT B
RIGHT OF ENTRY AGREEMENT

This Right of Entry Agreement (this Agreement) is made as of the date of the final signature below, by and between the City of Fresno, a municipal corporation, having a mailing address of 2600 Fresno Street, Fresno, CA 93721 (Grantor) and 5 Bars Communities a dba of XG Communities, LLC., a Delaware limited liability company, 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 is the fee owner of record of that certain real property (the Property).
- B. Grantor and Grantee have entered into that certain Wireless Marketing Agreement Regarding Wireless Master Planning (Subscription Agreement) and a License 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 Subscription 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 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 Subscription 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 entity.

7. Indemnification by Grantee. Except to the extent otherwise provided below, Grantee agrees to 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, any encroachments of the wall on any other property or for claims related to the gross negligence or willful misconduct of Grantor.

8. Authority to Execute. Grantor(s) warrants and represents to Grantee that he/she/it/they is/are the sole owner(s) of 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. No representations or covenants of any kind other than those expressly contained herein have been made by either party hereto. This Agreement may only be modified or amended by an agreement in writing duly executed and delivered by each of 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 to use the Premises 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 Premises, or any unforeseen costs or expenses incurred by the City relating to Licensee's use of the Premises in the performance of this Agreement.

14. Hours of Operation. The hours of operation that Licensee shall be permitted to conduct its project shall be between 7 am and 5 pm, Monday through Friday. No weekend work shall be permitted.

15. Governing Law. This Agreement shall be governed in accordance with the laws of the 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.

[Signatures follow on the next page.]

IN WITNESS WHEREOF, Licensor 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.

"LICENSOR"
CITY OF FRESNO,
A California municipal corporation

By: _____

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

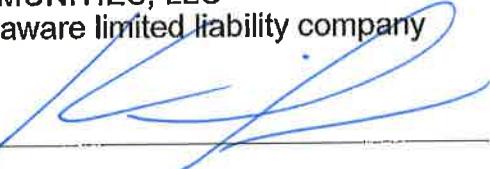
By: _____
Brandon Collet
Deputy City Attorney

Date

ATTEST:
YVONNE SPENCE, CMC
City Clerk

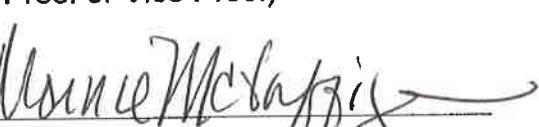
By: _____
Deputy

"LICENSEE"
5 BARS COMMUNITIES A DBA OF XG
COMMUNITIES, LLC
A Delaware limited liability company

By: 

Name: Kevin Madsen

Title: volunteer chair
(If corporation or LLC, Board Chair,
Pres. or Vice Pres.)

By: 

Name: Monnie McCaffigan
President

Title: President
(If corporation or LLC, CFO,
Treasurer, Secretary or Assistant
Secretary)

EXHIBIT C
INSURANCE REQUIREMENTS

**Wireless Marketing Agreement between City of Fresno (City)
and 5 Bars Communities a dba of XG Communities, LLC. (Consultant)**

MINIMUM SCOPE OF INSURANCE

Coverage shall be at least as broad as:

1. The most current version of Insurance Services Office (ISO) Commercial General Liability Coverage Form CG 00 01, providing liability coverage arising out of your business operations. The Commercial General Liability policy shall be written on an occurrence form and shall provide coverage for "bodily injury," "property damage" and "personal and advertising injury" with coverage for premises and operations (including the use of owned and non-owned equipment), products and completed operations, and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability not less than those set forth under "Minimum Limits of Insurance."
2. The most current version of ISO *Commercial Auto Coverage Form CA 00 01, providing liability coverage arising out of the ownership, maintenance or use of automobiles in the course of your business operations. The Automobile Policy shall be written on an occurrence form and shall provide coverage for all owned, hired, and non-owned automobiles or other licensed vehicles (Code 1- Any Auto). If personal automobile coverage is used, the City, its officers, officials, employees, agents, and volunteers are to be listed as additional insureds.
3. Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.
4. Professional Liability (Errors and Omissions) and Cyber Liability (Privacy and Data breach) insurance appropriate to the Consultant's profession.

MINIMUM LIMITS OF INSURANCE

The Consultant, or any party the Consultant subcontracts with, shall maintain limits of liability of not less than those set forth below. However, insurance limits available to the City, its officers, officials, employees, agents, and volunteers as additional insureds, shall be the greater of the minimum limits specified herein or the full limit of any insurance proceeds available to the named insured:

1. **COMMERCIAL GENERAL LIABILITY:**
 - (i) \$1,000,000 per occurrence for bodily injury and property damage;
 - (ii) \$1,000,000 per occurrence for personal and advertising injury;
 - (iii) \$2,000,000 aggregate for products and completed operations; and,
 - (iv) \$2,000,000 general aggregate applying separately to the work performed under the Agreement.

2. **COMMERCIAL AUTOMOBILE LIABILITY:**
\$1,000,000 per accident for bodily injury and property damage.
3. **WORKERS' COMPENSATION INSURANCE** as required by the State of California with statutory limits.
4. **EMPLOYER'S LIABILITY:**
 - (i) \$1,000,000 each accident for bodily injury;
 - (ii) \$1,000,000 disease each employee; and,
 - (iii) \$1,000,000 disease policy limit.
5. **PROFESSIONAL LIABILITY** (Errors and Omissions):
 - (i) \$1,000,000 per claim/occurrence; and,
 - (ii) \$2,000,000 policy aggregate.
6. **CYBER LIABILITY** insurance with limits of not less than:
 - (i) \$1,000,000 per claim/occurrence; and,
 - (ii) \$2,000,000 policy aggregate

UMBRELLA OR EXCESS INSURANCE

In the event the Consultant purchases an Umbrella or Excess insurance policy(ies) to meet the "Minimum Limits of Insurance," this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such Umbrella or Excess insurance policy(ies) shall also apply on a primary and non-contributory basis for the benefit of the City, its officers, officials, employees, agents, and volunteers.

DEDUCTIBLES AND SELF-INSURED RETENTIONS

The Consultant shall be responsible for payment of any deductibles contained in any insurance policy(ies) required herein and the Consultant shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared to on the Certificate of Insurance, and approved by, the City's Risk Manager or designee. At the option of the City's Risk Manager or designee, either:

- (i) The insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees, agents, and volunteers; or
- (ii) The Consultant shall provide a financial guarantee, satisfactory to the City's Risk Manager or designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall the City be responsible for the payment of any deductibles or self-insured retentions.

OTHER INSURANCE PROVISIONS/ENDORSEMENTS

The General Liability and Automobile Liability insurance policies are to contain, or be endorsed to contain, the following provisions:

1. The City, its officers, officials, employees, agents, and volunteers are to be covered as additional insureds. The Consultant shall establish additional insured status for the City and for all ongoing operations by use of ISO Form CG 20 10 11 85 or CG 20 10 10 01 or by an executed manuscript insurance company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.
2. The coverage shall contain no special limitations on the scope of protection afforded to The City, its officers, officials, employees, agents, and volunteers. Any available insurance proceeds in excess of the specified minimum limits and coverage shall be available to the Additional Insured.
3. For any claims relating to this Agreement, Consultant's insurance coverage shall be primary insurance with respect to the City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents, and volunteers shall be excess of Consultant's insurance and shall not contribute with it. The Consultant shall establish primary and non-contributory status by using ISO Form CG 20 01 04 13 or by an executed manuscript insurance company endorsement that provides primary and non-contributory status as broad as that contained in ISO Form CG 20 01 04 13.

The Workers' Compensation insurance policy is to contain, or be endorsed to contain, the following provision: the Consultant and its insurer shall waive any right of subrogation against the City, its officers, officials, employees, agents, and volunteers.

The Cyber Liability insurance shall cover claims involving privacy violations, information theft, damage to or destruction of electronic information, intentional and/or unintentional release of private information (including credit monitoring costs), alteration of electronic information, extortion and network security. Such coverage is required for claims involving any professional services for which Consultant is engaged with the City for such length of time as necessary to cover any and all claims

If the Professional (Errors and Omissions) and Cyber Liability insurance policy(ies) is written on a claims-made form:

1. The retroactive date must be shown, and must be before the effective date of the Agreement or the commencement of work by the Consultant.
2. Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the Agreement work or termination of the Agreement, whichever occurs first, or, in the alternative, the policy shall be endorsed to provide not less than a five-year discovery period.

3. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the effective date of the Agreement or the commencement of work by the Consultant, the Consultant must purchase "extended reporting" coverage for a minimum of five years' completion of the Agreement work or termination of the Agreement, whichever occurs first.
4. A copy of the claims reporting requirements must be submitted to the City for review.
5. These requirements shall survive expiration or termination of the Agreement.

All policies of insurance required herein shall be endorsed to provide that the coverage shall not be cancelled, non-renewed, reduced in coverage or in limits except after thirty calendar days written notice by certified mail, return receipt requested, has been given to the City. The Consultant is also responsible for providing written notice to the City under the same terms and conditions. Upon issuance by the insurer, broker, or agent of a notice of cancellation, non-renewal, or reduction in coverage or in limits, the Consultant shall furnish the City with a new certificate and applicable endorsements for such policy(ies). In the event any policy is due to expire during the work to be performed for the City, the Consultant shall provide a new certificate, and applicable endorsements, evidencing renewal of such policy not less than fifteen calendar days prior to the expiration date of the expiring policy.

Should any of these policies provide that the defense costs are paid within the Limits of Liability, thereby reducing the available limits by defense costs, then the requirement for the Limits of Liability of these policies will be twice the above stated limits.

The fact that insurance is obtained by the Consultant shall not be deemed to release or diminish the liability of the Consultant, including, without limitation, liability under the indemnity provisions of this Agreement. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Consultant. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of the Consultant, its principals, officers, agents, employees, persons under the supervision of the Consultant, vendors, suppliers, invitees, consultants, sub-consultants, subcontractors, or anyone employed directly or indirectly by any of them.

VERIFICATION OF COVERAGE

The Consultant shall furnish the City with all certificate(s) and **applicable endorsements** effecting coverage required hereunder. All certificates and **applicable endorsements** are to be received and approved by the City's Risk Manager or designee prior to the City's execution of the Agreement and before work commences. All non-ISO endorsements amending policy coverage shall be executed by a licensed and authorized agent or broker. Upon request of the City, the Consultant shall immediately furnish City with a complete copy of any insurance policy required under this Agreement, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this Agreement.

SUBCONTRACTORS - If the Consultant subcontracts any or all of the services to be performed under this Agreement, the Consultant shall require, at the discretion of the City Risk Manager or designee, subcontractor(s) to enter into a separate side agreement with the City to provide required indemnification and insurance protection. Any required side agreement(s) and associated insurance documents for the subcontractor must be reviewed and preapproved by the City Risk Manager or designee. If no side agreement is required, the Consultant shall require and verify that subcontractors maintain insurance meeting all the requirements stated herein and the Consultant shall ensure that the City, its officers, officials, employees, agents, and volunteers are additional insureds. The subcontractors' certificates and endorsements shall be on file with the Consultant, and the City, prior to commencement of any work by the subcontractor.