

WHEN RECORDED MAIL TO:

**TOWN OF LOS GATOS
110 E. MAIN STREET
LOS GATOS, CA 95030
ATTN: TOWN CLERK**

**NO FEE PER GOVERNMENT CODE
SECTIONS 6103 AND 27383**

**NORTH 40 TRANSPORTATION DEMAND MANAGEMENT AGREEMENT
(BELLATERRA)**

This North 40 Transportation Demand Management Agreement (“TDM Agreement”) is entered into effective this ____ day of _____, 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; and

WHEREAS, the Project includes (i) approximately two hundred fifty-three (253) for-sale residential units, and (ii) forty-nine (49) affordable senior apartments, and one (1) manager’s apartment (the “Senior Affordable Units”); and

WHEREAS, that portion of the North 40 site to be benefitted and burdened by the effect of this Agreement (the “Property”) is more particularly described in Exhibit A attached hereto and incorporated herein by this reference; and

WHEREAS, the Property comprises the Bellaterra residential development (“Bellaterra”); and

WHEREAS, a Homeowners Association (the “HOA”) will be formed to manage and own common property of Bellaterra within the Project; and

WHEREAS, the requirements of development approved for the Project include the implementation of a TDM program (the “TDM Program”); and

WHEREAS, it is not practicable for the Project to mitigate transportation impacts on and through Project site only TDM Program; and

WHEREAS, the TDM program will serve the North 40 and other Town locations and measure effectiveness by total reductions in vehicle miles for travel originating and concluding both within and outside the Property, in order to offset the impact of the Property; and

WHEREAS, the Town is best positioned to implement, monitor, and adjust such a program.

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

1. **TDM Contribution.** The total SummerHill contribution to the TDM Program shall be in the form of annual payments, each of the sum of Forty-one Thousand Two Hundred Eighty-Three Dollars (\$41,283) funded from Bellaterra. The Bellaterra HOA CC&Rs shall incorporate and reference this agreement and the funding requirement for the TDM Contribution.

2. The first such payment shall be due and payable within ten (10) days after the issuance by the Town of the Certificate of Occupancy for the 215th unit of Bellaterra. Subsequent annual payments shall be due and payable on each annual anniversary of the date of the first payment. Each annual payment shall be adjusted by the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index for All Urban Consumers, all items (CPI). The adjustment shall be based upon the CPI published on December 31 of the preceding year.

2) **Use of Funds.** The Town shall program the use of funds for townwide TDM measures, such measures being at the Town’s sole discretion. The funds shall be used toward TDM measures, which may include the accrual of funds over time without limit, to be used toward future TDM measures.

3) **Satisfaction.** The above contribution in Section 1 also satisfies any and all obligation of the Senior Affordable Units to contribute to the TDM Program.

4) **Term.** As the transportation impact from the Property will continue in perpetuity, so shall the TDM Program and fees shall continue in perpetuity or until such point as the Town acts to cancel the TDM Program.

5) **Operation of TDM Program.** The Parties acknowledge that the TDM Program is a Town-operated and managed program. SummerHill’s role is limited to providing funding as required by this Agreement. No relationship of agency, partnership, or joint venture exists between the Parties with respect to the TDM Program. The Town shall defend, indemnify, and hold harmless SummerHill and its agents, members, managers, employees, officers, directors, shareholders, successors and assigns from any third party claims, lawsuits, damages, liabilities, costs and expenses (including attorneys’ fees and costs) for personal injury or property damage

arising out of, or relating to, the operation of the TDM Program, except to the extent the claim at issue is caused by the negligence or willful misconduct of SummerHill.

6) Dispute Resolution. Any dispute under this TDM Agreement, including with regard to the payment amounts to be paid pursuant to Section 1 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) Integrated Agreement. This TDM Agreement 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.

8) No Third-Party Beneficiaries. This TDM 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.

9) Successors and assigns. This TDM Agreement shall be binding upon, and inure to the benefit of, the Parties and their respective successors, transferees and assigns. This TDM Agreement may be assigned by SummerHill to any entity that controls, is controlled by or is under common control with SummerHill. In addition, the Parties acknowledge that it is expressly contemplated that this TDM Agreement will be assigned by SummerHill to the HOA, which will assume all obligations of SummerHill hereunder. SummerHill shall give written notice of such assignment to the Town. Upon the giving of such notice, SummerHill shall be released from all obligations and duties of any nature hereunder. If requested by SummerHill, Town shall record a document releasing SummerHill or its affiliated assignee(s) from all such obligations in the Official Records of Santa Clara County

10) Amendments to be in Writing. This TDM 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 TDM Agreement.

11) Notice. All notices shall be given personally or by first class mail, postage prepaid, addressed as shown below. Notices shall be deemed given on the earlier of the date delivered or the second day following the date on which the same have been mailed in the manner required by the prior sentence. Any of the Parties may, by notice given in the manner required by this Section, designate any further or different addresses to which subsequent notices shall be sent.

a) Notice to the Town:

Town of Los Gatos
110 E. Main St.
Los Gatos, CA 95030
Attn: Town Manager

b) Notice to SummerHill

SummerHill N40 LLC
3000 Executive Parkway, Suite 450
San Ramon, CA 94583
Attn: Chief Operating Officer

with a copy to

SummerHill N40 LLC
777 South California Ave.
Palo Alto, CA 94304
Attn: General Counsel

12) Recording. The Parties shall cause this TDM Agreement and all amendment and supplements to it, to be recorded against the Property in the Official Records of Santa Clara County.

13) Covenants to Run with the Land. All rights and obligations under this Agreement are intended by the Parties to be, and shall be construed as, covenants running with the Property. All persons who may have or may acquire an interest in the Property, including but not limited to the HOA, shall be deemed to have notice of, and be bound by, the terms of the Agreement.

Individual homebuyers and individual owners of lots and/or condominiums upon which residential other uses are constructed (“Individual Owners”) benefit from the right to use TDM Agreement program. However, with respect to Bellaterra only, upon the transfer of title to the first condominium under the authorization of a final subdivision public report issued by the Department of Real Estate, Individual Owners in Bellaterra shall have none of the rights and obligations described in this Agreement except for the obligation to fund regular or special assessments to the HOA. At the point of such initial transfer of title, the HOA shall be responsible alone for performing the obligations of this Agreement.

14) Mortgagee Protection. No breach of this Agreement shall defeat or render invalid the lien of any deed of trust or mortgage recorded against all or any portion of the Property. No lender taking title to all or any portion of the Property through foreclosure or deed in-lieu of foreclosure shall be liable for any defaults or monetary obligations of SummerHill arising prior to acquisition of possession of such property by such lender. The foreclosing lender shall have the right to find a substitute developer to assume the obligations of SummerHill, which substitute shall be considered for approval by the Town pursuant to this Agreement, which approval shall not be unreasonably withheld, conditioned or delayed. The Town agrees to provide any lender of SummerHill who has recorded a deed of trust or mortgage against all or any portion of the Property of which the Town has been given notice (each, a “Lender”) with written notice of any default relating to SummerHill and/or the Property given by the Town to SummerHill. The Town agrees that, notwithstanding anything to the contrary contained in this Agreement, Lender shall have an additional ninety (90) days from the date Lender receives notice of a default to cure any such default, provided that Lender shall not have any obligation to cure any such default.

15) Miscellaneous. This TDM 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 TDM Agreement.

[SIGNATURES ON FOLLOWING PAGE]

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

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, Esq.
Town Attorney

ATTEST:

Shelley Neis
Town Clerk

**EXHIBIT A
LEGAL DESCRIPTION OF THE PROPERTY**

Real property located in the Town of Los Gatos, County of Santa Clara, State of California, described as follows:

LOTS 1-22, 24-26 AND 30-39, AND PARCELS A-U, Z-OO, QQ-QQQ, and TTT AS SHOWN ON THE MAP OF “TRACT 10441”, FILED FOR RECORD ON OCTOBER 11, 2018 IN BOOK 918 OF MAPS, AT PAGES 4 THROUGH 18, SANTA CLARA COUNTY RECORDS.