

NORTH 40 IN LIEU TRAFFIC FEE CREDIT AGREEMENT

This North 40 In Lieu Traffic Fee Credit Agreement (“Agreement”) is entered into effective this ____ day of August, 2020, by and between the Town of Los Gatos, a California General Law City (“Town”) and SummerHill N40 LLC, a California limited liability company (“SummerHill”), each a “Party” and collectively “Parties,” with respect to the following facts and circumstances:

WHEREAS, in 2017, the Town approved Phase 1 of the North 40 project (“Project”) to be developed on part of the property known as the North 40 site, bounded generally by California State Route 17 to the west, Lark Avenue to the south, California State Route 85 to the north and Los Gatos Boulevard to the east. SummerHill is the developer of the Project; and

WHEREAS, the Town by Resolution 2014-59 adopted a Traffic Impact Policy (the “Policy”). Under the Policy, developments such as the Project must pay Traffic Impact Mitigation Fees based upon trip generation of the development. The Policy contains a Traffic Improvements Project List, which identifies traffic improvement for which a developer that installs such improvements is granted a credit against its Traffic Impact Mitigation Fees; and

WHEREAS, per the conditions of approval of Architecture and Site Application S-13-090 for the Project, the Project's Traffic Impact Mitigation Fee shall be paid before issuance of a building permit.

WHEREAS, SummerHill N40 LLC is ready to pull building permits for Lots 1-22, 24-27, and 30-39 of Tract 10441 recorded on October 11, 2018 that will result in the generation of 2,338 average daily trips resulting in a Traffic Impact Mitigation Fee obligation (the "Phase 1 Traffic Fees") of Two Million One Hundred Seventy-Four Thousand and Seventy-Five Dollars (\$2,174,075);

WHEREAS, the Project is required by its conditions of approval to construct four improvements that are on the Traffic Improvements Project List: (1) Westbound Lark to Hwy 17 northbound ramps, (2) Lark/Los Gatos Intersection Improvements, (3) Complete street Improvements – Lark from Garden Hill to Los Gatos, and (4) Local Bikeway Improvements (collectively, the “Phase 1 Traffic Improvements”); and

WHEREAS, the Town and SummerHill have worked together to refine the exact scope of the Phase 1 Traffic Improvements. Pursuant to such agreed-upon scope, SummerHill has caused its contractor DeSilva Gates to prepare a detailed estimate of the cost of each of these Phase 1 Traffic Improvements based on actual bids. These estimates (the “Current Estimates”) are memorialized in SummerHill’s letter of February 20, 2020 to the Town. The two-page letter (including the eight-page attachment from DeSilva Gates) is attached hereto as Exhibit “A” and incorporated herein by this reference; and

WHEREAS, the Town and SummerHill agree that SummerHill shall have credits applied to the Traffic Impact Mitigation Fee that it pays to the Town in order to obtain building permits for the Project in amounts based upon the Current Estimates, with adjustments detailed below.

NOW THEREFORE, in consideration of the foregoing recitals and the conditions and covenants contained herein, the parties hereto agree as follows

1) Traffic Improvements. The amount of credits that shall be applied against the Phase 1 Traffic Fees to determine the amount of such fees that Summerhill must pay to obtain building permits shall be based upon the Current Estimates. For each of the four Phase 1 Traffic Improvements listed above, the applicable amount of the Current Estimates for each improvement shall be as listed below:

a) Westbound Lark to Hwy 17 northbound ramps: Construction total of \$1,268,000 plus 12% for both soft costs and contingencies, for a total of \$1,572,320.

b) Lark/Los Gatos Intersection Improvements: Construction total of \$769,000 plus 12% for both soft costs and contingencies, for a total of \$953,560.

c) Complete street Improvements – Lark from Garden Hill to Los Gatos: Construction total of \$213,000 plus 12% for both soft costs and contingencies, for a total of \$264,120.

d) Local Bikeway Improvements: No credit requested.

2) Initial Amount of Credits. The total credit based upon paragraph 1 above shall be in the amount of \$2,790,000 (the "Baseline Costs"), which includes the construction costs, soft costs and contingencies. Subtracting the Phase 1 Traffic fees from the Baseline Costs leaves a potential credit amount for future reimbursement to SummerHill (the "Baseline Credit") of Six Hundred Fifteen Thousand Nine Hundred and Twenty-Five Dollars (\$615,925). Thus, the parties agree that SummerHill's obligation to pay Traffic Impact Mitigation Fees to obtain building permits for the Project shall be satisfied by the completion of the Phase I Traffic Improvements.

3) Adjustment of Credits. Should significant changes to the scope of work occur due to unforeseen circumstances, adjustments to the credits may be granted by the Town up to a total of ten percent. This adjustment is not intended to address minor variation in quantities, labor, or other construction costs. Following completion of the Phase 1 Traffic Improvements, SummerHill may elect to provide to the Town a summary of expenses reasonably supported by invoices from their general contractor, subcontractors, and soft cost vendors in the event that the actual costs of completing the Phase 1 Traffic Improvements (the "Actual Costs") have exceeded the Baseline Costs. The Town may reasonably audit these numbers at its own expense, with any such audit to be completed within sixty (60) days of submission of the supporting documentation. If the Actual Costs as finally agreed upon by the Parties exceed the Baseline Costs, then the Baseline Credit shall be increased by the difference between the Actual Costs and the Baseline Costs. The increased amount, together with the original amount of the Baseline Credit, shall be deemed to be the "Adjusted Credit." If an Adjusted Credit has not been computed pursuant to this paragraph, then the Adjusted Credit as used in paragraph 4 herein shall be deemed to be the Baseline Credit.

4) Reimbursement From Other Development That is a Part of Tentative Map M-13-014. Each time that one or more building permits are ready for release by the Town for any or all lots 23, 28, 29 of Tract 10441 or APN 424-07-036 and 037, the Traffic Impact Mitigation Fee for each such lot shall be calculated per the impact fee policy in effect at the time and paid by the building permit applicant. If the Adjusted Credit is a positive number, then such amount of such fees will be paid by the Town as a reimbursement to SummerHill N40 LLC within thirty (30) days of receipt thereof. Each time a payment is made to SummerHill pursuant to this paragraph 4, the Adjusted Credit shall be reduced by such payment. This obligation shall cease once the Adjusted Credit reaches zero or the original

building permits as identified in this section have been issued. This section shall be in effect for a period of five years.

5) No Reimbursement. No reimbursement for the Phase 1 Traffic Improvement from future projects that are not a part of Tentative Map M-13-014 shall be paid to SummerHill.

6) Dispute Resolution. Any dispute under this agreement, including with regard to the payment amounts to be paid pursuant to paragraph 3 hereunder shall first be negotiated by the Parties. If negotiation fails, either Party may demand binding arbitration, which shall be conducted under the auspices of the Judicial Arbitration and Mediation Service (JAMS). Each party shall bear its own costs and attorneys' fees in the arbitration, regardless of the outcome thereof.

7) Good Faith Cooperation. The Parties shall cooperate and use their good faith efforts to expedite the issuance of any necessary permits or permissions from the Town or from third parties for the construction of the Phase 1 Traffic Improvements. The Parties to this Agreement agree to execute any and all documents reasonably necessary to effectuate the terms, conditions, purposes, and aims of this Agreement.

8) Integrated Agreement. This Agreement, together with the exhibit attached hereto, shall be deemed the complete and total agreement of the parties concerning the subject matter hereof, which supersedes memoranda or correspondence, if any, and any previous drafts or oral understandings, if any, made by the parties concerning the subject matter hereof. Nothing herein shall preclude the parties from executing such other documents as are necessary to perfect this Agreement.

9) No Third-Party Beneficiaries. This Agreement is intended exclusively for the benefit of the Parties hereto, and no third parties are entitled to any rights hereunder or to claim to be beneficiaries hereof.

10) Successors and assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors, transferees and assigns.

11) Amendments to be in Writing. This Agreement may not be altered, amended, modified or changed in any respect or particular whatsoever except by writing duly executed by all the parties to this Agreement.

12) Miscellaneous. This Agreement may be signed in counterparts. Each executed duplicate hereof shall be considered as an original. Facsimile or signatures on electronically transmitted documents in PDF form and copies of signatures shall have the same force and effect as original signatures. The captions and titles herein are for convenience only and shall not be used to interpret this Agreement.

IN WITNESS WHEREOF, The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

SummerHill N40 LLC, a California limited liability company

By: SummerHill Homes LLC, its Manager

By: _____

Its: _____

By: _____

Its: _____

TOWN OF LOS GATOS, a California municipal corporation

By: Laurel Prevetti

Its: Town Manager

APPROVED AS TO FORM:

Robert Schultz
Town Attorney

ATTEST:

Shelley Neis
Town Clerk