

SETTLEMENT AGREEMENT BETWEEN
THE TOWN OF LOS GATOS AND SUMMERHILL N40 LLC

This Settlement Agreement (“Agreement”) is entered into as of December 1, 2020 (“Effective Date”) by and between the Town of Los Gatos, a California municipal corporation (“Town”), and Summerhill N40 LLC, a California limited liability company (“SummerHill”), which are collectively referred to as the “Parties.”

RECITALS

A. SummerHill (as used herein, “SummerHill” includes predecessor and related entities to SummerHill N40 LLC) is the developer of that certain project known as Phase 1, 20.7 acres of the 44-acre North 40 Specific Plan area in the Town (“Project”). The Project includes 270 market rate residential units (of which 253 are to be built by Summerhill and 17 by others) and neighborhood-serving commercial uses. It also includes a multi-level mixed use building (the “Market Hall”) which includes commercial uses, 50 affordable residential units and an attached garage (the “Market Hall Garage”).

B. On August 1, 2017, the Town Council approved the Architecture and Site Permit (S-13-090) and the Vesting Tentative Map (M-13-014) by adopting Resolution 2017-045 (the “Resolution”). The Resolution contains 179 separately numbered “Conditions of Approval for Architecture and Site” (the “A&S COAs”).

C. As approved, the Market Hall Garage is a four-story structure with one below-grade and three above-grade parking levels. In or about February 2020, SummerHill filed an application requesting that the approval be modified to remove the below-grade parking level (the “Garage Application”). The rationale for the Garage Application was that even with the below-grade level eliminated, the Market Hall would have more parking than required by the Town’s parking standards, and that there were environmental benefits to eliminating that extra construction.

D. The Garage Application was denied by the Planning Commission. SummerHill appealed the denial to the Town Council, which on October 20, 2020 denied the appeal (the “Denial”).

E. On November 11, 2020, Summerhill filed a claim with the Town under the Government Claims Act pursuant to Government Code Section 910 (the “Claim”). The Claim alleges that the Denial was wrongful and in violation of law for several reasons, and seeks unspecified damages estimated to be in excess of Five Million Dollars.

F. The Parties wish to provide for a settlement of the Claim by entering into this Agreement and modifying certain of the A&S COAs as specified herein. Conditions 1 and 42 of the A&S COAs give authority to the Town Community Development Director and the Parks and Public Works Director to modify said conditions. The modifications proposed herein do not affect the scope or magnitude of the improvements, but only potentially the construction timing thereof. No conditions are added or eliminated.

ATTAHJMENT 2

SETTLEMENT AGREEMENT TERMS

In consideration of the Recitals set forth above, the terms and conditions of this Agreement and other valuable consideration, the adequacy of which is hereby acknowledged, the Parties agree as follows:

1. Council Action. The Town Council agrees that certain specific A&S COAs contained in the Resolution shall be replaced in totality with modified versions of said conditions, as attached hereto as Exhibit A and incorporated herein by this reference; and (b) in all other respects the Resolution would remain in full force and effect. The Community Development Director and the Parks and Public Works Director are authorized to take all appropriate actions to effectuate and confirm such changes, consistent with their authority under the Resolution. The Town and SummerHill agree that all references in Exhibit A to market rate unit thresholds apply solely with respect to SummerHill's 253 market rate units.

2. Mutual Release.

2.1 Tolling of the Claim. Any and all statutes of limitation or other time limitations or deadlines to file suit under Federal, State or local law that may apply to any allegation, claim or cause of action that Summerhill may assert relating to or arising from the Denial shall be tolled from the Effective Date until March 31, 2021 ("Initial Tolling Period"). In the event that any lawsuit or other legal challenge to the Town Council's approval of this settlement ("Litigation") or the modification of the A&S COAs authorized herein is filed during the Initial Tolling Period, the Initial Tolling Period shall automatically extend and remain in effect until complete and final resolution of all Litigation, including resolution and exhaustion of any appeals if applicable ("Extended Tolling Period.")

2.2 Trigger of Releases. Upon the expiration of the Initial Tolling Period or the Extended Tolling Period if applicable, the Parties agree as follows: Each party hereto, and its respective employees, representatives, agents, related entities, officers, directors, shareholders, members, partners, predecessors, insurers, attorneys, administrators, successors and assigns, does hereby fully and forever completely release, acquit and discharge the other party and its respective employees, representatives, agents, related entities, officers, directors, shareholders, members, partners, predecessors, insurers, attorneys, administrators, successors and assigns, from any and all damages, claims, actions, disputes, demands, losses, liens, written contracts, costs, expressed and/or implied warranty obligations, attorneys' fees, costs, actions, causes of action, and liabilities of whatever kind and nature arising from or related to, the Denial, including the filing of the Claim, and the allegations contained in the Claim. This release does not extend to any claims the Parties may have in the future relating to construction of the Project or public improvements by SummerHill as part of the Project.

3. Town Discretion. Nothing in this Agreement shall be deemed to constrain or otherwise limit the discretion of the Town Council with respect to the Project.

4. Scope of Agreement. This Agreement only applies to the Denial. The Parties anticipate that SummerHill or a successor in interest may seek future approvals of other parts of the Project. The Parties acknowledge that any such future approvals shall be

subject to the Town's lawful ordinances, permits, codes and/or regulations, as well as state and federal law that may apply.

5. Entire Agreement. The Agreement constitutes the full and entire agreement between the Parties with respect to the subject matter hereof, superseding all prior agreements, negotiations and discussions among the Parties related to the Denial, and the Parties acknowledge that there is no other agreement, oral or written, regarding the subject matter of the Agreement. The Agreement may not be modified, except by a written instrument executed by each of the Parties.

6. Final Agreement. The Parties acknowledge that: (a) the Agreement and its reduction to final form is the result of good faith negotiations among the Parties through their respective counsel; (b) the Parties' counsel have reviewed and examined the Agreement before execution; and (c) this Agreement is the result of joint draftsmanship and that should any of the provisions hereof be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague or ambiguous, such provisions shall not be construed against the drafting party in accordance with California Civil Code Section 1654, and that each party to this Agreement waives the effect of such statute.

7. No Admission. This Agreement is the result of a compromise and shall not be considered as an admission of liability or responsibility on the part of any party herein released, nor shall the release of any claims or waiver of costs in consideration of the execution of the Agreement constitute or be construed as an admission of any liability whatsoever by any party herein released.

8. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, legal representatives, successors, assigns and transferees.

9. Severability. If any portion of this Agreement is held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, the court is authorized and instructed to modify this Agreement, if possible, to effectuate the original intent of the parties. However, in no event shall the releases be effective unless the Modification Resolution is adopted and remains in effect, without becoming a subject of litigation.

10. Execution in Counterparts. This Agreement may be executed electronically and in one or more identical counterparts and all such counterparts together shall constitute a single instrument for the purpose of the effectiveness of this Agreement.

<p>TOWN OF LOS GATOS, A municipal corporation</p> <hr/> <p>By: Laurel Prevetti, Town Manager</p>	<p>SUMMERHILL N40 LLC, a California Limited Liability Company</p> <p>By: SummerHill Homes LLC, its manager</p> <hr/> <p>By</p> <p>Its: _____</p> <hr/> <p>By</p> <p>Its: _____</p> <hr/>
<p>Approved as to Form:</p> <hr/> <p>By: Robert Schultz, Town Attorney</p> <hr/>	

EXHIBIT A

MODIFIED CONDITIONS OF APPROVAL

1. Condition 7: BMP UNITS: BMP applicants shall be qualified by the Santa Clara Housing Authority. The affordable units shall be required to be maintained for the term required under State Density Bonus law or for the life of the buildings, whichever is longer. The developer shall enter into an Affordable Housing agreement with the Town prior to issuance of building permits. The proposed BMP units must be available and/or occupied prior to final occupancy issuance for the 225th market rate unit or when the Community Development Director determines, at his/her sole discretion, that the BMP units are substantially completed and there would be no health and safety concerns with allowing for the certificate of occupancy of the market rate units before the final completion and acceptance of the BMP units. Construction of the Market Hall and BMP units will commence in January 2021 and be diligently pursued to completion of the Market Hall and BMP units with a projected end date of February 2023.
2. Condition 63: GRADING ACTIVITY SEQUENCING: On-site grading activity may be done concurrently with the off-site public improvements.
3. Condition 82. PUBLIC IMPROVEMENTS: The following improvements shall be installed by the Developer. Plans for those improvements shall be prepared by a California registered civil engineer, reviewed and approved by the Town of Los Gatos, and guaranteed by contract, Faithful Performance Security and Labor & Materials Security before the issuance of a building permit or the recordation of a map. The improvements must be substantially completed, as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.
 - a. Los Gatos Boulevard:
 - i. Provide new curb, gutter, and sidewalk with landscaped planting strip, street lights, signing, striping, new traffic signals or traffic signal modifications and storm drainage along the Phase 1 frontages as directed by the Parks and Public Works Director. All improvements shall be constructed per Town Standard details.
 - ii. The existing street section of Los Gatos Boulevard from Lark Avenue to Burton Road shall be removed and a traffic-appropriate engineered structural pavement section for the full-width shall be constructed and subsequently re-striped, as directed by the Parks and Public Works Director. Final grind and overlay shall be completed when the Parks and Public Works Director determines, at his/her sole discretion, that final grind and overlay shall be completed (not tied to issuance of certificates of occupancy).
 - iii. A multi-use path shall be installed along the project's Phase 1 Los Gatos Boulevard frontage, as directed by the Parks and Public Works Director.
 - iv. Center median islands for prohibiting left turn movements from northbound and southbound Los Gatos Boulevard shall be installed, except at Neighborhood Street, between Lark Avenue and the northern limits of Phase 1.
 - b. Lark Avenue:
 - i. Provide new curb, gutter, and sidewalk with landscaped planting strip, street lights, signing, striping, new traffic signals or traffic signal modifications, and storm drainage along the northern side of Lark Avenue from the California State Route 17

northbound on-ramp to Los Gatos Boulevard as directed by the Town Engineer. All improvements shall be constructed per Town of Los Gatos Standard Details.

ii. A multi-use path shall be installed along the north side of Lark Avenue from Los Gatos Boulevard to the California State Route 17 northbound ramps.

iii. The existing street section of Lark Avenue from the California State Route 17 northbound on-ramp to Los Gatos Boulevard shall be removed and a traffic appropriate engineered structural pavement section for the full-width shall be constructed and subsequently re-stripped, as directed by the Parks and Public Works Director. Final grind and overlay shall be completed when the Parks and Public Works Director determines, at his/her sole discretion, that final grind and overlay shall be completed (not tied to issuance of certificates of occupancy).

4. **CONDITION 84. FRONTAGE IMPROVEMENTS:** The Applicant shall be required to improve the project's public frontages to the current Town of Los Gatos Standards. These improvements may include, but are not limited to:
- a. Curb
 - b. Gutter
 - c. Sidewalk
 - d. Driveway approach(es)
 - e. Curb ramp(s)
 - f. Street lighting (upgrade and/or repair)
 - g. Traffic signal(s)

The improvements must be substantially completed, as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.

5. **CONDITION 85. FRONTAGE IMPROVEMENTS (INTERSECTION OF LARK AVENUE AND LOS GATOS BOULEVARD):** The Applicant shall upgrade the existing traffic signal to current Town of Los Gatos standards. These improvements include, but may not be limited to:
- a. signal controller cabinet assembly
 - b. signal service pedestal
 - c. update of non-LED signal indication to LEDs
 - d. LED safety lights
 - e. update of non-ADA compliant pedestrian pushbuttons to ADA compliance
 - f. eight (8) inch signal heads to twelve (12) inch
 - g. installation of pedestrian count down signals where non-pedestrian count down signals are currently located
 - h. fire preemption
 - i. video detection system
 - j. signal interconnection
 - k. fiber optic connection
 - l. communication modem and switches

As directed by the Parks and Public Works Director. The improvements must be substantially completed as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 125th market rate unit.

6. **Condition 88: LARK AVENUE BIKE LANES:** A 10-foot multi-use trail will be installed on the project's Lark Avenue frontage. The Applicant shall install from this multi-use trail a Class II or better bike lane extending west to the connection point with the Los Gatos Creek Trail. Applicant will install a Class II or better bike lane on the

east side of Lark Avenue from the intersection of Los Gatos Boulevard to the Los Gatos Creek Trail. The Lark Avenue roadway along this section shall be slurry sealed prior to final striping. The improvements must be substantially completed, as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.

- 7.. Condition 89: GREEN BICYCLE FACILITIES: The Applicant shall install green bike lanes and bike boxes in all directions of improved streets and intersections as directed by the Town Engineer. The improvements must be substantially completed, as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.
8. Condition 90: MULTI-MODAL PATH: The Applicant shall construct and install a multi-use path system that complies with the direction provided by Town Council at a Special Meeting conducted on June 17, 2015. During said meeting, a motion passed unanimously stating "All projects for development shall include multi-modal paths, physically separated from vehicle roadways running from north to south and providing connectivity to perimeter paths at both the north and south ends." Said paths shall:
 - a. Extend through the development and along the project frontage.
 - b. Connect to northern and southern ends of the development.
 - c. Connect the intersections of:
 - i. Lark Avenue and the northbound California State Route 17 on-ramps.
 - ii. Lark Avenue and Los Gatos Boulevard.
 - iii. Neighborhood Street and Los Gatos Boulevard.

Connections to the above-listed intersections shall be constructed with enhanced amenities, such as textured pavement and adequate waiting areas for pedestrians and bicyclists, to encourage use of the multi-use path. The multi-use path shall be placed within a ten (10) foot easement along Lark Avenue. The multi-use path shall be placed behind the roadway curb along Los Gatos Boulevard and extend into a multi-use path easement. The improvements must be substantially completed, as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.

9. Condition 97: TRENCHING MORATORIUM: Trenching within a newly paved street will be allowed subject to the following requirements:
 - a. The Town standard "T" trench detail shall be used.
 - b. A Town-approved colored controlled density backfill shall be used.
 - c. All necessary utility trenches and related pavement cuts shall be consolidated to minimize the impacted area of the roadway.
 - d. The total asphalt thickness shall be a minimum of three (3) inches, meet Town standards, or shall match the existing thickness, whichever is greater. The final lift shall be 1.5-inches of one-half (1/2) inch medium asphalt. The initial lift(s) shall be of three-quarter (3/4) inch medium asphalt.
 - e. The Contractor shall schedule a pre-paving meeting with the Town Engineering Construction Inspector the day the paving is to take place.
 - f. A slurry seal topping may be required by the construction inspector depending their assessment of the quality of the trench paving. If required, the slurry seal shall extend the full width of the street and shall extend five (5) feet beyond the longitudinal limits of trenching. Slurry seal materials shall be approved by the Town Engineering Construction Inspector prior to placement. Black sand may be required in the slurry mix. All existing striping and pavement markings shall be replaced upon

completion of slurry seal operations. All pavement restorations shall be substantially completed as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.

10. Condition 98: SIDEWALK REPAIR: The Developer shall repair and replace to existing Town of Los Gatos standards any sidewalk damaged now or during construction of this project. All new and existing adjacent infrastructures shall meet Town standards. New curb and gutter shall be constructed per Town Standard Details. New concrete shall be free of stamps, logos, names, graffiti, etc. Any concrete identified that is displaying a stamp or equal shall be removed and replaced at the Contractor's sole expense and no additional compensation shall be allowed therefore. The limits of curb and gutter repair will be determined by the Engineering Construction Inspector during the construction phase of the project. The improvements must be substantially completed as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.
11. Condition 99: CURB AND GUTTER REPAIR: The Developer shall repair and replace to existing Town of Los Gatos standards any curb and gutter damaged now or during construction of this project. All new and existing adjacent infrastructures shall meet Town standards. New curb and gutter shall be constructed per Town Standard Details. New concrete shall be free of stamps, logos, names, graffiti, etc. Any concrete identified that is displaying a stamp or equal shall be removed and replaced at the Contractor's sole expense and no additional compensation shall be allowed therefore. The limits of curb and gutter repair will be determined by the Engineering Construction Inspector during the construction phase of the project. The improvements must be substantially completed as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit.
12. Condition 101: CURB RAMPS: The developer shall construct all curb ramps in compliance with ADA Standards which must be substantially completed as determined by the Public Works Director, at his/her sole discretion, prior to the final occupancy issuance for the 187th market rate unit. New concrete shall be free of stamps, logos, names, graffiti, etc. Any concrete identified that is displaying a stamp or equal shall be removed and replaced at the Contractor's sole expense and no additional compensation shall be allowed therefore.