

NORTH CAROLINA

DEVELOPMENT AGREEMENT

WAKE COUNTY

This Development Agreement (the “**Agreement**”), made this the _____ day of _____, 2023, by and between the Town of Apex, a municipal corporation under the laws of North Carolina (the “**Town**”) and Lennar Carolinas, LLC, a Delaware limited liability company (the “**Developer**”).

WITNESSETH:

WHEREAS, Developer is the owner of those certain tracts of real property identified as New Lot 3 and New Lot 4 totaling approximately 30.65 acres and located between South Salem Street to the south, Apex Barbecue Road to the north, and NC-540 to the west, as depicted on the map entitled Depot 499 Recombination Plat (the “**Map**”), recorded in Book of Maps 2022, Pages 2237 - 2240 at the Wake County Register of Deeds and the developer and contract purchaser of New Lot 1, containing 32.54 acres, as shown on the Map, and New Lot 1, containing 73.34 acres, as shown on the map recorded in Book of Maps 2022, Pages 213 - 214 at the Wake County Register of Deeds (the “**Properties**”) and plans to develop the Properties or cause the development of the Properties as a PUD with residential and commercial uses in accordance with the Depot 499 PUD Plan; and

WHEREAS, the Developer desires to construct a waterline and all necessary or convenient appurtenances thereto (collectively, the “**Facilities**”) to connect the Properties to certain existing Town water infrastructure so that the Developer can develop the Properties in the manner that Developer desires. Developer further desires for the Town to accept the public dedication of the Facilities once built and to assume maintenance of the Facilities; and

WHEREAS, to meet its needs, the Developer proposes to arrange for, accomplish, and finance the extension, construction, and installation of the Facilities, upon, across, beneath, and through land adjacent to the Properties pursuant to Chapter 12 of the Town’s Code of Ordinances; and

WHEREAS, Developer has agreed to construct the Facilities in accordance with the Town’s Master Water Plan at a 20-inch size which is in excess of the 10-inch waterline required to serve the Developer’s proposed development; and

WHEREAS, pursuant to North Carolina General Statutes 160A-320, the Town has a duly adopted “Policy Regarding Town Participation in Utility Projects” governing reimbursement of costs incurred by private developers in constructing extensions of public utilities infrastructure and related public improvements (the “**Policy**”); and

WHEREAS, the Town has determined that the public cost of the improvement subject to reimbursement will not exceed \$250,000 and that the coordination of separately constructed

improvements would be impracticable and therefore, desires to optimize the expansion of its utility infrastructure and related public improvements while minimizing the cost to the Town.

NOW, THEREFORE, IT IS HEREBY AGREED between the Town and the Developer:

1. Recitals. The foregoing recitals shall constitute an integral part of this Agreement, and this Agreement shall be construed in light thereof.

2. Construction of Improvements. The Developer shall, at its own expense, construct the Facilities, all of which are more particularly described on **Exhibit A** attached hereto and incorporated herein by reference (the “**Plans**”). The Developer shall design, construct and install the Facilities (i) in a good and workmanlike manner, (ii) in compliance with this Agreement, the Policy, Town Specifications, and all applicable Federal, State, and local laws, statutes, ordinances, rules, regulations, policies, and specifications, and (iii) in accordance with the Plans. The Developer hereby represents to the Town, and the Town concurs, that the Facilities are in excess of the size and/or capacity of the facilities required to serve the Developer’s proposed development, and therefore the Facilities are subject to reimbursement pursuant to the Policy.

The Developer shall administer the construction contract without cost or expense to the Town except as provided for in this Agreement, and the Town may require the Developer to file reports of its administration with the Town’s Engineer.

3. Certification, Inspection, and Acceptance of Facilities. Upon completion of construction of the Facilities, Developer shall provide the Town with written certification and as-built drawings from Developer’s designated consulting engineering firm that the Facilities are complete and have been constructed and installed in compliance with this Agreement and within appropriate easements or fee simple parcels. The Facilities shall be offered for public dedication to the Town upon completion of construction and shall be subject to inspection and acceptance by the Town. Upon the inspection and acceptance of the Facilities, Developer shall take any steps necessary to transfer title to and possession of the Facilities, including but not limited to all steps necessary to acquire and transfer to the Town all easement rights, rights-of-way, and all other rights of use, access, ingress and egress, necessary or desirable for the existence, improvement, use, operation, inspection, maintenance, repair, reconstruction, replacement and/or removal of the Facilities. Thereafter, the Town shall own the Facilities and have exclusive possession and control of the Facilities. In the event that any defect or breach of warranty claim becomes known after acceptance and dedication of the Facilities, Developer agrees either to pursue its rights and claims against the contractor or other party responsible for the defect or breach of warranty and pay over any recoveries to the Town or to assign such rights and claims to the Town as directed by the Town.

4. Approved Project Costs.

a. The “**Approved Project Costs**” are those costs attributed to the construction of the waterline as shown in the estimate provided by the Developer’s Engineer and attached hereto as **Exhibit B**. Costs that are not certified by the Developer’s Engineer and approved by the Town’s Engineer shall not be included in the Approved Project Costs. Approved Project Costs shall not include any costs for designing, bidding, and managing services, or for acquisition of property or easements required for construction of the Facilities. The Developer’s engineer shall provide an estimate of the incremental cost differential for the construction of a 20” waterline instead of a 10” waterline. The amount of the actual incremental construction costs is subject to the review and approval of the engineer designated by the Town (the “**Approved Incremental Construction Cost**”).

b. The Town shall not participate in or be responsible to pay or reimburse any change order increasing the costs of the Facilities unless agreed to by the Town and approved by the Town’s Engineer in writing prior to execution of the change order. In other words, the costs associated with a change order shall be excluded from the Approved Project Costs unless the change order is pre-approved by the Town’s Engineer, which approval will not be unreasonably withheld, conditioned or delayed. Developer shall immediately upon learning of a proposed change order provide the Town with all the documentation and information needed for the Town to evaluate the proposed change order. In addition, the Approved Project Costs incurred by Developer in constructing the Facilities shall reflect any cost savings that reduce the amount that the Developer actually pays to construct the Facilities.

5. Reimbursements. The Town shall reimburse the Approved Incremental Construction Cost as provided below:

a. *Credits.* The Developer shall receive a credit against water capital reimbursement fees otherwise due to the Town for the development of the Properties but not yet paid up to a total combined amount of credits that is equal to the total amounts of the Approved Incremental Construction Cost not to exceed \$250,000.

b. *Payments.* If the fee credits are less than the Approved Incremental Construction Cost, the Town shall reimburse the Developer the remaining unreimbursed balance of the Approved Incremental Construction Cost in one lump sum payment to be made to Developer within sixty (60) days after the Facilities are dedicated and accepted as required by Paragraph 3 above.

c. The reimbursement referenced in this Paragraph 5 shall be the only credits, reimbursements, payments, compensation or other remuneration to which the Developer shall be entitled in connection with this Agreement. In no event shall the credits, payment, or reimbursement paid by the Town under this Agreement exceed the Approved Incremental Construction Cost.

6. Notices. Any notice given pursuant to this Agreement shall be deemed given if (a) delivered by hand, or (b) faxed to the addressee and then deposited in the United States Mail to the addressee, postage paid certified mail, return receipt requested and addressed as follows:

If to the Town: Town of Apex
Post Office Box 250
Apex, NC 27502-0250
Attention: Michael Deaton, Water Resources Director
Email: michael.deaton@apexnc.org

If to Developer: Lennar Carolinas, LLC
1100 Perimeter Park Drive, Suite 112
Morrisville, NC 27560
Attn: Stephen Dorn
Email: stephen.dorn@lennar.com

7. Termination for Failure to Complete. If Developer does not complete construction of the Facilities on or before the fifth anniversary of the full execution of this Agreement absent force majeure delays (as defined below), the Town may terminate this Agreement and have no further obligations to Developer.

8. Delay Beyond the Control of the Parties. Neither Developer nor Town, having taken commercially reasonable precautions, shall be in default of the provisions of this Agreement for delays in performance due to forces beyond the control of the parties. “Forces beyond the control of the parties” shall mean, but is not limited to, delay caused by natural disaster, fire, flood, earthquakes, storms, lightning, epidemic, pandemic, war, riot, civil disobedience, or other event reasonably outside of the parties’ control. Due to the ever-changing circumstances surrounding the COVID-19 pandemic, situations may arise during the performance of this Agreement that affect availability of resources and staff of Developer or Developer’s contractors or the Town. There could be changes in anticipated performance times and service costs. Developer will exercise reasonable efforts to overcome the challenges presented by current circumstances. The Parties agree that they shall not be liable to each other for any delays, expenses, losses, or damages of any kind arising out of the impact of the COVID-19 pandemic.

9. Indemnification. To the extent permitted by law, the Developer agrees to defend, pay on behalf of, indemnify, and hold-harmless the Town of Apex, its elected and appointed officials, employees, agents, and volunteers against any and all claims, demands, suits or losses, including all costs connected therewith, for any damages which may be asserted, claimed or recovered against or from the Town of Apex, its elected or appointed officials, employees, agents, and volunteers by reason

of personal injury, including bodily injury or death and/or property damage, including loss of use thereof solely caused by the negligence of the Developer or Developer's contractors.

10. Anti-Human Trafficking. The Developer warrants and agrees that no labor supplied by the Developer or the Developer's subcontractors in the performance of this Agreement shall be obtained by means of deception, coercion, intimidation or force, or otherwise in violation of North Carolina law, specifically Article 10A, Subchapter 3 of Chapter 14 of the North Carolina General Statutes, Human Trafficking.

11. Insurance. The Developer shall maintain valid general liability insurance in the minimum amount of \$1,000,000, commercial automobile liability insurance in the minimum amount of \$2,000,000, and provide certificates of such insurance naming the Town of Apex as an additional insured by endorsement to the policies. If the policy has a blanket additional insured provision, the contractor's insurance shall be primary and non-contributory to other insurance. Additionally, the Developer shall require all of the Developer's subcontractors to maintain and show proof of workers' compensation and employer's liability insurance in the minimum amount of \$1,000,000. The Developer shall provide notice of cancellation, non-renewal or material change in coverage to the Town of Apex within 10 days of their receipt of notice from the insurance company. All required certificates of insurance, endorsements, and blanket additional insured policy provisions are attached and considered part of this document. Notwithstanding the foregoing, neither the requirement of Developer to have sufficient insurance nor the requirement that Town is named as an additional insured, shall constitute waiver of the Town's governmental immunity in any respect, under North Carolina law.

12. Nondiscrimination. Pursuant to Section 3-2 of the Town of Apex Code of Ordinances, Developer hereby warrants and agrees that Developer will not discriminate against a protected class in employment, subcontracting practices, or the solicitation or hiring of vendors, suppliers, or commercial customers in connection with this Agreement. For the purposes of this Agreement "protected class" includes age, race, religious belief or non-belief, ethnicity, color, national origin, creed, sex, sexual orientation, gender identity, marital status, natural hair style, genetic information, pregnancy, familial status, disability, veteran or military status, or disabled veteran status.

13. E-Verify Compliance. The Developer shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify). Developer shall require all of the Developer's subcontractors to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify). Town shall comply with North Carolina General Statute § 160A-169.1 (E-Verify).

14. Complete Agreement, Modifications, Waiver and Assignment. This Agreement constitutes the entire agreement between the parties hereto and it is understood and agreed that all undertakings, negotiations, representations, promises, inducements and agreements heretofore had

between these parties are merged herein. This Agreement may not be changed, modified, or amended orally, but only by an agreement in writing signed by both the Town and the Developer. No waiver of any of the provisions to this Agreement shall be valid unless in writing and signed by the party against whom it is sought to be enforced. This Agreement is not assignable without the written consent of all parties to this Agreement. There are no third-party beneficiaries of this Agreement.

15. No Agency, Joint Venturer Relationship. The Town and the Developer agree to exercise good faith in dealing with each other. The Town and the Developer are not agents, partners, or joint venturers of any kind, and the Town shall have no relationship via this Agreement with any third party with whom the Developer contracts in furtherance of this Agreement.

16. Choice of Law, Jurisdiction, and Venue. This Agreement shall be governed, interpreted and construed under the laws of the State of North Carolina without regard to principals of conflicts of laws. The parties agree that any dispute or other matter concerning this Agreement shall be decided by state or federal courts sitting in Wake County, North Carolina. The parties irrevocably submit to the sole and exclusive jurisdiction of such courts and waive all objections and defenses based on jurisdiction and/or improper or inconvenient venue. The parties agree that this Agreement may be enforced by specific performance.

17. Electronic Signature. Pursuant to Article 40 of Chapter 66 of the North Carolina General Statutes (the Uniform Electronic Transactions Act) this Agreement and all documents related hereto containing an electronic or digitized signature are legally binding in the same manner as are hard copy documents executed by hand signature. The Parties hereby consent to use electronic or digitized signatures in accordance with the Town's Electronic Signature Policy and intend to be bound by the Agreement and any related documents. If electronic signatures are used the Agreement shall be delivered in an electronic record capable of retention by the recipient at the time of receipt.

[REMAINDER OF PAGE INTENTIONALLY BLANK – SIGNATURES FOLLOW]

IN WITNESS WHEREOF, the Town and the Developer have duly executed this Agreement under seal as of the day and year first above written.

TOWN OF APEX

BY: _____(SEAL)
Shawn Purvis, Interim Town Manager

ATTEST:

Allen Coleman, Town Clerk

STATE OF NORTH CAROLINA)
WAKE COUNTY)

I, a Notary Public of the County and State aforesaid, certify that Allen Coleman, personally came before me this day and acknowledged that he is Town Clerk of the Town of Apex, a North Carolina Municipal Corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its Town Manager, sealed with its corporate seal and attested by her as its Town Clerk.

Witness my hand and official stamp or seal, this the _____ day of _____, 20__.

_____ [AFFIX NOTARIAL STAMP SEAL]
[Signature of Notary Public]

My Commission Expires: _____

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act

By: _____
Antwan Morrison, Finance Director

DEVELOPER

LENNAR CAROLINAS, LLC, a Delaware
limited liability company

BY: _____

Print Name: Robert Smart

Title: Vice President

STATE OF _____

COUNTY OF _____

I, a Notary Public of the County and State aforesaid, do hereby certify that Robert Smart, Vice President of Lennar Carolinas, LLC, a Delaware limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of

_____.

Witness my hand and official stamp or seal, this the _____ day of _____, 2023.

[AFFIX NOTARIAL STAMP SEAL]

[Signature of Notary Public]

My Commission Expires: _____