

AGREEMENT TO USE PROPERTY FOR A TEMPORARY NAVIGATION CENTER

This AGREEMENT TO USE PROPERTY FOR A TEMPORARY NAVIGATION CENTER (this “Agreement”), dated as of April __, 2017, is made by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation (“City”), acting by and through the City Administrator, the Director of Public Works, the Director of the Department of Homelessness and Supportive Housing Homeless, and the Director of Property, and LMC San Francisco I Holdings, LLC, a Delaware limited liability company (“Owner”).

Recital

A. Owner owns that certain improved real property in the City and County of San Francisco, located at 1515 South Van Ness Avenue, San Francisco, California, as more particularly described in Exhibit A (the “Property”). The Property is currently improved with a one story warehouse building, consisting of approximately ___ square feet (the “Building”). All references in this Agreement to the Property shall include the Building.

B. Owner intends to demolish the Building and construct a project on the Property, as set forth in [*reference City approvals*] (the “New Project”). Owner intends to begin work on the New Project or around [_____, 2018.]

C. California Government Code Sections 8698 through 8698.2 authorize the governing body of a political subdivision, including the City, to declare the existence of a shelter crisis upon a finding by the governing body that a significant number of persons within the jurisdiction are without the ability to obtain shelter, and that the situation has resulted in a threat to the health and safety of those persons. In Ordinance No. 57-16, enacted on April 22, 2016, the Board of Supervisors found that a significant number of persons within the City are without the ability to obtain shelter, and that the situation has resulted in a threat to the health and safety of those persons. For that reason, and based on factual findings set forth in that ordinance, the Board of Supervisors declared the existence of a shelter crisis in the City and County of San Francisco for the purposes of California Government Code Sections 8698 through 8698.2.

D. [*add reference to Board action on this*]

E. In response to the shelter crisis, the City wishes to construct and operate a temporary navigation center on the Property to provide temporary housing for homeless persons and to provide services to such persons, generally consistent with City navigation centers at 1950 Mission Street, at the Civic Center Hotel, and at 25th and Michigan Streets.

F. City and Owner desire to enter into this Agreement to allow City to create and operate the temporary navigator center on the terms set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing covenants, promises and undertakings set forth herein, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and Owner agree as follows:

1. PERMITTED USES

(a) City may enter and use the Property for the sole purpose of constructing and operating a navigation center to serve homeless persons. The construction work shall be performed by the City or its contractors, at no cost to Owner, in accordance with the scope of work described in Exhibit B [*and shown in Exhibit B-1?*] (the "Work"). The Work shall include portable bathroom and shower facilities, but no cooking or kitchen facilities, as more particularly described in Exhibit B. Any material change from the Work described in Exhibit B shall be subject to Owner's prior written approval, which Owner may give or withhold in Owner's sole discretion. City shall begin the Work within thirty (30) days after the start of the term of this Agreement.

(b) City shall enter into an agreement with a third party (the "Operator") for the operation of the navigation center at the Property generally in the form attached as Exhibit C. Any material change from the form of management agreement attached as Exhibit C shall be subject to Owner's prior written approval.

(c) City shall use, and shall cause its contractors and agents to use, due care at all times to avoid any damage or harm to the Property. City shall not perform any excavation work or perform any construction except as described in the approved Work. City shall not dump or dispose of refuse or other unsightly materials on, in, under or about the Property. City shall take appropriate action in good faith to address any reasonable neighborhood concerns and complaints relating to the City's use of the Property, consistent with City's actions with respect to navigations centers in other parts of the City.

(d) City shall not cause, nor shall City allow any of its contractors or agents to cause, any Hazardous Material (as defined below) to be brought upon, kept, used, stored, generated or disposed of in or about the Property. City shall promptly notify Owner when City learns of, or has reason to believe that, a release of Hazardous Material has occurred in, on or about the Property. City shall further comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination. If City or its contractors or agents cause a release of Hazardous Material, City shall, without cost to Owner and in accordance with all laws and regulations, promptly return the Property to the condition immediately prior to the release. For purposes hereof, "Hazardous Material" means material that, because of its quantity, concentration or physical or chemical characteristics, is at any time now or hereafter deemed by any federal, state or local governmental authority to pose a present or potential hazard to public health, welfare or the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance, pollutant or contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq., or pursuant to Section 25316 of the California Health & Safety Code; a "hazardous waste" listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the Property or are naturally occurring substances in the Property, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids. The term "release" or "threatened release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under or about the Property.

2. AS-IS; NO REPRESENTATIONS OR WARRANTIES

(a) City accepts the Property strictly in its "AS IS" condition, without representation or warranty of any kind by Owner, its officers, agents or employees, including, without limitation, the suitability, safety, or duration of availability of the Property or any facilities on the Property for City's use. Without limiting the foregoing, this Agreement is made subject to all applicable laws, rules and ordinances governing the use of the Property, and to any and all covenants, conditions, restrictions, easements, encumbrances, claims of title and other title matters affecting the Property, whether foreseen or unforeseen, and whether such matters are of record or would be disclosed by an accurate inspection or survey. It is City's sole obligation to conduct an independent investigation of the Property and all matters relating to its use of the Property hereunder, including, without limitation, the suitability of the Property for such uses. City, at its own expense, shall obtain such permission or other approvals from any third parties with existing rights as may be necessary for City to make use of the Property in the manner contemplated hereby.

(b) Under California Civil Code Section 1938, to the extent applicable to this Agreement, City is hereby advised that the Property has not undergone inspection by a Certified Access Specialist to determine whether it meets all applicable construction-related accessibility requirements. City shall be solely responsible for maintaining all facilities placed in or on the Property pursuant hereto in good and safe condition, and Owner shall have no duty whatsoever for any maintenance of the Property or any such facilities therein.

3. COVENANT TO MAINTAIN; REPAIR OF DAMAGE

City shall at all times, at no cost to Owner, maintain the Property in a good, clean, safe, secure, sanitary and slightly condition in so far as the Property may be affected by City's activities hereunder. If any portion of Property is damaged by any of the activities of City or its contractors or agents, City shall, at no cost to Owner, repair such damage as required to continue to operate the navigation center.

4. TERM OF AGREEMENT

(a) The term of this Agreement is temporary only and shall start on the date of execution, and shall continue until _____, 2018; provided (1) if the Property is damaged or destroyed by casualty, and City elects not to make such repairs as needed to continue to operate the Property as a navigation center, City shall have the right to terminate this Agreement by delivery of notice to Owner, and (2) Owner shall have the right to terminate this Agreement for a City default as set forth in section (b) below.

(b) If City fails to comply with any material covenant, condition or term of this Agreement and such failure continues for fifteen (15) days after the date of written notice by Owner to City, City shall be in default under this Agreement; provided that if such default is not capable of cure within 15 days, City shall have a reasonable period to complete such cure if City undertakes prompt action to cure the default within the fifteen (15)-day period and thereafter diligently prosecutes the same to completion. Owner shall have the right to terminate this Agreement by delivery of written notice of termination if City fails to cure the default within the time period set forth above.

5. NO AGREEMENT FEE

There shall be no fee charged in connection with City's use of the Property under this Agreement.

6. COMPLIANCE WITH LAWS

City shall, at no cost to Owner, conduct and cause to be conducted all activities on the Property allowed hereunder in a safe and prudent manner and in compliance with all laws, regulations, codes, ordinances and orders of any governmental or other regulatory entity (including, without limitation, the Americans with Disabilities Act and any other disability access laws), whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. City shall, at no cost to Owner, procure and maintain in force at all times during its use of the Property any and all licenses or approvals necessary to conduct the activities allowed hereunder.

7. INDEMNITY

City shall indemnify, defend and hold harmless Owner, its boards, officers, agents, and employees (collectively, "Agents"), and each of them, from and against any and all demands, claims, legal or administrative proceedings, losses, costs, penalties, fines, liens, judgments, damages and liabilities of any kind (collectively, "Losses"), arising in any manner out of (a) any injury to or death of any person occurring in or on the Property during the term of this Agreement; (b) any damage to property occurring in, on or about the Property relating in any manner to City's use of the Property under this Agreement (subject to the surrender provisions of Section 9), (c) any failure by City to faithfully observe or perform any of the terms, covenants or conditions of this Agreement, or (d) any release or discharge of any Hazardous Material caused or allowed by City or its Agency on, in, under or about the Property, except (1) to the extent of Losses resulting directly from the negligence or willful misconduct of Owner or its Agents, and (2) the parties agree to look first to any liability insurance held by Operator to the extent applicable to the Losses, and City's indemnification shall not extend to items to the extent covered by such insurance. The foregoing indemnity shall include, without limitation, reasonable attorneys' and consultants' fees, investigation and remediation costs and all other reasonable costs and expenses incurred by the indemnified parties, including costs to negotiate with any insurer and to pay any deductible. City specifically acknowledges and agrees that it has an obligation to defend Owner from any claim that falls within this indemnity provision even if the allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to City. City's obligations under this section shall survive the expiration or other termination of this Agreement.

8. WAIVER OF CLAIMS; WAIVER OF CONSEQUENTIAL AND INCIDENTAL DAMAGES

(a) Neither Owner nor any of its Agents shall be liable for any damage to the property of City, or its contractors or agents, or for any bodily injury or death to such persons, resulting or arising from the condition of the Property or its use by City.

(b) Owner would not be willing to give this Agreement in the absence of a complete waiver of liability for consequential or incidental damages due to the condition of the Property. Accordingly, City fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against for consequential and incidental damages, and covenants not to sue Owner, for any loss, cost, liability, claim or damage resulting from the condition of the Property or the City's use of the Property as contemplated by this Agreement.

(c) In connection with the foregoing release, City acknowledges that it is familiar with Section 1542 of the California Civil Code, which reads:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

City acknowledges that the release contained herein includes all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims. City realizes and acknowledges that it has agreed upon this Agreement in light of this realization and, being fully aware of this situation, it nevertheless intends to waive the benefit of Civil Code Section 1542, or any statute or other similar law now or later in effect. The release contained herein shall survive any termination of this Agreement.

9. SURRENDER

Upon the expiration or termination of this Agreement, City shall surrender the Property to Owner in good condition, subject to any damage, destruction, casualty and wear and tear caused by City's use. The parties acknowledge and agree that City shall have the right to remove its property, but City shall not be required to remove the improvements made as part of the Work and that Owner intends to demolish the Building immediately following the end of the Term. Notwithstanding anything to the contrary in this Agreement, City shall not be responsible to repair any damage or destruction to the Building, even any damage caused by City or its contractors or agents, except to the extent that such damage increases Owner's demolition costs for the New Project. Upon any casualty or damage to the Building that City elects not to repair (and instead terminates this Agreement), City and Owner shall meet and confer in good faith for a period of not less than 30 days to reach agreement on the increased cost to Owner, if any, resulting the Building damage. Owner shall consult with its demolition contractor and provide evidence of any increased cost, which evidence will be subject to review by City's Department of Building Inspection. If the parties are not able to reach agreement, either party may submit the matter to binding arbitration as set forth in Exhibit D.

10. CITY'S AND OPERATOR'S INSURANCE

Owner acknowledges that City maintains a program of self-insurance and agrees that City shall not be required to carry any insurance with respect to this Agreement. City shall require the Operator to maintain the insurance as set forth in Exhibit C. City assumes the risk of damage to the Building, and for any increased cost to Owner resulting from such damage as set forth in Section 9. [*Insurance under review*]

11. NO JOINT VENTURES OR PARTNERSHIP; NO AUTHORIZATION

This Agreement does not create a partnership or joint venture between City and Owner as to any activity conducted by City on, in or relation to Property. This Agreement does not constitute authorization or approval by City of any activity conducted or to be conducted by Owner on, in, around or relating to Property.

12. UTILITIES

Owner has no responsibility or liability of any kind with respect to any utilities that may be on, in or under the Property. City has the sole responsibility to locate such utilities and protect them from damage. City shall arrange and pay for any necessary temporary relocation of utility facilities, subject to the prior written approval of Owner. City shall be solely responsible for arranging and paying directly for any utilities or services necessary for its activities hereunder.

13. NO COSTS TO OWNER

City shall bear all costs or expenses of any kind or nature in connection with its use of the Property, and shall keep the Property free and clear of any liens or claims of lien arising out of or in any way connected with its use of the Property.

14. NOTICES

Except as otherwise expressly provided herein, any notices given under this Agreement shall be effective only if in writing and given by delivering the notice in person, by sending it first class mail or certified mail with a return receipt requested, or nationally-recognized overnight courier that guarantees next day delivery and provides a receipt therefor, with postage prepaid, addressed as follows (or such alternative address as may be provided in writing):

City: Naomi Kelly, City Administrator
City and County of San Francisco
City Hall, Room 362
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Attn: 1515 South Van Ness Navigation Center]

with a copy to:

[insert Jeff Kositsky address]

Owner: _____

Attn: _____

Notices herein shall be deemed given two (2) days after the date when they shall have been mailed if sent by first class, certified or overnight courier, or upon the date personal delivery is made.

15. MACBRIDE PRINCIPLES - NORTHERN IRELAND

The provisions of San Francisco Administrative Code §12F are incorporated herein by this reference and made part of this Agreement. By signing this Agreement, Owner confirms that Owner has read and understood that the City urges companies doing business in Northern Ireland to resolve employment inequities and to abide by the MacBride Principles, and urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

16. SUNSHINE ORDINANCE

Owner understands and agrees that the City's Sunshine Ordinance (San Francisco Administrative Code Chapter 67) and the State Public Records Law (Gov't Code Section 6250 et seq.) apply to this Agreement and any and all records, information, and materials submitted to City in connection with this Agreement. Accordingly, any and all such records, information and materials may be subject to public disclosure in accordance with the City's Sunshine Ordinance and the State Public Records Law. Owner hereby authorizes City to disclose any records, information and materials submitted to City in connection with this Agreement.

17. CONFLICT OF INTEREST

Through its execution of this Agreement, Owner acknowledges that it is familiar with the provisions of Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Sections 87100 et seq. and Sections 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which would constitute a violation of said provision, and agrees that if Owner becomes aware of any such fact during the term of this Agreement, Owner shall immediately notify the City.

18. NOTIFICATION OF LIMITATIONS ON CONTRIBUTIONS

Through its execution of this Agreement, Owner acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing of any land or building to or from the City whenever such transaction would require the approval by a City elective officer, the board on which that City elective officer serves, or a board on which an appointee of that individual serves, from making any campaign contribution to (1) the City elective officer, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual or candidate, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Owner acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Owner further acknowledges that the prohibition on contributions applies to each Owner; each member of Owner's board of directors, and Owner's chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than twenty percent (20%) in Owner; any subcontractor listed in the contract; and any committee that is sponsored or controlled by Owner. Additionally, Owner acknowledges that Owner must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Owner further agrees to provide to City the names of each person, entity or committee described above.

16. NON-DISCRIMINATION

In the performance of this Agreement, Owner agrees not to discriminate against any employee of Owner, any City employee working with Owner, or applicant for employment with Owner, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

17. GENERAL PROVISIONS

(a) This Agreement may be amended or modified only by a writing signed by City and Owner. (b) No waiver by any party of any of the provisions of this Agreement shall be effective unless in writing and signed by an officer or other authorized representative, and only to the extent expressly provided in such written waiver. No waiver shall be deemed a subsequent or continuing waiver of the same, or any other, provision of this Agreement. (c) Except as expressly provided to the contrary,

all approvals and determinations to be made by City hereunder may be made in the sole and absolute discretion of the City Administrator. (d) This instrument (including the exhibit(s) hereto) contains the entire agreement between the parties relating to City's use of the Property and all prior written or oral negotiations, discussions, understandings and agreement relative to City's use are merged herein. (e) The sections and other headings of this Agreement are for convenience of reference only and shall be disregarded in the interpretation of this Agreement. (f) Time is of the essence in all matters relating to this Agreement. (g) This Agreement shall be governed by California law and the City's Charter. (h) If either party commences an action against the other or a dispute arises under this Agreement, the prevailing party shall be entitled to recover from the other reasonable attorneys' fees and costs. For purposes hereof and for purposes of the indemnifications set forth herein, reasonable attorneys' fees of City shall be based on the fees regularly charged by private attorneys in San Francisco with comparable experience notwithstanding the City's use of its own attorneys. (i) This Agreement may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument. (j) Owner is the sole owner of the Property. (k) If Owner is a corporation, limited liability company or a partnership, each of the persons executing this Agreement on behalf of Owner does hereby covenant and warrant that Owner is a duly authorized and existing entity, that Owner has and is qualified to do business in California, that Owner has the full right and authority to enter into this Agreement, and that each and all of the persons signing on behalf of Owner are authorized to do so.

In witness whereof, City and Owner have executed this Agreement on the date set forth below, effective as of the date first set forth above.

OWNER:

_____,
a California [corporation, limited liability
company, sole proprietor, individual, etc.]

By: _____
Name: _____
Its: _____

By: _____
Name: _____
Its: _____

CITY:

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation

By: _____
Naomi Kelly, City Administrator

By: _____
Mohammed Nuru, Director of Public Works

By: _____
Jeff Kositsky, Director of Department of
Homelessness and Supportive Housing
Homeless

By: _____
John Updike, Director of Property

APPROVED AS TO FORM:

DENNIS J. HERRERA, City Attorney

By: _____
Charles Sullivan, Deputy City
Attorney

EXHIBIT A

Property Description

EXHIBIT B

Scope of Work

EXHIBIT C

Management Contract

EXHIBIT D

Binding Arbitration

1. Arbitration. Any dispute involving the City's reimbursement for Owner's increased demolition costs under Section 9 (the "Increased Costs") shall be submitted to arbitration in accordance with this Exhibit D. The arbitration shall take place in the City and County of San Francisco.

2. Appointment. Each party shall appoint one (1) construction manager/construction cost estimator (each, the "Cost Estimator") within twenty (20) days after the notice that the arbitration provisions of this section have been invoked. Upon selection, each party shall promptly notify the other party in writing of the name of the Cost Estimator selected. Each such Cost Estimator shall be competent, qualified by training and experience, and be involved in the business of estimating construction costs for large commercial projects in San Francisco. Each such Cost Estimator may have a prior working relationship with either or both of the parties, provided that such working relationship shall be disclosed to both parties. Without limiting the foregoing, each Cost Estimator shall have at least ten (10) years' experience estimating commercial construction costs in the City and County of San Francisco. If either party fails to appoint its Cost Estimator within such twenty (20)-day period, the Cost Estimator appointed by the other party shall individually determine the Increased Costs.

3. Instruction and Completion. Each Cost Estimator will make an independent determination of the Increased Costs, and prepare a written report with their determination and the justification for the determination (the "Report"). The Cost Estimators may share and have access to objective information in preparing their Report, but they will independently analyze the information in their determination of the Increased Costs. Neither of the Cost Estimators shall have access to the final determination of the other (except for the sharing of objective information) until both Reports are submitted in accordance with the provisions of this Section. Neither party shall communicate with the Cost Estimator appointed by the other party regarding the instructions contained in this section before the Cost Estimators complete their Reports. Each Cost Estimator shall complete, sign and submit its Report setting forth its determination of the Increased Costs to the parties within forty-five (45) days after the appointment of the last of such Cost Estimators. If the higher determination of Increased Costs is not more than one hundred ten percent (110%) of the lower determination of Increased Costs, then the Increased Costs shall be the average of such two (2) figures.

4. Potential Third Cost Estimator. If the higher determination of Increased Costs is more than one hundred ten percent (110%) of the lower determination of Increased Costs, then the first two Cost Estimators shall agree upon and appoint an independent third Cost Estimator meeting the minimum qualifications set forth above. Such third Cost Estimator shall consider the Reports submitted by the first two Cost Estimators as well as any other relevant evidence which the third Cost Estimator may request of either or both of the first two Cost Estimators. Neither party, nor the Cost Estimators they appoint, shall conduct any ex parte communications with the third Cost Estimator regarding the Increased Costs. Within thirty (30) days after his or her appointment, the third Cost Estimator shall select the Increased Costs determination by one or the other of the first two (2) Cost Estimators that is the closer, in the opinion of the third Cost Estimator, to the actual Increased Costs. The determination of the third Cost Estimator shall be limited solely to the issue of deciding which of the determinations of the two Cost Estimators is closest to the actual Increased Costs. The third Cost Estimator shall have no right to propose a middle ground or to modify either of the two Reports, or any provision of this Agreement.

5. Conclusive Determination. Except as provided in California Code of Civil Procedure Section 1286.2 (as the same may be amended from time to time), the determination of the Increased Costs as set forth above shall be conclusive, final and binding on the parties. Neither of the first two (2) Cost Estimators nor the third Cost Estimator shall have any power to modify any of the provisions of this Agreement and must base their decision on the definitions, standards, assumptions, instructions and other provisions contained in this Agreement. Subject to the provisions of this section, the parties will cooperate to provide all appropriate information to the Cost Estimators.

6. Fees and Costs. Each Party shall bear the fees, costs and expenses of the Cost Estimator it selects. The fees, costs and expenses of the third Cost Estimator shall be shared equally by City and Developer.