

EASEMENT AGREEMENT FOR AIR RIGHTS

This Easement Agreement for Air Rights (“Agreement”) is made this _____ day of _____, 2020, by and between the City of Vancouver, a Washington municipal corporation (“City”), and TC Waterfront LLC, a Delaware limited liability company, CG Waterfront, LLC, a Delaware limited liability company, and JSP Waterfront, LLC, a Delaware limited liability company (collectively, the “Waterfront LLC’s”).

RECITALS

A. City is the owner of real property located in Clark County, Washington, which is currently improved and used as a public park and public right-of-way is legally described on **Exhibit A** attached hereto (the “City Property”).

B. Waterfront LLCs, are the owners of real property located in Clark County, Washington, to the northeast of the City Property, commonly known as “Block 20” of the Vancouver Waterfront, and legally described on **Exhibit B** attached hereto (the “Waterfront LLC’s Property”).

C. Waterfront LLCs intend to develop its property with a seven-story apartment building with underground parking (the “Building”).

D. Waterfront LLCs desire to obtain from City, and City desires to grant to Waterfront LLCs, subject to the terms and provisions of this Agreement, an easement permitting the construction, location, maintenance, operation, occupancy, and use of such Building that extends above City Property, as legally described and depicted in **Exhibit C** attached hereto and incorporated (“the Easement Area”).

NOW THEREFORE, in consideration of the covenants contained herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

AGREEMENTS

1. Incorporation of Recitals. The foregoing recitals are hereby incorporated into this Agreement.
2. Grant of Easement. City does hereby declare, grant, create, and establish to and for the benefit and use of Waterfront LLCs and any successive owners of Waterfront LLCs Property, a perpetual, exclusive easement in the air space of the Easement Area to the extent reasonably necessary to accommodate the construction, location, operation, occupancy, of the Building as such shall extend over and above the Easement Area as described in Exhibit C.
3. Compensation. Upon execution of this Agreement, Waterfront LLCs shall pay or cause to be paid to the City the sum of one hundred thirty eight thousand eight hundred and eight-eight dollars (\$138,888.00) as consideration for the easement granted herein. City and Waterfront LLC's have reached the payment for the airspace rights without a full study to accommodate Waterfront LLCs' construction scheduling needs. This payment is only for the City Property used as a park. In the event the City adopts an ordinance providing for a methodology to assess payments for airspace rights over city rights-of-way, Waterfront LLCs agree to reopen the valuation provided for in this Agreement.
4. Damages and Indemnities. In exercising the rights granted under the terms hereof and satisfying the obligations imposed herein, Waterfront LLCs shall take precautions to avoid unlicensed encroachment upon and interference with the portions of the City Property lying outside of the Easement Area, and if such are distributed or harmed in any way by Waterfront LLCs' activities, Waterfront LLCs shall, reimburse City for its costs in repairing all such damage.

Waterfront LLCs hereby covenant and agree to defend, indemnify and hold harmless City's officers, employees, representatives, agents, successors and assigns (hereinafter collectively the "Indemnitees") from all claims, losses, expenses, liens (including, without limitation, liens or claims for services rendered or labor or materials furnished), encumbrances, liabilities, penalties, judgments, settlements, fines, losses, damages, proceedings, actions (civil, criminal or administrative) (whether brought by any governmental entity or non-governmental entity or person), and costs, including without limitation, attorney's fees, court costs, consultant fees, expert fees and other litigation-related expenses (hereinafter, collectively, the "Claims"), brought against, imposed upon, suffered by or paid by Indemnitees or arising out of or in connection with or resulting from: (i) Waterfront LLCs' construction activities within the Easement Area; (ii) the negligence of Waterfront LLCs or Waterfront LLCs' officers, employees, contractors, subcontractors, consultants, agents and/or assigns (collectively, "Waterfront LLCs' Agents" in connection with the Building; (iii) injury to a person or persons including accidental injury or death arising out of, indirectly or directly, the utilization of the Easement Area including the construction of the Waterfront LLCs' Building and the maintenance or utilization thereof by Waterfront LLCs or Waterfront LLCs' Agents, or the invitees of either Waterfront LLCs, or Waterfront LLCs' Agents at any time following such construction of the Waterfront LLCs' Building. The foregoing indemnities shall survive and continue after the execution hereof and the termination or revocation of the easements granted hereunder.

4. Work Standards. All work to be performed by Waterfront LLCs or their agents, contractors, or subcontractors within the Easement Area and shall be performed at Waterfront LLCs' sole cost and expense, and shall be performed: (i) in a careful and workmanlike manner; (ii) in accordance with all applicable laws, codes, regulations, and ordinances, and (iii) free of all claims or liens. Waterfront LLCs shall restore any property damage to the City's Property caused by Waterfront LLCs' use of the easements granted herein.

7. Insurance. Waterfront LLCs shall obtain Commercial General Liability ("CGL") insurance insuring against claims for injuries, damages to or death of persons and injuries, loss of use and damages to property arising out of Waterfront LLCs activities on City Property, within the Easement Area, including contractual liability coverage for claims pursuant to the indemnity provisions of this Agreement to afford protection for limits of not less than \$2,000,000 combined single limit for bodily injury or property damage. Such CGL insurance policy shall be annually renewing, occurrence based, and shall be primary and not contributory to any similar insurance. City, and its officers, agents and employees shall be named as additional insureds with form at least as broad as ISO CG 2026 – Designated Person or Organization, without modification, affording coverage regardless of the additional insureds' sole or concurrent negligence, as respects to operations arising out of this Agreement. Such insurance shall not be canceled or materially altered without first giving thirty (30) days' written notice thereof to City. Waterfront LLCs shall furnish City certificates of such CGL insurance prior to construction over City's Property, and annually thereafter and upon City's request from time to time.

Waterfront LLCs shall also obtain and maintain Statutory Workers Compensation insurance covering all employees as required by law.

9. Damage to Underground Utilities, Park Trees, or Other Building.

Waterfront LLCs shall promptly repair, at Waterfront LLCs expense, any damage to existing Building on or under the City Property or in the public right-of-way that is caused directly or indirectly by acts or omissions of Waterfront LLCs, their contractors, agents or employees in the exercise of the rights reserved in this Agreement.

If any damage occurs to the existing trees and shrubs, Waterfront LLCs shall replace, at Waterfront LLCs sole expense, the damaged vegetation with trees and shrubs of the same variety, size and condition. Waterfront LLCs acknowledge that the trees and shrubs that exist on the City Property are valuable property and that locating trees of similar size and species may be challenging. To the extent Waterfront LLCs are unable to replace damaged trees with trees of the equivalent size or species, Waterfront LLC must compensate the City for each damaged tree in an amount of \$4,000 per tree.

9. As-Built Plans. After completion of the Building, Waterfront LLCs shall deliver to City a copy of plans showing the actual location of the Building including the portion of the building extending over City Property.

10. Reservation of Rights. City reserves the right to use the Easement Area for any lawful use not inconsistent with this Agreement, so long as such use shall not materially interfere with the construction and subsequent use of the Building.
11. Duty of Maintenance. Waterfront LLCs, on behalf of all subsequent owners of the Waterfront LLCs' Building, shall have the duty and obligation, to at all times, to maintain the Waterfront LLCs' Building erected on, over, above and through the Easement Area in a safe and structurally sound condition. Upon completion of the Building, and at intervals not exceeding two (2) years thereafter, Waterfront LLCs shall cause its Building to be inspected by a certified structural inspector under the supervision of a licensed structural engineer and Waterfront LLCs shall provide the City with a copy of all documentation related to any such inspection within thirty (30) days of the inspection. All maintenance required by the above inspections shall be the responsibility and duty of Waterfront LLCs and must be completed by a properly licensed and insured contractor approved by the City within ninety (90) days of the inspection, or as directed by the inspection report, whichever is sooner. Waterfront LLCs shall provide City with a copy of all documentation related to the maintenance within thirty (30) days of the completion of said maintenance. In the event that Waterfront LLCs fail to satisfy the ongoing inspection and maintenance duties and requirements set forth in this Agreement, and such failure continues for a period of thirty (30) days following written notice from City thereof (provided, however, if the nature of such duties and requirements reasonably requires a period longer than thirty (30) days to complete, then Waterfront LLCs shall not be deemed to have failed to timely perform such duties and requirements so long as Waterfront LLCs commence such performance within the initial thirty (30) day period and diligently prosecutes the same to completion), Waterfront LLCs are authorized to complete inspections and maintenance as deemed appropriate by City or Waterfront LLCs' agents, and in City's sole discretion, City may seek payment from Waterfront LLCs for City's actual, out of pocket costs and expenses in connection therewith and may place a lien on the Building for such costs and expenses if Waterfront LLCs fail to reimburse City within thirty (30) days following written demand therefor, which shall include reasonable supporting documentation for such costs and expenses.
12. Easement Runs with the City Property. The Easement hereby granted shall be an easement running with the real property rights constituting the Easement Area as described in Exhibit C, for the benefit of the Waterfront LLCs Building and property described in Exhibit B and shall be binding upon City and its successors and assigns and successive owners of the Easement Area and inure to the benefit of Waterfront LLCs and its successors and assigns. The Easements granted under this instrument shall continue so long as the Waterfront LLCs Building, as they are to be constructed, remain in existence.
13. Restrictions, Covenants, and Indemnities Run with the Waterfront LLC's's Building. The restrictions, covenants and agreements of indemnity hereby imposed in connection with the construction and utilization of the subject Waterfront LLCs' Building (collectively the "Restrictions") shall run with the Easement Area (Exhibit C) and the Waterfront LLCs' Building (Exhibit B) for the benefit of the Easement Area and shall be binding upon the Waterfront LLCs and its successors and assigns and shall inure to the benefit of the City and its successors and assigns and all successive owners of the Easement Area. The Restrictions shall be perpetual

obligations and shall not terminate, notwithstanding any termination, expiration or revocation of the terms of the Easement, until satisfied in accordance with terms hereof.

14. Non-waiver. No failure to exercise and no delay in exercising any right, power, or privilege on the part of any Party shall constitute a waiver of any other or further exercise thereof or the exercise of any right, power, or privilege. Further, the rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law. No waiver of any of the provisions of this instrument shall be deemed or shall constitute a waiver of any other provisions whether or not similar, nor shall any constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.
15. Further Assurances. Each Party further covenants to the other to execute any and all other documents which may be necessary to effect the terms and conditions of this Agreement and any other agreements or documents as contemplated by this Agreement.
16. Incorporation by Reference. All recitals and exhibits to this Agreement are hereby incorporated by reference as if set forth herein.
17. Right of Specific Performance. Each Party shall have the right to require the other Party to specifically perform such Party's obligations hereunder, including the right to enjoin the other Party from exercising any right that may interfere with the rights granted hereunder to the other Party.
18. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument. This Agreement may be signed and delivered by facsimile or via email in PDF or other similar format, each of which shall be effective as an original.
19. Entire Agreement. This Agreement sets forth the entire understanding of the Parties, and supersedes all prior understandings relating to them, whether written or oral. This Agreement may be amended in whole or in part only by mutual written agreement of City and Waterfront LLCs.
20. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and permitted assigns. This Agreement shall not confer any rights or remedies upon any person other than the Parties and their respective successors and permitted assigns.
21. Further Acts and Cooperation. Each Party shall deliver to the other Party, from time to time, at no additional cost to the requesting Party, such further information, plans, instruments, records, or other documents or assurances as may be reasonably necessary to give full effect to this Agreement and to allow each Party fully to exercise such Party's obligations and enjoy such Party's rights accorded by this Agreement.

22. Notice. Waterfront LLCs shall give City reasonable prior written notice of Waterfront LLCs' intention to commence construction of the Building of no less than fifteen (15) business days.
23. Binding Effect & Runs with the Land. The benefits and burdens of this Agreement are appurtenant to and shall run with the Waterfront LLCs' Property and City's Property, as applicable, shall be binding upon the heirs, executors, administrators, personal representatives, transferees, or successors in interest or assigns of the Waterfront LLCs and City, as the current fee or leasehold owners thereof, for the term hereof, and shall not be extinguished by nonuse or abandonment, or transfer of any interest in the properties affected.
24. Attorneys' Fees. If any suit is instituted by either party to this Agreement arising out of or pertaining to this Agreement, the substantially prevailing party shall be entitled to recover its reasonable attorneys' fees and all costs and expenses incurred relative to that suit and on appeal from the substantially non-prevailing party, in addition to such other relief available to the substantially non-prevailing party.
25. Severability. If any clause, sentence, or other portion of the terms, conditions, covenants, and restrictions of this Agreement becomes illegal, null, or void for any reason, or is held by any court of competent jurisdiction to be so, the remaining portions will remain in full force and effect.
26. Enforcement and Venue. In the event of a breach of any of the covenants or agreements set forth in this Agreement, the parties shall be entitled to any and all remedies available at law or in equity, including but not limited to the equitable remedies of specific performance or mandatory or prohibitory injunction. The Parties agree that if legal action is necessary in connection with this Agreement, exclusive venue shall lie in the Superior Court of Washington, Clark County.
27. Amendments. It is hereby mutually agreed and understood that any addition, variation, or modification to this Agreement shall be ineffective unless in writing and signed by the parties hereto or their successors in interest.
28. Applicable Law. This Agreement and the performance thereof shall be governed, interpreted, construed, and regulated by the laws of the state of Washington.
29. Recording & Excise Tax. This Agreement shall be recorded and Waterfront LLCs shall pay all recording costs and any applicable excise taxes due in connection with making of this Agreement.
30. Authority. City represents and warrants that it is the owner of the City Property and that the person executing this Agreement on its behalf is duly authorized to do so. Waterfront LLCs represent and warrant that it is the owner of the Waterfront LLCs' Property and the person or persons executing this Agreement on behalf of the Waterfront LLCs are duly authorized to do so. All persons signing this Agreement in a representative capacity represent and warrant they have authority to do so.

Executed and delivered as of the day and year first above written.

[Signatures on following pages]

By: _____
Eric Holmes, City Manager

Attest:

Natasha Ramras, City Clerk

I certify that I know or have satisfactory evidence that **Eric Holmes** signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the City Manager of the City of Vancouver to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this _____ day of _____, 2019.

NOTARY PUBLIC for Washington
Residing in _____
My Commission Expires: _____

Waterfront LLC's

By:_____

XXXXXX
XXXXXX

STATE OF WASHINGTON)
) ss.
County of Clark)

I certify that I know or have satisfactory evidence that _____ signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the _____ of Waterfront LLC's, LLC to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this _____ day of _____, 2019.

NOTARY PUBLIC for Washington
Residing in _____
My Commission Expires: _____

CG Waterfront, LLC

By:_____

XXXXXX
XXXXXX

STATE OF WASHINGTON)
) ss.
County of Clark)

I certify that I know or have satisfactory evidence that _____ signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the _____ of CG Waterfront, LLC to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this _____ day of _____, 2019.

My Commission Expires: _____

By:_____

STATE OF WASHINGTON)
) ss.
County of Clark)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this _____ day of _____, 2019.

My Commission Expires: _____