

**DRAFT**

Subdivider: **Fairfield Murphy Road LLC**

File No.: **100.01.226**

Project Name: **Cerano Apartments**

Private Job Account No.: **3170**

Improvement Plan No.: **2-1103 & 2-1105**

Tract/Parcel Map No.: **10019**

Council Approval Date: \_\_\_\_\_

Completion Period: \_\_\_\_\_

**CITY OF MILPITAS**

**AMENDMENT NO. 1 TO SUBDIVISION IMPROVEMENT AGREEMENT**

This AMENDMENT NO. 1 TO SUBDIVISION IMPROVEMENT AGREEMENT (this "Amendment") is made and effective this 6<sup>th</sup> day of May, 2011 (the "Effective Date"), by and between the CITY OF MILPITAS, a municipal corporation of the State of California, (hereafter referred to as "CITY") and FAIRFIELD MURPHY ROAD LLC, a Delaware Limited Liability Company, (hereafter referred to as "SUBDIVIDER" and collectively with CITY referred to herein as the "Parties").

RECITALS:

A. The Parties entered into that certain Subdivision Improvement Agreement dated May 7, 2010 ("SIA") for the construction of certain improvements related to the Cerano Apartments project as more particularly described therein (herein the "Project").

B. Pursuant to that certain Escrow Agreement dated August 20, 2010 (the "Escrow Agreement"), by and among the CITY, SUBDIVIDER and First American Fund Control ("First American"), SUBDIVIDER delivered to First American cash in the amount of \$4,405,000.00 as the security for SUBDIVIDER'S performance under the SIA.

C. Due to changes to the existing conditions and priorities contemplated for the Project, the Parties now desire to amend the SIA to memorialize revisions to (i) the storm drain bypass line, (ii) the Bellew Storm Drain Pump Station and (iii) the trail access to the Santa Clara Valley Water District's Coyote Creek.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree to amend the SIA as follows:

1. Definitions. Capitalized terms used in this Amendment and not otherwise defined herein shall have the meanings ascribed to them in the SIA. The term "the Agreement" or "this Agreement" shall hereafter mean and refer to the SIA as amended and modified by this Amendment.

2. Storm Drain Bypass Line. Section 3 of the SIA is hereby deleted in its entirety and replaced with the following:

“3. SUBDIVIDER agrees to provide the AutoCad plans of the completed design of the new 42” parallel storm drain system to the CITY, without any representation or warranty, for the CITY’s future use. The Project shall connect into the existing storm drain system fronting the development.”

3. Bellew Pump Station. Section 4 of the SIA is hereby deleted in its entirety and replaced with the following:

“4. SUBDIVIDER agrees to replace (design and build) two diesel engines with two 600 horsepower rated electric motors, variable frequency drives, and accessories for operation to handle the 10 year flow of 140 cfs as recommended in the Brady Bellew Storm Pump Station Retrofit Study dated October 2010. SUBDIVIDER shall also upgrade the electrical service to the Pump Station to allow for future replacement (by others) of one additional diesel motor, and install a backup generator to service one 600 HP electric motor and the existing 40 HP jockey pump (collectively, the “Bellew Pump Station Upgrade”). Such Bellew Pump Station Upgrade shall be completed the earlier of twenty-four (24) months of the Effective Date of the Amendment or City issuance of the Phasing Occupancy Permit Final Inspection for the last residential units within the meaning of Section 10 of the SIA, as such period may be extended by approval of the City Engineer or due to delays caused by force majeure. The cost of the pump station improvements shall be credited by the City against the storm connection fee assessed to SUBDIVIDER, up to the amount shown in section 19B.g. below.”

4. Coyote Creek Trail Access. Section 6 of the SIA is hereby deleted in its entirety and replaced with the following:

“6. City acknowledges that SUBDIVIDER has submitted for design approval from the Santa Clara Valley Water District and the CITY for the Coyote Creek trail access improvements. SUBDIVIDER shall complete such approved improvements before the occupancy of the last unit; provided however that if the design for such improvements is not approved within six (6) months prior to SUBDIVIDER’S anticipated last unit occupancy (based on written notice from SUBDIVIDER to the CITY of such last unit occupancy), then SUBDIVIDER shall tender an amount to the CITY, as reasonably approved by SUBDIVIDER and the CITY based on qualified bids obtained by SUBDIVIDER, sufficient for the CITY to complete such improvements, and CITY agrees that such tender of cash shall be in complete satisfaction of SUBDIVIDER’S obligations with respect to the Coyote Creek Trail access improvements.”

5. Townhome Development. The Parties acknowledge and agree that SUBDIVIDER, as owner of Lot 1 of Tract 10019, has elected to be solely responsible for the improvements required to be made by SUBDIVIDER under the SIA (as more particularly described on Improvement Plans Nos. 2-1103 & 2-1105), except that the owner of Lot 2 of Tract 10019 (herein the "**Lot 2 Owner**") shall construct the curb, gutter, sidewalk and utility connections along Murphy Ranch Road adjacent to Lot 2 and enter into a separate SIA for said improvements. — CITY agrees that construction and completion of offsite improvements completed by SUBDIVIDER is not a condition to issuance of building permits for the townhome units within Lot 2 of Tract 10019, and that construction and acceptance of the improvements set forth in the SIA (with the exception of the curb, gutter, sidewalk and utility connections described above) shall no longer be a condition to the City's issuance of building occupancy permits for the townhome units within Lot 2 of Tract 10019, notwithstanding any final conditions imposed by CITY upon approval of the Project.

6. Acceptance by CITY. Upon the completion of improvements required under the SIA (as more particularly described on Improvement Plans Nos. 2-1103 & 2-1105), as hereby amended, SUBDIVIDER shall deliver written notice to the CITY and, within thirty (30) days thereafter, the CITY shall notify SUBDIVIDER in writing of its approval and acceptance thereof for purposes of issuance of occupancy permits for the last residential units under Section 10 of the SIA. Should the CITY dispute the completion of any portion of the improvements, then the CITY shall provide SUBDIVIDER with written notification (with reasonable particularity) of such disapproval and SUBDIVIDER shall promptly cause such items to be completed and promptly resubmit notice to CITY upon the completion thereof.

7. Effect of This Amendment. Except as amended and/or modified by this Amendment, the SIA is hereby ratified and confirmed and all other terms of the SIA shall remain in full force and effect, unaltered and unchanged by this Amendment. In the event of any conflict between the provisions of this Amendment and the provisions of the SIA, the provisions of this Amendment shall prevail. Whether or not specifically amended by the provisions of this Amendment, all of the terms and provisions of the SIA are hereby amended to the extent necessary to give effect to the purpose and intent of this Amendment.

8. Miscellaneous.

(a) This Amendment shall be construed in accordance with its fair meaning and as if prepared by both parties hereto. All exhibits referred to herein are incorporated by reference and made a part hereof as though fully set forth herein.

(b) This Amendment shall be construed in accordance with the laws of the State of California. Any action or proceeding brought by any party against any other party arising out of or related to this Amendment shall be brought exclusively in the County of Santa Clara, California.

(c) Neither this Amendment nor any term hereof may be changed, waived, discharged or terminated orally, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought.

(d) Time is of the essence of this Amendment and each of its provisions.

(e) This Amendment may be executed in one or more counterparts, all of which together shall constitute a single instrument.

(f) In the event of any action to enforce any of the terms hereof, the prevailing party shall be entitled to recover its costs and expenses, including its actual attorneys' fees.

(g) In the event an act of the government, war conditions, fire, flood, or other act of God prevents Party from performing in accordance with the provisions of the Agreement, such nonperformance shall be excused and shall not be considered a breach or default for so long as the said conditions prevail.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE.]

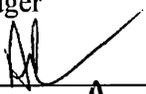
IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first above written.

SUBDIVIDER:

FAIRFIELD MURPHY ROAD LLC,  
a Delaware limited liability company

By: FF California Housing Fund, LLC,  
a Delaware limited liability company,  
Its Manager

By: FF Properties, Inc.,  
a Delaware corporation,  
Its Manager

By:   
Printed Name: Andrew Hinkelman  
Its: President

CITY:

CITY OF MILPITAS,  
a municipal corporation of the State of California

By: \_\_\_\_\_  
Thomas C. Williams  
City Manager

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
City Attorney

ATTEST TO:

By: \_\_\_\_\_  
Mary Lavelle  
City Clerk