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City of South San Francisco
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South San Francisco, CA 94083

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**FIRST AMENDED AND RESTATED
DEVELOPMENT AGREEMENT
BY AND BETWEEN
CITY OF SOUTH SAN FRANCISCO
AND
BMR-GATEWAY OF PACIFIC V LP**

**GATEWAY OF PACIFIC PHASE 5 PROJECT
SOUTH SAN FRANCISCO, CALIFORNIA**

FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT

Gateway of Pacific Phase 5 Project

This FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT FOR THE GATEWAY OF PACIFIC PHASE 5 PROJECT is dated _____, 2020 (“Agreement”), between BMR-GATEWAY OF PACIFIC V LP, a Delaware limited partnership, formerly known as BMR-475 ECCLES AVENUE LLC, a Delaware limited liability company (“Owner”), and the CITY OF SOUTH SAN FRANCISCO, a municipal corporation organized and existing under the laws of the State of California (“City”). Owner and the City are individually referred to herein as a “Party” and collectively referred to herein as “Parties.”

RECITALS

- A. WHEREAS, California Government Code (“Government Code”) Sections 65864 through 65869.5 authorize the City to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property or on behalf of those persons having same; and
- B. WHEREAS, pursuant to Government Code Section 65865, the City has adopted rules and regulations, embodied in Chapter 19.60 of the South San Francisco Municipal Code (“Municipal Code” or “SSFMC”), establishing procedures and requirements for adoption and execution of development agreements; and
- C. WHEREAS, this Agreement concerns eight and nine-tenths (8.9) acres of property consisting of (a) a six and one-tenth (6.1) acre site located at 475 Eccles Avenue, in the East of 101 Area Plan, as shown and more particularly described in Exhibit A, attached (“Approved Property”), and (b) a two and eight-tenths (2.8) acre site formerly occupied by railroad spurs located immediately north of the Approved Property and south of Phases 1 through 4 of the Gateway of Pacific campus, as shown and more particularly described in Exhibit A (“Added Property”). The Approved Property and the Added Property are collectively referred to herein as the “Property”; and
- D. WHEREAS, Owner has a legal or equitable interest in the Property subject to this Agreement; and
- E. WHEREAS, on July 27, 2016, the City Council, by Resolution Number 94-2016, approved a conditional use permit to allow Owner to increase the base floor area ratio (“FAR”) from five tenths (0.5) to one (1.0) on the Approved Property based on an approved “Incentives Program” as provided in Municipal Code Section 20.110.003; and
- F. WHEREAS, on July 27, 2016, the City Council, by Ordinance Number 1 522-2016, approved and adopted that certain Development Agreement between the City and Owner for the 475 Eccles Avenue Life Science Campus Project (“2016 Agreement”) on the Approved Property; and
- G. WHEREAS, the 2016 Agreement became effective on or about August 26, 2016 (“2016 Effective Date”); and

- H. WHEREAS, subsequent to the 2016 Effective Date, Owner acquired the Added Property; and
- I. WHEREAS, subsequent to the 2016 Effective Date, Owner submitted a modified development proposal to the City to permit development of the Property as depicted in the Project Documents, prepared by Flad Architects, BKF Engineers, and CMG Landscape Architecture and attached hereto as Exhibit B; and
- J. WHEREAS, the modified development proposal for the Gateway of Pacific Phase 5 project, by including the Added Property, enables development of an integrated Gateway of Pacific campus by providing pedestrian and bicycle connections between the Approved Property and the Gateway of Pacific campus to the north; and
- K. WHEREAS, the modified development proposal also redesigns the site on the Approved Property to integrate it physically and aesthetically with the adjacent Gateway of Pacific campus to the north; and
- L. WHEREAS, the modified development proposal is 262,287 square feet, as identified in Resolution Number 94-2016 based on the application of an FAR of approximately 1.0 to the Approved Property, and does not include the density that could be available to Owner based on the application of allowable FAR to the Added Property; and
- M. WHEREAS, by entering into this Agreement, Owner has not waived any right it may have for future additional development on the Property based on the application of allowable FAR to the Property; and
- N. WHEREAS, this Agreement does not grant a vested right to develop more than the density of the modified development proposal; and
- O. WHEREAS, concurrently with approval of this Agreement, following review and recommendation by the Planning Commission and after a duly noticed public hearing, the City Council, by Resolution No. _____, approved an amendment to the conditional use permit issued under by Resolution No. 94-2016 to enable development of the modified development proposal; and
- P. WHEREAS, Owner has requested that the City enter into this Agreement to amend and restate the rights and obligations of the Parties relating to the development of the Property, expand the property subject to this Agreement to include the Added Property, and incorporate approvals of the modified development proposal into this Agreement; and
- Q. WHEREAS, all proceedings necessary for the valid adoption and execution of this Agreement have taken place in accordance with Government Code Sections 65864 through 65869.5, the California Environmental Quality Act (“CEQA”), and Chapter 19.60 of the Municipal Code; and
- R. WHEREAS, the City Council and the Planning Commission have found that this Agreement is consistent with the objectives, policies, general land uses and programs

specified in the South San Francisco General Plan as adopted on October 13, 1999 and as amended from time to time; and

- S. WHEREAS, on _____, 2020, the City Council adopted Ordinance No. _____ approving and adopting this Agreement, and the Ordinance took effect thirty days later.

AGREEMENT

NOW, THEREFORE, the Parties, pursuant to the authority contained in Government Code Sections 65864 through 65869.5 and Chapter 19.60 of the Municipal Code and in consideration of the mutual covenants and agreements contained herein, agree as follows:

1. Effective Date

Pursuant to Section 19.60.140 of the Municipal Code, notwithstanding the fact that the City Council adopts an ordinance approving this Agreement, this Agreement shall be effective and shall only create obligations for the Parties from and after the date that the ordinance approving this Agreement takes effect (“2020 Effective Date”).

2. Duration

This Agreement shall expire December 31, 2030. Notwithstanding the foregoing, if litigation against the Owner (or any of its officers, agents, employees, contractors, representatives or consultants) to which the City also is a party should delay implementation or construction on the Property of the “Project” (as defined in Section 3 below), the expiration date of this Agreement shall be extended for a period equal to the length of time from the time the summons and complaint is served on the defendant(s) until the judgment entered by the court is final, and not subject to appeal; provided, however, that the total amount of time for which the expiration date shall be extended as a result of such litigation shall not exceed five (5) years.

3. Project Description; Development Standards For Project

The project to be developed on the Property pursuant to this Agreement (the “Project”) shall consist of construction of two new buildings and one parking structure, and exterior landscaping, driveways, pathways, pedestrian amenities, and other related improvements, to be built in one or more phases, to create a connected, pedestrian-friendly, campus-style development, as more particularly described in the Project Documents and as approved by the City Council, provided that the Project also includes any subsequent modifications made by Owner with approval by the Planning Commission or the City Council, so long as such modifications do not increase the maximum amount of square feet permitted to be constructed on the Property (262,287 square feet of gross floor area for the two new buildings).

- (a) The permitted uses, the density and intensity of uses, the maximum heights, locations and total area of the proposed buildings, the development schedule, the provisions for vehicular access and parking, any reservation or dedication of land,

any public improvements, facilities and services, and all environmental impact mitigation measures imposed as approval conditions for the Project, as any such items may be modified under Section 3, above, shall be exclusively those provided in the City Council resolutions required to implement the Project, the 475 Eccles Avenue Environmental Impact Report dated October 26, 2012 (DEIR) and February 2016 (FEIR) ("2016 EIR"), this Agreement, and the applicable ordinances in effect as of the 2016 Effective Date, except as modified in this Agreement. The Project will be redeveloped in one or two phases, at Owner's election. Each phase of development will adhere to the governing Municipal Code provisions applicable to the Property as of the 2016 Effective Date (except as modified by this Agreement), as well as the Conditions of Approval and the Mitigation Monitoring and Reporting Program set forth in Exhibit C hereto.

- (b) Subject to Owner's fulfillment of its obligations under this Agreement, upon the 2020 Effective Date of this Agreement, the City hereby grants to Owner a vested right to develop and construct on the Property all the improvements for the Project authorized by, and in accordance with, the terms of this Agreement and the applicable ordinances in effect as of the 2016 Effective Date.
- (c) Upon such grant of right, no amendments to the City General Plan, the City Zoning Code, the Municipal Code, or other City ordinances, policies or regulations in effect as of the 2016 Effective Date shall apply to the Project, except such modifications that are not in conflict with and do not prevent implementation of the Project; provided, however, that nothing in this Agreement shall prevent or preclude the City from adopting any land use regulations or amendments expressly permitted herein or otherwise required by State or Federal Law.
- (d) Owner shall cause the Project to be submitted for certification pursuant to the Leadership in Energy and Environmental Design ("LEED") Green Building Rating System of the U.S. Green Building Council or other industry equivalent agency. Owner shall use good faith efforts to achieve a "Silver" (or higher) rating, pursuant to the LEED Green Building Rating System; provided, however, that Owner shall not be in default under this Agreement if, notwithstanding Owner's good faith efforts, the Project does not receive a "Silver" (or higher) rating.
- (e) Upon completion of Project improvements within the Added Property, Owner shall execute and have recorded, at no cost to the City, a shared access easement substantially in the form attached hereto as Exhibit E, on the terms and at the location described therein ("Public Trail Easement Agreement").

4. Permits for Project

All required permits for the Project shall comply with all applicable Uniform Codes, the Municipal Code in effect as of the 2016 Effective Date, CEQA requirements (including any required mitigation measures) and Federal and State Laws.

5. Vesting of Approvals

Upon the City's approval of this Agreement, the approval shall be vested in Owner and its successors and assigns for the term of this Agreement, provided that the successors and assigns comply with the terms and conditions of the Agreement, including, but not limited to, submission of insurance certificates and bonds for the grading of the Property and construction of improvements.

6. Cooperation Between Parties in Implementation of this Agreement

It is the Parties' express intent to cooperate with one another and diligently work to implement all land use and building approvals for development of the Property in accordance with the terms of this Agreement. Accordingly, Owner and the City shall proceed in a reasonable and timely manner, in compliance with the deadlines mandated by applicable agreements, statutes or ordinances, to complete all steps necessary for implementation of this Agreement and development of the Property in accordance with the terms of this Agreement. The City shall proceed in an expeditious manner to complete all actions required for the development of the Project, including, but not limited to, the following:

- (a) Scheduling all required public hearings by the City Council and City Planning Commission; and
- (b) Processing and checking all maps, plans, permits, building plans and specifications and other plans relating to development of the Property filed by Owner or its nominee, successor or assign as necessary for development of the Property, and inspecting and providing acceptance of or comments on work by Owner that requires acceptance or approval by the City.

Owner, in a timely manner, shall provide the City with all documents, applications, plans and other information necessary for the City to carry out its obligations hereunder and to cause its planners, engineers and all other consultants to submit in a timely manner all necessary materials and documents.

7. Acquisition of Other Property; Eminent Domain

In order to facilitate and insure development of the Project in accordance with the City Council's approval, the City may assist Owner, at Owner's request and at Owner's sole cost and expense, in acquiring any easements or properties necessary for the satisfaction and completion of any off-site components of the Project required by the City to be constructed or obtained by Owner in the City's approval of the Project, in the event Owner is unable to acquire such easements or properties or is unable to secure the necessary agreements with the applicable property owners for such easements or properties. Owner expressly acknowledges that the City is under no obligation to use its power of Eminent Domain.

8. Maintenance Obligations on Property

All of the Property subject to this Agreement shall be maintained by Owner or its successors and assigns in perpetuity in accordance with City requirements to prevent accumulation of litter and trash, to keep weeds abated, to provide erosion control, and to comply with other requirements set forth in the Municipal Code, subject to City approval as permitted or required by the Municipal Code.

- (a) If Owner subdivides the property or otherwise transfers ownership of a parcel or building in the Project to any person or entity such that Owner, or Owner's member, partner, parent, or subsidiary, no longer owns a majority interest in a parcel or building in the Project, Owner shall first establish an Owner's Association and submit Conditions, Covenants and Restrictions ("CC&Rs") to the City for review and approval by the City Attorney not to be unreasonably withheld, conditioned or delayed (provided, however, that if such transfer arises from a Mortgage Transfer Event (as defined in Section 30 below), then such Association shall be established and CC&Rs shall be submitted as soon as reasonably practicable after such Mortgage Transfer Event). Said CC&Rs shall satisfy the requirements of Section 19.36.040 of the Municipal Code.
- (b) Any provisions of said CC&Rs governing the Project relating to the maintenance obligations under this section shall be enforceable by the City.

9. New Taxes

Any subsequently enacted City-wide taxes shall apply to the Property, provided that: (i) the application of such taxes to the Property is prospective; and (ii) the application of such taxes would not prevent development in accordance with this Agreement.

10. Assessments

Nothing herein shall be construed to relieve the Property from common benefit assessments levied against it and similarly situated properties by the City pursuant to and in accordance with any statutory procedure for the assessment of property to pay for infrastructure and/or services that benefit the Property.

11. Additional Conditions

Owner shall comply with all of the following requirements:

- (a) **Fees.** Owner shall not be responsible for any fees imposed by the City in connection with the development and construction of the Project, except as outlined in Exhibit D attached hereto and incorporated herein. No fee requirements (other than those identified herein) imposed by the City on or after the 2016 Effective Date and no changes to then-existing fee requirements (except those already subject to periodic adjustments as specified in the adopting or implementing resolutions and ordinances) that occurred or occur on or after the 2016 Effective Date shall apply to the Project. Any application, processing,

administrative, legal and inspection fees that are revised during the term of this Agreement shall apply to the Project provided that (i) such fees have general applicability; (ii) the application of such fees to the Property is prospective; and (iii) the application of such fees would not prevent development in accordance with this Agreement.

- (b) **Transportation Demand Management Plan.** Owner shall prepare an annual Transportation Demand Management (TDM) report, and submit same to City, to document the effectiveness of the TDM plan in achieving the goal of 35% alternative mode usage by employees within the Project when the Project is built out to a 1.0 FAR or less.

The TDM report will be prepared by an independent consultant, retained by City with the approval of Owner (which approval shall not be unreasonably withheld or delayed) and paid for by Owner, which consultant will work in concert with Owner's TDM coordinator. The TDM report will include a determination of historical employee commute methods, which information shall be obtained by survey of all employees working in the redeveloped buildings on the Property. All non-responses to the employee commute survey will be counted as a drive alone trip. TDM monitoring shall be required and conducted pursuant to South San Francisco Municipal Code, Chapter 20.400, as that Chapter may be revised, amended, or reorganized from time to time.

- 1) **TDM Reports:** The initial TDM report for each redeveloped building on the Property will be submitted two (2) years after the granting of a certificate of occupancy with respect to the building, and this requirement will apply to all of the redeveloped buildings on the Property except the parking facility. The second and all later reports with respect to each building shall be included in an annual comprehensive TDM report submitted to City covering all of the redeveloped buildings on the Property which are submitting their second or later TDM reports.
- 2) **Report Requirements:** The goal of the TDM program is to encourage alternative mode usage, as defined in Chapter 20.400 of the South San Francisco Municipal Code. The initial TDM report shall either: (1) state that the applicable property has achieved the Targeted Alternative Mode Usage, based on the number of employees in the redeveloped buildings at the time, providing supporting statistics and analysis to establish attainment of the goal; or (2) state that the applicable property has not achieved the Targeted Alternative Mode Usage, providing an explanation of how and why the goal has not been reached, and a description of additional measures that will be adopted in the coming year to attain the Targeted Alternative Mode Usage.
- 3) **Penalty for Non-Compliance:** If after the initial TDM report, subsequent annual reports indicate that, in spite of the changes in the TDM plan, the Targeted Alternative Mode Usage is still not being achieved, or if Owner

fails to submit such a TDM report at the times described above, City may assess Owner a penalty in the amount of Fifteen Thousand Dollars (\$15,000.00) per year for each percentage point that the actual alternative mode usage is below the Targeted Alternative Mode Usage goal.

- i. In determining whether a financial penalty is appropriate, City may consider whether Owner has made a good faith effort to meet the TDM goals.
 - ii. If City determines that Owner has made a good faith effort to meet the TDM goals but a penalty is still imposed, and such penalty is imposed within the first three (3) years of the TDM plan (commencing with the first year in which a penalty could be imposed), such penalty sums, in the City's sole discretion, may be used by Owner toward the implementation of the TDM plan instead of being paid to City. If the penalty is used to implement the TDM Plan, an Implementation Plan shall be reviewed and approved by the City prior to expending any penalty funds.
 - iii. Notwithstanding the foregoing, the amount of any penalty shall bear the same relationship to the maximum penalty as the completed construction to which the penalty applies bears to the maximum amount of square feet of Office, Commercial, Retail and Research and Development use permitted to be constructed on the Property. For example, if there is 200,000 square feet of completed construction on the Property included within the TDM report with respect to which the penalty is imposed, the penalty would be determined by multiplying Fifteen Thousand Dollars (\$15,000.00) times a fraction, the numerator of which is 200,000 square feet and the denominator of which is the maximum amount of square feet of building construction, excluding parking facilities, permitted on the Property; this amount would then be multiplied by the number of percentage points that the actual alternative mode usage is below the Targeted Alternative Mode Usage goal.
 - iv. The provisions of this section are incorporated as Conditions of Approval for the Project and shall be included in the approved TDM for the Project.
- (c) **EIR.** The Parties will adhere to the Conditions of Approval for the Project and the Mitigations which result from the 2016 EIR and Mitigation Monitoring and Reporting Program (attached as Exhibit C). Entitlement review for future Project phases will be limited in scope, so long as consistent with the 2016 EIR and the Project Documents.

(d) **Climate Action Plan.** The Project shall comply with the *City of South San Francisco Climate Action Plan Adopted February 13, 2014* (the “CAP”). The applicable measures from the CAP are as follows:

- 1) Measure 2.1, Action 5 (provide conduit for future electric vehicle charging installations);
- 2) Measure 3.4, Action 1 (encourage high-albedo surfaces, as identified in voluntary CALGreen standards);
- 3) Measure 4.1, Action 2 (requiring construction of new nonresidential conditioned space 5,000 square feet or more to comply with one of the following standards: (i) Meet a minimum of 50% of modeled building electricity needs with on-site renewable energy sources; (ii) participate in a power purchase agreement to offset a minimum of 50% of modeled building electricity use; (iii) comply with CALGreen Tier 2 energy efficiency requirements to exceed mandatory efficiency requirements by 20% or more.)

To comply with this Measure 4.1, Action 2, the Project must demonstrate that it is projected to achieve the CAP target of a 50% or 20% reduction (or offset) below the energy demand that would result if the Project were built under the assumptions used in the CAP’s Adjusted Business As Usual (ABAU) projections.

- 4) Measure 4.1, Action 3 (install conduit to accommodate wiring for solar); and
- 5) Measure 6.1, Action 2 (Revitalize implementation and enforcement of the Water Efficient Landscape Ordinance by undertaking one of the following: (i) establishing a variable-speed pump exchange for water features; (ii) limiting turf area in commercial and large multi-family projects; (iii) restricting hours of irrigation to occur between 3:00 a.m. and two hours after sunrise; (iv) installing irrigation controllers with rain sensors; (v) landscaping with native, water-efficient plants; (vi) installing drip irrigation systems; (vii) reducing impervious surfaces.

12. Indemnity

Owner agrees to indemnify, defend (with counsel selected by the City subject to the reasonable approval of Owner) and hold harmless the City, and its elected and appointed councils, boards, commissions, officers, agents, employees, and representatives from any and all claims, costs (including legal fees and costs) and liability for any personal injury or property damage which may arise directly or indirectly as a result of any actions or inactions by Owner, or any actions or inactions of Owner’s contractors, subcontractors, agents, or employees in connection with the construction, improvement, operation, or maintenance of the Project, provided that Owner shall have no indemnification obligation

with respect to gross negligence or willful misconduct of the City, its contractors, subcontractors, agents or employees or with respect to the maintenance, use or condition of any public improvement after the time it has been dedicated to and accepted by the City or another public entity (except as provided in an improvement agreement or maintenance bond).

13. Interests of Other Owners

Owner has no knowledge of any reason why Owner, and any other persons holding legal or equitable interests in the Property as of the 2020 Effective Date, will not be bound by this Agreement.

14. Assignment

- (a) Right to Assign. Owner may at any time or from time to time transfer its right, title or interest in or to all or any portion of the Property. In accordance with Government Code Section 65868.5, the burdens of this Agreement shall be binding upon, and the benefits of this Agreement shall inure to, all successors in interest to Owner. As a condition precedent to any such transfer, Owner shall require the transferee to acknowledge in writing that the transferee has been informed, understands and agrees that the burdens and benefits under this Agreement relating to such transferred property shall be binding upon and inure to the benefit of the transferee.
- (b) Notice of Assignment or Transfer. No transfer, sale or assignment of Owner's rights, interests and obligations under this Agreement shall occur without prior written notice to the City and approval by the City Manager, which approval shall not be unreasonably withheld, conditioned or delayed. The City Manager shall consider and decide the matter within ten (10) days after Owner's notice, provided all necessary documents, certifications and other information evidencing the ability of the transferee's ability to perform under this Agreement, are provided to the City Manager.
- (c) Exception for Notice. Notwithstanding Section 14(b), Owner may at any time, upon notice to the City but without the necessity of any approval by the City, transfer the Property or any part thereof and all or any part of Owner's rights, interests and obligations under this Agreement: (i) to any subsidiary, affiliate, parent or other entity which controls, is controlled by or is under common control with Owner, (ii) to any member or partner of Owner or any subsidiary, parent or affiliate of any such member or partner, (iii) to any successor or successors to Owner by merger, consolidation, non-bankruptcy reorganization or government action, or (iv) as a result of a Mortgage Transfer Event (as defined in Section 30, below). As used in this subsection, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of management or policies, whether through the ownership of voting securities, partnership interest, contracts (other than those that transfer Owner's interest in the property to a third party not specifically identified in this subsection) or otherwise.

- (d) Release Upon Transfer. Upon the transfer, sale, or assignment of all of Owner's rights, interests and obligations under this Agreement pursuant to Section 14(a), Section 14(b) or Section 14(c) of this Agreement, Owner shall be released from the obligations under this Agreement, with respect to the Property, or portion thereof, transferred, sold, or assigned, arising subsequent to the date of the City Manager's approval of such transfer, sale, or assignment or the effective date of such transfer, sale or assignment, whichever occurs later; provided, however, that if any transferee, purchaser or assignee approved by the City Manager expressly assumes any right, interest or obligation of Owner under this Agreement, Owner shall be released with respect to such rights, interests and assumed obligations. In any event, the transferee, purchaser or assignee shall be subject to all the provisions hereof and shall provide all necessary documents, certifications and other necessary information prior to City Manager approval, where such approval is required as set forth in Section 14(b), above.
- (e) Owner's Right to Retain Specified Rights or Obligations. Notwithstanding Section 14(a) and Section 14(c), Owner may withhold from a sale, transfer or assignment of this Agreement certain rights, interests and/or obligations which Owner shall retain, provided that Owner specifies such rights, interests and/or obligations in a written document to be appended to or maintained with this Agreement and recorded with the San Mateo County Recorder prior to or concurrently with the sale, transfer or assignment. Owner's purchaser, transferee or assignee shall then have no interest in or obligations for such retained rights, interests and obligations and this Agreement shall remain applicable to Owner with respect to such retained rights, interests and/or obligations.
- (f) Time for Notice. Within ten (10) days of the date escrow closes on any such transfer, Owner shall notify the City in writing of the name and address of the transferee. Said notice shall include a statement as to the obligations, including any mitigation measures, fees, improvements or other conditions of approval, assumed by the transferee. Any transfer which does not comply with the notice requirements of this Section and Section 14(b) shall not release Owner from its obligations to the City under this Agreement until such time as the City is provided notice in accordance with Section 14(b).

15. Insurance

- (a) Commercial General Liability Insurance. At all times that Owner is constructing any portion or phase of the Project, or any improvement related to any portion or phase of the Project, Owner shall maintain in effect a policy of commercial general liability insurance with a per-occurrence combined single limit of not less than ten million dollars (\$10,000,000.00). With the exception of workers' compensation and employer's liability, this insurance shall include City as an additional insured to the extent liability is caused by work or operations performed by or on behalf of Owner.

- (b) Workers Compensation Insurance. At all times that Owner is constructing any portion or phase of the Project, or any improvement related to any portion or phase of the Project, Owner shall maintain Worker's Compensation insurance for all persons employed by Owner for work at the Project site. Owner shall require each contractor and subcontractor similarly to provide Worker's Compensation insurance for its respective employees. Owner agrees to indemnify the City for any damage resulting from Owner's failure to maintain any such required insurance.
- (c) Evidence of Insurance. Prior to commencement of any construction of any portion or phase of the Project, or any improvement related to any portion or phase of the Project, Owner shall furnish the City satisfactory evidence of the insurance required in subsections (a) and (b).
- 1) In the event of a reduction (below the limits required in this Agreement) or cancellation in coverage, or an adverse material change in insurance coverage and limits required in this Agreement, Owner shall, prior to such reduction, cancellation or change, provide at least ten (10) days' prior written notice to the City, regardless of any notification by the applicable insurer. If the City discovers that the policies have been cancelled or reduced below the limits required in this Agreement and no notice has been provided by either insurer or Owner, said failure shall constitute a material breach of this Agreement.
 - 2) In the event of a reduction (below the limits required by this Agreement) or cancellation in coverage, Owner shall have five (5) days in which to provide evidence of the required coverage during which time no persons shall enter the Property to construct improvements thereon, including construction activities related to the landscaping and common improvements. Additionally, no persons not employed by existing tenants shall enter the Property to perform such work until such time as the City receives evidence of substitute coverage.
 - 3) If Owner fails to obtain substitute coverage within ten (10) days, the City may obtain, but is not required to obtain, substitute coverage and charge Owner the cost of such coverage plus an administrative fee equal to ten percent (10%) of the premium for said coverage.
- (d) The insurance shall include the City, its elective and appointive boards, commissions, officers, agents, employees and representatives as additional insureds on the policies.

16. Covenants Run With the Land

The terms of this Agreement are legislative in nature, and apply to the Property as regulatory ordinances. During the term of this Agreement, all of the provisions, agreements, rights, powers, standards, terms, covenants and obligations contained in this

Agreement shall run with the land and shall be binding upon the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns, devisees, administrators, representatives, lessees and all other persons or entities acquiring the Property, any lot, parcel or any portion thereof, and any interest therein, whether by sale, operation of law or other manner, and they shall inure to the benefit of the Parties and their respective successors.

17. Conflict With State or Federal Law

In the event that State or Federal laws or regulations, enacted after the 2020 Effective Date, prevent or preclude compliance with one or more provisions of this Agreement, such provisions of this Agreement shall be modified (in accordance with Section 18 set forth below) or suspended as may be necessary to comply with such State or Federal laws or regulations. Notwithstanding the foregoing, Owner shall have the right to challenge, at its sole cost, in a court of competent jurisdiction, the law or regulation preventing compliance with the terms of this Agreement and, if the challenge in a court of competent jurisdiction is successful, this Agreement shall remain unmodified and in full force and effect.

18. Procedure for Modification Because of Conflict With State or Federal Laws

In the event that State or Federal laws or regulations enacted after the 2020 Effective Date prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, the Parties shall meet and confer in good faith in a reasonable attempt to modify this Agreement to comply with such State or Federal law or regulation. Any such amendment or suspension of the Agreement shall be approved by the City Council in accordance with Chapter 19.60 of the Municipal Code.

19. Periodic Review

- (a) During the term of this Agreement, the City shall conduct “annual” and/or “special” reviews of Owner’s good faith compliance with the terms and conditions of this Agreement in accordance with the procedures set forth in Chapter 19.60 of the Municipal Code. The City may recover from Owner reasonable costs incurred in conducting said review, including staff time expended and reasonable attorneys’ fees.
- (b) At least five (5) calendar days prior to any hearing on any annual or special review, the City shall mail Owner a copy of all staff reports and, to the extent practical, related exhibits. Owner shall be permitted an opportunity to be heard orally or in writing regarding its performance under this Agreement before the City Council or, if the matter is referred to the Planning Commission, then before said Commission. Following completion of any annual or special review, the City shall give Owner a written Notice of Action, which Notice shall include a determination, based upon information known or made known to the City Council or the City’s Planning Director as of the date of such review, whether Owner is in

default under this Agreement and, if so, the alleged nature of the default, a reasonable period to cure such default, and suggested or potential actions that the City may take if such default is not cured by Owner.

20. Amendment or Cancellation of Agreement

This Agreement may be further amended or terminated only in writing and in the manner set forth in Government Code Sections 65865.1, 65867.5, 65868, 65868.5 and Chapter 19.60 of the Municipal Code.

21. Agreement is Entire Agreement

This Agreement and all exhibits attached hereto or incorporated herein contain the sole and entire agreement between the Parties concerning Owner's entitlements to develop the Property. The Parties acknowledge and agree that neither of them has made any representation with respect to the subject matter of this Agreement or any representations inducing the execution and delivery hereof, except representations set forth herein, and each Party acknowledges that it has relied on its own judgment in entering this Agreement. The Parties further acknowledge that all statements or representations that heretofore may have been made by either of them to the other are void and of no effect, and that neither of them has relied thereon in its dealings with the other.

22. Events of Default

Failure by either Party to perform any material term or provision of this Agreement shall constitute a default. Owner shall also specifically be in default under this Agreement upon the happening of one or more of the following events:

- (a) If a warranty, representation or statement made or furnished by Owner to the City is false or proves to have been false in any material respect when it was made; or,
- (b) A finding and determination by the City made following an annual or special review under the procedure provided for in Government Code Section 65865.1 and Chapter 19.60 of the Municipal Code that, upon the basis of substantial evidence, Owner has not complied in good faith with the terms and conditions of this Agreement; or,
- (c) Owner fails to fulfill any of its obligations set forth in this Agreement and such failure continues beyond any applicable cure period provided in this Agreement. This provision shall not be interpreted to create a cure period for any event of default where such cure period is not specifically provided for in this Agreement.

23. Procedure Upon Default

- (a) Upon the occurrence of an event of default, either Party may terminate or modify this Agreement in accordance with the provisions of Government Code Section 65865.1 and of Chapter 19.60 of the Municipal Code, provided Section 23(e) has been complied with.

- (b) The City shall not be deemed to have waived any claim of defect in Owner's performance if, on annual or special review, the City does not propose to terminate this Agreement.
- (c) No waiver or failure by the City or Owner to enforce any provision of this Agreement shall be deemed to be a waiver of any provision of this Agreement or of any subsequent breach of the same or any other provision.
- (d) Any actions for breach of this Agreement shall be decided in accordance with California law. The remedy for breach of this Agreement shall be limited to specific performance and attorneys' fees as provided in Section 24(a).
- (e) The non-defaulting Party shall give the defaulting Party written notice of any default under this Agreement, and the defaulting Party shall have thirty (30) days after the date of the notice to cure the default or to reasonably commence the procedures or actions needed to cure the default; provided, however, that if such default is not capable of being cured within such thirty (30) day period, the defaulting Party shall have such additional time to cure as is reasonably necessary.

24. Attorneys' Fees and Costs

- (a) Action by Party. If legal action by either Party is brought because of breach of this Agreement or to enforce a provision of this Agreement, the prevailing Party is entitled to reasonable attorneys' fees and court costs.
- (b) Action by Third Party. If any person or entity not a party to this Agreement initiates an action at law or in equity to challenge the validity of any provision of this Agreement or the Project approvals, the Parties shall cooperate in defending such action. Owner shall bear its own costs of defense as a real party in interest in any such action, and shall reimburse the City for all reasonable court costs and attorneys' fees expended by the City in defense of any such action or other proceeding or payable to any prevailing plaintiff/petitioner.

25. Severability

If any material term or condition of this Agreement is for any reason held by a final judgment of a court of competent jurisdiction to be invalid, and if the same constitutes a material change in the consideration for this Agreement, then either Party may elect in writing to invalidate this entire Agreement, and thereafter this entire Agreement shall be deemed null and void and of no further force or effect following such election.

26. No Third Parties Benefited

No person other than the City, Owner, or their respective successors is intended to or shall have any right or claim under this Agreement, this Agreement being for the sole benefit and protection of the Parties and their respective successors. Similarly, no

amendment or waiver of any provision of this Agreement shall require the consent or acknowledgment of any person not a party or successor to this Agreement.

27. Binding Effect of Agreement

The provisions of this Agreement shall bind and inure to the benefit of the Parties originally named herein and their respective successors and assigns.

28. Relationship of Parties

It is understood that this Agreement is a contract that has been negotiated and voluntarily entered into by the City and Owner and that Owner is not an agent of the City. The Parties do not intend to create a partnership, joint venture or any other joint business relationship by this Agreement. The City and Owner hereby renounce the existence of any form of joint venture or partnership between them, and agree that nothing contained herein or in any document executed in connection herewith shall be construed as making the City and Owner joint venturers or partners. Neither Owner nor any of Owner's agents or contractors are or shall be considered to be agents of the City in connection with the performance of Owner's obligations under this Agreement.

29. Bankruptcy

The obligations of this Agreement shall not be dischargeable in bankruptcy.

30. Mortgagee Protection: Certain Rights of Cure

- (a) Mortgagee Protection. Owner may encumber its interest in the Property to secure a loan made to Owner and collaterally assign its rights under this Agreement in connection with such loan without the consent of the City, subject to the terms and conditions of this Section 30. This Agreement shall be superior and senior to all liens placed upon the Property or any portion thereof after the date on which this Agreement or a memorandum of this Agreement is recorded with the San Mateo County Recorder, including the lien of any deed of trust or mortgage ("Mortgage"). Notwithstanding the foregoing, no breach hereof shall defeat, invalidate, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against all persons and entities, including all deed of trust beneficiaries or mortgagees ("Mortgagees"), who acquire title to the Property or any portion thereof by foreclosure, trustee's sale, deed in lieu of foreclosure or otherwise as a result of a default under a Mortgage (a "Mortgage Transfer Event"). Owner shall deliver written notice to the City within fourteen (14) days after recording any Mortgage against the Property, including the address for notices to the Mortgagee.
- (b) Mortgagee Not Obligated. No Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of any improvements required by this Agreement, or to pay for or guarantee construction or completion thereof. The City, upon receipt of a written request therefor from a Mortgagee

upon or after Owner's default under a Mortgage, shall permit the Mortgagee to succeed to the rights and obligations of Owner under this Agreement, provided that all defaults by Owner hereunder that are reasonably susceptible of being cured are cured by the Mortgagee as soon as is reasonably possible. The Mortgagee thereafter shall comply with all of the provisions of this Agreement.

- (c) Notice of Default to Mortgagee. If the City receives notice from a Mortgagee requesting a copy of any notice of default given to Owner hereunder and specifying the address for service thereof, the City shall deliver to the Mortgagee concurrently with service thereof to Owner, all notices given to Owner describing all claims by the City that Owner has defaulted hereunder. If the City determines that Owner is in noncompliance with this Agreement, the City also shall serve notice of noncompliance on the Mortgagee, concurrently with service thereof on Owner. Until such time as the lien of the Mortgage has been extinguished, the City shall:
- 1) Take no action to terminate this Agreement or exercise any other remedy under this Agreement, unless the Mortgagee shall fail, within thirty (30) days of receipt of the notice of default or notice of noncompliance, to cure or remedy or commence to cure or remedy such default or noncompliance; provided, however, that if such default or noncompliance is of a nature that cannot be remedied by the Mortgagee or is of a nature that can only be remedied by the Mortgagee after such Mortgagee has obtained possession of and title to the Property, by deed-in-lieu of foreclosure or by foreclosure or other appropriate proceedings, then such default or noncompliance shall be deemed to be remedied by the Mortgagee if, within ninety (90) days after receiving the notice of default or notice of noncompliance from the City, (i) the Mortgagee shall have acquired title to and possession of the Property, by deed-in-lieu of foreclosure, or shall have commenced foreclosure or other appropriate proceedings, and (ii) the Mortgagee diligently prosecutes any such foreclosure or other proceedings to completion.
 - 2) If the Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings by reason of any process or injunction issued by any court or by reason of any action taken by any court having jurisdiction over any bankruptcy or insolvency proceeding involving Owner, then the times specified above for commencing or prosecuting such foreclosure or other proceedings shall be extended for the period of such prohibition.
- (d) Performance by Mortgagee. Each Mortgagee shall have the right, but not the obligation, at any time prior to termination of this Agreement, to do any act or thing required of Owner under this Agreement, and to do any act or thing not in violation of this Agreement, that may be necessary or proper in order to prevent termination of this Agreement. All things so done and performed by a Mortgagee shall be as effective to prevent a termination of this Agreement as the same would

have been if done and performed by Owner instead of by the Mortgagee. No action or inaction by a Mortgagee pursuant to this Agreement shall relieve Owner of its obligations under this Agreement. No performance by or on behalf of a Mortgagee shall cause it to become a “mortgagee-in-possession” or otherwise cause it to be deemed to be in possession of the Property or bound by or liable under this Agreement unless it becomes an Owner of the Property. In the event a Mortgagee becomes an Owner, such Mortgagee shall not be liable for any obligation hereunder of any previous Owner of the Property that arose prior to the time such Mortgagee became an Owner of the Property, except for (a) continuing non-monetary obligations that are capable of cure by Mortgagee and (b) monetary obligations for which the City provided a notice of default to Owner under Section 24(e) and, if applicable, to Mortgagee under Section 31(c), and neither Owner nor such Mortgagee thereafter cured such default of Owner’s monetary obligation.

- (e) Mortgagee’s Consent to Modifications. Subject to the sentence immediately following, the City shall not consent to any amendment or modification of this Agreement unless Owner provides the City with written evidence of each Mortgagee’s consent, which consent shall not be unreasonably withheld, to the amendment or modification of this Agreement being sought. Each Mortgagee shall be deemed to have consented to such amendment or modification if it does not object to the City by written notice given to the City within thirty (30) days from the date written notice of such amendment or modification is given by the City or Owner to the Mortgagee, reasonable evidence of the delivery of which notice shall be provided to the City if given only by Owner.

31. Estoppel Certificate

Either Party from time to time may deliver written notice to the other Party requesting written certification that, to the knowledge of the certifying Party, (i) this Agreement is in full force and effect and constitutes a binding obligation of the Parties; (ii) this Agreement has not been amended or modified either orally or in writing, or, if it has been amended or modified, specifying the nature of the amendments or modifications; and (iii) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, describing therein the nature and monetary amount, if any, of the default. A Party receiving a request hereunder shall endeavor to execute and return the certificate within ten (10) days after receipt thereof, and shall in all events execute and return the certificate within thirty (30) days after receipt thereof. However, a failure to return a certificate within ten (10) days shall not be deemed a default of the Party’s obligations under this Agreement and no cause of action shall arise based on the failure of a Party to execute such certificate within ten (10) days. The City Manager shall have the right to execute the certificates requested by Owner hereunder. The City acknowledges that a certificate hereunder may be relied upon by permitted transferees and Mortgagees. At the request of Owner, the certificates provided by the City establishing the status of this Agreement with respect to any lot or parcel shall be in recordable form, and Owner shall have the right to record the certificate for the affected portion of the Property at its cost.

32. Force Majeure

Notwithstanding anything to the contrary contained herein, either Party shall be excused for the period of any delay in the performance of any of its obligations hereunder, except the payment of money, when prevented or delayed from so doing by certain causes beyond its control, including, and limited to, major weather differences from the normal weather conditions for the South San Francisco area, war, acts of God or of the public enemy, fires, explosions, floods, earthquakes, epidemics, pandemics, invasions by non-United States armed forces, failure of transportation due to no fault of the Parties, unavailability of equipment, supplies, materials or labor when such unavailability occurs despite the applicable Party's good faith efforts to obtain same (good faith includes the present and actual ability to pay market rates for said equipment, materials, supplies and labor), strikes of employees other than Owner's, freight embargoes, sabotage, riots, acts of terrorism and acts of the government (other than City) and/or a material adverse change in the financial and commercial real estate demand markets, conditions which indicate an insufficient economic return, including resource scarcities that make construction prohibitively expensive and/or the inability of Owner to obtain funds for the Project, due to the financial marketplace, (other than Owner's inability to obtain financing related to Owner's financial condition) and are beyond the control or without the fault of the Party claiming an extension of time. The Party claiming such extension of time to perform shall send written notice of the claimed extension to the other Party within thirty (30) days from the commencement of the cause entitling the Party to the extension.

33. Rules of Construction and Miscellaneous Terms

- (a) The singular includes the plural; the masculine gender includes the feminine; "shall" is mandatory, "may" is permissive.
- (b) Time is and shall be of the essence in this Agreement.
- (c) Where a Party consists of more than one person, each such person shall be jointly and severally liable for the performance of such Party's obligation hereunder.
- (d) The captions in this Agreement are for convenience only, are not a part of this Agreement and do not in any way limit or amplify the provisions thereof.
- (e) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California in effect on the date thereof.
- (f) This Agreement may be executed in multiple originals, each of which is deemed an original, and may be signed in counterparts.

34. Exhibits

Exhibits to this Agreement, including the following, are all incorporated into this Agreement by reference, as if set forth fully herein.

- Exhibit A — Legal Description and Map of Property
- Exhibit B — Project Documents
- Exhibit C — Conditions of Approval and EIR Mitigation and Monitoring Program
- Exhibit D — Applicable City Laws/Fees
- Exhibit E — Form of Public Trail Easement Agreement

35. Notices

All notices required or provided for under this Agreement shall be in writing and delivered in person (to include delivery by courier) or sent by certified mail, postage prepaid, return receipt requested or by overnight delivery service. Notices to the Parties shall be addressed as follows:

- City: City Clerk
 P.O. Box 711
 South San Francisco, CA 94083

- With a copy to: Meyers Nave
 555 12th Street, 15th Floor
 Oakland, CA 94607
 Attn: Sky Woodruff, City Attorney

- Owner: BMR-Gateway of Pacific V LP
 17190 Bernardo Center Drive
 San Diego, CA 92128
 Attn: Vice President, Legal

- With a copy to: Perkins Coie LLP
 505 Howard Street, Suite 1000
 San Francisco, CA 94105
 Attn: Cecily Barclay

A party may change its address for notice by giving notice in writing to the other party and thereafter notices shall be addressed and transmitted to the new address.

IN WITNESS WHEREOF this Agreement has been executed by the Parties on the day and year first above written.

CITY:

CITY OF SOUTH SAN FRANCISCO

By: _____
Name: _____
Its: City Manager

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

OWNER:

BMR-GATEWAY OF PACIFIC V LP

By: _____
Name: _____
Its: _____

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Exhibit A

Legal Description and Map of Property

Exhibit B

Project Documents

Exhibit C

Conditions of Approval and EIR Mitigation and Monitoring Program

Exhibit D

Applicable City Laws/Fees

Exhibit E

Form of Public Trail Easement Agreement

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

The City of South San Francisco
400 Grand Avenue
South San Francisco, CA 94080
Attention: City Clerk

EXEMPT FROM RECORDING FEES PER
GOVERNMENT CODE §§6103, 27383

PUBLIC TRAIL EASEMENT AGREEMENT

This Easement Agreement ("**Agreement**") is made on _____, 2020, by and between BMR-Gateway of Pacific V LP, a Delaware limited partnership ("**Grantor**"), and the City of South San Francisco, a municipal corporation ("**Grantee**"). Grantor and Grantee shall hereinafter be referred to collectively as the "**Parties**" and each individually as a "**Party**."

RECITALS

A. Grantor is the owner of that certain real property situated in the City of South San Francisco, State of California, commonly known as Phase 5 of the Biomed Gateway of Pacific Campus, South San Francisco, California, as shown and legally described in the attached Exhibit A (Grantor's Property).

B. Grantor has constructed certain improvements on Grantor's Property, located immediately south of the existing Gateway of Pacific Campus, which improvements include two office/R&D buildings, a parking structure, landscaping and interconnected pedestrian and bicycle paths, commonly known as GOP Phase 5 (the "**Project**"). The Project includes a two and eight-tenths (2.8) acre site formerly occupied by railroad spurs, located along the north edge of the Project and south of the Gateway of Pacific Campus.

C. Grantor and Grantee have executed a First Amended and Restated Development Agreement (Recorded Document No. _____) ("**Development Agreement**"), dated _____, which sets forth certain rights and obligations of the Parties with respect to the Project.

D. Pursuant to Section 3 of the Development Agreement, Grantor is required to provide an easement for public use of the trail corridor over a portion of Grantor's Property that will become a part of Grantee's "Rails to Trails" plan connecting Forbes Avenue (west of the Project) to Oyster Point Boulevard (east of the Project) within the City of South San Francisco, in the approximate location shown in the attached Exhibit B ("**Easement Area**"), on the terms and conditions described in this Agreement.

E. Grantor and Grantee are executing this Agreement to memorialize the grant of easement and set forth the terms and conditions related thereto.

NOW, THEREFORE, for valuable consideration, the receipt of which each of the parties hereto does hereby acknowledge, the parties hereto do hereby agree as follows:

AGREEMENT

1. Grant of Easement. Subject to the provisions of this Agreement, Grantor hereby grants to Grantee a nonexclusive shared use easement for public pedestrian and non-vehicular transportation use ("**Shared Use Access**") over and across the Easement Area ("**Shared Use Trail Easement**"). Shared Use Access includes walking, running and other means of non-vehicular transportation such as use of skateboards, scooters, motor assisted bicycles and similar modes of transportation, as well as resting and viewing on benches that will be located within the Easement Area. Shared Use Access does not include use of motorcycles, automobiles, trucks, vans or similar vehicles. The Easement Area shall be free of any obstructions, except for those specific architectural, utility and/or safety features that may be approved by Grantee in writing.

2. Execution and Recording of Easement Agreement. Grantor shall execute this Agreement and grant to the Grantee the Shared Use Trail Easement upon completion of construction of the Project, including construction of the pedestrian and bicycle trail and associated landscaping, lighting, and other improvements to the Easement Area. Grantor agrees that this Agreement shall bind Grantor and Grantor's successors in interest, heirs and assigns, and shall record this Agreement with the County Recorder's Office of the County of San Mateo.

3. Limitations on Use. Grantee acknowledges that the easement granted herein is nonexclusive. Grantor, its successors, assigns, grantees, tenants, and licensees shall have the right to use the Easement Area in a manner that will not interfere with Grantee's use of the Easement Area. Grantor, and its respective successors, assigns, grantees, and licensees shall refrain from any obstruction of, blockage, or construction in the Easement Area that would interfere with Shared Use Access, except as provided herein.

4. Maintenance. Grantor shall maintain the Easement Area in a good and safe condition, sufficient for Shared Use Access at all times and repair at Grantor's sole cost and expense, except as provided herein. Any maintenance or repair activities performed by Grantor may not interfere with the continued use of the Easement Area for the purposes described herein.

5. Grantor's Reserved Rights. Notwithstanding the foregoing, Grantor reserves on behalf of itself, its agents, contractors, subcontractors, suppliers, consultants, employees, invitees or other authorized persons acting for or on behalf of Grantor ("**Grantor's Agents**"), including but not limited to any lessee, the right to use the Easement Area in any way not inconsistent with the above grant of the Shared Use Access Easement, including temporary use of all or a portion of the Easement Area as necessary to:

(a) occasionally transport goods or provide services to Grantor's Property or the Gateway of Pacific Campus to the north, including lightweight trucks and vehicles, provided such transportation is temporary in nature;

(b) construct, restore, modify, repair or maintain the Easement Area, Grantor's Property or the Gateway of Pacific Campus to the north; and

(c) provided that Grantor shall post temporary signs at each end of the Easement Area 48 hours prior to such temporary use (except in the case of an emergency, in which case such notices will be posted by Grantor as soon as feasible) to inform the public about the nature of the transport vehicles, maintenance or repair activities scheduled to take place.

6. Transfer of Property. The Shared Use Trail Easement created by this Agreement shall run with the land and any portion thereof, and its terms shall extend to, bind and inure to the benefit of the parties hereto and their respective heirs, successors and assigns. Upon the transfer of the Property to a successor party, the successor party shall constitute the "Grantor" hereunder and all predecessors in interest to such successor party shall be fully relieved of all obligations and liability hereunder arising on or after the effective date of such transfer.

7. Indemnification.

(a) Grantee shall indemnify, defend and hold harmless Grantor, its officers, agents, employees and representatives from and against any and all claims, losses, liabilities or damages, demands and actions, including payment of reasonable attorneys' fees, arising out of or resulting from the use of the Easement Area by Grantee or that are caused by any negligent or willful act or omission of Grantee, its officers, agents, employees, or anyone directly or indirectly acting on behalf of Grantee.

(b) Grantor shall indemnify, defend and hold harmless Grantee, its officers, agents, employees and representatives from and against any and all claims, losses, liabilities or damages, demands and actions, including payment of reasonable attorneys' fees, arising out of or resulting from the performance of Grantor's obligations pursuant to this Agreement or failure to perform, that are caused by any negligent or willful act or omission of Grantor, its officers, agents, employees, or anyone directly or indirectly acting on behalf of Grantor.

(c) Notwithstanding the foregoing or any other provision in this Agreement, Grantor does not waive any of its rights under California Civil Code section 846.

8. Insurance. Grantor shall provide Grantee with evidence of property and liability insurance in accordance with the City's standard insurance requirements prior to commencing any maintenance or repair work (except in the case of an emergency, in which case such evidence will be provided to Grantee as soon as feasible).

9. Enforcement. Grantee shall have all rights and remedies at law and in equity in order to enforce the Shared Use Trail Easement and the terms of this Agreement. All rights and remedies available to Grantee under this Agreement or at law or in equity shall be cumulative and not alternative, and invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any other available right or remedy.

10. Litigation Expenses.

(a) General. If either Party hereto brings an action or proceeding (including any cross-complaint, counterclaim, or third-party claim) against the other Party by reason of a default, or otherwise arising out of this Agreement, the prevailing Party in such action or proceeding shall be entitled to its costs and expenses of suit, including but not limited to reasonable attorneys' fees, which shall be payable whether or not such action is prosecuted to judgment. "**Prevailing Party**" within the meaning of this Section 10 shall include without limitation, a Party who dismisses an action for recovery hereunder in exchange for payment of the sums allegedly due, performance of covenants allegedly breached, or consideration substantially equal to the relief sought in the action.

(b) Appeal. Attorneys' fees under this Section 10 shall include attorneys' fees on any appeal, and, in addition, a party entitled to attorneys' fees shall be entitled to all other reasonable costs and expenses incurred in connection with such action.

(c) Mediation. Before bringing any litigation under this Agreement, the plaintiff shall be obligated to meet and confer with the other party and mediate the dispute. Such obligation shall not exceed one mediation session.

11. Amendment. This Agreement may be amended or otherwise modified only in writing signed and acknowledged by Grantor and Grantee, or the respective successors and assigns of each; such amendment may include modification, relocation or termination of the Share Use Trail Easement.

12. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

13. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be entitled to be the original and all of which shall constitute one and the same agreement.

14. References; Titles. Wherever in this Agreement the context requires, reference to the singular shall be deemed to include the plural. Titles of sections and paragraphs are for convenience only and neither limit nor amplify the provisions of this Agreement.

15. Notice. Any notice given under this Agreement shall be in writing and given by delivering the notice in person, by commercial overnight courier that guarantees next day delivery and provides a receipt, or by sending it by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, to the mailing address listed below or any other address notice of which is given.

Grantor: BMR-Gateway of Pacific V LP
17190 Bernardo Center Drive
San Diego, CA 92128
Attn: Vice President, Legal

With a copy to: Perkins Coie LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105
Attn: Cecily Barclay

City: City of South San Francisco
Public Works Department, Engineering Division
315 Maple Ave
South San Francisco, CA 94080
Attn: Matthew Ruble

With a copy to: Meyers Nave
1999 Harrison St., 9th Floor
Oakland, CA 94612
Attn: Sky Woodruff, City Attorney

Any mailing address number may be changed at any time by giving written notice of such change in the manner provided above at least ten (10) days prior to the effective date of the change. All notices under this Agreement shall be deemed given, received, made or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

16. Severability. If any provision of this Agreement shall to any extent be invalid or unenforceable, the remainder of this Agreement (or the application of such provisions to persons or circumstances other than those in respect of which it is invalid or unenforceable) shall not be affected thereby, and each provision of this Agreement, unless specifically conditioned upon such invalid or unenforceable provision, shall be valid and enforceable to the fullest extent permitted by law.

17. Entire Agreement. This Agreement, together with any attachments hereto or inclusions by reference, constitute the entire agreement between the parties on the subject matter hereof, and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties hereto with respect to the easement which is the subject matter of this Agreement. This Agreement has been drafted by a mutual effort of the parties, and each party waives the benefit of any statute, law or judicial decision providing that ambiguities in an agreement shall be interpreted against the "drafting party."

18. Default. The failure to perform any covenant or obligation of a party hereunder and to cure such non-performance within thirty (30) days of written notice by the party to whom performance is owed shall constitute a default hereunder, provided that if more than thirty (30) days are reasonably required for such cure, no event of default shall occur if the defaulting party commences such cure within such period and diligently prosecutes such cure to completion. Upon such default, the non-defaulting party shall be entitled to all remedies and means to cure or correct such default, both legal and equitable, allowed by operation of law except termination of the easement herein granted.

19. No Dedication. The Public Access Easement shall not be, or deemed or construed to be, a dedication to the public, and is subject to any pre-existing easements of record.

20. Survival. All waivers given or made hereunder shall survive termination of this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto.

[signatures on the following page]

CITY:

CITY OF SOUTH SAN FRANCISCO,
a municipal corporation

GRANTOR:

BMR-Gateway of Pacific V LP
a Delaware limited partnership

By: _____

Name: _____

Title: _____

By: _____

Its: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

City Attorney

Attest:

City Clerk

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA)
)
COUNTY OF)

On _____, before me, _____, a Notary Public personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) are/is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal) _____

CERTIFICATE OF ACCEPTANCE

This is to certify that the interest in real property conveyed by this Shared Use Trail Easement Agreement (Public Access Easement) dated _____ from the Grantor to the City of South San Francisco, is hereby accepted by order of its City Council's Resolution No. _____ adopted on _____, and the City of South San Francisco consents to recordation thereof by its duly authorized officer.

Dated: _____

CITY OF SOUTH SAN FRANCISCO

By: _____

Name: _____

Title: City Manager

ATTEST:

CITY CLERK

Approved as to form: Date: _____ By: _____ City Attorney

EXHIBIT A

Legal Description of Grantor's Property

EXHIBIT B

Easement Area

3564123.1