



TOWN OF APPLE VALLEY

TOWN COUNCIL STAFF REPORT

To: Honorable Mayor and Town Council **Date:** July 25, 2017
From: Lori Lamson, Assistant Town Manager **Item No:** 4
Subject: PROFESSIONAL SERVICES CONTRACT FOR 5 BARS TO CONDUCT
A WIRELESS TELECOMMUNICATION MASTER PLAN AND
MARKETING PLAN FOR TOWN OWNED PROPERTY

T.M. Approval: _____ **Budgeted Item:** Yes No N/A

RECOMMENDED ACTION:

Award the attached Professional Services Agreement to 5 Bars Communities a dba of XG Communities, LLC to provide professional services to the Town, pertaining to the development of a Master Plan for the location of wireless telecommunication facilities on Town owned property and market 3rd party wireless telecommunication providers to enter into a contract to locate and provide revenue to the Town.

SUMMARY:

Recent expansion of wireless technologies has increased demand for Wireless Communication Facilities and Infrastructure. This creates opportunities for the Town to identify existing and future opportunities for Wireless Communication Facilities within the Town. Staff recommends approval of an agreement with a qualified consultant to assist the Town in evaluating its Wireless Communications Facilities and Infrastructure.

The Town recently sent out a Request for Proposals to several companies that have the capability of providing this unique service. This is a rather new service that has been identified as a way to collectively and proactively market Wireless Telecommunication Service providers to locate sites on municipally owned property, generating revenue for the city.

We received one proposal from 5 Bars, LLC, now 5 Bars Communities a dba of XG Communities, LLC. This was the same company that presented before the Town Council at the February 28, 2017 meeting.

5 Bars proposal includes the preparation of a Wireless Master Plan (WMP) and Implement a Marketing Program for Wireless Communication Facilities and Infrastructure within the Town. If approved, 5 Bars will prepare the Wireless Master Plan at no cost to the Town. 5 Bars will then implement a marketing program and will receive as compensation 35% of the revenue generated through the marketing of the Town's infrastructure to third parties.

BACKGROUND:

Wireless network capacity is outpaced by wireless data demand. Traditional approaches used to increase capacity are limited by cell tower barriers and physical limitations of radio frequency.

5 Bars, a leading innovator in distributed antenna systems (DAS) and Wi-Fi wireless services for intelligent infrastructure, has proposed to prepare a Wireless Master Plan and implement a Marketing Program for Wireless Communication Facilities and Infrastructure for the Town of Apple Valley.

The Wireless Master Plan is a comprehensive, customized study that will serve as a planning tool for the Town to guide the future development of Wireless Communication Facilities. With a Wireless Master Plan, the Town can identify opportunities for future Wireless Communications Infrastructure, rather than react to demands from service providers. The proposed plan will include a radio frequency benchmark survey, evaluation of wireless carrier's coverage, and a survey of existing wireless communications facilities and inventory of local fiber assets.

If approved, 5 Bars will be compensated by a share of the actual revenue generated by its services. 5 Bars will receive 35% revenue share from new/existing leases, and the Town will receive 65%. The initial marketing program agreement is for a period of three (3) years, with two (2) one (1) year renewal periods.

The proposed Agreement allows the Town to benefit financially from future leasing, licensing and other agreements intended to expand the wireless communications infrastructure within the Town. This proposed action promotes Public Safety by ensuring wireless facilities are located in a safe manner and revenue is generated to fund Town services.

FISCAL IMPACT:

Revenue generated from the Marketing Program will be shared as follows during the term of the Agreement:

Town of Apple Valley 65%
5 Bars 35%

ATTACHMENTS:

1. Professional Services Agreement
 - Exhibit A – Scope of Services
 - Exhibit B – Right of Entry Agreement
 - Exhibit C – Insurance Requirements
 - Exhibit D – License Agreement

APPLE VALLEY
PROFESSIONAL SERVICES AGREEMENT

PARTIES AND DATE.

This Agreement is made and entered into this 25th day of July, 2017 by and between the Town of Apple Valley, a municipal corporation organized under the laws of the State of California with its principal place of business at 14955 Dale Evans Parkway, Apple Valley, California 92307 (“Town”) and 5 BARS COMMUNITIES A DBA OF XG COMMUNITIES, LLC, a Delaware limited liability company with its principal place of business at 19200 Von Karman Ave. Suite 100, Irvine, CA 92612 (“Consultant”). Town and Consultant are sometimes individually referred to as “Party” and collectively as “Parties.”

2. RECITALS.

2.1 Consultant.

Consultant desires to perform and assume responsibility for the provision of certain professional services required by the Town on the terms and conditions set forth in this Agreement. Consultant represents that it is experienced in providing master planning services and tools that merge technical expertise on coverage needs with surveys of existing and forecasted wireless coverage conditions. The Consultant evaluates that information to identify existing municipal assets that can meet wireless coverage needs. These planning tools allows municipal clients the ability to access information to identify intelligent options and solutions for the processing of applications for wireless telecommunication facilities on a real time basis. The Consultant is qualified to provide the professional services necessary to develop a wireless master plan, including radio frequency (“RF”) benchmark survey a technical survey of existing infrastructure, and projections of wireless requirements. The Consultant will develop the master plan and market the opportunities to third parties.

2.2 Project.

Town desires to engage Consultant to render such services for developing a master plan as described above, providing wireless consulting, management and development services related to the use of Town Assets for the purpose of planning and

implementing a marketing plan for Wireless Telecommunication Facilities project. The Town desires to engage the Consultant to proactively market Town-owned underutilized assets on terms that maximize revenue to the Town and minimize planning impacts and visual blight in the Town. This description shall be known as the (“Project”) as set forth in this Agreement.

3. TERMS.

3.1 Scope of Services and Term.

3.1.1 General Scope of Services. The Consultant promises and agrees to furnish and to provide the services described in this section (“Services”). The Services are more particularly described in Exhibit “A” attached hereto and incorporated herein by reference. All Services shall be subject to, and performed in accordance with, this Agreement, the exhibits attached hereto and incorporated herein by reference, and all applicable local, state and federal laws, rules, and regulations.

3.1.2 Term. The term of this Agreement shall be from August 1, 2017 to July 31, 2027 with three five (5) one-year extensions possible upon written mutual consent of the Town and the Consultant, unless earlier terminated as provided herein. The full potential term of the Agreement is five (5) years. Consultant shall complete the Services within the term of this Agreement, and shall meet any other established schedules and deadlines. The Parties may, by mutual, written consent, extend the term of this Agreement if necessary to complete the Services.

3.2 Responsibilities of Consultant.

3.2.1 Control and Payment of Subordinates; Independent Contractor. The Services shall be performed by Consultant or under its supervision. Consultant will determine the means, methods and details of performing the Services subject to the requirements of this Agreement. Town retains Consultant on an independent contractor basis and not as an employee. Consultant retains the right to perform similar or different services for others during the term of this Agreement. Any additional personnel performing the Services under this Agreement on behalf of Consultant shall also not be employees of Town and shall at all times be under Consultant’s exclusive direction and control. Consultant shall pay all wages, salaries, and other amounts due such personnel in connection with their performance of Services under this Agreement and as required by law. Consultant shall be responsible for all reports and obligations respecting such additional personnel, including, but not limited to: social security taxes, income tax

withholding, unemployment insurance, disability insurance, and workers' compensation insurance.

3.2.2 Schedule of Services. Consultant shall perform the Services expeditiously, within the term of this Agreement, and in accordance with the Schedule of Services set forth in Exhibit "B" attached hereto and incorporated herein by reference. Consultant represents that it has the professional and technical personnel required to perform the Services in conformance with such conditions. In order to facilitate Consultant's conformance with the Schedule, Town shall respond to Consultant's submittals in a timely manner. Upon request of Town, Consultant shall provide a more detailed schedule of anticipated performance to meet the Schedule of Services.

3.2.3 Conformance to Applicable Requirements. All work prepared by Consultant shall be subject to the approval of Town.

3.2.4 Town's Representative. The Town hereby designates Carol Miller, Assistant Director of Community Development, or his or her designee, to act as its representative for the performance of this Agreement ("Town's Representative"). Town's Representative shall have the power to act on behalf of the Town for all purposes under this Contract. Consultant shall not accept direction or orders from any person other than the Town's Representative or his or her designee.

3.2.5 Consultant's Representative. Consultant hereby designates Greg Steiniger, National Vice President, or his or her designee, to act as its representative for the performance of this Agreement ("Consultant's Representative"). Consultant's Representative shall have full authority to represent and act on behalf of the Consultant for all purposes under this Agreement. The Consultant's Representative shall supervise and direct the Services, using his best skill and attention, and shall be responsible for all means, methods, techniques, sequences, and procedures and for the satisfactory coordination of all portions of the Services under this Agreement.

3.2.6 Coordination of Services. Consultant agrees to work closely with Town staff in the performance of Services and shall be available to Town's staff, consultants and other staff at all reasonable times.

3.2.7 Standard of Care; Performance of Employees. Consultant shall perform all Services under this Agreement in a skillful and competent manner, consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Consultant represents and maintains that it is skilled in the professional calling necessary to perform the Services. Consultant warrants that all employees and subconsultants shall have sufficient skill and experience to perform the Services assigned to them. Finally, Consultant represents that it, its employees and

subconsultants have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the Services, including a Town Business License, and that such licenses and approvals shall be maintained throughout the term of this Agreement. As provided for in the indemnification provisions of this Agreement, Consultant shall perform, at its own cost and expense and without reimbursement from the Town, any services necessary to correct errors or omissions which are caused by the Consultant's failure to comply with the standard of care provided for herein. Any employee of the Consultant or its sub-consultants who is determined by the Town to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project, a threat to the safety of persons or property, or any employee who fails or refuses to perform the Services in a manner acceptable to the Town, shall be promptly removed from the Project by the Consultant and shall not be re-employed to perform any of the Services or to work on the Project.

3.2.8 Laws and Regulations. Consultant shall keep itself fully informed of and in compliance with all local, state and federal laws, rules and regulations in any manner affecting the performance of the Project or the Services, including all Cal/OSHA requirements, and shall give all notices required by law. Consultant shall be liable for all violations of such laws and regulations in connection with Services. If the Consultant performs any work knowing it to be contrary to such laws, rules and regulations and without giving written notice to the Town, Consultant shall be solely responsible for all costs arising therefrom. Consultant shall defend, indemnify and hold Town, its officials, directors, officers, employees, and agents free and harmless, pursuant to the indemnification provisions of this Agreement, from any claim or liability arising out of any failure or alleged failure to comply with such laws, rules or regulations.

3.2.8.1 Compliance with Local Ordinances. Subject to the Scope of Work (EXHIBIT A) "Telecommunication Ordinance Revision", the Consultant shall comply with all Town ordinances pertaining to Wireless Telecommunication Facilities, and all such additional Town regulations that are consistent with such ordinances (such ordinances and regulations are collectively referred to hereinafter as the "Ordinance").

3.2.8.2 Labor Certification. By its signature hereunder, Consultant certifies that it is aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and agrees to comply with such provisions before commencing the performance of the Services.

3.2.8.3 Equal Opportunity Employment. Consultant represents that it is an equal opportunity employer and it shall not discriminate against

any subconsultant, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex or age. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination.

3.2.9 Insurance.

3.2.9.1 Time for Compliance. Consultant shall not commence Work under this Agreement until it has provided evidence satisfactory to the Town that it has secured all insurance required under this section. In addition, Consultant shall not allow any subconsultant to commence work on any subcontract until it has provided evidence satisfactory to the Town that the subconsultant has secured all insurance required under this section. Failure to provide and maintain all required insurance shall be grounds for the Town to terminate this Agreement for cause.

3.2.9.2 Minimum Requirements. Consultant shall, at its expense, procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Agreement by the Consultant, its agents, representatives, employees or subconsultants. Consultant shall also require all of its subconsultants to procure and maintain the same insurance for the duration of the Agreement. Such insurance shall meet at least the following minimum levels of coverage:

(A) Minimum Scope of Insurance. The Consultant shall maintain a minimum coverage as set forth in the attached Exhibit C to this Agreement. The Town shall be entitled to coverage at the maximum policy limits for the required insurance maintained by the Consultant, which shall at no time be less than the amounts required and set forth in the attached Exhibit C to this Agreement. This Agreement's insurance provisions shall be separate and independent from the indemnification and defense provisions of Section 3.5.4 of this Agreement and shall not in any way limit the applicability, scope or obligations of the indemnification defense provisions in Section 3.5.4.

3.2.10 Safety. Consultant shall execute and maintain its work so as to avoid injury or damage to any person or property. In carrying out its Services, the Consultant shall at all times be in compliance with all applicable local, state and federal laws, rules and regulations, and shall exercise all necessary precautions for the safety of employees appropriate to the nature of the work and the conditions under which the work is to be performed. Safety precautions as applicable shall include, but shall not be limited to: (A) adequate life protection and life saving equipment and procedures; (B) instructions in accident prevention for all employees and subconsultants, such as safe walkways,

scaffolds, fall protection ladders, bridges, gang planks, confined space procedures, trenching and shoring, equipment and other safety devices, equipment and wearing apparel as are necessary or lawfully required to prevent accidents or injuries; and (C) adequate facilities for the proper inspection and maintenance of all safety measures.

3.2.11 Accounting Records. Consultant shall maintain complete and accurate records with respect to all costs and expenses incurred under this Agreement. All such records shall be clearly identifiable. Consultant shall allow a representative of Town during normal business hours to examine, audit, and make transcripts or copies of such records and any other documents created pursuant to this Agreement. Consultant shall allow inspection of all work, data, documents, proceedings, and activities related to the Agreement for a period of three (3) years from the date of final payment under this Agreement.

3.3 Fees and Payments.

3.3.1 Compensation. 65% Town/35% Consultant Revenue Shares. The Town shall be entitled to sixty-five percent (65%) of recurring gross payments that are received by the Consultant from sub-licensees on new Wireless Telecommunications Facilities that are on Town Assets licensed to the Consultant pursuant to this Agreement. Annual Reports reflecting the revenue generated to the Town will be provided by the Consultant. Compensation shall be submitted to the Town within 30 days of the Consultant receiving the funds.

3.3.2 Default. If there is default by either party to this Agreement, the party claiming a default of any term or condition of this Agreement shall provide the defaulting party with written notice of the default pursuant to the provisions contained in Paragraph 3.6.1 of this Agreement. After receipt of such notice, the defaulting party shall have thirty (30) days in which to cure any monetary default and sixty (60) days in which to cure a non-monetary default. If a non-monetary default reasonably requires more than a sixty (60) day cure period, the defaulting party shall have such extended period provided that the defaulting party commences the cure within the sixty (60) day period and thereafter continuously and diligently pursues the cure to completion.

3.3.3 Right to Audit. During the Term of this Agreement the parties shall maintain originals, or when originals are not available options, of all records, books, papers and documents relating to this Agreement and all accompanying License Agreements between the parties. At all reasonable times, the parties shall allow each other to have access to examine, copy and audit such records. Additionally, the Consultant shall allow the Town, and the Town shall have the right at any time, to have access to and examine, copy and audit records, books, papers and documents may or may not exist in the normal course of the Consultant's business.

3.3.4 Reimbursement for Expenses. Consultant shall not be reimbursed for any expenses unless authorized in writing by Town.

3.3.5 Construction, Engineering and Other Costs: The Town shall have no financial responsibility for planning, construction, and engineering costs associated with the implementation of this Agreement. The Consultant may recover from Wireless Service Providers construction costs, installation costs, utilities, or other expenses incurred by the Consultant, to the extent said reimbursement does not reduce the rent to be paid by Wireless Service Providers, and such recovered sums shall not be included in the computation of compensation hereunder.

3.4 Termination of Agreement.

3.4.1 Grounds for Termination. Town may, by written notice to Consultant, terminate the whole or any part of this Agreement at any time and without cause by giving written notice to Consultant of such termination, and specifying the effective date thereof, at least seven (7) days before the effective date of such termination. Upon termination, Consultant shall be compensated only for those Services which have been adequately rendered to Town, and Consultant shall be entitled to no further compensation except for Consultant's recurring Revenue Shares related to existing License Agreements not yet terminated, for the remainder of the terms of existing License Agreements. Consultant may not terminate this Agreement except for cause.

3.4.2 Effect of Termination. If this Agreement is terminated as provided herein, Town may require Consultant to provide all finished or unfinished Documents and Data and other information of any kind prepared by Consultant in connection with the performance of Services under this Agreement. Consultant shall be required to provide such document and other information within fifteen (15) days of the request.

3.4.3 Additional Services. In the event this Agreement is terminated in whole or in part as provided herein, Town may procure, upon such terms and in such manner as it may determine appropriate, services similar to those terminated.

3.5 Intellectual Property, Exclusivity, and Confidentiality.

3.5.1 Intellectual Property and Licensing. The Consultant hereby grants the Town a limited, non-exclusive, non-transferable, non-sublicensable license during the term of this Agreement to use the Services for the purposes of offering, promoting, managing, tracking, the development and use of Wireless Telecommunications Facilities.

3.5.2 Ownership of Services. The Consultant retains all right, title and interest in any underlying software subject to the limitations set forth in this Agreement.

3.5.3 Exclusivity. During the term of this Agreement, the Consultant will be the sole and exclusive provider of services as defined as Services in this Agreement, subject to the Town's right to directly market Town Marketed Assets. The Town expressly understand and agrees that the exclusivity set forth in this Agreement is consideration in exchange for the pricing and other benefits being provided to the Town hereunder.

3.5.4 Subconsultants. Consultant shall require all subconsultants to agree in writing that Town is granted a non-exclusive and perpetual license for any Documents & Data the subconsultant prepares under this Agreement. Consultant represents and warrants that Consultant has the legal right to license any and all Documents & Data. Consultant makes no such representation and warranty in regard to Documents & Data which were prepared by design professionals other than Consultant or its subconsultants, or those provided to Consultant by the Town.

3.5.5 Right to Use. Town shall not be limited in any way in its use or reuse of the any written Documents and/or Data or any part of them at any time for purposes of this Project or another project, provided that any such use not within the purposes intended by this Agreement or on a project other than this Project without employing the services of Consultant shall be at Town's sole risk. If Town uses or reuses the Documents & Data on any project other than this Project, it shall remove the Consultant's seal from the Documents & Data and indemnify and hold harmless Consultant and its officers, directors, agents and employees from claims arising out of the negligent use or re-use of the Documents & Data on such other project. Consultant shall be responsible and liable for its Documents & Data, pursuant to the terms of this Agreement, only with respect to the condition of the Documents & Data at the time they are provided to the Town upon completion, suspension, abandonment or termination. Consultant shall not be responsible or liable for any revisions to the Documents & Data made by any party other than Consultant, a party for whom the Consultant is legally responsible or liable, or anyone approved by the Consultant.

3.5.6 Additional Town Commitments. The Town acknowledges that it is using licensed software containing propriety and intellectual property and shall: (i) not copy, modify, transfer, display, share, or use any portion of the licensed software except as expressly authorized in the Agreement or in the applicable documentation; (ii) not contest or do or aid others in contesting or doing anything which impairs the validity of any proprietary or intellectual property rights, title, or interest of the Consultant in and to any software; (iii) not engage in any activity that interferes with or disrupts the Consultant's provision of the Services; and (iv) use the Services exclusively for authorized and legal purposes, consistent with all applicable laws, regulations, and the rights of others.

3.5.7 Indemnification. Consultant shall defend, indemnify and hold the Town, its directors, officials, officers, employees, volunteers and agents free and harmless, pursuant to the indemnification provisions of this Agreement, for any alleged infringement of any patent, copyright, trade secret, trade name, trademark, or any other proprietary right of any person or entity in consequence of the use on the Project by Town of the Documents & Data, including any method, process, product, or concept specified or depicted.

3.5.8 Confidentiality. All Documents & Data, either created by or provided to Consultant in connection with the performance of this Agreement, shall be held confidential by Consultant. All Documents & Data shall not, without the prior written consent of Town, be used or reproduced by Consultant for any purposes other than the performance of the Services. Consultant shall not disclose, cause or facilitate the disclosure of the Documents & Data to any person or entity not connected with the performance of the Services or the Project. Nothing furnished to Consultant that is otherwise known to Consultant or is generally known, or has become known, to the related industry shall be deemed confidential. Consultant shall not use Town's name or insignia, photographs of the Project, or anything pertaining to the Services or the Project in any magazine, trade paper, newspaper, television or radio production or other similar medium without the prior written consent of Town.

3.6 General Provisions.

3.6.1 Delivery of Notices. All notices, approvals, acceptances, demands and other communication required or permitted under this Agreement, to be effective, shall be in writing and, unless otherwise provided herein, shall be deemed validly given on the date either: (1) personally delivered to the addresses indicated within this Agreement; or (2) on the third business day following deposit, postage prepaid, using certified mail, return receipt requested, in any U.S. Postal mailbox or at any U.S. Post Office; or (3) one business day after the dispatch date by overnight delivery service. All notices, demands, or requests shall be addressed to the following:

Consultant:

5 BARS COMMUNITIES

19200 Von Karman Avenue, Suite 100

Irvine, CA 92612

Atten: Kevin Muldoon

Town:

Town of Apple Valley

14955 Dale Evans Parkway

Apple Valley, California 92307

Atten: Lori Lamson, Interim Town Manager

3.6.2 Indemnification.

3.6.2.1 Scope of Indemnity. To the fullest extent permitted by law, Consultant shall defend, indemnify and hold the Town, its directors, officials, officers, employees, volunteers and agents free and harmless from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, to property or persons, including wrongful death, in any manner arising out of, pertaining to, or incident to any alleged acts, errors or omissions of Consultant, its officials, officers, employees, subcontractors, consultants or agents in connection with the performance of the Consultant's Services, the Project or this Agreement, including without limitation the payment of all consequential damages, expert witness fees and attorneys fees and other related costs and expenses. Notwithstanding the foregoing, to the extent Consultant's Services are subject to Civil Code Section 2782.8, the above indemnity shall be limited, to the extent required by Civil Code Section 2782.8, to claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Consultant.

3.6.2.2 Additional Indemnity Obligations. Consultant shall defend, with Counsel of Town's choosing and at Consultant's own cost, expense and risk, any and all claims, suits, actions or other proceedings of every kind covered by Section 3.6.2.1 that may be brought or instituted against Town or its directors, officials, officers, employees, volunteers and agents. Consultant shall pay and satisfy any judgment, award or decree that may be rendered against Town or its directors, officials, officers, employees, volunteers and agents as part of any such claim, suit, action or other proceeding. Consultant shall also reimburse Town for the cost of any settlement paid by Town or its directors, officials, officers, employees, agents or volunteers as part of any such claim, suit, action or other proceeding. Such reimbursement shall include payment for Town's attorney's fees and costs, including expert witness fees. Consultant shall reimburse Town and its directors, officials, officers, employees, agents, and/or volunteers,

for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided. Consultant's obligation to indemnify shall survive expiration or termination of this Agreement, and shall not be restricted to insurance proceeds, if any, received by the Town, its directors, officials, officers, employees, agents, or volunteers.

3.6.3 Governing Law. This Agreement shall be governed by the laws of the State of California. Venue shall be in San Bernardino County in the Town of Apple Valley.

3.6.4 Successors and Assigns. This Agreement shall be binding on the successors and assigns of the Parties.

3.6.5 Assignment or Transfer. Consultant shall not assign, hypothecate or transfer, either directly or by operation of law, this Agreement or any interest herein without the prior written consent of the Town. Any attempt to do so shall be null and void, and any assignees, hypothecates or transferees shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer.

3.6.6 Independent Contractor. The Consultant shall, during the Agreement Term, be construed as an independent contractor and not an employee of the Town. This Agreement is not intended nor shall it be construed to create an employer-employee relationship, a joint venture relationship or to allow the Town to exercise discretion or control over the professional manner in which the Consultant performs the services which are the subject matter of this Agreement; however, the services to be provided by the Consultant shall be provided in a manner consistent with all applicable standards and regulations governing such services. The Consultant shall pay all salaries and wages, employer's social security taxes, unemployment insurance and similar taxes relating to employees and shall be responsible for all applicable withholding taxes.

3.6.7 Construction; References; Captions. Since the Parties or their agents have participated fully in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days or period for performance shall be deemed calendar days and not work days. All references to Consultant include all personnel, employees, agents, and subconsultants of Consultant, except as otherwise specified in this Agreement. All references to Town include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content or intent of this Agreement.

3.6.8 Amendment; Modification. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

3.6.9 Waiver. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a Party shall give the other Party any contractual rights by custom, estoppel or otherwise.

3.6.10 No Third-Party Beneficiaries. There are no intended third-party beneficiaries of any right or obligation assumed by the Parties.

3.6.11 Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

3.6.12 Prohibited Interests. Consultant maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Consultant, to solicit or secure this Agreement. Further, Consultant warrants that it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Consultant, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. Consultant further agrees to file, or shall cause its employees or subconsultants to file, a Statement of Economic Interest with the Town's Filing Officer as required under state law in the performance of the Services. For breach or violation of this warranty, Town shall have the right to rescind this Agreement without liability. For the term of this Agreement, no member, officer or employee of Town, during the term of his or her service with Town, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.

3.6.13 Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate or convenient to attain the purposes of this Agreement.

3.6.14 Attorney's Fees. If either Party commences an action against the other party, either legal, administrative or otherwise, arising out of or in connection with this Agreement, the prevailing party in such litigation shall be entitled to have and recover from the losing party reasonable attorney's fees and all other costs of such action.

3.6.15 Authority to Enter Agreement. Consultant has all requisite power and authority to conduct its business and to execute, deliver, and perform the Agreement.

Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party.

3.6.16 Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original.

3.6.17 Entire Agreement. This Agreement contains the entire Agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or Agreements. This Agreement may only be modified by a writing signed by both parties.

[SIGNATURES ON NEXT PAGE]

SIGNATURE PAGE
TO
TOWN OF APPLE VALLEY
PROFESSIONAL SERVICES AGREEMENT

TOWN OF APPLE VALLEY

**5 BARS COMMUNITIES A DBA OF
XG COMMUNITIES, LLC**

By: _____
Lori Lamson,
Interim Town Manager

By: _____
Kevin Muldoon
Vice President and General Counsel

ATTEST:

La Vonda M. Pearson, Town Clerk

APPROVED AS TO CONTENT:

Lori Lamson, Interim Town Manager

APPROVED AS TO FORM:

BEST BEST & KRIEGER LLP

John Brown, Town Attorney

EXHIBIT "A"

SCOPE OF SERVICES

1. **Scope and Nature of Services.** The Consultant shall provide the services described in this Exhibit A for the purposes of identifying potential 3rd party wireless companies who may wish to negotiate an Agreement with the Town to use or lease Town Assets including but not limited to tower(s), poles(s), building(s), fiber, conduit(s), data room(s), street furniture and any structure(s) or object(s) of any kind or character not particularly mentioned herein ("Town Asset(s)"). The Consultant shall develop a wireless master plan to identify opportunities to locate or cause to be located on Town property within the Town Right of Way for the purposes of promoting, transmitting or facilitating wireless communication of telephone or data or any other means ("Wireless Telecommunication Facilities") but the Consultant shall have no right to locate any such wireless telecommunication facilities for itself or for any third party unless and until a separate third party Agreement is entered in writing with the Town of Apple Valley. The Town in its sole discretion shall identify a list ("Asset List") of Town Assets to be included in services provided by the Consultant. The Consultant shall elect to add or remove one or more assets from the Asset List at any time by notifying the Consultant in writing.
 - A. Consulting Services. The Consultant shall provide the Town the following consulting services at no cost to the Town: a comprehensive radio frequency ("RF") analysis, which will, among other things, (i) describe, by using state of the art metrics, the current state of wireless coverage within the Town's jurisdiction for each major wireless telecommunications carrier, (ii) identify key areas of multiple wireless broadband service provider coverage needs ("Coverage Needs"), (iii) identify available Town Assets that would satisfy or partially satisfy Coverage Needs, and (iv) provide RF modeling to show how the selection of additional sites for Wireless Telecommunications Facilities will address Coverage Needs. The items referred to in clauses, (i), (ii), (iii) and (iv) in the preceding sentence are hereinafter referred as the "Consulting Services". For the duration of the Agreement Term, the Consultant shall also provide, on a quarterly basis, a written update summarizing investments, technology changes, financial gains and fee recommendations, from factor and aesthetic policy development, technology refresh and advancement updates, and other consultation specific to wireless broadband service providers, unless the Consultant and the Town mutually waive the annual ongoing study, to ensure the Town is capitalizing on opportunities to improve wireless broadband service to the community. The Consulting Services may be used by the Town for the enhancement and evolution of the Master Plan.
 - B. Marketing Services. At no cost to the Town, the Consultant shall market the Master Plan to wireless carriers, cable companies, internet service providers

(ISPs), street light providers, and Internet of Things (IoT) companies, (“Wireless Service Providers”) to obtain their feedback and interest in locating and/or collocating on any existing and/or proposed site(s) included in the Master Plan. The Town grants the Consultant the exclusive right to market Town Assets for the development of Wireless Telecommunication Facilities. The Consultant shall market the Master Plan to all Wireless Services Providers, with a goal of ensuring that residents, visitors, and businesses within the Town’s jurisdiction receive the maximum benefit of all available services from all existing wireless service providers.

C. Management Services and Future Required Installation Agreements. During the Agreement Term, the Consultant may at any time request in writing that the Town make Town Assets available for the installation of Wireless Telecommunications Facilities. Upon approval of a separate written installation Agreement, the Town shall notify the Consultant of any approval in writing and shall offer to enter into a license with the Consultant, which license shall be in a form that is substantially consistent the form set forth in Exhibit A to this Agreement. Thereafter, the Consultant or affiliate of the Consultant, and no cost to the Town, shall construct or cause the construction of the Wireless Telecommunications Facilities, and sublicense the Town Assets (either as improved with Wireless Telecommunications Facilities, or subject to improvement with Wireless Telecommunications Facilities) in accordance with the terms of this Agreement and a license Agreement to be executed for each designated Town Asset provided, however, that a single license Agreement may be utilized for multiple or all sites that are the subject of this Agreement as detailed in each future installation Agreement). The Consultant understands and acknowledges that the Town shall have the final determination as to whether to move forward with the execution of a license and/or other installation Agreement of substantially equivalent purpose. The Consultant further understands and acknowledges that it must comply or cause compliance with and receive (or cause receipt of)all necessary entitlements and permits from the Town, including but not limited to complying or causing compliance with the Town’s ordinance governing Wireless Telecommunications Facilities, all applicable building codes and public works requirements, as well as comply or cause compliance with and receive (or cause receipt of) all necessary and applicable permits from any other regulatory agency, before the Consultant undertakes (or causes the undertaking of) any construction on a Town Asset.

D. Exclusions.

- (i) This Agreement shall not require or allow the Consultant to market, license, sublicense and/or construct Wireless Telecommunications Facilities on Town Assets that are not on the Asset List.

- (ii) Town Assets intended for direct-marketing by the Town for macro-cell site development are identified in writing by the Town ("Town Marketed Assets"). Town Marketed Assets shall be marketed, in all, directly by the Town only; marketing rights for such assets shall not be granted, delegated, or contracted to any third party.
- (iii) This Agreement shall not require or allow the provision of Services by the Consultant for facilities licensed to any municipal, county, district, agency, state or Federal government for stations in the Private Land Mobile Radio Services, Maritime Radio Services, Aviation Radio Services, other stations designated for Homeland Security or Law Enforcement communications or the circuits necessary to support such facilities ("Excluded Service"). This Agreement shall not limit, control, or govern the provision of the Excluded Services by the Town.

2. **Telecommunication Ordinance Revision.** Within one hundred and eighty (180) days after the Effective Date, the Town shall reasonably consider revisions to its telecommunication ordinance to specify that the Town's review of Wireless Telecommunication Facilities that are (i) on Town Assets, and (ii) subject to a license Agreement that substantially conforms to the form attached as "Exhibit D" will be accomplished exclusively through the licensing process described in this Agreement.
3. **Right of Entry Agreement.** The Consultant shall have the right to analyze the suitability of the Town Property designated by the Town for the Consultant's intended use. The Town and the Consultant shall enter into a Right of Entry Agreement for the Consultant and its employees, agents, contractors, engineers, and surveyors to have the right to enter upon Town property, upon reasonable written notice to the Town, to inspect, conduct, perform and examine soil borings, drainage testing, material sampling, surveys and other geological or engineering tests or studies of the Town property, to apply for all licenses and permits required for the Consultant's use of the designated Town property from all applicable governmental or regulatory entities, and to do those things on or off the designated Town property that, in the sole opinion of the Consultant, are necessary to determine the physical condition of designated Town property, the environmental history of the designated Town property, and the feasibility or suitability of the designated Town property for the Consultant's use ("Due Diligence Investigation"). Activities conducted in connection with the Consultant's Due Diligence Investigation shall be at the sole expense and cost of the consultant. The Right of Entry Agreement shall grant the Consultant access to the designated Town property for a defined and specific period of time as set forth in the Right of Way Agreement. The proposed form or Right of Entry Agreement is attached hereto and incorporated by reference herein as Exhibit B.

4. **Town Owned Wireless Telecommunications Facilities and Town Licenses.**
The Town shall retain ownership of all Town leases, licenses, and other Agreements in existence as of the Effective Date with wireless providers located within Town jurisdictional boundaries and Town owned property outside of the Town jurisdictional boundaries. The Town shall retain ownership of any Wireless Telecommunication Facilities the Town subsequently develops on property owned or leased by the town for the Town's own non-commercial use. The Consultant shall own the Wireless Telecommunications Facilities developed on Town Assets pursuant to this Agreement. The Town leases, licenses and other Agreements in existence as of the Effective Date and any Town owned/developed Wireless Telecommunication Facilities in existence as of the Effective Date shall NOT be subject to this Agreement and/or any accompanying Agreements between the Town and the Consultant, unless specifically designated otherwise in writing.

EXHIBIT "B"

RIGHT OF ENTRY AGREEMENT

This Right. of Entry Agreement (this "**Agreement**") is made as of the date of the final signature below, by and between the Town of Apple Valley, a general law municipal corporation, having a mailing address, of 14955 Dale Evans Parkway, Apple Valley, CA 92307 ("**Grantor**") and 5 Bars Communities a dba of XG Communities, LLC, a Delaware limited liability company, with an address at 19200 Von Karman Ave, Suite.100, Irvine, CA 92612 ("**Grantee**"). Grantor and Grantee are sometimes collectively referred to as "Parties" or individually as "Party."

RECITALS

- A. Grantor is the fee owner of record of that certain real property (the "**Property**").
- B. Grantor and Grantee have entered into that certain Subscription Agreement Regarding Wireless Master Planning ("**Subscription Agreement**") pursuant to which Grantee has agreed to provide certain consulting, marketing, and management services relating to the placement of Wireless Telecommunications Facilities on some or all of the Property.
- C. Pursuant to the Subscription Agreement, Grantor and Grantee have agreed to enter into this Agreement to that Grantee may enter upon the Property, upon 24 hour written notice to Grantor, to inspect, conduct, perform and examine soil borings, drainage testing, material sampling, surveys and other geological or engineering tests or studies of the Property, to apply for and obtain all licenses and permits required for Grantee's use of the designated Property from all applicable governmental or regulatory entities, and to do those things on or off the designated Property that, in the sole opinion of Grantee, are necessary to determine the physical condition of designated Property, the environmental history of the designated Property, and the feasibility or suitability of the designated Property for Grantee's use ("**Due Diligence Investigation**").

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions contained herein, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, the Parties agree as follows:

AGREEMENT

1. **Right of Entry.** Grantor hereby grants to Grantee and its agents, employees, contractors, subcontractors, and volunteers non-exclusive permission to enter over and

across, as well as to use the Property as is reasonable and necessary, for the express purpose of conducting, at Grantee's sole expense, the Due Diligence Investigation. (the above- described activities are collectively referred to hereafter as the "**Work**").

2. **Term.** The Right of Entry granted pursuant to Section 1, above, shall be for a limited term, commencing as of the date of this Agreement and expiring upon the expiration or earlier termination of the Subscription Agreement.

3. **Entry at Own Risk; No Duty to Warn.** Grantee and its agents, employees, contractors, subcontractors, and volunteers shall access, enter and use the Property at their own risk and peril. Grantor shall have no duty to inspect the Property (or any portion thereof) and no duty to warn of any latent or patent defect, condition or risk which may exist on the Property.

4. **Liens.** Grantee shall not permit to be placed against the Property, or any part thereof, any mechanics', materialmen's, constructors' or other liens (collectively, the "**Liens**") arising out of the acts or omissions of the Grantee or its agents, employees, contractors, subcontractors, or volunteers hereunder. Grantee hereby indemnifies and agrees to hold the Grantor and the Property free and harmless from all liability for any and all such Liens, together with all costs and expensed, including, but not limited to, attorneys' fees and court costs reasonably incurred by Grantor in connection therewith.

5. **Hazardous Substances.** Grantee and its agents, employees, contractors, subcontractors, and volunteers shall not use, store or transport or allow the use, storage or transportation of any hazardous substances on or onto the Property.

6. **Restoration of the Property.** Except to the extent otherwise contemplated by this Agreement, Grantee shall, at its own cost and expense, restore the Property to the same condition in which it was prior to Grantee's entry.

7. **Indemnification by Grantee.** Except to the extent otherwise provided below, Grantee agrees to hold harmless and indemnify Grantor from and against any and all, claims, demands, actions, and causes of action for injury or death of any person, or damages to property, arising out of or resulting from the use or access of the Property by the Grantee or its agents, employees, contractors, subcontractors, and volunteers pursuant to this Agreement. Notwithstanding the foregoing, the Grantee shall have no obligation to indemnify Grantor from a pre-existing condition at the Property, any encroachments of the wall on any other property or for claims related to the gross negligence or willful misconduct of Grantor.

8. **Authority to Execute.** Grantor(s) warrants and represents to Grantee that he/ she/it/they is/are the sole owner(s) of the Property and may execute and approve this

Agreement and no permission or consent of any other person is required to approve this Agreement.

9. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns.

10. **Entire Agreement.** No representations or covenants of any kind other than those expressly contained herein have been made by either party hereto. This Agreement may only be modified or amended by an agreement in writing duly executed and delivered by each of the parties hereto.

11. **Severability.** If any provision of this instrument, or the application thereof to any person or circumstances, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

12. **Permits.** Prior to beginning any work, Licensee, at its sole expense, shall obtain all necessary permits to use the Premises as permitted under this Agreement.

13. **All Expenses to Be Borne by Licensee.** Licensee shall bear any and all costs and expenses associated with the rights granted to Licensee to use the Premises, or any unforeseen costs or expenses incurred by the Town relating to Licensee's use of the Premises in the performance of this Agreement.

14. **Hours of Operation.** The hours of operation that Licensee shall be permitted to conduct its project shall be between 7:30 am and 5:30 pm, Monday through Friday. No weekend work shall be permitted.

15. **Governing Law.** This Agreement shall be governed in accordance with the laws of the State of California.

16. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute a single agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first set forth above.

EXHIBIT "C"

INSURANCE REQUIREMENTS

5 BARS shall procure and maintain or shall cause a sublicensee to, procure and maintain (5 BARS and/or sublicensees shall be referred to hereinafter; as the context dictates, as " Contractor"), for the duration of the Agreement and any applicable sublicense entered into under and/or pursuant to the Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the 5 BARS, a sublicensee, its agents, representatives, or employees.

Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage (occurrence for CG 0001)

Minimum Limits of Insurance

Contractor shall maintain limits no less than:

1. General Liability: \$ 1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to and approved by the Town. At the option of the Town, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the Town, its officers, officials, employees and volunteers; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration and defense expenses.

Other Insurance Provisions

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. The Town, its officers, employees and volunteers are to be covered as additional insureds as respects: liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; premises owned, occupied or used by the Contractor; or automobiles owned, leased or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the Town of Apple Valley, its officers, officials, employees or volunteers.
2. For any claims related to this project, the Contractor's insurance coverage shall be primary insurance as respects the Town of Apple Valley, its officers, employees and volunteers. Any insurance or self-insurance maintained by the Town of Apple Valley, its officers, officials, employees or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
3. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the Town of Apple Valley, its officers, officials, employees or volunteers.
4. The Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
5. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the Town of Apple Valley.

Acceptability for Insurers

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the Town of Apple Valley.

Verification of Coverage

Contractor shall furnish the Town of Apple Valley with original endorsements effecting coverage required by this clause. The Endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. The endorsements are to be on forms provided by the Town. All endorsements are to be received and approved by the Town of Apple Valley before work commences. As an alternative to the Town of Apple Valley forms, the Contractor's insurer may provide complete, certified copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

Subcontractors

Contractor shall include all subcontractors as insured under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

EXHIBIT "D"

LICENSE AGREEMENT

THIS LICENSE AGREEMENT is made as of the date of the final signature below, by and between the Town of Apple Valley, a municipal corporation, having a mailing address of 14955 Dale Evans Parkway, CA 92307 ("**Licensor**") and 5 Bars Communities a dba of XG Communities, LLC, a Delaware limited liability company, with an address at 19200 Von Karman Ave, Suite 100, Irvine, CA 92612 ("**Licensee**").

1. Definitions.

"Agreement" means this License Agreement.

"Approvals" means all certificates, permits, licenses and other approvals that Licensee must obtain as required by law in order for Licensee or its agents or sublicensees to use the Licensed Premises for the purpose intended by this Agreement.

"Company Facilities" means any and all Wireless Telecommunications Facilities to be developed by Licensee on the Licensed Premises.

"Town Facilities" means any and all existing facilities, inclusive of but not limited to all buildings and improvements owned by and under the possession and control of Licensor, including but not limited to utility poles, lamp posts, other utility facilities, fences, gates, and all roof tops of all such buildings, facilities and/or improvements.

"Defaulting Party" means the party to this Agreement that has defaulted as provided for in Section 26 of this Agreement.

"Easement" and **"Utility Easement"** have the meanings set forth in Section 7 of this Agreement.

"Harmful Interference" means Interference that endangers the functioning of a radio navigation service or of other safety services or seriously degrades, obstructs, or repeatedly interrupts a radio communication service operating in accordance with both International Telecommunications Union Radio Regulations and the regulations of the Federal Communications Commission.

"Hazardous Material" means any substance which is (i) designated, defined, classified or regulated as a hazardous substance, hazardous material, hazardous waste, pollutant or contaminant under any Environmental Law, as currently in effect or as hereafter amended or enacted, (ii) a petroleum hydrocarbon, including crude oil or any

fraction thereof and all petroleum products, (iii) PCBs, (iv) lead, (v) asbestos, (vi) flammable explosives, (vii) infectious materials, or(vii) radioactive materials.

“Environmental Law(s)” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Section 9601 *et seq.*, the Resource Conservation and Recovery Act of 1976, 42 U.S. C. Section 6901 *et seq.*, the Toxic Substances Control Act, 15 U.S.C. Section 2601 *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. Section 5101 *et seq.*, and the Clean Water Act, 33 U.S.C. Section 1251 *et seq.*, as said laws have been supplemented or amended to date, the regulations promulgated pursuant to said laws and any other federal, state or local law, statute, rule, regulation or ordinance that regulates or proscribes the use, storage, disposal, presence, clean-up, transportation or release or threatened release into the environment of Hazardous Material.

“Improvements” means a Wireless Telecommunications Facility(ies).

“Interference” means the effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radio communication system, manifested by any performance degradation, misinterpretation, or loss of information.

“Licensed Premises” means those portions of Licensor' s Property described in the sketches attached hereto as **Exhibit "D"**

“Licensee” means 5 Bars Communities a dba of XG Communities, LLC, a Delaware limited liability company.

“Licensee' s Notice Address” means 19200 Von Karman Ave, Suite 100, Irvine CA 92612.

“Licensor” means Town of Apple Valley, a general law municipal corporation.

“Licensor's Notice Address” means 14955 Dale Evans Parkway, Apple Valley, CA 92307.

“Licensor's Properties” means those properties (each of which is a subject of this License Agreement).

“Non-Defaulting Party” means the party to this Agreement that has not defaulted as provided for in Section 26 of this Agreement.

“Rent” means percent (__%) of recurring Sublicense Revenue received by Licensee from Sublicensees on new Wireless Telecommunications Facilities constructed on Licensed Premises under or pursuant to this Agreement.

“Sublicense Revenue” means the total amount of rent (excluding any reimbursement from Sublicensee(s) of taxes, construction costs, installation costs, utilities, or other expenses incurred by Licensee to the extent said reimbursement is not an offset of rent to be paid by Sublicensee(s)) paid to Licensee by all Sublicensee(s) using each of the Licensed Premises, whether pursuant to a license or other similar agreement, as modified, renewed, or assigned.

“Sublicensee” means a third party to which Licensee has granted the right to use and occupancy of one or more of the Licensed Premises, subject to the terms and conditions contained herein.

“Subscription Agreement” means the Wireless Marketing Agreement Regarding Licenses and Sublicenses of Publicly-Owned Properties Pertaining to Wireless Telecommunications Facilities, between Licensor and Licensee, dated September 19, 2016.

“Wireless Telecommunications Facilities” means the equipment and associated structures needed to transmit and/or receive electromagnetic signals. A wireless telecommunication facility typically includes antennas, supporting structures, enclosures and/or cabinets housing associated equipment, cable, access roads and other accessory development.

2. **Licensor's Cooperation.** During the Lease Term, Licensor shall:

(i) Cooperate with Licensee in its efforts to obtain all of the Approvals and (ii) take no action that would adversely affect any of the Licensed Premises; provided, however, that if Licensor elects to replace infrastructure on the Licensed Premises that is unrelated to the delivery of Wireless Telecommunications services, then such replacement shall be accomplished in a manner calculated to minimize interference with the Wireless Telecommunications infrastructure on the Licensed Premises. Licensor acknowledges that Licensee's ability to use each of the Licensed Premises is contingent upon Licensee obtaining and maintaining the Approvals. Additionally, Licensor authorizes Licensee and its employees, representatives, agents and consultants to prepare, and submit, file and present on behalf of Licensor building, permitting, zoning or land-use applications with the appropriate local, state and/or federal agencies necessary to obtain land use changes, special exceptions, zoning variances, conditional use permits, special use permits, administrative permits, construction permits, operation permits and/or building permits. Licensor understands that any such application and/or the satisfaction of any requirements thereof may require Licensor's cooperation, which Licensor hereby agrees to provide. Licensor shall not knowingly do or permit anything that will interfere with or negate any Approvals pertaining to the Improvements or Licensed Premises or cause them to be

in nonconformance with applicable local, state or federal laws. Licensor agrees to execute such documents as may be necessary to obtain and thereafter maintain the Approvals, and agrees to be named as the applicant for said Approvals. The provisions of this Section shall not apply in the event of any dispute between and/or involving Licensor and Licensee.

3. **Subdivision.** In the event that a subdivision of Licensor's Property is legally required to license the any of the Licensed Premises to Licensee, Licensor agrees to seek subdivision approval at Licensee's expense.

4. **Term.** The Term of this Agreement shall continue commence on _____ ("**Commencement Date**") and the license for each Licensed Premise listed in **Exhibit "B"** has expired. The term of each License listed in **Exhibit "B"** shall begin on the commencement date listed for such Licensed Premises on **Exhibit "B"**, and shall continue for a period of ten (10) years with three five (5) year options subject to the written mutual consent of the Licensor and Licensee. At the end of term of the lease agreement 5 BARS will hand over the administration of the lease to the Town unless mutually agreed upon by both parties.

5. **Rent.**

a. **Rent.** From and after the Commencement Date and effective upon Licensee's receipt of Sublicense Revenue, Licensee shall pay Rent for the each of the Licensed Premises.

b. **Sublicenses.** Licensee shall exercise discretion as to whether, and on what terms, to sublicense, license or otherwise allow occupancy of the Licensed Premises, subject to the following:

- i. Licensee shall make every reasonable effort to ensure that each proposed Wireless Telecommunications Facility will not affect, detract, or impact the operation of existing Licensor facilities, particularly traffic signal control and street lighting devices.
- ii. Licensee shall ensure that the proposed Wireless Telecommunications Facility is not dependent on the resources dedicated to Licensor facilities.
- iii. Licensee shall propose new locations for Wireless Telecommunications Facilities to Licensor, and Licensor shall have the final authority to approve or reject said locations.
- iv. In the event of damage, Licensor shall not be obligated to repair or restore the Wireless Telecommunications Facility to normal operating conditions unless Licensor is the primary and direct cause of such damage. As

between Licensee and Licensor, Licensee shall bear all other costs incurred to repair or restore Wireless Telecommunications Facilities; provided however, the Licensee may allocate its responsibility under this sentence to a third party, including a Sublicensee.

- v. Licensee shall make every reasonable effort to restore Licensor facilities in a safe and efficient manner. Licensor shall not be held responsible for lack of revenue during the down time.
- vi. Licensee shall give Licensor reasonable notice (or no less than fourteen (14) prior to impacting Licensor facilities in a manner that is beyond the routine maintenance and operation of Wireless Telecommunications Facilities.
- vii. Any sublicense agreement shall include the requirement that the Sublicensee must comply with the terms and conditions of this Agreement.
- viii. Any sublicense agreement shall include a provision substantially consistent with the following, relating to interference with Town Facilities and communications systems:

Notwithstanding any other provisions this Sublicense Agreement, Sublicensee agrees to operate any and all of its Wireless Telecommunications Facilities on the Property in full compliance with the technical standards set forth in the Rules and Regulations of the Federal Communications Commission ("FCC") as codified in 47 C.F.R. and upon notice of non-compliance. Licensee and Sublicensee both recognize and stipulate that Town's public safety communications systems are vital to the life, health, and safety of the public safety personnel, and of members of the general public, and agree that protecting such systems against harmful interference is an integral responsibility of this agreement.

Licensee and Sublicensee agree to meet and confer with the Town on a case-by-case basis, and at the request of any Party and/or the Town, in the event that additions or changes to Wireless Telecommunications Facilities of the property cause incompatibilities with the Town's installed communications system(s).

Licensee and Sublicensee agree that in the event of harmful interference or degradation to Town's public safety radio operations, Town may require on a case-by-case basis that the use of the interfering Wireless Telecommunications Facility be suspended upon reasonable notice by the

Town to Licensee and the applicable Sublicensee pending resolution of the cause and cure of such interference or degradation.

The findings of the Town's communications engineering representative shall be determinant in declaring harmful interference caused by such non-compliance, and in the event of a dispute the burden of seeking a determination of compliance from Federal Communications Commissions shall be on the Sublicensee.

This procedure shall not be invoked unless absolutely necessary.

These provisions shall be binding on Licensee, Sublicensee, and any successor, assignee, or service provider designated by Licensee and/or Sublicensee.

- ix. Except as specified in this Section 5(b), Licensors shall not unreasonably interfere with Licensee's discretion relation to the terms of sublicenses, licenses or the grants of occupancy of the Licensed Premises.

c. Accounting/Adjustments. The parties hereto acknowledge that all information needed to calculate Rent may, from time to time, not be readily available. Accordingly, the parties agree that Licensee may base Rent on Sublicensee agreements, and later make adjustments if overpayments or underpayments occur. At any time, Licensors may request that Licensee provide an accounting of the Rent in such form and content as Licensors may reasonably request.

6. Construction, Engineering, and Other Costs

- a. Licensors shall have no financial responsibility for planning, construction and engineering costs associated with the implementation of this License Agreement.
- b. Licensee may recover from Sublicensees's taxes, construction costs, installation costs, utilities, or other expenses incurred by licensee, to the extent said reimbursement is not an offset of rent to be paid by Sublicensee(s), and such recovered sums shall not be included in the computation of Rent.

7. Licensed Premises; Survey. Licensee has provided Licensors with a copy of an "as-built" survey for each Licensed Premises, which shall depict and identify the boundaries of each Licensed Premises and the Easements. The description of each Licensed Premises set forth in Exhibit "A" shall control in the event of any discrepancies.

8. **Access.** Conditioned upon and subject to commencement of the License Term, Licensor grants to Licensee and Licensee's employees, agents, contractors, sublicensees, licensees and their employees, agents and contractors access to land located within Licensor's Property to Licensee, for the purpose of constructing, repairing, maintaining, replacing, demolishing and removing the facility to be located upon each Licensed Premises as necessary to obtain or comply with any Approvals (the "**Access License**"). Licensee may request and Licensor shall not unreasonably deny or withhold the granting of an alternate Utility License either to Licensee or directly to the public utility at no cost and in a location acceptable to Licensee and the public utility. The Access Licenses and Utility Licenses (collectively, the "**Access/ Utility Licenses**") shall be utilized for the purposes provided during the License Term and thereafter for a reasonable period of time necessary for Licensee to remove the Improvements.

9. **Use of Property.** The Licensed Premises and the Access/Utility Licenses shall be used for the purpose of constructing, maintaining and operating the Improvements and for uses incidental thereto. All Improvements shall be constructed at no expense to Licensor. All Improvements, inclusive of security fences, shall comply with the requirements of Town's Code and all other laws and regulations applicable thereto, and Licensee shall obtain all required and necessary governmental agency Approvals and permits. Licensee will maintain the Licensed Premises in a safe condition. It is the intent of the parties that Licensee's Improvements shall not constitute a fixture.

10. **Removal of Obstructions.** Licensee has the right to remove obstructions from Licensor's Property, as approved by the Licensor, which approval shall be requested in writing by Licensee and shall not be unreasonably withheld, conditioned or delayed by Licensor. Potential obstructions include but are not limited to vegetation, which may encroach upon, interfere with or present a hazard to Licensee's use of the Licensed Premises or the Access/Utility Licenses. Licensee shall dispose of any materials removed.

11. **Hazardous Materials.**

a. Licensee's Obligation and Indemnity. Licensee shall not (either with or without negligence) cause or permit the escape, disposal or release of any Hazardous Materials on or from the Licensed Premises in any manner prohibited by law. Licensee shall indemnify and hold Licensor harmless from and against any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, any and all sums paid for settlement of claims, attorneys' fees, and consultants' and experts' fees) from the release of any Hazardous Materials on the Licensed Premises if caused by Licensee or persons acting under Licensee.

b. Licensor's Obligation and Indemnity. Licensor shall not (either with or without negligence) cause or permit the escape, disposal or release of any Hazardous Materials on or from Licensor's Property or Licensed Premises in any manner prohibited by law. Licensor shall indemnify and hold Licensee harmless from and against any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses (including, without limitation, any and all sums paid for settlement of claims, attorneys' fees, and consultants' and experts' fees) from the presence or release of any Hazardous Materials on Licensor's Property or Licensed Premises unless caused by Licensee or persons. acting under Licensee.

12. **Real Estate Taxes.** To the extent that a possessory interest is deemed created, Licensee acknowledges that notice is and was hereby given to Licensee pursuant to California Revenue and Taxation Code Section 107. 6 that use or occupancy of any public property may subject the Licensee to possessory interest taxes or other taxes levied against Licensee's right to possession, occupancy or use of any public property. Licensee shall pay all applicable (federal, state, county, city, local) excise, sales, consumer use, possessory interest, or other similar taxes required by law that are levied upon this Agreement or upon Licensee's services under this Agreement. Licensee agrees to reimburse Licensor for any documented increase in real estate or personal property taxes levied against Licensor's Property that are directly attributable to the Improvements. Licensor agrees to provide Licensee any documentation evidencing the increase and how such increase is attributable to Licensee' s use. Licensee reserves the right to challenge any such assessment, and Licensor agrees to cooperate with Licensee in connection with any such challenge.

13. **Insurance.** At all times during the performance of its Due Diligence Investigation and during the License Term, Licensee, at its sole expense, shall obtain and keep in force the required insurance as set forth in the attached **Exhibit "C"**. Licensor shall be entitled to coverage at the maximum policy limits carried by Licensee for the required insurance, which shall at no time be less than the required amounts set forth in the attached **Exhibit "C"** to this Agreement. The insurance provisions shall be separate and independent from the indemnification and defense provisions between the Licensee and Licensor and shall not in any way limit the applicability, scope or obligations of the indemnification defense provisions in Section 14(a).

14. **Indemnification.**

a. Licensee shall indemnify, defend, and hold harmless Licensor, its elected and appointed officials, officers, employees, agents, and contractors, from and against liability, claims, demands, losses, damages, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense, to the extent directly or proximately resulting from Licensee's activities undertaken pursuant to this Agreement, except to the extent arising from or caused by the negligence or willful misconduct of Licensor, its elected and appointed officials, officers, employees, agents, or contractors. Licensor shall promptly notify Licensee of any claim, action or proceeding covered by this Section 14(a).

b. Right to Audit. During the term of this Agreement, Licensee shall maintain originals, or when originals are not available copies, of all records, books, papers and documents relating to this Agreement and all accompanying agreements between Licensee and Sublicensees (subject to Licensee's right to reasonably redact such records, books, papers and documents to the extent they are proprietary, represent confidential information, or constitute trade secrets). At all reasonable times, Licensee shall allow Licensor to have access to, examine, copy, and audit such records, including but not limited to access to and audit of information pertaining to the identities of the Sublicensees whom Licensee has attempted to sublicense the Licensed Premises.

15. **Waiver of Claims and Rights of Subrogation.** The parties hereby waive all rights of action for negligence against the other because damage to the Improvements, Licensor's Property or to the Licensed Premises resulting from any fire or other casualty of the kind covered by property insurance policies with extended coverage, regardless of whether, or in what amount, such insurance is carried by the parties. All policies of property insurance carried by either party for the Improvements, Licensor's Property or the Licensed Premises shall include a clause or endorsement denying to the insurer rights by way of subrogation against the other party to the extent rights have been waived by the insured before the occurrence of injury or loss.

16. **Eminent Domain.** If Licensor receives notice of a proposed taking by eminent domain of any part of the Licensed Premises or the Access/Utility Licenses, Licensor will notify Licensee of the proposed taking within five(5) days of receiving said notice and Licensee will have the option to: (i) declare this Agreement null and void and thereafter neither party will have any liability or obligation hereunder other than payment of Rent for so long as Licensee remains in physical possession of the Licensed Premises; or (ii) remain in possession of that portion of the Licensed Premises and Access/Utility

Licenses that will not be taken, in which event there shall be an equitable adjustment in Rent on account of the portion of the Licensed Premises and Access/Utility Licenses so taken.

17. Right of First Refusal. If, during the License term, Licensor receives an offer to purchase, make a loan, or give any consideration in exchange for any of the following interests in all or a portion of any of the Licensed Premises: (i) fee title, (ii) a perpetual or other easement, (iii) a lease, (iv) any present or future possessory interest, (v) any or all portions of Licensor's interest in this Agreement including rent, or (vi) an option to acquire any of the foregoing, Licensor shall provide written notice to Licensee of said offer ("**Licensor's Notice**"). Licensor's Notice shall include the prospective buyer's name, the purchase price being offered, any other consideration being offered, the other terms and conditions of the offer, the due diligence period, the proposed closing date and, if a portion of Licensor's Property is to be sold, a description of said portion. Licensee shall have a right of first refusal to purchase, at its election and on the terms and conditions as in Licensor's Notice, a fee simple interest in Licensor's Property or the Licensed Premises or a perpetual easement for the Licensed Premises. If the Licensor's Notice is for more than the Licensed Premises, Licensee shall have the option of purchasing the property subject to Licensor's Notice in its entirety, or in the alternative, negotiating with the proposed purchaser to acquire a perpetual easement in only the Licensed Premises. If Licensee does not exercise its right of first refusal by written notice to Licensor given within thirty (30) days, Licensor may sell the property described in the Licensor's Notice. If Licensee declines to exercise its right of first refusal, then this Agreement shall continue in full force and effect and Licensee's right of first refusal shall survive any such conveyance.

18. Sale of Property. If during the Lease Term, Licensor sells all or part of Licensor's Property, of which the Licensed Premises is a part, then such sale shall be subject to this Agreement.

19. Surrender of Property. Upon expiration or termination of this Agreement, Licensee shall, within a reasonable time, remove all above and below ground Improvements and restore the Licensed Premises to its original condition, without, however, being required to replace any trees or other plants removed, or alter the then existing grading.

20. Recording. Licensee shall have the right to record a memorandum of the Agreement with the San Bernardino County Recorder's Office. Licensor shall execute and deliver each such memorandum, for no additional consideration, promptly upon Licensee's request.

21. **Licensors' s Covenant of Title.** Licensors covenants that Licensor holds good and marketable fee simple title to Licensor's Property and each of the Licensed Premises and has full authority to enter and execute this Agreement. Licensor further covenants that there are no encumbrances or other impediments of title that might interfere with or be adverse to Licensee.

22. **Interference with Licensee's Business.** Licensee shall have the exclusive right to construct, install and operate Wireless Telecommunications Facilities that emit radio frequencies on Licensor's Property. Licensor agrees that it will not permit the construction, installation or operation on Licensor's Property of (i) any additional wireless telecommunications facilities or (ii) any equipment or device that interferes with Licensee's use of the Licensed Premises for a Wireless Telecommunications Facility. Each of the covenants made by Licensor in this Section is a covenant running with the land for the benefit of the Licensed Premises.

23. **Quiet Enjoyment.** Licensor covenants that Licensee, on paying Rent and performing the covenants of this Agreement, shall peaceably and quietly have, hold and enjoy the Licensed Premises and Access/Utility Licenses.

24. **Mortgages.** This Agreement, Licensee's interest in the Licensed Premises and the Access/Utility Licenses shall be subordinate to any mortgage given by Licensor which currently encumbers the Licensed Premises, provided that any mortgagee shall recognize the validity of this Agreement in the event of foreclosure. In the event that the Licensed Premises is or shall be encumbered by such a mortgage, Licensor shall obtain and furnish to Licensee a mutually agreed upon non-disturbance agreement for each such mortgage, in recordable form. If Licensor fails to cooperate in providing any Licensee requested non-disturbance agreement, Licensee may withhold and accrue, without interest, the Rent until Licensee receives all such documentation.

25. **Title Insurance.** Licensee, at Licensee's option, may obtain title insurance on each of the Licensed Premises and Access/Utility Licenses at Licensee's sole cost and expense. Licensor shall cooperate with Licensee's efforts to obtain title insurance by executing documents or obtaining requested documentation as required by the title insurance company. If Licensor fails to provide the requested documentation reasonably necessary to Licensee for Licensee to obtain title insurance within thirty (30) days of Licensee's request, Licensee, at Licensee's option, may withhold and accrue, without interest, the Rent until such time as Licensee receives all such documentation.

26. **Default.**

a. Notice of Default; Cure Period. If there is a default by Licensor or Licensee (the "**Defaulting Party**") with respect to any of the provisions of this Agreement or Licensor's or Licensee's obligations under this Agreement, the other party (the "**Non-Defaulting Party**") shall give the Defaulting Party written notice of such default. After receipt of such written notice, the Defaulting Party shall have thirty (30) days in which to cure any monetary default and sixty (60) days in which to cure any non-monetary default. The Defaulting Party shall have such extended periods as may be required beyond the sixty (60) day cure period to cure any non-monetary default if the nature of the cure is such that it reasonably requires more than sixty (60) days to cure, and the Defaulting Party commences the cure within the sixty (60) day period and thereafter continuously and diligently pursues the cure to completion. The Non-Defaulting Party may not maintain any action or effect any remedies for default against the Defaulting Party unless and until the Defaulting Party has failed to cure the same within the time periods provided in this Section.

b. Consequences of Licensee's Default. Licensor acknowledges that under the terms of this Agreement, Licensee has the right to terminate this Agreement at any time upon one hundred eighty (180) days' written notice to Licensor. Accordingly, in the event that Licensor maintains any action or effects any remedies for default against Licensee resulting in Licensee's dispossession or removal, (i) the Rent shall be paid up to the date of such physical dispossession or removal and (ii) Licensor shall be entitled to recover from Licensee, in lieu of any other damages, as liquidated, final damages, a sum equal to six months' Rent which shall be calculated at the highest value of the Rent which is in effect on the date of default and for the six month period thereafter. In no event shall Licensee be liable to Licensor for indirect or speculative damages in connection with or arising out of any default.

c. Consequences of Licensor's Default. If Licensor is in default beyond the applicable periods set forth above in Section 26(a), Licensee may, at its option, upon written notice: (i) terminate the Lease, vacate the Licensed Premises and be relieved from all further obligations under this Agreement; (ii) perform the obligation(s) of Licensor specified in such notice, in which case any expenditures reasonably made by Licensee in so doing shall be deemed paid for the account of Licensor and Licensor agrees to reimburse Licensee for said expenditures upon demand; (iii) take any actions that are consistent with Licensee's rights; (iv) sue for injunctive relief, and/or (v) set-off from Rent any amount reasonably expended by Licensee as a result of such default.

27. **Force Majeure.** If an event or condition constituting a "force majeure"—including, but not limited to, an act of God, labor dispute, civil unrest, epidemic, or natural disaster—prevents or delays either the Licensor or the Licensee ("**Party**") from

performing or fulfilling an obligation under this Agreement, said Party is not in Default, under Section 26 of this Agreement, of the obligation. A delay beyond a Party's control automatically extends the time, in an amount equal to the period of the delay, for the Party to perform the obligation under this Agreement. The Licensor and Licensee shall prepare and sign an appropriate document acknowledging any extension of time under this Section.

28. Applicable Law. This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State where the Licensed Premises is located. The parties agree that the venue for any litigation regarding this Agreement shall be the state where the Licensed Premises is located.

29. Assignment, Sublease, Licensing and Encumbrance. Lessee may assign this Agreement to a person or entity with demonstrated capacity to carry out Lessee's obligations under this Agreement. Lessee shall provide 30 days prior written notice of such assignment to Lessor. Lessee may enter into subleases, licenses, or other authorizations ("**Sub-Authorizations**") to allow a third party to utilize and operate from the Leased Premises, so long as such third party is a provider of services that utilize Wireless Telecommunications Facilities. Sub-Authorizations shall not require the consent of Lessor.

30. Miscellaneous.

a. Entire Agreement. Licensor and Licensee agree that this Agreement, together with that certain Consulting Services Agreement Regarding Wireless Master Planning and Memorandum of Understanding and Agreement Regarding Licenses and Sublicenses of Publicly-Owned Properties Pertaining to Wireless Telecommunications Facilities between Licensor and Licensee, contain all of the agreements, promises and understandings between Licensor and Licensee with regard to the Licensed Premises. No oral agreements, promises or understandings shall be binding upon either Licensor or Licensee in any dispute, controversy or proceeding at law. Any addition, variation or modification to this Agreement shall be void and ineffective unless made in writing and signed by the parties hereto.

b. Captions. The captions preceding the Sections of this Agreement are intended only for convenience of reference and in no way define, limit or describe the scope of this Agreement or the intent of any provision hereof.

c. Construction of Document. Licensors and Licensees acknowledge that this document shall not be construed in favor of or against the drafter by virtue of said party being the drafter and that this Agreement shall not be construed as a binding offer until signed by Licensee.

d. Notices. All notices hereunder shall be in writing and shall be given by (i) established national courier service which maintains delivery records, (ii) hand delivery, or (iii) certified or registered mail, postage prepaid, return receipt requested. Notices are effective upon receipt, or upon attempted delivery if delivery is refused or if delivery is impossible because of failure to provide reasonable means for accomplishing delivery. The notices shall be sent to Licensor at Licensor's Notice Address and to Licensee at Licensee's Notice Address.

e. Partial Invalidity. If any term of this Agreement is found to be void or invalid, then such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.

f. IRS. Form W-9. Licensor agrees to provide Licensee with a completed IRS Form W-9, or its equivalent, upon execution of this Agreement and at such other times as may be reasonably requested by Licensee. In the event the Property is transferred, the succeeding Licensor shall have a duty at the time of such transfer to provide Licensee with a completed IRS Form W-9, or its equivalent, and other related paper work to affect a transfer in Rent to the new Licensor. Licensor's failure to provide the IRS Form W-9 within thirty (30) days after Licensee's request shall be considered a default and Licensee may take any reasonable action necessary to comply with IRS regulations including, but not limited to, withholding applicable taxes from Rent payments.

IN WITNESS WHEREOF, Licensor and Licensee having read the foregoing and intending to be legally bound hereby, have executed this Agreement as of the day and year this Agreement is fully executed.

SIGNATURES CONTINUE ON FOLLOWING PAGE]

License Recipient

Town Manager

ATTEST:

Town Clerk