

Resolution Of The City Council Of The City of Emeryville Authorizing The City Manager To Execute A Parking And Construction License With LMV II Emeryville Holdings, LP For APN 049-1557-003

WHEREAS, LMV II Emeryville Holdings, LP (“**Developer**”) is the owner of certain real property, situated at 1450 Sherwin Avenue in the City of Emeryville, California, (the “**Property**”); and

WHEREAS, the City is the owner of certain real property, APN 049-1557-003, situated adjacent to the Property in the City of Emeryville, California, (the “**City Property**”); and

WHEREAS, on November 1, 2016, the City Council of the City of Emeryville approved Ordinance No. 16-006, which adopted a planned unit development zoning designation and approving a preliminary development plan for 10.05 acre Sherwin William Project Site bounded by Sherwin Avenue on the South, the Union Pacific Railroad tracks to the west; Horton Street to the east, and Temescal Creek to the North, (APNs 49-1041-26-15 and 16), and which may be subsequently amended (“**Planned Development Plan** or **PDP**”); and

WHEREAS, on May 25, 2017, the Planning Commission for the City of Emeryville adopted Resolution CPC No. SUBDIV16-002 approving a major subdivision permit for Vesting Tentative Map 8357, subject to certain Conditions of Approval (“**Vesting Tentative Map** or **VTM**”); and

WHEREAS, on December 14, 2017, the Planning Commission of the City of Emeryville approved Resolution CPC No. FDP 17-002 approving the Final Development Plan for the Public Park and Open Space (“**Final Development Plan 2** or **FDP2**”); and

WHEREAS, on February 22, 2018, the Planning Commission of the City of Emeryville approved Resolution CPC No. FDP 17-001 approving the Architecture Final Development Plan for the buildings (“**Final Development Plan 1** or **FDP1**”); and

WHEREAS, the PDP, VTM, FDP1 and FDP2, and the plans and permits approved under said resolutions as they may from time to time be amended, are collectively referred to herein as the “**Project Approvals**”.

WHEREAS, on June 28, 2018, the Planning Commission of the City of Emeryville approved Resolution CPC No. UP18-005, approving a temporary surface parking lot on the City Property; and

WHEREAS, the Developer has requested to use the City Property for a temporary surface parking lot, consistent with Resolution CPC No. UP18-005 to facilitate construction of the Project consistent with the Project Approvals; and

WHEREAS, the City finds that facilitating construction of the Project in a manner as proposed by the Developer will be beneficial to the community by diverting construction traffic away from residences, providing additional security in the area, and improving a roadway; and now, therefore, be it


RESOLVED, by the City Council of the City of Emeryville that the City Manager is hereby authorized to execute the proposed Parking and Construction License, attached hereto as Exhibit A; and, be it, further

RESOLVED, by the City Council of the City of Emeryville that the City Manager and the Public Works Director are hereby authorized to take further action as contemplated by the terms and conditions in the Parking and Construction License.

ADOPTED, by the City Council of the City of Emeryville at a regular meeting held Tuesday, April 16, 2019, by the following vote:

AYES:	<u>4</u>	Mayor Medina, Vice Mayor Patz, and Council Members Donahue and Martinez
NOES:	<u>0</u>	
ABSTAIN:	<u>0</u>	
ABSENT:	<u>0</u>	
RECUSE:	<u>1</u>	Council Member Bauters

ATTEST:


CITY CLERK


MAYOR

APPROVED AS TO FORM:


CITY ATTORNEY

PARKING AND CONSTRUCTION LICENSE

THIS PARKING AND CONSTRUCTION LICENSE ("**Agreement**") is entered into as of this _____ day of _____, 2019 ("**Effective Date**") by and between the City of Emeryville, a California municipal corporation ("**City**"), and LMV II Emeryville Holdings, LP, a Delaware limited partnership ("**Licensee**"). City and Licensee are sometimes hereinafter referred to individually as "**Party**" and collectively as the "**Parties**."

RECITALS

A. The City owns certain property also known as APN 049-1557-003 that is bounded by Sherwin Avenue to the South and the Union Pacific Railroad Tracks to the West (the "**City Property**") and is shown on the conceptual map attached hereto as Exhibit A and is more particularly described in the legal description attached hereto as Exhibit B, both incorporated herein by reference.

B. The City Property is subject to a perpetual, exclusive easement held by Union Pacific Railroad Company, which is more fully described in the Grant Deed, recorded on December 21, 2006, as Document No. 2006465429 at the Alameda County Recorder's Office (the "**UPRR Easement**").

C. Licensee is the owner of certain property located at 1450 Sherwin Avenue, also known as APNs 049-1557-002, 049-1557-004, 049-1557-005, and 049-1557-006, bounded by Sherwin Avenue to the South, the Union Pacific Railroad Tracks to the West, Horton Street to the East and Temescal Creek to the North ("**Licensee's Property**," which is adjacent to the City Property. The City has issued various approvals to Licensee regarding Licensee's Property, including but not limited to a general plan amendment (City Council Resolution No. 16-148), a rezone and preliminary development plan (Ordinance No. 16-006 approving PUD13-001), a major subdivision permit for vesting tentative map 8357 (City Planning Commission Resolution No. SUBDIV16-002), two final development plans (FDP17-001, FDP17-002), and a conditional use permit (UP18-005) for a temporary surface parking lot (City Planning Commission Resolution No. UP18-05), which expires on May 24, 2021 (the "**Parking Use Permit**") (collectively, "**Licensee Permits**").

D. On May 25, 2018, Licensee's predecessor recorded an Irrevocable Offer to Dedicate an Easement for Public Park, Open Space and Greenway Purposes as Document No. 201810445 at the Alameda County Recorder's Office, which dedicates an easement across a portion of Licensee's Property ("**Park Easement**"), subject to a temporary construction easement, which expires on March 6, 2023 ("**Temporary Construction Easement**").

E. Licensee desires to use the City Property for a temporary surface parking lot solely for the occupants and guests of Lots 1-5, on Licensee's Property, as permitted under the Parking Use Permit ("**LMV Parking Licensees**").

F. Licensee also desires to use the City Property for certain temporary activities related to construction of Licensee's planned improvements on Licensee's Property, and the City Property, as described herein, together with access to, through and on the City Property by

the use of the City Property to respond to such emergency, the City shall allow LMC Parking Licensees and LMV Construction Licensees to resume use of the City Property as outlined herein. The terms governing City's use of the City Property in this Section 2(b) shall apply to the grant of licenses to Licensee and to the Licenses granted to the LMV Parking Licensees and the LMV Construction Licensees.

3. Authorized Uses; Grant of Licenses. Subject to the UPRR Easement and RMP, Licensee is hereby granted exclusive and non-revocable licenses to use the City Property for the following purposes (which are individually referred to generically as "**License**", and collectively referred to as "**Licenses**"), along with their associated improvements, pursuant to the terms and conditions in this Agreement:

a. Parking License. Use of a temporary surface parking lot solely for the LMV Parking Licensees, provided such use is consistent with Parking Use Permit.

b. Construction License. Uses and activities supporting development of Licensee's Property consistent with Licensee Permits and undertaken by LMV Construction Licensees, including but not limited to:

- (i) Use as a construction staging area, including but not limited to storage and assembly of construction materials and equipment;
- (ii) Parking of construction equipment, and trucks and other vehicles used by Licensee's employees, contractors and invitees;
- (iii) Installation and use of a construction trailer, with temporary overhead electrical connections, subject to any applicable permits;
- (iv) Placement of documented clean soil removed from Licensee's Property, in accordance with the Park and Open Space Improvement Agreement; and
- (v) A haul route to and from Licensee's Property, to direct construction-related trucks and other vehicles away from the adjacent neighborhood, as depicted in the CMP.
- (vi) Activities as required by the RMP and the Reimbursement Agreement.

4. Authorized Improvements.

a. Parking Improvements. The improvements authorized to be installed on the City Property pursuant to this Agreement related to the Parking License shall include but not be limited to perimeter fencing to prevent access for unauthorized users, security cameras, lighting, paving, grading, striping, soil removal and disposal, drainage improvements, and accessibility improvements (collectively, the "**Parking Improvements**", and together with the Construction Improvements discussed below, the "**Improvements**"). The right of Licensee to install, maintain, and use the Parking Improvements are subject to the following limitations, and

5. **Consideration.** Licensee shall pay City One Dollar (\$1.00) per year, payable in advance on the Effective Date and each anniversary thereof.

6. **No Conveyance of Interest in City Property.** Nothing in this Agreement, including the permission to install the Parking Improvements and Construction Improvements, shall be interpreted as, or otherwise be deemed to be, a transfer or conveyance of any interest in the City Property whatsoever between the City and Licensee.

7. **Term.**

a. Parking License. Unless otherwise terminated or revoked, as provided for herein, the term of the Parking License shall commence upon the Effective Date, and shall continue thereafter until Parking Use Permit expires on May 24, 2021. In the event that the Planning Commission amends the Parking Use Permit to extend the expiration date, the term for the Parking License shall automatically be extended to the date set forth in the amended Parking Use Permit. Notwithstanding the foregoing, the term of the Parking License may not be extended beyond the expiration of the Temporary Construction Easement.

b. Construction License. Unless otherwise terminated or revoked, as provided herein, the term of the Construction License shall commence upon the Effective Date, and shall terminate on March 6, 2023. The City Manager may administratively extend the term of the Construction License in the event that the expiration date for the Temporary Construction Easement is extended by the Parties.

c. Agreement. This Agreement shall automatically terminate upon termination of all License terms and completion of restoration of City Property in accordance with Section 14. Sections 9, 14, and 16 survive termination of this Agreement.

8. **Scope of Licenses; Conditions.**

In addition to the other terms and conditions set forth herein, the Licenses provided for herein shall be subject to the following:

a. The Licenses shall include, and shall be limited to, the right and privilege of Licensee and the LMV Parking Licensees and LMV Construction Licensees to use the City Property for the exercise of the purposes herein described.

b. Each License provided for herein is a non-revocable, exclusive, non-transferrable (except as set forth in Sections 2.b and 11) right and privilege of Licensee and the LMV Parking Licensees and LMV Construction Licensees.

c. Licensees' use and activities on the City Property are in compliance with all of the Licensee Permits, RMP, CMP and all other applicable laws and regulations.

d. All activities on the City Property must be compliant with the City's noise ordinance, codified as Chapter 13 of Title 5 of the Emeryville Municipal Code.

use of the City Property unless such damage or loss is caused by the sole active negligence or willful misconduct of City. As a material part of City's decision to issue this Agreement, Licensee hereby assumes all risk of entering and using the City Property, and all risk of damage to the Improvements in, upon, or about the City Property arising, from any cause attributable to City's exercising its rights hereunder, and Licensee hereby waives all claims in respect thereto against City, except if caused by the sole active negligence or willful misconduct of City. Licensee expressly waives, releases and relinquishes any and all claims, causes of action, rights and remedies Licensee may now or hereafter have against City, and its officials, officers, employees, and agents, whether known or unknown, with respect to liability for revocation or termination of this Agreement and the Licenses granted hereunder by City (except to the extent caused by City's breach of this Agreement), including any and all right to claim, demand, or receive any further compensation for the offer which Licensee may be eligible to receive under the California Relocation Assistance Act (Government Code §7260, et seq.), the article 1, § 19 of the California Constitution, the California Eminent Domain Law (Code of Civil Procedure §1230.010, et seq.), and/or the California Code of Regulations, Title 25 or other applicable local, state, or federal statute, ordinance, regulation, rule, or decisional law (collectively "**Compensatory Laws**"), including, but not limited to, the fair market value of the Licenses, severance damages, loss of goodwill, loss of profits, or relocation benefits and assistance, or claims for unreasonable pre-condemnation activities or inverse condemnation, or any other compensation, except if caused by the sole active negligence or willful misconduct of City.

LICENSEE HEREBY ACKNOWLEDGES THAT IT HAS READ AND IS FAMILIAR WITH THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 ("**SECTION 1542**"), WHICH IS SET FORTH BELOW:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."

BY INITIALING BELOW, LICENSEE HEREBY WAIVES THE PROVISIONS OF SECTION 1542 SOLELY IN CONNECTION WITH THE MATTERS WHICH ARE THE SUBJECT OF THE FOREGOING WAIVERS AND RELEASES:

LICENSEE's Initials

The waivers and releases by Licensee contained herein shall survive the term of this Agreement and shall be binding upon the assignees, transferees, and successors in interest of Licensee.

10. No Transfer of Rights. This Agreement and the Licenses, and all rights and obligations of Licensee with respect thereto, under the terms and conditions hereof, are personal to Licensee, and shall not be assigned or transferred by Licensee to any third party, unless approved by the City in advance and in writing, which approval shall not be unreasonably withheld, conditioned or delayed.

the Improvements and remove the Improvements and restore the City Property to the same condition in which it existed prior to the placing of the Improvements, reasonable wear and tear excepted or as otherwise provided for in the Park and Open Space Improvement Agreement. In addition to any other restoration that may be required, at a minimum, Licensee shall perform a two inch grind and pave the entire width of Halleck Street from gutter to gutter between Sherwin Avenue and Park Avenue to City standard specifications for paving and striping ("**Halleck Paving**") at the earlier of: at the same time Licensee undertakes street improvements on Sherwin Avenue as required by Condition of Approval III.A.3.j of City Planning Commission Resolution No. SUBDIV 16-002, or prior to the last issuance of a temporary certificate of occupancy for Lots 2, 3, 4 or 5. The City Manager and the Licensee may extend the deadline for performing the Halleck Paving by mutual agreement. In no event shall Licensee have any claim against the City for any of the costs of constructing, maintaining or removing the Improvements. In case Licensee shall fail to restore the City Property as provided herein within one-hundred-twenty (120) calendar days after the effective date of revocation or termination, City may proceed with such work at the expense of Licensee or may assume title and ownership of the Improvements and any other property of Licensee located on or within the City Property. No revocation hereof shall release Licensee from any liability or obligation hereunder, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date the Improvements are removed and the City Property is restored as provided above.

15. Insurance. Prior to entering the City Property for any purpose, Licensee shall obtain and maintain, or cause to be maintained, in full force at Licensee's own expense, insurance as described below against claims which may arise out of or result from the performance of the Agreement and use of the City Property by Licensee, LMV Parking Licensees, LMV Construction Licensees and their contractors and subcontractors of any tier, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. All policies shall be written on an occurrence basis. All insurance shall be written by companies that are authorized to write business in the State of California and have, at all times, a Best's rating of "A- X" (A minus X) or better by AM Best & Company, and with coverage and policy limits as follows (unless otherwise specified herein):

a. Commercial General Liability insurance written on Insurance Services Office ("ISO") Commercial General Liability Coverage "occurrence" form CG 00 01 or another Commercial General Liability "occurrence" form providing equivalent coverage and including Broad Form Comprehensive General Liability coverage, blanket contractual liability coverage, Independent Contractors coverage, coverage for bodily injury (including death), property damage (including loss of use thereof) and products and completed operations with limits of not less than \$2,000,000 per occurrence. Limits may be provided in a "layered" program utilizing primary, umbrella or excess liability policies and shall be maintained for at least 1 year following termination of the Agreement.

b. Comprehensive auto liability for all owned, hired and non-owned vehicles brought onto City premises with combined single limits of not less than \$2,000,000 per occurrence.

c. Worker's Compensation insurance as required by the State of California.

and if the total cost of the Improvement work is \$1,000 or more, Licensee agrees to fully comply with and to obligate its contractors and subcontractors to fully comply with such Prevailing Wage Laws. Licensee shall defend, indemnify and hold the City, its officials, officers, employees and agents free and harmless from any claim or liability arising out of any failure or alleged failure to comply with the Prevailing Wage Laws.

18. Possessory Interest Tax. Pursuant to California Revenue and Taxation Code section 107.6, the property interest created by this Agreement may be subject to property taxation, and if created, Licensee shall be responsible for such tax, if levied.

19. Miscellaneous.

a. Amendments. The provisions of this Agreement may be amended by mutual written consent of both parties.

b. Notices. All notices permitted or required under this Agreement shall be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

LICENSEE: LMV II Emeryville Holdings, LP
492 9th Street, Suite 300
Oakland, CA 94607
Attention: Dan Ferguson and Heidi Mather

with a copy to:
Anna Shimko
Burke Williams & Sorensen, LLP
101 Howard Street, Suite 400
San Francisco, CA 94105

CITY: City of Emeryville
1333 Park Avenue
Emeryville, CA 94608-3517
Attn: Public Works Director

With a separate copy to:
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608-3517
Attn: City Attorney

Such notice shall be deemed made, if addressed to the party at its applicable address (1) when personally delivered, (2) forty-eight (48) hours after deposit in the U.S. Mail, first class, registered, certified and postage prepaid or (3) upon the date of delivery in person or by courier. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service. Either party may change its address by written notice to the other in the manner set forth above.

SIGNATURE PAGE TO
PARKING AND CONSTRUCTION LICENSE AGREEMENT
BETWEEN
CITY OF EMERYVILLE AND

LMV II EMERYVILLE HOLDINGS, LP

“CITY”

CITY OF EMERYVILLE,
a California municipal corporation

By: _____
Christine Daniel
City Manager

Approved as to form:

By: Michael Guina
Michael Guina
City Attorney

“LICENSEE”

LMV II EMERYVILLE HOLDINGS, LP,
a Delaware limited partnership;

By: Lennar Multifamily BTC Venture II GP Subsidiary, LLC,
a Delaware limited liability company,
its General Partner;

By: Lennar Multifamily BTC Venture II Manager, LLC,
a Delaware limited liability company,
its Manager;

By: Dan Ferguson, Vice President

EXHIBIT "B"

LEGAL DESCRIPTION OF CITY PROPERTY

PARKING AND CONSTRUCTION LICENSE

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RECITALS

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B. The City Property is subject to a perpetual, exclusive easement held by Union Pacific Railroad Company, which is more fully described in the Grant Deed, recorded on December 21, 2006, as Document No. 2006465429 at the Alameda County Recorder's Office (the "**UPRR Easement**").

C. Licensee is the owner of certain property located at 1450 Sherwin Avenue, also known as APNs 049-1557-002, 049-1557-004, 049-1557-005, and 049-1557-006, bounded by Sherwin Avenue to the South, the Union Pacific Railroad Tracks to the West, Horton Street to the East and Temescal Creek to the North ("**Licensee's Property**," which is adjacent to the City Property. The City has issued various approvals to Licensee regarding Licensee's Property, including but not limited to a general plan amendment (City Council Resolution No. 16-148), a rezone and preliminary development plan (Ordinance No. 16-006 approving PUD13-001), a major subdivision permit for vesting tentative map 8357 (City Planning Commission Resolution No. SUBDIV16-002), two final development plans (FDP17-001, FDP17-002), and a conditional use permit (UP18-005) for a temporary surface parking lot (City Planning Commission Resolution No. UP18-05), which expires on May 24, 2021 (the "**Parking Use Permit**") (collectively, "**Licensee Permits**").

D. On May 25, 2018, Licensee's predecessor recorded an Irrevocable Offer to Dedicate an Easement for Public Park, Open Space and Greenway Purposes as Document No. 201810445 at the Alameda County Recorder's Office, which dedicates an easement across a portion of Licensee's Property ("**Park Easement**"), subject to a temporary construction easement, which expires on March 6, 2023 ("**Temporary Construction Easement**").

E. Licensee desires to use the City Property for a temporary surface parking lot solely for the occupants and guests of Lots 1-5, on Licensee's Property, as permitted under the Parking Use Permit ("**LMV Parking Licensees**").

F. Licensee also desires to use the City Property for certain temporary activities related to construction of Licensee's planned improvements on Licensee's Property, and the City Property, as described herein, together with access to, through and on the City Property by

Licensee's employees, contractors, vendors and other persons supporting such construction related purposes ("**LMV Construction Licensees**").

G. City is willing to allow Licensee to improve the City Property and to use the City Property for purposes of a temporary surface parking lot, and to use the City Property for the construction-related purposes described herein, subject to all of the terms and conditions of this Agreement.

H. On March 6, 2018, the City Council for the City of Emeryville adopted Resolution No. 18-25, authorizing the City Manager to enter into a Park and Open Space Improvement Agreement and authorizing the City Engineer to approve the final plans related to construction of project improvements that require Licensee to construct certain improvements on the City Property, and Park Easement, including but not limited to, a public park, open space, and greenway ("**Park and Open Space Improvement Agreement**").

I. The City Property is subject to a Risk Management Plan prepared by EKI Water and Environment, Inc. dated September 20, 2018 ("**RMP**"). The Parties anticipate entering into an agreement whereby the City will reimburse Licensee for its costs incurred in undertaking certain activities pursuant to the RMP ("**Reimbursement Agreement**"), which are required prior to constructing certain improvements pursuant to the Park and Open Space Improvement Agreement.

J. On April 11, 2019, the City Public Works Director approved a Construction Management Plan prepared by the Licensee as required by the Conditions of Approval of Licensee Permits ("**CMP**"). The CMP requires the Licensee to implement certain security measures, which include, but are not limited to, the installation of three security cameras that face away from Licensee Property and City Property, the installation of fencing around the perimeter to enclose the City Property and Licensee Property, and the presence of security guards ("**Security Measures**").

AGREEMENT

1. Incorporation of Recitals. The above recitals are true and correct and are hereby incorporated in this Agreement by reference.

2. Encroachment Permission.

a. Permission. Subject to the UPRR Easement, and the RMP, City hereby provides to Licensee permission to encroach upon the City Property, for the purpose of installing the Improvements (defined below) on the City Property and using the City Property as described herein, subject to the limitations set forth herein and Licensee's fulfillment and ongoing compliance with the terms and conditions set forth herein.

b. Emergency. In the event of an emergency, if City requires the use of the City Property or a portion thereof during the term of a License (see sections 3 and 7) to respond to an emergency, City shall provide Licensee such notice as reasonably possible for unplanned emergency City purposes, and Licensee thereafter shall not cause any unreasonable delay or interference with City's access to or use of the City Property. Once the City no longer requires

the use of the City Property to respond to such emergency, the City shall allow LMC Parking Licensees and LMV Construction Licensees to resume use of the City Property as outlined herein. The terms governing City's use of the City Property in this Section 2(b) shall apply to the grant of licenses to Licensee and to the Licenses granted to the LMV Parking Licensees and the LMV Construction Licensees.

3. Authorized Uses; Grant of Licenses. Subject to the UPRR Easement and RMP, Licensee is hereby granted exclusive and non-revocable licenses to use the City Property for the following purposes (which are individually referred to generically as "**License**", and collectively referred to as "**Licenses**"), along with their associated improvements, pursuant to the terms and conditions in this Agreement:

a. Parking License. Use of a temporary surface parking lot solely for the LMV Parking Licensees, provided such use is consistent with Parking Use Permit.

b. Construction License. Uses and activities supporting development of Licensee's Property consistent with Licensee Permits and undertaken by LMV Construction Licensees, including but not limited to:

- (i) Use as a construction staging area, including but not limited to storage and assembly of construction materials and equipment;
- (ii) Parking of construction equipment, and trucks and other vehicles used by Licensee's employees, contractors and invitees;
- (iii) Installation and use of a construction trailer, with temporary overhead electrical connections, subject to any applicable permits;
- (iv) Placement of documented clean soil removed from Licensee's Property, in accordance with the Park and Open Space Improvement Agreement; and
- (v) A haul route to and from Licensee's Property, to direct construction-related trucks and other vehicles away from the adjacent neighborhood, as depicted in the CMP.
- (vi) Activities as required by the RMP and the Reimbursement Agreement.

4. Authorized Improvements.

a. Parking Improvements. The improvements authorized to be installed on the City Property pursuant to this Agreement related to the Parking License shall include but not be limited to perimeter fencing to prevent access for unauthorized users, security cameras, lighting, paving, grading, striping, soil removal and disposal, drainage improvements, and accessibility improvements (collectively, the "**Parking Improvements**", and together with the Construction Improvements discussed below, the "**Improvements**"). The right of Licensee to install, maintain, and use the Parking Improvements are subject to the following limitations, and

conditioned upon Licensee implementing the following protective measures and physical construction standards in connection with the Parking Improvements:

i. Permits. Licensee obtaining all applicable permits, including an encroachment permit (if required by law in addition to the licenses and permissions granted by this Agreement), and payment of appropriate fees.

ii. Drawings. Detailed drawings prepared by the relevant licensed professional depicting the Parking Improvements on the City Property shall be provided to, reviewed by, and approved by City Public Works Director to ensure that the Parking Improvements comply with applicable laws, regulations, and permits, prior to construction. The drawings shall include an accurate depiction of the width, length, and height of the proposed Parking Improvements within the City Property.

iii. Modification of Drawings. City reserves the right, and Licensee hereby acknowledges, that City may, without liability, require changes to the drawings for the Parking Improvements, if City determines, in its reasonable discretion, that such action is necessary to protect the City Property.

iv. Maintenance. Upon City's approval of the drawings for the Parking Improvements, Licensee shall install and maintain, at its sole cost and expense, the Parking Improvements in strict compliance with the approved drawings. Changes or deviations to the Parking Improvements may be approved in writing by City's Public Works Director, which may be granted or denied in the City's discretion not to be unreasonably delayed, conditioned or withheld. The issuance by the City of building and encroachment permits (if required by law in addition to the licenses and permissions granted by this Agreement) for any changes and modifications shall be presumed to constitute consent of such changes and modifications under this Agreement.

v. Construction Schedule. A schedule of construction activities for the Parking Improvements will be provided to and approved by City, prior to the commencement of any construction work on the Parking Improvements within the City Property. All Parking Improvements shall be open and subject to inspection by City as required by applicable laws, regulations, and permits.

vi. Alteration to Parking Improvements. Licensee shall not alter, replace, or otherwise change the Parking Improvements without consent from the City and complying with the terms of the approved applicable permits, laws and regulations.

b. Construction Improvements. The improvements to be installed on the City Property related to the Construction License shall be as described in Section 3b herein and subject to the terms and conditions of the RMP and CMP (the "**Construction Improvements**") and shall require no additional City approval beyond any required in the RMP, CMP or any permit as required by applicable law or regulation.

c. Improvements. None of the authorized Improvements may interfere with the UPRR Easement.

5. Consideration. Licensee shall pay City One Dollar (\$1.00) per year, payable in advance on the Effective Date and each anniversary thereof.

6. No Conveyance of Interest in City Property. Nothing in this Agreement, including the permission to install the Parking Improvements and Construction Improvements, shall be interpreted as, or otherwise be deemed to be, a transfer or conveyance of any interest in the City Property whatsoever between the City and Licensee.

7. Term.

a. Parking License. Unless otherwise terminated or revoked, as provided for herein, the term of the Parking License shall commence upon the Effective Date, and shall continue thereafter until Parking Use Permit expires on May 24, 2021. In the event that the Planning Commission amends the Parking Use Permit to extend the expiration date, the term for the Parking License shall automatically be extended to the date set forth in the amended Parking Use Permit. Notwithstanding the foregoing, the term of the Parking License may not be extended beyond the expiration of the Temporary Construction Easement.

b. Construction License. Unless otherwise terminated or revoked, as provided herein, the term of the Construction License shall commence upon the Effective Date, and shall terminate on March 6, 2023. The City Manager may administratively extend the term of the Construction License in the event that the expiration date for the Temporary Construction Easement is extended by the Parties.

c. Agreement. This Agreement shall automatically terminate upon termination of all License terms and completion of restoration of City Property in accordance with Section 14. Sections 9, 14, and 16 survive termination of this Agreement.

8. Scope of Licenses; Conditions.

In addition to the other terms and conditions set forth herein, the Licenses provided for herein shall be subject to the following:

a. The Licenses shall include, and shall be limited to, the right and privilege of Licensee and the LMV Parking Licensees and LMV Construction Licensees to use the City Property for the exercise of the purposes herein described.

b. Each License provided for herein is a non-revocable, exclusive, non-transferrable (except as set forth in Sections 2.b and 11) right and privilege of Licensee and the LMV Parking Licensees and LMV Construction Licensees.

c. Licensees' use and activities on the City Property are in compliance with all of the Licensee Permits, RMP, CMP and all other applicable laws and regulations.

d. All activities on the City Property must be compliant with the City's noise ordinance, codified as Chapter 13 of Title 5 of the Emeryville Municipal Code.

e. Licensee shall provide a sign as set forth in the CMP with the name of the contractor and 24-hour contact person that is visible from the work area to persons on the right of way.

f. Licensee shall keep the City Property and Licensee Property clean, safe and orderly at all times at its sole cost and expense. This condition includes, but is not limited to, abating all graffiti within seventy-two (72) hours of Licensee receiving notice, maintaining the perimeter fencing in good working order at all times, and repairing any damage to the perimeter fencing within seventy-two (72) hours of notice of damage to the perimeter fencing.

g. Licensee shall comply with the requirements of the Alameda County NPDES permit, Best Management Practices established by the Alameda County Urban Runoff Clean Water Program and the Stormwater Pollution Prevention and Control Measures to prevent construction water, debris, pollutants or groundwater from entering the storm drains.

h. If the work contemplated will interfere with established drainage, Licensee shall make provision for drainage as acceptable to the City.

i. Except as contemplated by the RMP and the Reimbursement Agreement and as required in the ordinary course of the activities authorized under the Construction License, no hazardous materials shall be handled at any time on the City Property. Should any discharge, leakage, spillage, emission or pollution of any type occur upon the City Property due to Licensee's use and occupancy of the Property, excepting work performed by Licensee as required by the RMP and Reimbursement Agreement, then Licensee, at its sole cost, shall clean all affected property to the satisfaction of the City and any governmental body with jurisdiction. All proposed fill material profiles shall be submitted for review and approval by the Public Works Director, and shall meet the requirements set forth in "Information Advisory Clean Imported Fill Material" dated October, 2001, published by the Department of Toxic Substances Control.

j. Any mechanic's liens filed against the City Property on account of the work performed by Licensee hereunder shall be promptly cured by Licensee's payment thereof and the recording of applicable release of mechanic's Liens, or Licensee shall post a statutory mechanic's lien release bond in lieu thereof within seven (7) days after the filing of each such mechanic's lien.

k. The fencing along the City Property and the Licensee Property shall promptly be installed to enclose Licensee Property and City Property as described in the CMP after execution of this Agreement and prior to undertaking any activities on the City Property and Licensee Property, but in any event no later than thirty (30) days after execution of this Agreement by all parties.

9. Waiver and Release. Licensee, in perpetuity, expressly waives, releases and relinquishes any and all claims, causes of action, rights and remedies Licensee may now or hereafter have against City, and its officials, officers, employees, and agents, whether known or unknown, with respect to liability for any damage, death or bodily injury arising from Licensee's

use of the City Property unless such damage or loss is caused by the sole active negligence or willful misconduct of City. As a material part of City's decision to issue this Agreement, Licensee hereby assumes all risk of entering and using the City Property, and all risk of damage to the Improvements in, upon, or about the City Property arising, from any cause attributable to City's exercising its rights hereunder, and Licensee hereby waives all claims in respect thereto against City, except if caused by the sole active negligence or willful misconduct of City. Licensee expressly waives, releases and relinquishes any and all claims, causes of action, rights and remedies Licensee may now or hereafter have against City, and its officials, officers, employees, and agents, whether known or unknown, with respect to liability for revocation or termination of this Agreement and the Licenses granted hereunder by City (except to the extent caused by City's breach of this Agreement), including any and all right to claim, demand, or receive any further compensation for the offer which Licensee may be eligible to receive under the California Relocation Assistance Act (Government Code §7260, et seq.), the article 1, § 19 of the California Constitution, the California Eminent Domain Law (Code of Civil Procedure §1230.010, et seq.), and/or the California Code of Regulations, Title 25 or other applicable local, state, or federal statute, ordinance, regulation, rule, or decisional law (collectively "**Compensatory Laws**"), including, but not limited to, the fair market value of the Licenses, severance damages, loss of goodwill, loss of profits, or relocation benefits and assistance, or claims for unreasonable pre-condemnation activities or inverse condemnation, or any other compensation, except if caused by the sole active negligence or willful misconduct of City.

LICENSEE HEREBY ACKNOWLEDGES THAT IT HAS READ AND IS FAMILIAR WITH THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 ("**SECTION 1542**"), WHICH IS SET FORTH BELOW:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."

BY INITIALING BELOW, LICENSEE HEREBY WAIVES THE PROVISIONS OF SECTION 1542 SOLELY IN CONNECTION WITH THE MATTERS WHICH ARE THE SUBJECT OF THE FOREGOING WAIVERS AND RELEASES:

LICENSEE's Initials

The waivers and releases by Licensee contained herein shall survive the term of this Agreement and shall be binding upon the assignees, transferees, and successors in interest of Licensee.

10. No Transfer of Rights. This Agreement and the Licenses, and all rights and obligations of Licensee with respect thereto, under the terms and conditions hereof, are personal to Licensee, and shall not be assigned or transferred by Licensee to any third party, unless approved by the City in advance and in writing, which approval shall not be unreasonably withheld, conditioned or delayed.

11. Default; Remedies.

a. Termination. Any one License Term, both License Terms or the Agreement may be terminated upon any of the following events; provided that the City shall first provide Licensee with written notice of such event and a period of ten (10) calendar days after such written notice to cure, or to commence and diligently proceed to cure in the case of events which by their nature require more time to cure ("**Cure Period**"):

i. If, during the License Terms, Licensee fails to observe or perform any of the covenants, obligations or provisions of this Agreement or the Security Measures to be observed or performed by Licensee, which termination shall be effective after expiration of the Cure Period upon ten (10) calendar days written notice by the City to Licensee of such termination; or

ii. Upon any unapproved sale, lease, assignment or other transfer by Licensee, either directly or indirectly, of any of its interest in all or any portion of this Agreement, which termination shall be effective immediately upon any such sale, lease, assignment or transfer.

iii. The City determines Licensee is out of compliance with any of its License Permits, which termination shall be effective after expiration of the Cure Period upon ten (10) calendar days written notice by the City to Licensee of such termination.

iv. Licensee abandons construction of the project as contemplated by Licensee Permits. Abandonment shall be deemed to occur when any building permit expires.

b. Effect of Termination. Upon any termination of this Agreement, for any reason, neither party shall have any rights or obligations hereunder, except as specifically provided for in this Agreement, and Licensee shall immediately discontinue using the City Property.

c. Other Remedies. In addition to any other remedies at law or equity, the City Manager may issue an administrative citation pursuant to Chapter 7 of Title 1 of the Emeryville Municipal Code if Licensee fails to comply with any Licensee Permit, the RMP, the CMP, or other applicable law or regulation.

12. **Maintenance, Improvement of the City Property.** City shall have no obligation to maintain, repair or improve the City Property.

13. **Recovery of Costs for Enforcement.** The terms of this Agreement may be enforced by (a) City or its successors or assigns or (b) Licensee. In the event of any controversy, claim or dispute relating to this Agreement, or the breach thereof, the prevailing party shall be entitled to recover from the other party reasonable expenses, attorneys' fees and costs.

14. **Restoration of City Property.** Upon revocation or termination of all License Terms or this Agreement in any manner provided in this Agreement, Licensee, upon demand of City's Public Works Director and at Licensee's own cost and expense, shall abandon the use of

the Improvements and remove the Improvements and restore the City Property to the same condition in which it existed prior to the placing of the Improvements, reasonable wear and tear excepted or as otherwise provided for in the Park and Open Space Improvement Agreement. In addition to any other restoration that may be required, at a minimum, Licensee shall perform a two inch grind and pave the entire width of Halleck Street from gutter to gutter between Sherwin Avenue and Park Avenue to City standard specifications for paving and striping ("**Halleck Paving**") at the earlier of: at the same time Licensee undertakes street improvements on Sherwin Avenue as required by Condition of Approval III.A.3.j of City Planning Commission Resolution No. SUBDIV 16-002, or prior to the last issuance of a temporary certificate of occupancy for Lots 2, 3, 4 or 5. The City Manager and the Licensee may extend the deadline for performing the Halleck Paving by mutual agreement. In no event shall Licensee have any claim against the City for any of the costs of constructing, maintaining or removing the Improvements. In case Licensee shall fail to restore the City Property as provided herein within one-hundred-twenty (120) calendar days after the effective date of revocation or termination, City may proceed with such work at the expense of Licensee or may assume title and ownership of the Improvements and any other property of Licensee located on or within the City Property. No revocation hereof shall release Licensee from any liability or obligation hereunder, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date the Improvements are removed and the City Property is restored as provided above.

15. Insurance. Prior to entering the City Property for any purpose, Licensee shall obtain and maintain, or cause to be maintained, in full force at Licensee's own expense, insurance as described below against claims which may arise out of or result from the performance of the Agreement and use of the City Property by Licensee, LMV Parking Licensees, LMV Construction Licensees and their contractors and subcontractors of any tier, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. All policies shall be written on an occurrence basis. All insurance shall be written by companies that are authorized to write business in the State of California and have, at all times, a Best's rating of "A- X" (A minus X) or better by AM Best & Company, and with coverage and policy limits as follows (unless otherwise specified herein):

a. Commercial General Liability insurance written on Insurance Services Office ("ISO") Commercial General Liability Coverage "occurrence" form CG 00 01 or another Commercial General Liability "occurrence" form providing equivalent coverage and including Broad Form Comprehensive General Liability coverage, blanket contractual liability coverage, Independent Contractors coverage, coverage for bodily injury (including death), property damage (including loss of use thereof) and products and completed operations with limits of not less than \$2,000,000 per occurrence. Limits may be provided in a "layered" program utilizing primary, umbrella or excess liability policies and shall be maintained for at least 1 year following termination of the Agreement.

b. Comprehensive auto liability for all owned, hired and non-owned vehicles brought onto City premises with combined single limits of not less than \$2,000,000 per occurrence.

c. Worker's Compensation insurance as required by the State of California.

d. Employer's liability insurance on all employees, for occupational accidents or disease, with limits of not less than \$1,000,000 per occurrence

e. Equipment and Personal Property insurance adequate to cover the value of all tools and equipment, including rentals, used in performing the Work.

f. [intentionally omitted]

g. In each policy of insurance described above, Licensee shall name or, cause the City and City Parties to be named, as an Additional Insured under the policies required in clauses 15 (a), (b) and (d) above. All policies shall provide for (i) at least thirty (30) days written notice to City prior to cancellation, and (ii) at least ten (10) days written notice to City for cancellation due to non-payment of applicable premiums. All policies of insurance shall contain full Waivers of Subrogation in favor of City. Licensee or their contractors' insurance coverage shall be primary insurance with respect to any other insurance or self-insurance programs maintained by City and such other insurance or self-insurance programs shall be excess and non-contributory. Prior to entry upon City Property, Licensee shall deliver to City a certificate of insurance evidencing the coverage provided by each policy and provide replacement certificates fifteen (15) days prior to the expiration of any required coverage. City shall fully cooperate with Licensee in connection with any claim against City that is in whole or in part caused by Licensee, its contractor or any of its subcontractors.

16. Indemnity. Licensee shall indemnify, defend (with counsel reasonably acceptable to City) and hold harmless City and its respective officers, representatives, agents and employees (the "**City Parties**") from and against any and all third party suits or actions at law or in equity, claims, liabilities, obligations, losses, damages, costs and expenses (including reasonable attorneys' fees), including, but not limited to, bodily injury, sickness, disease or death of any persons or damage to real or personal property, tangible or intangible (collectively "**Claims**") arising directly from the performance or failure to perform the provisions of this Agreement, use of the City Property by or acts, omissions, negligence or willful misconduct of Licensee, LMV Parking Licensees, LMV Construction Licensees, or their contractors, subcontractors, agents or employees under this Agreement. Licensee's indemnity obligations under this Section 16 shall not extend to Claims to the extent occasioned by the active negligence or willful misconduct of City or City Parties. Licensee's indemnity obligations shall apply regardless of whether any insurance policies, or self-insurance maintained by the City has been determined to be applicable to such Claims, and regardless of whether or not City has prepared, supplied or approved of any specifications, drawings or plans for Improvements. This indemnification provision shall survive expiration or termination of this Agreement.

17. Prevailing Wage. Licensee is aware of the requirements of California Labor Code Section 1720, et seq., and 1770, et seq., as well as California Code of Regulations, Title 8, Section 16000, et seq., ("**Prevailing Wage Laws**"), which require compliance with prevailing wage rates, registration of contractors, certified payroll record requirements, hours of work requirements, apprenticeship standards and the performance of other requirements on "public works" and "maintenance" projects. If the Improvement work is being performed as part of an applicable "public works" or "maintenance" project, as defined by the Prevailing Wage Laws,

and if the total cost of the Improvement work is \$1,000 or more, Licensee agrees to fully comply with and to obligate its contractors and subcontractors to fully comply with such Prevailing Wage Laws. Licensee shall defend, indemnify and hold the City, its officials, officers, employees and agents free and harmless from any claim or liability arising out of any failure or alleged failure to comply with the Prevailing Wage Laws.

18. Possessory Interest Tax. Pursuant to California Revenue and Taxation Code section 107.6, the property interest created by this Agreement may be subject to property taxation, and if created, Licensee shall be responsible for such tax, if levied.

19. Miscellaneous.

a. Amendments. The provisions of this Agreement may be amended by mutual written consent of both parties.

b. Notices. All notices permitted or required under this Agreement shall be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

LICENSEE: LMV II Emeryville Holdings, LP
492 9th Street, Suite 300
Oakland, CA 94607
Attention: Dan Ferguson and Heidi Mather

with a copy to:
Anna Shimko
Burke Williams & Sorensen, LLP
101 Howard Street, Suite 400
San Francisco, CA 94105

CITY: City of Emeryville
1333 Park Avenue
Emeryville, CA 94608-3517
Attn: Public Works Director

With a separate copy to:
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608-3517
Attn: City Attorney

Such notice shall be deemed made, if addressed to the party at its applicable address (1) when personally delivered, (2) forty-eight (48) hours after deposit in the U.S. Mail, first class, registered, certified and postage prepaid or (3) upon the date of delivery in person or by courier. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service. Either party may change its address by written notice to the other in the manner set forth above.

c. Entire Understanding. This Agreement constitutes the entire understanding between the Parties, and supersedes all offers, negotiations and other agreements concerning the subject matter contained herein.

d. Invalidity. If any provision of this Agreement is invalid or unenforceable with respect to any Party, the remainder of this Agreement or the application of such provision to persons other than those as to whom it is held invalid or unenforceable, shall not be affected and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

e. Successors and Assigns. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees of the respective parties.

f. Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this Agreement, or which in any way arises out of the Parties' activities undertaken pursuant to this Agreement, shall be filed and prosecuted in the appropriate California State Court in the County of Alameda, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, Licensee expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

g. Exhibits. All exhibits attached hereto form material parts of this Agreement.

h. Time of the Essence. Time is of the essence in respect of all provisions of this Agreement in which a definite time for performance is specified.

i. Counterparts. This Agreement may be executed in any number of counterparts and each counterpart shall be deemed to be an original document. All executed counterparts together shall constitute one and the same document and any counterpart signature pages may be detached and assembled to form a single original document.

SIGNATURES ON FOLLOWING PAGE

**SIGNATURE PAGE TO
PARKING AND CONSTRUCTION LICENSE AGREEMENT
BETWEEN
CITY OF EMERYVILLE AND**

LMV II EMERYVILLE HOLDINGS, LP

“CITY”

**CITY OF EMERYVILLE,
a California municipal corporation**

By: _____
Christine Daniel
City Manager

Approved as to form:

By: Michael Guina
Michael Guina
City Attorney

“LICENSEE”

**LMV II EMERYVILLE HOLDINGS, LP,
a Delaware limited partnership;**

By: **Lennar Multifamily BTC Venture II GP Subsidiary, LLC,
a Delaware limited liability company,
its General Partner;**

By: **Lennar Multifamily BTC Venture II Manager, LLC,
a Delaware limited liability company,
its Manager;**

By: Dan Ferguson, Vice President

EXHIBIT "A"

CONCEPTUAL MAP OF CITY PROPERTY

EXHIBIT "B"

LEGAL DESCRIPTION OF CITY PROPERTY