

**WHEN RECORDED MAIL TO:**

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

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

**NORTH 40 TRANSPORTATION DEMAND MANAGEMENT AGREEMENT  
(MARKET HALL)**

This North 40 Transportation Demand Management Agreement (“TDM Agreement” or “Agreement”) is entered into effective this \_\_\_ day of \_\_\_\_\_, 2020, by and between the Town of Los Gatos, a California General Law Town (“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 (“N40 Phase 1”) 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**, N40 Phase 1 includes a commercial condominium development that will be created on Lot 27 of Tract 10441 (within N40 Phase 1) that is expected to contain a commercial condominium containing approximately 20,761 square feet of commercial space plus 2,772 square feet of community space (the “Market Hall Commercial Condo”), a garage condominium, and forty nine (49) affordable senior apartments and (1) manager apartment within one commercial condominium (the “Senior Affordable Condo”), collectively known as the “Market Hall Development”; and

**WHEREAS**, that portion of the N40 Phase 1 site to be benefitted and burdened by the effect of this Agreement is, initially, the entire Market Hall Development, more particularly described in Exhibit A attached hereto and incorporated herein by this reference (provided that the legal description of the burdened property is subject to adjustment as provided in Section 13 hereof); and

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

**WHEREAS**, it is not practicable for the Market Hall Condo to mitigate transportation impacts on and through a Market Hall Condo site-only TDM Program; and

**WHEREAS**, the TDM program will serve N40 Phase 1 and other Town locations and measure effectiveness by total reductions in vehicle miles for travel originating and concluding both within and outside the Market Hall Development, in order to offset the impact of the Market Hall Development; 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 for the Market Hall Condo shall be in the form of annual payments, each of the sum of Seventeen Thousand Six Hundred Forty-Nine and 75/100 Dollars (\$17,649.75) (the “TDM Contribution”). 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 tenant improvements of the Market Hall Condo. 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) Senior Affordable Condo Is Not Obligated by this TDM Agreement. Although Exhibit A to this Agreement initially describes all of the Market Hall Development (Lot 27 of Tract 10441), it is the intent of SummerHill and the Town that this TDM Agreement not bind or burden the Senior Affordable Condo consisting of forty nine (49) affordable senior apartments and (1) manager apartment because the TDM Program funding obligation for the Senior Affordable Condo is being met by a separate TDM Agreement that has been entered into between SummerHill and the Town with respect to an adjacent residential project known as “Bellaterra.” Accordingly, the TDM Contribution referenced above and this TDM Agreement shall not bind the Senior Affordable Condo or the garage condominium that will be created within Lot 27 when a condominium plan is recorded, which separation shall be effected pursuant to the terms of Section 13, below.

4) Term. As the transportation impact from the Market Hall Condo 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 Market Hall Commercial Condo owner, which will assume all obligations of SummerHill hereunder. SummerHill shall give written notice of such assignment to the Town. Any assignment shall be considered for approval by the Town pursuant to this Agreement, which approval shall not be unreasonably withheld, conditioned or delayed. Upon the giving of such notice and approval by the Town, 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, California.

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 amendments and supplements to it, to be recorded against the property described in Exhibit A in the Official Records of Santa Clara County, California.

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 Market Hall Development, subject to the provisions of this section. All persons who may have or may acquire an interest in the Market Hall Development shall be deemed to have notice of, and be bound by, the terms of the Agreement, subject to the provisions of this section. When SummerHill closes escrow on the sale of any or all of the condominiums within the Market Hall Development, SummerHill will assign all of its rights and obligations under this Agreement to the new owner of the Market Hall Commercial Condo only (excluding the garage condominium and/or the Senior Affordable Condo), and thereafter SummerHill shall be released from all obligations under this Agreement that arise from and after the date of such closing and assignment. Written notice of such assignment shall be provided to the Town.

At any time after a condominium plan has been recorded that creates the condominiums within the Market Hall Development, at the request of the Town, SummerHill, or the owner of the Senior Affordable Condo, the Parties to this Agreement shall enter into an amendment to this Agreement that replaces Exhibit A of this Agreement with the legal description for only the Market Hall Commercial Condo and excluding the Senior Affordable Condo and the garage condominium.

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 Market Hall Development. No lender taking title to all or any portion of the Market Hall Development 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 that has recorded a deed of trust or mortgage against all or any portion of the Market Hall Development of which the Town has been given notice (each, a “Lender”) with written notice of any default relating to SummerHill and/or the Market Hall Development 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 PROPERTY SUBJECT TO THIS TDM AGREEMENT

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

LOT 27 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.