CITY OF MILPITAS

FEE REIMBURSEMENT AGREEMENT

FOR TRANSIT AREA SPECIFIC PLAN PUBLIC FACILITIES AND
PUBLIC IMPROVEMENTS

This Fee Reimbursement Agreement for Public Facilities and Public Improvements (the “Agreement”), dated as of ________________2017__, is by and between the City of Milpitas, a municipal corporation of the State of California ("City"), and LMC Milpitas Holdings I, LLC, a Delaware Limited Liability Company and Lennar Homes of California, Inc., a California Corporation (individually and collectively as the "Developer").

WITNESSETH:

WHEREAS, Developer is the owner of that certain real property (APN No’s. 086-37-004, 08637-019, 086-37-020 and 086-37-021) located at 400-450 Montague Expressway in Milpitas, California; and

WHEREAS, on May 5, 2015, the City Council conditionally approved Vesting Tentative Map (MT14-0004), Site Development Permit (SD14-0017), Conditional Use Permit (UP14-0024), and Exception to Urgency Ordinance No. 240.2 for a 489-unit residential development project located at 400-450 Montague Expressway in Milpitas, California (the “Project”); and

WHEREAS, City has adopted a Transit Area Specific Plan (the “TASP”) and a Transit Area Specific Plan Development Impact Fee (the “TASP Fee”) to provide funds to finance public facilities and public improvements within the TASP area; and

WHEREAS, City has adopted a Fiscal Mitigation and Services Plan for the TASP (EPS no. 17107) in 2008, as amended in 2014, outlining the public facilities and public improvements that are to be constructed with the TASP fees (the “Financing Plan”); and

WHEREAS, the Project is in the TASP area and the total TASP Fee for the Project is estimated at Sixteen Million Twenty-Nine Thousand Nine Hundred Nine Dollars ($16,029,909.00) (489 units x $32,781/unit), subject to annual adjustment as provided for in Section 9 of City Council Resolution No. 8344; and

WHEREAS, pursuant to the conditions of approval for the Project set forth in City Council Resolution No. 8467 on May 5, 2015, Developer shall construct certain public facilities and improvements in the TASP area such as public parks and public recycled water system (the "Improvements") and complete the feasibility, design and construction drawings for bridge improvements over Montague Expressway and East Penitencia Creek (the “Designs”). The Improvements and Designs are included in the Financing Plan and would otherwise be financed by the TASP Fee, and which Improvements and Designs will serve more than the Developers’ properties within the TASP area; and

WHEREAS, on the Final Map recorded on October 17, 2016, Developer provided a public access easement over 0.91 acres for a future public park (the “Public Park Easement”); and

WHEREAS, City and Developer desire to enter into this Agreement to provide for allowable fee reimbursement against the TASP Fee to Developer for the Project.

NOW, THEREFORE, in consideration of the mutual promises contained herein, City and Developer hereby agree as follows:
SECTION 1. Allowable Fee Reimbursements

1.1 TASP Fee Reimbursement

Subject to the terms, conditions, and obligations of this Agreement, the City will provide the TASP Fee reimbursement to the Developer in the amount based on verifiable actual costs of the Improvements and the Designs and the estimated value of the Public Park Easement.

1.2 Parkland Fee

OVERVIEW

For development projects in the TASP area, TASP Policy 3.38, that cross references Policy 3.24 in the Midtown Specific Plan, indicates that parks are required at a ratio of 3.5 acres per 1,000 people, with at least 2.0 of those acres publicly accessible. The TASP Fee includes an amount that represents 2.0 acres of publicly accessible parkland. As the Project site includes a park dedication requirement pursuant to TASP Figure 3.6, the Developer is entitled to reimbursement of that portion of the TASP Fee earmarked for parkland in the actual verifiable amount of all costs associated with constructing the park, including reimbursement for the value of the Public Park Easement to be dedicated to the City, and costs for any proposed improvements on the Public Park Easement.

The Developer’s obligation to meet the remaining 1.5 acres per 1,000 persons (3.5 acres of parkland per 1,000 persons is required) can be met through private on-site recreational elements consistent with TASP Policy 3.38, that cross references Policy 3.24 in the Midtown Specific Plan.

The Parkland Fee Calculation is based upon the estimated number of persons expected to inhabit the development (per U.S. Census definitions), and the estimated value of parkland in the City of Milpitas (currently $64 per square foot/$2,787,840 per acre).

PROJECT DETAILS

The project has received land use entitlements for 489 multi-family units located in 19 Multi-Family Five-Plus buildings (MF5+). The U.S. census estimates that 2.49 persons on average will inhabit each MF5+ unit, resulting in an estimated 1,217.61 persons. Based on this population estimate, the development’s parkland obligation totals $11,880,765.52 (equivalent to 4.26 acres of parkland)

$15,013.70 of the $32,781.00 per unit TASP fee is used to meet a portion of the parkland requirement for the development. Based on the unit count and resulting TASP fee required, $7,341,699.30 of the development’s parkland dedication requirements (2.63 acres) will be met through payment of the TASP fee. The remaining delta to be satisfied is $4,539,057.22 (1.63 acres), which the developer proposes to meet via the provision of private recreation space on site.
The developer has met this obligation as shown in Exhibit A, and as summarized below:

<table>
<thead>
<tr>
<th>Unit Count/Population Estimate</th>
<th>489</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population Estimate</td>
<td>1,217.61 persons</td>
</tr>
<tr>
<td>TASP Parkland Requirement</td>
<td>3.5 acres/1000 people or equivalent fees-in-lieu</td>
</tr>
<tr>
<td>Resulting Fees Due/</td>
<td>$11,880,765.52/4.26 ac</td>
</tr>
<tr>
<td>Acreage Equivalent</td>
<td></td>
</tr>
<tr>
<td>Amount Satisfied Through TASP Fees</td>
<td>$7,341,699.30/2.63 ac</td>
</tr>
<tr>
<td>(Dollars/Acreage)</td>
<td></td>
</tr>
<tr>
<td>Remaining Delta to be Satisfied</td>
<td>$4,539,057.22/1.63 acres</td>
</tr>
<tr>
<td>(Dollars/Acreage)</td>
<td></td>
</tr>
<tr>
<td>Private Recreation Acreage</td>
<td>1.63 acres</td>
</tr>
<tr>
<td>Approved by City</td>
<td></td>
</tr>
<tr>
<td>REMAINING FEES/ACREAGE REQUIREMENT TO</td>
<td>$0</td>
</tr>
<tr>
<td>BE MET</td>
<td></td>
</tr>
<tr>
<td>Public Access Easement Acreage</td>
<td>0.91 acres/$2,536,934.40</td>
</tr>
<tr>
<td>Provided by Development/Dollar Value Equivalent</td>
<td></td>
</tr>
<tr>
<td>Estimated Value of Built Improvements on Public Acreage</td>
<td>$1,152,640.00</td>
</tr>
<tr>
<td>TOTAL Estimated Reimbursement Due to Developer</td>
<td>$3,689,574.40</td>
</tr>
</tbody>
</table>

SECTION 2. Reimbursement Issuance Timing

2.1 Developer shall pay the City the full applicable TASP Fee for each residential unit at the time of each building permit issuance at the rate in effect at that time, or if the Developer obtained a vesting tentative map, the amount in effect at the time the vesting map application was deemed complete subject to any annual adjustment as provided for in Section 9 of City Council Resolution No. 8344.

2.2 Developer shall receive the TASP Fee Reimbursement for the estimated value of the Public Park Easement upon recordation of a Final Map that provides a public access easement for purposes of a public park.

2.3 Developer shall receive the TASP Fee Reimbursement for the Improvements and the Designs upon completion and City’s acceptance of the Improvements and the Designs as stipulated hereinafter, including all supporting documentation for all costs associated with the Improvements and the Designs.

2.4 Developer may receive prorated progress reimbursement in phases upon completion and acceptance of any Improvements and the Designs in the amount corresponding to each Improvement or Design item and as determined by the City.
SECTION 3. Completion of the Improvements

3.1 Developer shall complete construction of the Improvements in accordance with the plans and specifications approved by City and in accordance with City standard construction specifications and this Agreement. All Improvements shall be completed (determined by filing of a notice of completion) prior to issuance of the certificate of occupancy for the final residential unit or building in Tract No. 10324, unless City determines in its sole discretion to waive such condition.

3.2 In the event the Improvements are not fully constructed and accepted by City as set forth herein, Developer shall be in breach of this Agreement and in addition to all other legal remedies available at law or equity, City may seek reimbursement from Developer for all reimbursements provided under this Agreement specific to those Improvements that have not been fully constructed and accepted, including interest at the legal rate. Additionally, City may withhold any and all certificate of occupancy, building permit, map approval, or any other City approval or permit relating to the Project.

SECTION 4. Inspection of Improvements

4.1 City shall at all times have access to the construction site during construction and Developer shall furnish City with all reasonable information necessary for ascertaining full knowledge of the Improvements with respect to the progress, workmanship and character of materials and equipment used and employed in the work.

4.2 Neither observation of the work by City nor failure of City to inspect the Improvements or to discover defects in material or workmanship shall relieve Developer from its obligations to complete construction in accordance with the plans and specifications approved by City and to ensure that the Improvements are free of defects in materials and workmanship.

SECTION 5. Acceptance of the Improvements

5.1 At such time as the Developer believes that each of the Improvements is complete, the Developer shall provide written notice of completion to the City ("Notice of Completion"), requesting an inspection. Within ten (10) business days or as mutually agreed following the date of receipt of the Developers’ written notice of completion of any Improvement, the City shall conduct a final inspection of the applicable Improvements. If, during the final inspection, the City determines that Improvements have not been completed in accordance with all applicable codes, regulations, permits and approved plans, the City shall prepare a punch list of all items to be completed by the Developer and shall provide such punch list to the Developer within ten (10) business days or as mutually agreed following the final inspection.

5.2 If the City delivers such punch list to the Developer within said ten (10) business day period or period as mutually agreed upon, then the Developer shall undertake to repair such punch list items in a diligent manner within twenty (20) calendar days, unless the repairs for such punch list items cannot reasonably be accomplished within twenty (20) calendar days, in which case they shall be completed as soon as practicable using commercially reasonable efforts. Upon completion of the punch list work, the Developer shall request another final inspection from the City and within ten (10) business days following such written notice from the Developer, the City shall conduct another final inspection.
5.3 If the City determines that the punch list work is complete and no other deficiencies are identified, the Developer will be deemed to have successfully completed the final inspection. If the City determines that the punch list work is not complete, then City and Developer shall repeat the inspection/punch list procedures specified in this Section until the successful completion of the punch list work and a final inspection. At such time as Developer has successfully completed the final inspection, City shall schedule the initial acceptance of the completed Improvements within thirty (30) calendar days thereafter before the City Council.

SECTION 6. Completion and Acceptance of the Designs

6.1 Developer shall perform and complete the Designs in accordance with the Project conditions 38.d. for Montague Expressway Pedestrian Bridge Overcrossing and 38.e. for East Penitencia Creek Vehicular/Pedestrian Crossing. The Designs are considered deemed complete upon approval of the construction plans and specifications, including all required supporting documents by the City and other agencies, such as the Santa Clara County Roads and Airports and/or the Santa Clara Valley Water District.

6.2 In the event the Designs are not fully completed and approved by City and/or other public agencies as set forth herein, Developer shall be in breach of this Agreement and in addition to all other legal remedies available at law or equity, City may seek reimbursement from Developer for all reimbursements provided under this Agreement specific to those Designs that have not been fully completed and approved, including interest at the legal rate. Additionally, City may withhold any and all certificate of occupancy, building permit, map approval, or any other City approval or permit relating to the Project. City approved plans and specifications, including all supporting documents become City property upon completion of the Designs.

SECTION 7. Delivery of Design Plans and Specifications

Prior to acceptance of the Improvements by the City and approval of the Designs by the City and the Santa Clara County Roads and Airports and/or Santa Clara Valley Water District, the Developer shall deliver to the City copies of all plans, specifications, shop drawings, as-built plans, operating manuals, service manuals, warranties and other documents relating to the design, construction, installation and operation of the applicable Improvements and Designs. Plans shall be submitted in CAD format, GIS format and/or PDF format as acceptable to the City.

SECTION 8. Supporting Documents for the Actual Costs

Following the completion and acceptance of the Improvements and the Designs provided in Sections 3 to 8, the Developer shall provide final invoices, records, change order documents, payment invoices, cancelled checks and other necessary documents, as requested by the City, in order to provide to the City a final accounting of actual costs for the Improvements and the Designs. The City shall thereafter have thirty (30) days in which to review and approve such items, which approval shall not be unreasonably withheld, conditioned or delayed. The City may request an additional 30 days to review and approve such items, which such 30 day extension request will not be unreasonably withheld by Developer. If the City does not approve all such items in thirty (30) days (or sixty (60) days if extended), and, if the Developer disputes the disapproval of such items by the City, the thirty (30) days (or sixty (60) if previously extended) may be extended as mutually agreed upon to resolve any disputes.
SECTION 9.  **Limited City Obligation**

The obligations arising from this Agreement are neither a debt of the City nor a legal or equitable pledge, charge, lien, or encumbrance upon any of its property or upon any of its income, receipts, or revenues, except for the developer impact fees that would have otherwise been collected for the **Public Park Easement**, the **Improvements**, the **Designs** and other capital facilities set forth in the project plans for the TASP Fee program. Neither the City of Milpitas general fund nor any other fund of the City, except the TASP Fee program, shall be liable for the reimbursement or payment of any obligations arising from this Agreement. The reimbursement or taxing power of the City is not pledged for the payment of any obligation arising from this Agreement. The Developer shall not compel the forfeiture of any of the City's property to satisfy any obligations arising from this Agreement.

SECTION 10.  **Liens, Claims, and Encumbrances**

Prior to acceptance of the **Improvements** by the City, and approval of the **Designs** by the City and the Santa Clara County Roads and Airports and/or Santa Clara Valley Water District, the Developer shall provide a written guarantee and assurance to the City that there are no liens, claims, or monetary encumbrances on the **Improvements** and the **Designs**, together with unconditional final releases from all contractors and material suppliers, and with copies of invoices and corresponding checks issued by the Developer for all items for which fee reimbursements are requested under this Agreement for the **Improvements** and the **Designs**. The City shall have no obligation to issue any reimbursements for the **Improvements** and the **Designs** until the Developer has cleared any and all liens, claims and monetary encumbrances from the **Improvements** and the **Designs** and provided the required documentation, guarantee and assurance in writing, to the satisfaction of the City. To be clear, Developer's obligation to clear any and all liens, claims and monetary encumbrances for the **Improvements** and the **Designs** are two separate obligations and the City shall not withhold the release of reimbursement for either of the **Improvements** or **Designs** due to liens, claims and monetary encumbrances remaining on the other.

SECTION 11.  **No Third Party Beneficiary**

By entering into this Agreement, City and the Developer are not entering into any contract or agreement with any general contractor, subcontractor, or other party nor is any general contractor, subcontractor, or other party a third party beneficiary of this Agreement, and City shall have no obligation to pay any general contractor, subcontractor, or other party for any work that such general contractor, subcontractor, or other party may do pursuant to the plans and specifications for the **Improvements** and the **Designs**.

SECTION 12.  **Warranty and Repair**

The Developer hereby warrants the **Improvements** as to materials and workmanship and should any failure of any **Improvement** occur within a period of one year after initial acceptance of such **Improvement** by City Council, the Developer shall promptly cause the needed repairs to be made without cost to the City. The provisions contained herein shall not be deemed to limit any rights Developer has or may have to seek damages or other relief from any acts or omissions of any contractor involved in the construction or design of the Improvements. Nothing herein shall be construed to limit any other warranties City may have.
from the manufacturer or any materials used in the Improvements nor in any way limit any rights of City in equity or law under this Agreement.

SECTION 13. Notice

Any notice, payment, or instrument required or permitted by this Agreement to either party shall be deemed to have been received when personally delivered to that party or seventy-two (72) hours following deposit of the same in any United States Post Office, first class, postage prepaid, addressed as follows:

Greg Chung, Interim Director of Engineering/City Engineer
City: Milpitas City Hall
455 East Calaveras Boulevard
Milpitas, California 95035
Phone: 408-586-3240; Fax: 408-586-3305

LMC Milpitas Holdings I, LLC
Developer: Attention: Kevin Ma, Vice President of Development
Email: kevin.ma@lennar.com
Phone: 415-975-4989; Mobile: 415-902-1744

Lennar Homes of California
Attention: Brent Reed, Forward Planning Manager Email: brent.reed@lennar.com
Phone: 925-327-8307; Mobile: 925-699-7465

Any party hereto may, by notice given hereunder, designate a different address to which subsequent notices, payments, and instruments shall be delivered to it.

SECTION 14. Term

The term of this Agreement shall start as of the date first written above and shall remain in effect until all the terms and conditions contained in this Agreement have been satisfied.

SECTION 15. Captions

Captions to Sections of this Agreement are for convenience purposes only, and are not part of this Agreement.

SECTION 16. Severability

If any portion of this Agreement is declared by a court of competent jurisdiction to be invalid or unenforceable, such portion shall be deemed severed from this Agreement and the remaining parts shall remain in full effect as though such invalid or unenforceable provision had not been a part of this Agreement.

SECTION 17. Successors and Assigns/Reimbursements to Developer

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. The TASP Fee Reimbursement granted herein shall run with the land with
respect to their application against the TASP Fees otherwise payable upon development of the Project.

SECTION 18.  Governing Law Venue

This Agreement is made under, and shall in all respects be interpreted, enforced, and governed by the laws of the State of California. In the event of a dispute concerning the terms of this Agreement, the venue for any legal action shall be with the appropriate court in the County of Santa Clara, State of California.

SECTION 19.  Indemnity

To the fullest extent permitted by law, Developer shall protect, indemnify, defend and hold City, its officers, employees, and agents harmless (with counsel acceptable to City) from and against any and all claims, liability, loss, costs, judgement, or any other obligations arising out of or resulting directly or indirectly by any cause whatsoever in connection with or incidental to the (i) activities performed by Developer, its officers, employees, or agents under this Agreement, or (ii) negligence, omission or willful misconduct by Developer, its officers, employee, or agents.

SECTION 20.  Waiver

Developer agrees that waiver by City of any breach or violation of any term, condition, or obligation of this Agreement shall not be deemed to be a waiver of any other term, condition, or obligation contained herein or a waiver of any subsequent breach or violation of the same term, condition or obligation.

SECTION 21.  Compliance with Laws

Developer shall comply with all applicable federal, state, and local laws, regulations, policies, or guidelines. Developer is aware of the requirements of California Labor Code Section 1720, et seq., and 1770, et seq., as well as California Code of Regulations, Title 8, Section 16000, et seq., (“Prevailing Wage Laws”), which require the payment of prevailing wage rates and the performance of other requirements on “public works” and “maintenance” projects. If the Designs or Improvements are part of an applicable “public works” or “maintenance” project, as defined by the Prevailing Wage Laws, Developer agrees to fully comply with such Prevailing Wage Laws. Developer shall defend, indemnify and hold the City, its officials, officers, employees and agents free and harmless from any claim or liability arising out of any failure or alleged failure to comply with the Prevailing Wage Laws and/or any other applicable law.

SECTION 22.  Entire Agreement

This Agreement contains the entire agreement between the parties with respect to the matters contained herein and may be amended only by subsequent written agreement signed by all parties.

SECTION 23.  Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one instrument.
IN WITNESS WHEREOF, the parties hereto have executed this
Agreement the day of the year first above written.

DEVELOPER:

LMC Milpitas Holdings I LLC, a Delaware limited liability company

By: __________________________
    City Manager

Dated: ________________ , 2017

Date of Execution: ________________ , 2017

Lennar Homes of California, Inc., a California corporation

By: __________________________
    Name: John Alexander Waterbury
    Title: Vice President

Date of Execution: ________________ , 2017

By: __________________________
    Name: Brian Olin
    Title: Vice President

Execution:
    City Attorney
Exhibit A