

RESOLUTION NO. 19-158

Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Execute Second Amendment To Grant of Easement 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 allow for access to the Project, the City and Chiron Corporation entered into that certain Grant of Easement dated June 5, 2001, and recorded in the Alameda County Recorder's Office as instrument number 2001-195966 on June 8, 2001; and

WHEREAS, the City and Novartis Vaccines and Diagnostics, Inc.- ("Novartis"), as successor to Chiron Corporation, entered into that certain Amendment Grant of Easement on May 10, 2017, and recorded in the Alameda County Recorder's Office as instrument number 2017147834 on July 7, 2017; and

WHEREAS, the Amended Grant of Easement allows the City to use the subject easement area for temporary construction purposes for a term ending on December 31, 2019;

WHEREAS, BRE-BMR 53RD, LP (dba BioMed Realty) is now the successor in interest to Novartis; and

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

WHEREAS, a Second Amendment To Grant of Easement Agreement has been prepared to address property owner change, 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 To Grant of Easement Agreement in the form attached hereto as Exhibit A; 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 Grant of Easement 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



RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Emeryville
1333 Park Avenue
Emeryville, CA 94608
Attn: City Attorney's Office

Exempt from recording fee pursuant to
Government Code § 27383 and transfer tax
pursuant to Revenue & Taxation Code
§ 11911

SECOND AMENDMENT TO GRANT OF EASEMENT AGREEMENT

THIS SECOND AMENDMENT TO GRANT OF EASEMENT AGREEMENT (this "2nd Amendment") is entered into as of the ____ day of December, 2019, by and between BRE-BMR 53rd LP, a Delaware limited partnership ("Grantor"), and the CITY OF EMERYVILLE, a California municipal corporation ("Grantee").

RECITALS

GRANTOR AND GRANTEE ENTER INTO THIS SECOND AMENDMENT TO GRANT OF EASEMENT AGREEMENT on the basis of the following facts, intentions and understandings:

A. Grantor's predecessor-in-interest, Chiron Corporation, a Delaware corporation ("Chiron"), and Grantee's predecessor-in-interest, City of Emeryville Redevelopment Agency, a municipal corporation of the State of California ("Agency"), entered into that certain Grant of Easement dated as of June 5, 2001, and recorded on June 8, 2001, in the Official Records of Alameda County as Instrument No. 2001-195966 (the "Original Agreement"), as amended by Novartis Vaccines and Diagnostics, Inc., a Delaware corporation (as successor-in-interest to Chiron, "Novartis"), and Grantee (as successor-in-interest to Agency) by that certain Amended Grant of Easement dated as of May 10, 2017, and recorded on July 7, 2017, in the Official Records of Alameda County as Instrument No. 2017147834 (the "1st Amendment" and, together with the Original Agreement, the "Agreement");

B. Grantor (as successor-in-interest to Novartis) is the owner of (1) that certain real property located in the City of Emeryville, County of Alameda, State of California, identified as the Chiron Property and more particularly described in Exhibit A to the Original Agreement, and (2) that certain real property located along Horton Street in the City of Emeryville, County of Alameda, State of California, identified as APNs 049-1544-005 and 049-1544-006 and a portion of 049-1544-001-01, and depicted in Exhibit A attached hereto (collectively, "Grantor's Property");

C. Grantee is the owner of that certain real property located in the City of Emeryville, County of Alameda, State of California, identified as the City Property and more particularly described in Exhibit B to the Original Agreement;

D. Grantee is in the process of creating the Horton Landing Park (the "Park Project") and the South Bayfront Bicycle/Pedestrian Overcrossing (the "Bridge Project") and, together with the Park Project, the "Project";

E. Grantor and Grantee entered into that certain Temporary Construction Access Agreement effective as of May 10, 2017, as amended by that certain First Amendment to Temporary Access Agreement effective as of May 28, 2018, and that certain Second Amendment to Temporary Access Agreement effective as of [INSERT DATE] (together, the "Construction Agreement") to grant to Grantee a temporary, exclusive right of access over a portion of Grantor's Property (as defined in the Construction Agreement) for use during construction of the Project;

F. City has engaged contractors to complete the Project; and

G. Grantor and Grantee desire to amend the Agreement on the terms set forth in this 2nd Amendment.

AGREEMENT

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises set forth herein, Grantor and Grantee hereby agree as follows:

1. Definitions. Capitalized terms not otherwise defined herein shall have the meanings given them in the Agreement.

2. Amendments.

a. In Section 1 of the 1st Amendment, "December 31, 2019" is hereby replaced with "December 31, 2021".

b. The following hereby replaces "effect." at the end of Section 2(a) of the Original Agreement:

effect, and with that certain Site Cleanup Plan, EPA Project No. BF-96921301 dated as of March 2010; that certain 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. Grantee shall give Grantor at least thirty (30) days' prior notice of any work or activity that will be performed that may impact or come into contact with the water table underlying the Easement Area.

3. Insurance. In Section 5(b) of the Original Agreement, “Grantor to be named 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 to be named as additional insureds”.
4. Hazardous Materials. Grantee shall immediately notify Grantor of any hazardous materials encountered as part of the work or activity performed pursuant to the Agreement, as amended by this 2nd Amendment. Grantee shall not use the Easement Area or any portion thereof for staging, storing, stockpiling or otherwise placing soils or hazardous materials. Grantee shall promptly provide Grantor with copies of any manifests related to the transporting of soils or hazardous materials that travel across or over the Easement Area. Upon at least thirty (30) days’ prior notice, Grantee shall permit Grantor and Grantor’s contractors and agents and Shell Development Company and its affiliates and its subsidiaries reasonable access over, across and under the Easement Area for purposes of performing environmental testing and remediation, at the testing/remediating party’s sole cost and expense.
5. Binding Obligation. The terms and provisions of this 2nd Amendment shall run with the land and shall be binding upon Grantor and its successors and assigns that hereafter hold title to the Chiron Property and shall inure to the benefit of Grantee and its successors and assigns that hereafter hold title to the City Property.
6. Modification. This 2nd Amendment shall not be changed, modified, amended or terminated in whole or in part without the written agreement of all record titleholders of the Chiron Property and the City Property.
7. Venue; Attorneys’ Fees. If either party brings an action or proceeding for damages for an alleged breach of any provision of this 2nd Amendment, or to enforce, protect or establish any right or remedy hereunder, venue shall be in the Superior Court of the County of Alameda, and the prevailing party shall be entitled to reasonable attorneys’ fees and court costs, including, without limitation, reasonable expert witnesses’ fees.
8. Relationship of Parties. Nothing in this 2nd Amendment shall be deemed or construed to create or establish any relationship of partnership, joint venture, agency or any similar relationship between the parties. Neither Grantor nor Grantee shall represent or cause any person or party to represent that it is a partner, joint venturer or agent of the other, or that it has any similar relationship with the other as a result of this 2nd Amendment.
9. Governing Law. This 2nd Amendment shall be governed and construed in accordance with the laws of the State of California.
10. Entire Agreement. The terms of this 2nd Amendment are intended by the parties as the final expression of their agreement with respect to such terms as are included in this 2nd Amendment, and may not be contradicted by evidence of any prior or contemporaneous agreement.

11. Interpretation. The headings of the sections and subsections of this 2nd Amendment are for convenience of reference only, and shall not be used to interpret any term or provision hereof or define, limit, extend or describe the scope of this 2nd Amendment.
12. Severability. If any non-material term or provision of this 2nd Amendment, or the application thereof to any person or circumstance, shall to any extent be invalid or unenforceable, the remainder of this 2nd Amendment, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this 2nd Amendment shall be valid and enforceable to the fullest extent allowed by law.
13. Recitals. The Recitals set forth above are incorporated into this 2nd Amendment by reference thereto.
14. Counterparts. This 2nd Amendment may be executed in one (1) or more counterparts, each of which shall be deemed an original, and both of which together shall constitute one and the same instrument.
15. 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 2nd Amendment.
16. Acts of the Parties. Each party shall promptly perform, execute and deliver or cause to be performed, executed and/or delivered any and all acts and assurances as either may reasonably require in order to carry out the intent and purpose of this 2nd Amendment.
17. Authority. The persons signing below represent that they have the authority to bind their respective party, and that all necessary board of directors', shareholders', partners', City Council's or other approvals have been obtained.
18. Nonwaiver. Unless otherwise expressly provided in this 2nd Amendment, no waiver by Grantor or Grantee of any provision hereof shall be deemed to have been made unless expressed in writing and signed by Grantor or Grantee, as the case may be. No delay or omission in the exercise of any right or remedy accruing to Grantor or Grantee, as the case may be, upon any breach under this 2nd Amendment shall impair such right or remedy or be construed as a waiver of any such breach theretofore or thereafter occurring. The waiver by Grantor or Grantee of any breach of any term, covenant or condition herein stated shall not be deemed to be a waiver of any other term, covenant or condition.
19. Construction. The parties acknowledge that each party and its counsel have reviewed and revised this 2nd Amendment, and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this 2nd Amendment or any amendment or exhibits hereto.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

COPY

IN WITNESS WHEREOF, the parties have executed this 2nd Amendment on the date(s) set forth below, effective as of the day and year first above written.

GRANTOR:

BRE-BMR 53rd LP,
a Delaware limited partnership

By: _____
Name: _____
Its: _____

GRANTEE:

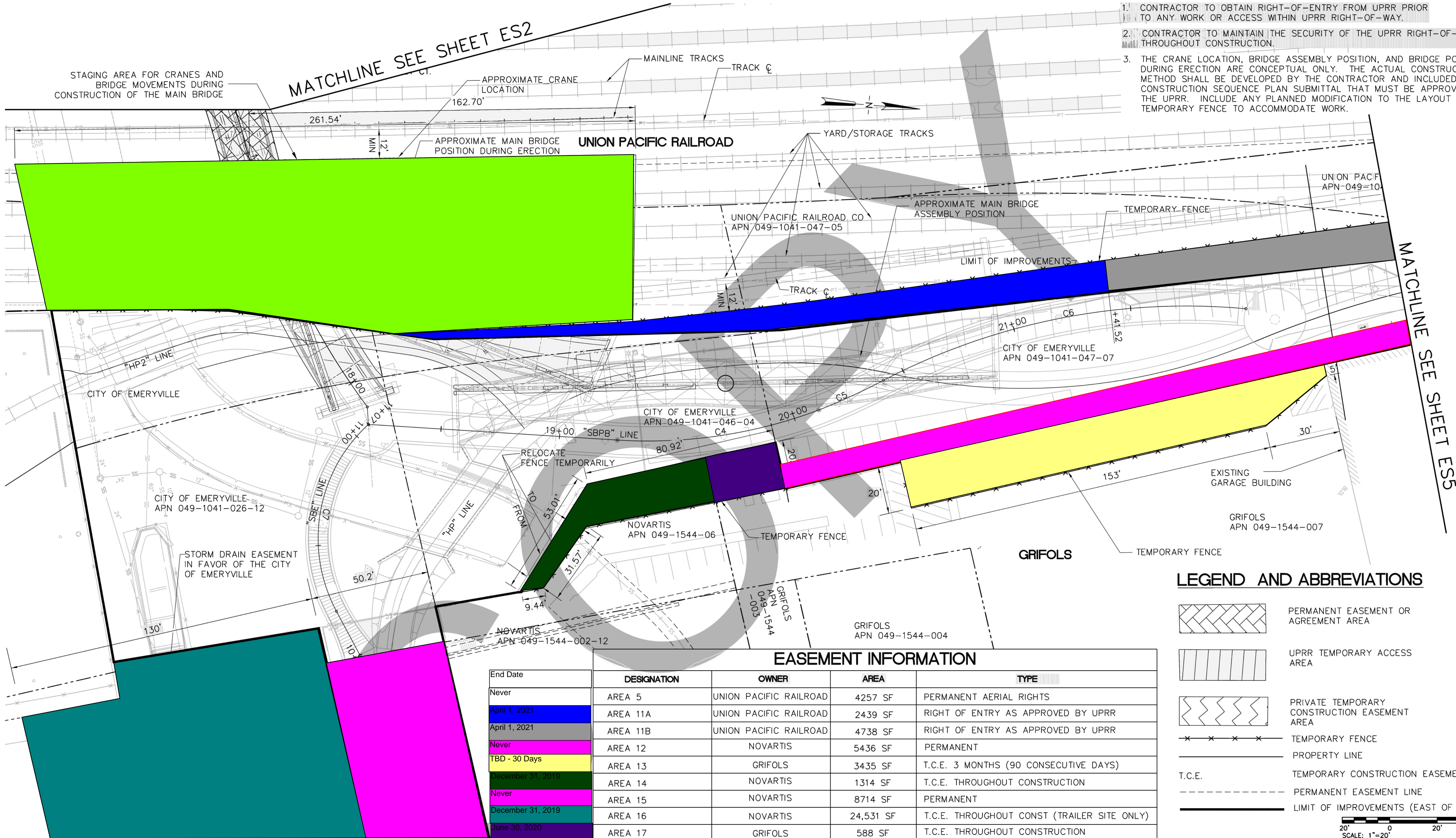
CITY OF EMERYVILLE,
a California municipal corporation

By: _____
Name: _____
Its: _____

Approved As To Form:

By: Michael Guina
Name: Michael Guina
Title: City Attorney

- NOTE:**
1. CONTRACTOR TO OBTAIN RIGHT-OF-ENTRY FROM UPRR PRIOR TO ANY WORK OR ACCESS WITHIN UPRR RIGHT-OF-WAY.
 2. CONTRACTOR TO MAINTAIN THE SECURITY OF THE UPRR RIGHT-OF-WAY THROUGHOUT CONSTRUCTION.
 3. THE CRANE LOCATION, BRIDGE ASSEMBLY POSITION, AND BRIDGE POSITION DURING ERECTION ARE CONCEPTUAL ONLY. THE ACTUAL CONSTRUCTION METHOD SHALL BE DEVELOPED BY THE CONTRACTOR AND INCLUDED IN A CONSTRUCTION SEQUENCE PLAN SUBMITTAL THAT MUST BE APPROVED BY THE UPRR. INCLUDE ANY PLANNED MODIFICATION TO THE LAYOUT OF THE TEMPORARY FENCE TO ACCOMMODATE WORK.



LEGEND AND ABBREVIATIONS

- PERMANENT EASEMENT OR AGREEMENT AREA
 - UPRR TEMPORARY ACCESS AREA
 - PRIVATE TEMPORARY CONSTRUCTION EASEMENT AREA
 - TEMPORARY FENCE
 - PROPERTY LINE
 - T.C.E. TEMPORARY CONSTRUCTION EASEMENT
 - PERMANENT EASEMENT LINE
 - LIMIT OF IMPROVEMENTS (EAST OF UPRR)
- 20' 0 20' 40'
SCALE: 1"=20'

EASEMENT INFORMATION

End Date	DESIGNATION	OWNER	AREA	TYPE
Never	AREA 5	UNION PACIFIC RAILROAD	4257 SF	PERMANENT AERIAL RIGHTS
April 1, 2021	AREA 11A	UNION PACIFIC RAILROAD	2439 SF	RIGHT OF ENTRY AS APPROVED BY UPRR
April 1, 2021	AREA 11B	UNION PACIFIC RAILROAD	4738 SF	RIGHT OF ENTRY AS APPROVED BY UPRR
Never	AREA 12	NOVARTIS	5436 SF	PERMANENT
TBD - 30 Days	AREA 13	GRIFOLS	3435 SF	T.C.E. 3 MONTHS (90 CONSECUTIVE DAYS)
December 31, 2019	AREA 14	NOVARTIS	1314 SF	T.C.E. THROUGHOUT CONSTRUCTION
Never	AREA 15	NOVARTIS	8714 SF	PERMANENT
December 31, 2019	AREA 16	NOVARTIS	24,531 SF	T.C.E. THROUGHOUT CONST (TRAILER SITE ONLY)
June 30, 2020	AREA 17	GRIFOLS	588 SF	T.C.E. THROUGHOUT CONSTRUCTION
TBD-48 hours	AREA 18	UNION PACIFIC RAILROAD	17,241 SF	RIGHT OF ENTRY AS APPROVED BY UPRR

MATCHLINE SEE SHEET ES4

0

CONFORMED SET FOR CONSTRUCTION

RL

JUN 2019

DEL

1

DESCRIPTION

BY

DATE

APP'D.

DESIGNED BY:
D. LOFTUS

DRAWN BY:
R. LITTELL

CHECKED BY:
D. DESAI

SCALE:
1" = 20'

HNTB

1735 TECHNOLOGY DRIVE, SUITE 650
SAN JOSE, CA 95110
408.451.7300

BIGGS CARDOSA ASSOCIATES INC

STRUCTURAL ENGINEERS

865 The Alameda
San Jose, California 95126
408-296-5515

City of Emeryville

1333 Park Avenue
Emeryville, CA 94608
(510) 596-4330

SOUTH BAYFRONT PEDESTRIAN BICYCLE BRIDGE

EMERYVILLE CALIFORNIA

CONSTRUCTION AREAS AND EASEMENTS 3

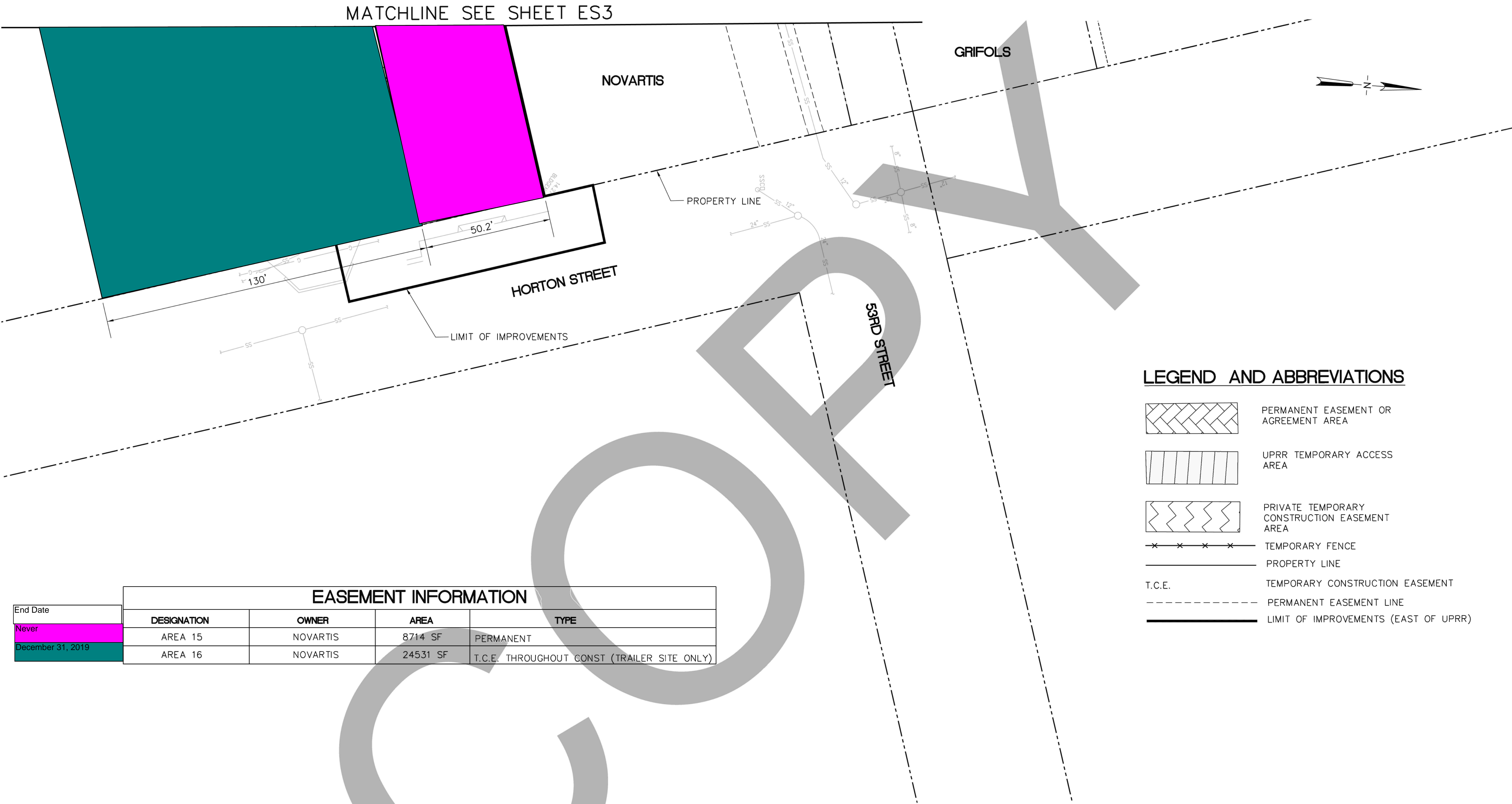
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SHEET NO.
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PAGE NO.
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REGISTERED PROFESSIONAL ENGINEER
DAVID E. LOFTUS
No. C59069
Exp. 06/30/19
CIVIL
STATE OF CALIFORNIA

2007073
(ES.DWG)



LEGEND AND ABBREVIATIONS

- PERMANENT EASEMENT OR AGREEMENT AREA
- UPRR TEMPORARY ACCESS AREA
- PRIVATE TEMPORARY CONSTRUCTION EASEMENT AREA
- TEMPORARY FENCE
- PROPERTY LINE
- T.C.E. TEMPORARY CONSTRUCTION EASEMENT
- PERMANENT EASEMENT LINE
- LIMIT OF IMPROVEMENTS (EAST OF UPRR)



EASEMENT INFORMATION				
End Date	DESIGNATION	OWNER	AREA	TYPE
Never	AREA 15	NOVARTIS	8714 SF	PERMANENT
December 31, 2019	AREA 16	NOVARTIS	24531 SF	T.C.E. THROUGHOUT CONST (TRAILER SITE ONLY)

0	CONFORMED SET FOR CONSTRUCTION	RL	JUN 2019	DEL
REV.	DESCRIPTION	BY	DATE	APP'D.

DESIGNED BY:
D. LOFTUS

DRAWN BY:
R. LITTELL

CHECKED BY:
D. DESAI

SCALE:
1" = 20'

1735 TECHNOLOGY DRIVE, SUITE 650
SAN JOSE, CA 95110
408.451.7300

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STRUCTURAL ENGINEERS

865 The Alameda
San Jose, California 95126
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1333 Park Avenue
Emeryville, CA 94608
(510) 596-4330

SOUTH BAYFRONT PEDESTRIAN BICYCLE BRIDGE

EMERYVILLE CALIFORNIA

CONSTRUCTION AREAS AND EASEMENTS 4

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