

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

City of San José
Department of Public Works
200 E. Santa Clara St., 5th Floor
Attention: Director of Public Works
File No.:

RECORDED WITHOUT FEE
PER GOVERNMENT CODE
SECTIONS 6103 AND 27383

SPACE ABOVE RESERVED FOR RECORDER'S USE

**MAINTENANCE AND ACCESS AND ENCROACHMENT AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND
TM SAN JOSE 78 LLC**

This Maintenance and Access and Encroachment Agreement ("Agreement") is made and entered into by and between the City of San José, a municipal corporation of the State of California ("City") and TM San Jose 78 LLC, a Delaware limited liability company and its successors in interest ("Owner"), as of _____ ("Effective Date").

RECITALS

WHEREAS, the Owner is the owner of certain real property in the City of San José, County of Santa Clara, State of California, described as Lot 1 on that certain Parcel Map recorded on May 8, 2017, in Book 903 of Maps, Pages 46-49, in the Official Records of Santa Clara County, California ("Property"), which Map is attached as Exhibit A-1 hereto and incorporated herein by reference ("Map"); and

WHEREAS, the Property is bounded by and subject to that certain public right-of-way owned by the City, commonly known as Coleman Avenue, which for the purposes of this Agreement relates to both (i) a portion of Coleman Avenue dedicated on the Map for any and all public

uses under, on, over, along and across those portions designated and delineated on the Map as “Grade Separated Street Easement”, said easement being a perpetual right of way and easement to construct, install, maintain, repair, renew, replace, operate and use a grade separation structure and public street, together with all appurtenances thereto including, but not limited to, all necessary footings, piers, haunches, roadways, pipe lines and electrical conduits (“Grade Separated Street Easement”), and (ii) a portion of Coleman Avenue dedicated to public use as an easement for a public street and incidental purposes on April 4, 1883 in Book 67 of Deeds, Page 549 in Santa Clara County Records (“Additional Street Area”), which Additional Street Area is more particularly described in Exhibit A-2 attached hereto and incorporated herein by reference; and

WHEREAS, the Map reserved from the Grade Separated Street Easement in favor of the Owner and its successors and assigns, the Owner’s right to use the at grade areas within a portion of the Grade Separated Street Easement designated and delineated on the Map as “PPLE” (Private Parking Lot Easement) for vehicle parking purposes including the right to maintain all necessary surface improvements, underground pipelines, irrigation systems and associated appurtenances for the private parking use that are not inconsistent with the Grade Separated Street Easement (“Private Parking”); and

WHEREAS, Owner has submitted plans to construct, maintain, repair, occupy and use the Private Parking, which is intended to reside within a portion of the Grade Separated Street Easement, as more particularly described in Exhibit A-3 attached hereto and incorporated herein by reference (the “Subject Premises”); and

WHEREAS, Owner also has submitted plans and an application, pursuant to San José Municipal Code Chapter 13.37, to construct, maintain, repair and use: (i) a trash enclosure structure and associated appurtenances including footings, foundation and pipelines (“Trash Enclosure”) within a portion of the Subject Premises, and (ii) additional private parking improvements within the Additional Street Area (“Additional Parking”), all as more particularly shown in Exhibit A-4; and

WHEREAS, both the Trash Enclosure and Additional Parking are outside the scope of the Owner’s Private Parking easement, and therefore, shall be allowed only pursuant to a revocable license by the City; and

WHEREAS, the City has approved plans and specifications for the design and construction of the Private Parking, Trash Enclosure and Additional Parking, which are on file with the City and are incorporated herein by reference ("Plans"); and

WHEREAS, the City Council of the City of San José has authorized the Trash Enclosure and Additional Parking pursuant to San José Municipal Code Chapter 13.37, subject to the conditions set forth therein, a true copy of which is attached hereto as Exhibit B and incorporated herein by reference ("Authorization"); and

WHEREAS, this Agreement constitutes the understanding between the parties regarding maintenance and access for the Private Parking and public use of the Subject Premises and Additional Street Area, and this Agreement together with the Authorization constitutes a revocable permit from the City allowing the Owner to maintain the Trash Enclosure and Additional Parking, subject to the terms and conditions set forth therein;

NOW, THEREFORE, subject to all of the terms, conditions and restrictions set forth in this Agreement, the City and Owner, for itself and all successive owners of the Property, intending to be bound thereby for the benefit of the Subject Premises and Additional Street Area, do hereby agree as follows:

1. Incorporation of Recitals. The recitals are true and correct and are incorporated herein as if repeated in their entirety.
2. Rights in Subject Premises. The City shall not be estopped from ordering alteration of the Private Parking, or alteration or removal of the Trash Enclosure or Additional Parking, where necessary to effectuate its rights in the Subject Premises or Additional Street Area or demanding compliance with any of Owner's obligations under this Agreement. This Agreement shall not be construed to create any property right in the Subject Premises or the Additional Street Area that the Owner did not possess prior to executing this Agreement or be construed to diminish any property right in the Subject Premises that the Parking Owner possessed prior to the execution of this Agreement. This Agreement shall have no value in any proceeding greater than the

Owner's cost to obtain it. The Owner shall be solely responsible for all costs of complying with its obligations under this Agreement.

3. Term of Agreement. The term of this Agreement shall commence upon the Effective Date and continue for the life of the Private Parking, even if the City earlier revokes or terminates the Authorization for the Trash Enclosure or Additional Parking.
4. Conformance with Plans and Agreement. The Owner acknowledges and agrees that the design, construction, maintenance, repair, occupancy, use and removal of the Private Parking, Trash Enclosure and Additional Parking shall be in strict conformance with the Plans and this Agreement. The City has entered into this Agreement based on each and every condition contained therein and this Agreement shall be strictly construed against the Owner. This Agreement grants the Owner no rights that are not explicitly written in this Agreement. The enumeration of the City's rights in this Agreement shall not be considered exclusive or as limiting the rights generally reserved to the City under applicable law. Each of the obligations and conditions in this Agreement is a material and essential condition to the City's execution of this Agreement.
5. Changes to Private Parking. The City may require changes to the Private Parking where: (i) the City determines to use the Subject Premises for a public purpose within the scope of the Grade Separated Street Easement; (ii) the City determines that the Private Parking conflicts with the public's current or prospective use of the Grade Separated Street Easement; (iii) the Private Parking constitutes a public nuisance; or (iv) the Private Parking is declared unlawful by a court of competent jurisdiction. The City's changes shall be effective thirty (30) days after providing Owner with written notice.
6. Changes or Removal of the Trash Enclosure and Additional Parking. The City may require changes to, or the complete removal of, the Trash Enclosure and Additional Parking where: (i) the City determines to use the Subject Premises for a public purpose within the scope of the Grade Separated Street Easement or the Additional Street Area for any purpose; (ii) the City determines that the Trash Enclosure or Additional Parking conflicts with the public's current or prospective use of the Grade Separated Street Easement or Additional Street Area; (iii) either the Trash Enclosure or Additional

Parking constitute a public nuisance; (iv) either the Trash Enclosure or Additional Parking is declared unlawful by a court of competent jurisdiction; or (v) the Owner is in Default under this Agreement. The City's changes shall be effective thirty (30) days after providing Owner with written notice.

7. Removal or Alteration. Within thirty (30) days after the City issues notice of changes to the Private Parking or notice of changes or removal of the Trash Enclosure or Additional Parking, the Owner shall submit to the City plans for the alteration or removal of the Private Parking, Trash Enclosure or Additional Parking as necessary to accommodate the changes, to a condition that is safely usable by the City and public, in compliance with all applicable City standards and specifications and satisfactory to the City's Director of Public Works, all without liability or expense to the City. Prior to commencing any removal or alteration work, the City shall have approved the plans and specifications for the work. All removal or alteration work shall be performed under the City's direction. The Owner shall commence removal or alteration within ten (10) days, and shall complete all work within thirty (30) days, after the City's approval of the plans. The Owner's obligations under this section shall not be deemed to have been satisfied until the City issues a written notice of acceptance of the removal or alteration work.

8. Default. Owner shall be in default under this Agreement if it breaches, or fails to timely observe and perform any obligation under, this Agreement and fails to timely cure such breach or failure in accordance with this Agreement ("Default"). The Director of Public Works shall notify the Owner in writing of any breach or failure to perform. Except where a different time period is provided in this Agreement for a particular obligation, the Owner shall, within fifteen (15) days of the Director of Public Works' notice, commence, diligently proceed using best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. If the Director of Public Works determines in writing that such breach or failure to perform is incapable of cure within fifteen (15) days, Owner shall continue to diligently proceed to cure using its best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence, but in no event shall the Owner's cure rights extend for a period beyond sixty (60) days from the date of the Director's notice. If the Owner does not cure the breach or failure to perform to the City's satisfaction within the foregoing cure periods, the Owner shall be in Default, and the Owner hereby grants

to the City any consent or right necessary for the City to remedy the Default. The Owner shall be responsible for all of the City's actual costs to remedy the Default. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Owner's obligations under this Agreement and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

9. Maintenance and Repair. The Private Parking, Trash Enclosure and Additional Parking shall be maintained and repaired to the City's satisfaction so that they are in a safe condition and good working order for the intended purpose and in a similar condition to that which was originally constructed, except where a higher standard is required by applicable law. All replacements, restorations and repairs shall be at least equal in quality to the original, except that such replacements, restorations, and repairs shall comply with all requirements of applicable law and City standards and specifications in effect at the time of the replacement, restoration or repair. The City also shall have the right, but not the obligation, to stop or direct maintenance or repairs of the Private Parking, Trash Enclosure or Additional Parking to protect the public health or safety. Additional maintenance and repair requirements are set forth in Exhibit C attached hereto and incorporated herein by reference.

10. City's Right to Enter and Cure. Notwithstanding anything to contrary in this Agreement, the City may repair or alter the Private Parking, or may repair, alter or remove the Trash Enclosure or Additional Parking, as necessary, and at the Owner's expense, if the City determines that it represents a dangerous condition or threat of danger to life or property. The Owner shall make any necessary modifications or repairs within ten (10) days after the City's written notice, except that in cases of emergency as determined by the City, the City shall only be required to provide Owner with one (1) day telephone notice. The Owner shall have no right to cure its failure to comply with the obligations in this section.

11. Work Schedules. Owner shall notify the City at least seventy-two (72) hours prior to starting any work authorized or required by this Agreement to arrange a schedule acceptable to the City. Owner shall upon completion of any work under this Agreement, notify the Director of Public Works in writing. No work shall be deemed complete until

such notification is received and the work is approved by the Director of Public Works in writing.

12. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Owner, including portions covered by structures, furnishings, materials or equipment, for any lawful purpose for which the Subject Premises or Additional Street Area may be used.

13. Public Utilities and Facilities. The Owner's design, construction, maintenance, repair, occupancy, use and removal of the Private Parking, Trash Enclosure or Additional Parking shall not interfere with, impede or make more costly the City's operation, maintenance or improvement of the Grade Separated Street Easement or Additional Street Area. The Owner shall verify the location of all public and quasi-public utilities and facilities that may be affected by work pursuant to this Agreement. The Owner shall protect and assume all responsibility for loss or damage to such utilities or facilities caused directly or indirectly by Owner or its contractors, agents, employees or invitees, and shall immediately notify the Director of Public Works of any such loss or damage. Any repairs or restoration to public utilities or facilities shall be performed under the direction of the Director of Public Works. The Owner shall complete such repairs and restoration within ten (10) days after written demand from the City. If the Owner fails to complete repairs or restoration within the 10-day period, the Owner shall have no right to cure, and the City may perform such repairs or restoration and the Owner shall reimburse the City for its actual costs within fifteen (15) days of the City's invoice therefore. If the design, construction, maintenance, repair, occupancy, use or removal of the Private Parking, Trash Enclosure or Additional Parking requires the removal, relocation, or repair of utilities or facilities, Owner shall coordinate its work with the owner(s) of such utilities or facilities in advance of its performance of the work and shall pay the owner(s) for all costs incurred due to the Owner's performance under this Agreement.

13. Owner Responsibility for Private Parking. The Owner shall be solely responsible for the design, construction, maintenance, repair, occupancy, use and removal of the

Private Parking, Trash Enclosure and Additional Parking and the City shall not be liable for its review, approval, inspection, maintenance, repair, restoration or removal of any aspect or portion of the Private Parking, Trash Enclosure and Additional Parking.

14. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Private Parking, Trash Enclosure and Additional Parking. The Owner acknowledges that it bears the full risk of loss or damage to the Private Parking, Trash Enclosure and Additional Parking and the Property and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any loss or damage arising from or relating to the Private Parking, Trash Enclosure and Additional Parking. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the Grade Separated Street Easement and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.

15. Indemnity/Hold Harmless. To the fullest extent permitted by law, Owner shall indemnify, hold harmless and defend the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), whether or not the Claims involve a third party, which arise out of, relate to or result from: (i) any act or omission of the Owner, its independent contractors, agents, officers, employees or invitees_pursuant to or in connection with the Private Parking, Trash Enclosure and Additional Parking or while in or about the Private Parking, Trash Enclosure and Additional Parking or Property for any reason; (ii) the design, construction, maintenance, repair, occupancy, use and removal of the Private Parking, Trash Enclosure and Additional Parking; and/or (iii) any breach of this Agreement or violation of applicable law by the Owner, its independent contractors, agents, officers, employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City's sole negligence. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or

may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Owner by the City and continues at all times thereafter.

16. Insurance. Owner shall, at Owner's sole cost and expense and for the full term of this Agreement, obtain and maintain at least all of the minimum insurance requirements described in Exhibit D attached hereto and incorporated herein by reference. Said insurance shall name the City as additional insured by endorsement and shall be filed with and approved by the City's Risk Manager.
17. Liens. Owner shall not allow or permit to be enforced against the City any mechanic, laborer, materialmen, contractor, subcontractor, or any other liens, claims or demands arising from any work performed under this Agreement. Owner shall discharge or pay all of said liens, claims and demands before any action is brought to enforce the same against the City or the Subject Premises.
18. Sale or Transfer of Property. The Owner shall notify potential successor owners of the Property of the Private Parking's existence and the obligations under this Agreement. At least sixty (60) days prior to the closing of any sale or transfer of the Property, the Owner shall cause its successors, assigns and transferees to submit a written statement to the City evidencing the sale or transfer, agreeing to the terms and conditions of this Agreement and providing updated contact information for purposes of notices under this Agreement.
19. Notices. Unless otherwise specified in this Agreement, all notices required or provided for under this Agreement shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this section. A notice shall be effective on the date it is delivered in person, or if mailed, on the date of deposit in the United States Mail. Any changes to the notice addresses must be delivered in accordance with this section. Notices shall be addressed as follows:

If to City:

City of San José
200 East Santa Clara Street, 5th Floor
San Jose, CA 95113
Attn: Director of Public Works

With a copy to:

City Attorney
200 East Santa Clara Street, 16th Floor
San Jose, CA 95113

If to Owner:

TM San Jose 78 LLC
c/o Trumark Companies
3001 Bishop Drive, Suite 100
San Ramon, California 94583
Phone: _____
Attn: _____

20. Compliance with Law. Owner agrees to comply with all applicable laws, ordinances and regulations in its design, construction, maintenance, repair, occupancy, use and removal of the Encroachment.
21. Agreement Binding on Successor Owners. The Owner consents to the City's recordation of the Permit against title to the Property. The Permit shall be binding upon all successor owners of the Property. Other than by virtue of the sale or transfer of the Property, Owner shall not assign this Agreement in whole or in part.
22. Severability. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.
23. Survival. All provisions of this Agreement shall survive revocation or termination of the Permit. The provisions under Sections 13-17 and 28-29 shall survive the expiration of this Agreement.
24. Headings. The headings used in this Agreement are for convenience only and shall not be used in the interpretation of this Agreement.
25. Days. All references to days in this Agreement shall mean calendar days, unless specified otherwise.

26. Time is of the Essence. Time is of the essence in performing each and all obligations under this Agreement.
27. Amendment. This Agreement may be amended only by a written instrument executed by the Owner, approved by the City Council and recorded on title to the Property.
28. Choice of Law. This Agreement shall be construed according to the laws of the State of California.
29. Venue. Any dispute arising under this Agreement shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.

IN WITNESS WHEREOF, this Agreement is executed by the parties as of the date first written above.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

[Sr.] Deputy City Attorney

By: _____
Name:
Title:

OWNER*

Print Name of Owner and Type of Entity

By _____
Name:
Title:

By _____
Name:
Title:

* Proof of authorization for Owner's signatories is required to be submitted concurrently with this Agreement. All Owner signatures must be accompanied by an attached notary acknowledgement.

EXHIBIT A-1
PARCEL MAP

EXHIBIT A-2

**DESCRIPTION OF
ADDITIONAL STREET AREA**

EXHIBIT A-3
**DESCRIPTION OF
SUBJECT PREMISES**

EXHIBIT A-4

**MAP OF AUTHORIZED ENCROACHMENT AREAS
UNDER COLEMAN AVENUE**

EXHIBIT B

AUTHORIZATION FOR TRASH ENCLOSURE AND ADDITIONAL PARKING

EXHIBIT C

ADDITIONAL MAINTENANCE/REPAIR REQUIREMENTS

Owner's maintenance and repair of the Private Parking, Trash Enclosure and Additional Parking shall include all of the following requirements, in addition to any additional requirements necessary to comply with applicable law:

- A. All work shall be coordinated through the City's Department of Public Works, Development Services Division.
- B. All graffiti shall be removed from the Private Parking, Trash Enclosure and Additional Parking within five (5) business days of occurrence.
- C. All cosmetic damage (i.e., non-structural, damage posing no harm or threat of harm to life or property) to the Private Parking, Trash Enclosure and Additional Parking shall be repaired within ten (10) business days of occurrence.
- D. All structural damage to the Private Parking, Trash Enclosure and Additional Parking shall be repaired within thirty (30) days of occurrence, unless the damage represents a dangerous condition or threat of danger to life or property, in which case the Owner shall repair the Private Parking, Trash Enclosure and Additional Parking in accordance with Section 10 of the Agreement.
- E. **INSERT ADDITIONAL REQUIREMENTS**
- F. **INSERT ADDITIONAL REQUIREMENTS**
- G. **INSERT ADDITIONAL REQUIREMENTS**
- H. **INSERT ADDITIONAL REQUIREMENTS**
- I. **INSERT ADDITIONAL REQUIREMENTS**
- J. **INSERT ADDITIONAL REQUIREMENTS**

EXHIBIT D

INSURANCE REQUIREMENTS

Owner, at Owner's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance hereunder by Owner, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. Insurance Services Office Commercial General Liability coverage "occurrence" form CG 0001 including products and completed operations and X. C. U. (explosion, collapse, underground.); and
2. Insurance Services Office form number CA 0001 covering Automobile Liability code 1 "any auto", or code 2 "owned autos" and endorsement CA 0025. Coverage also to include code 8 "hired autos" and code 9 "non-owned" autos; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance.

B. Minimum Limits of Insurance

Owner shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial 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; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor and Employers Liability limits of \$1,000,000 per accident.

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of City, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officer, employees, agents and contractors; or Owner shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

- a. The City of San Jose, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Owner; products and completed operations of Owner; premises owned, leased or used by Owner; and automobiles owned, leased, hired or borrowed by Owner. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents and contractors.
- b. Owner's insurance coverage shall be primary insurance as respects City, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents or contractors shall be excess of Owner's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Owner shall not affect coverage provided City, its officers, employees, agents, or contractors.
- d. Coverage shall state that Owner'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.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees and agents.

2. Workers' Compensation and Employers Liability

Coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officials and agents.

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) calendar days' prior written notice has been given to City.

E. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to City's Risk Manager.

F. Verification of Coverage

Owner shall furnish City with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José
Finance Dept./Risk Management
200 East Santa Clara Street
San Jose, California 95113
Phone (408) 535-7061
Fax (408) 292-6489

G. Subcontractors

Owner shall include all subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.