

## RESOLUTION NO. 19-157

### **Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Execute Second Amendment To Temporary Construction Access Agreement With BRE-BMR 53RD, LP For South Bayfront Pedestrian Bicycle Bridge Project**

**WHEREAS**, the South Bayfront Pedestrian/Bicycle Bridge Project ("Bridge Project") and the Horton Landing Park Project ("Park Project") (collectively, the "Project") was authorized for construction on May 21, 2019; and

**WHEREAS**, to implement the project requires the temporary use of land now owned by BRE-BMR 53RD, LP (dba BioMed Realty); and

**WHEREAS**, a Temporary Construction Access Agreement was executed by the predecessor property owner Novartis that included a term defining an expiration date of December 31, 2019, and

**WHEREAS**, construction will require time beyond December 31, 2019; and

**WHEREAS**, Amendment 2 of the Temporary Construction Access agreement has been prepared to address time extension and concerns from BioMed related to Hazardous Materials; now, therefore, be it

**RESOLVED**, by the City Council of the City of Emeryville hereby approves the Second Amendment of Temporary Construction Access Agreement; and, be it, further

**RESOLVED**, by the City Council of the City of Emeryville that the City Manager is authorized to execute said Second Amendment to Temporary Construction Access Agreement on behalf of the City, with such minor and clarifying changes necessary to effect the terms thereof; and, be it, further.

**RESOLVED**, by the City Council of the City of Emeryville that the City Manager is further authorized to execute time extension amendments as warranted by construction progress until construction work is accepted as complete.

**ADOPTED**, by the City Council of the City of Emeryville at a regular meeting held Tuesday, December 3, 2019, by the following vote:

|          |          |   |
|----------|----------|---|
| AYES:    | <u>5</u> | Mayor Patz, Vice Mayor Martinez, and Council Members Bauters, Donahue, and Medina |
| NOES:    | <u>0</u> |   |
| ABSTAIN: | <u>0</u> |   |
| ABSENT:  | <u>0</u> |   |

  
MAYOR

ATTEST:

  
CITY CLERK

APPROVED AS TO FORM:

  
CITY ATTORNEY

**SECOND AMENDMENT TO TEMPORARY CONSTRUCTION ACCESS  
AGREEMENT**

**THIS SECOND AMENDMENT TO TEMPORARY CONSTRUCTION ACCESS AGREEMENT** (this “2<sup>nd</sup> Amendment”) is dated as of December \_\_, 2019 (the “Effective Date”), by and among BRE-BMR 53<sup>rd</sup> LP, a Delaware limited partnership, as successor in interest to Novartis Vaccines and Diagnostics, Inc. (“Grantor”), and the City of Emeryville, a California municipal corporation (“City”).

**RECITALS**

WHEREAS Grantor and City are parties to that certain Temporary Construction Access Agreement dated as of May 10, 2017 (the “Original Agreement”), as amended by that certain First Amendment to Temporary Construction Access Agreement dated as of February 7, 2018 (together with the Original Agreement, the “Agreement”), which grants to City Temporary Construction Access to enter upon, exit from, traverse and otherwise use the Access Areas on a portion of Grantor’s Property for the Work;

WHEREAS Owner and City desire to extend the term of the Agreement;

WHEREAS City has selected City’s contractor to perform the Work and to have the right to exercise the Access Rights as contemplated under the Agreement;

WHEREAS City desires and Grantor is willing to provide certain additional rights to City to use certain facilities and utilities on Grantor’s Property in connection with the Project; and

WHEREAS Owner and City desire to further amend the terms of the Agreement as detailed below.

**AGREEMENT**

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, each intending to be legally bound, covenant and agree as follows:

1. Defined Terms. Capitalized terms not otherwise defined herein shall have the meanings given them in the Agreement.
2. Term. In Section 1(b)(iii) of the Original Agreement, “December 31, 2019” is hereby replaced with “December 31, 2021”.
3. Hazardous Materials. The following is added as a new Section 2(e) of the Original Agreement:

(e) City shall immediately notify Grantor of any hazardous materials encountered as part of the Work. No City Party (as defined below) shall use Grantor’s Property or any portion thereof for staging, storing, stockpiling or

otherwise placing soils or hazardous materials. City shall promptly provide Grantor with copies of any manifests related to the transporting of soils or hazardous materials that travel across or over Grantor's Property. Upon at least thirty (30) days' prior notice, City shall permit Grantor and Grantor's contractors and agents (collectively, the "**Grantor Parties**") and Shell Development Company and its affiliates (collectively, "**Shell**") reasonable access over, across and under Grantor's Property for purposes of performing environmental testing and remediation, at the testing/remediating party's sole cost and expense. Grantor shall use commercially reasonable efforts to prevent Shell's access to Grantor's Property from unreasonably interfering with City's enjoyment of the Access Rights.

4. Indemnification. The following is added at the end of Section 3(a) of the Original Agreement:

Notwithstanding anything in this Agreement to the contrary, however, City shall indemnify, hold harmless and defend Grantor from and against any and all suits, damages, costs, fees, claims, demands, causes of action, losses, liabilities and expenses (including attorneys' fees and other defense costs or liabilities) (collectively, "**Claims**") with respect to any hazardous materials or hazardous materials conditions (i) on or originating from property other than Grantor's Property that affects Grantor's Property because of a City Party's (as defined below) exercise of the Access Rights or performance of the Work or (ii) on Grantor's property to the extent (A) placed on, under or about Grantor's Property or (B) exacerbated by a City Party (collectively, "**City Liabilities**"). Grantor shall not, however, hold City Parties liable for Claims related to Hazardous Materials on or about Grantor's Property related to the Access Rights other than the City Liabilities. Grantor will use commercially reasonable efforts, if negotiating an agreement with Shell related to Shell's access to the Access Areas during the term of this Agreement, to include in such agreement a requirement that Shell defend and indemnify City Parties from Claims with respect to any hazardous materials or hazardous materials conditions that affect Grantor's Property arising from the performance of environmental testing and remediation by Shell in the Access Areas during the term of this Agreement.

5. Insurance. In Section 4(f)(3) of the Agreement, "Grantor as an additional insured" is hereby replaced with "Grantor, BioMed Realty, L.P., and BioMed Realty II LP, and each of their respective lenders, affiliates, subsidiaries, directors, officers, representatives and employees as additional insureds".

6. Conditions to Exercise. Any Work performed pursuant to the Access Rights shall be performed in accordance with that certain Site Cleanup Plan, EPA Project No. BF-96921301 dated as of March 2010; those certain Remedial Specifications – South Bayfront Pedestrian Bicycle Bridge – Project No. EPW17-112, CIP Project Nos. 16475006 & 17237003 dated as of January 2019; and any other risk management plans approved or required by the San Francisco Bay Regional Water Quality Control Board. City shall give Grantor at least thirty (30) days' prior

notice of any Work that will be performed that may impact or come into contact with the water table underlying Grantor's Property.

7. Notices. Grantor's notice address shall be amended to be as follows:

If to Grantor: BRE-BMR 53<sup>rd</sup> LP  
17190 Bernardo Center Drive  
San Diego, California 92128  
Attention: Legal Department  
Telephone: (858) 485-9840  
Email: [legalreview@biomedrealty.com](mailto:legalreview@biomedrealty.com)

8. Counterparts. This 2<sup>nd</sup> Amendment may be executed in counterparts and, upon execution by the parties, each executed counterpart shall have the same force and effect as an original instrument and as if the parties had signed the same instrument.

9. Effect on Agreement. Except as stated herein, the Agreement shall remain unmodified and in full force and effect. Any reference to the "Agreement" in the Agreement shall hereafter be deemed to refer to the Agreement, as amended by this 2<sup>nd</sup> Amendment.

10. Signatures. A facsimile, electronic or portable document format (PDF) signature on this 2<sup>nd</sup> Amendment shall be equivalent to and have the same force and effect as an original signature.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have executed this 2<sup>nd</sup> Amendment as of the Effective Date.

**OWNER:**

BRE-BMR 53<sup>rd</sup> LP,  
a Delaware limited partnership


By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**CITY:**

CITY OF EMERYVILLE,  
a California municipal corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Approved As To Form:**

By:   
Name: Michael Guina  
Title: City Attorney