

CONSTRUCTION MANAGEMENT AGREEMENT

THIS CONSTRUCTION MANAGEMENT AGREEMENT (the “**Agreement**”) is made and executed on _____, 202____ (the “**Effective Date**”), by and between the Mountain View Whisman School District (the “**District**”); and Mountain View Owners LLC (the “**Construction Manager**”); and is made with the reference to the following facts and objectives:

RECITALS

A. WHEREAS, Construction Manager is the owner of that certain real property located at 777 West Middlefield Road, Mountain View, California, described in **Exhibit A** (Property: Map and Legal Description, Plus Street Address), attached hereto and incorporated herein by this reference, and by Assessor's Parcel Number(s): 153-24-005 (“**Property**”).

B. WHEREAS, the District leased a 1.8 acre parcel of the Property (“**Lot 2**”) from Construction Manager to be designed, developed, constructed, operated and maintained by the District as an apartment complex with 144 units, as described in this Agreement (the “**Project**”). Lot 2 is as indicated in Exhibit A.

C. WHEREAS, concurrent with the development and construction of the Project, Construction Manager is developing and constructing a market-rate apartment complex with 572 units on Lot 1 as indicated on Exhibit A (“**Market-Rate Housing**”),

D. WHEREAS, as a condition to the City of Mountain View’s issuance of a certificate of occupancy to Construction Manager with regard to the Market-Rate Housing, a certificate of occupancy must first be issued to the District with regard to Project. As such, the ability of Construction Manager to timely and successfully develop the Market-Rate Housing is inextricably tied to the District’s timely development of the Project. Therefore, given the relationship between the District and Construction Manager and concurrent development and construction of the Market-Rate Housing and the Project, the District and Construction Manager concluded it is in the best interest of both parties for the District to engage Construction Manager to provide construction management services to the District in connection the construction of the Project as described in greater detail below.

E. WHERAS, in July of 2022, the District and Palisades Builders, Inc (“**General Contractor**”) entered into a construction contract for the Project (“**Construction Contract**”).

F. WHEREAS, the District desires to retain the Construction Manager to act as the District's construction manager to manage and coordinate the construction of the Project.

G. WHEREAS, the District anticipates that it will take approximately thirty-three (33) months from the date of commencement of construction to complete construction of the Project.

NOW THEREFORE, in consideration of the mutual promises in this Agreement and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledge, the parties hereto agree as follows:

TERMS AND CONDITIONS

ARTICLE 1: CONSTRUCTION MANAGER’S SERVICES

1.1 Standards of Performance. The Construction Manager agrees to act as the District’s construction manager on the Project, providing administrative support to the District in connection with the fulfillment of the District’s duties and obligations set forth in the construction contract between the District and Palisades Builders, Inc. (“General Contractor”). The Construction Manager will perform the Services required under this Agreement consistent with the skill and care ordinarily provided by Construction Managers practicing in the same or similar locality under the same or similar circumstances (the “**Standard of Care**”). The District understands and acknowledges that the Construction Manager is not acting in the capacity of a licensed contractor or design professional, and shall not be responsible for the design of the Project or for the performance of the work.

1.2 Construction Phase.

1.2.1 Coordination Among Team Members. The Construction Manager shall establish procedures for the coordination of communications between and among the District, the Architect and the General Contractor with respect to all aspects of the Project and shall implement such procedures.

1.2.2 Permitting and Inspections. The Construction Manager shall coordinate and secure the building permits and inspections by governmental agencies necessary for the execution and completion of the work on the Project.

1.2.3 Meetings. The Construction Manager shall coordinate and attend progress meetings with the District’s representative, Jason Cave, the Architect and the General Contractor to jointly discuss such matters as procedures, progress, scheduling, changes and problems, if any, occurring at the Project. The Construction Manager shall thereafter report and make recommendations to the District relating to the same.

1.2.4 Administration of the Construction Contract. The Construction Manager shall manage the administration of the Construction Contract as set forth in the Construction Contract.

1.2.5 Plans and Specifications. The Project shall be constructed in accordance with the final version of the plans and specifications approved by the District (“Approved Plans and Specifications”). No changes to the Approved Plans and Specifications shall be made without the prior written authorization of the District.

1.2.6 Monitoring of Construction Phase. The Construction Manager shall provide periodic visits to the Project on behalf of the District for the purpose of observing the general progress of the work, the general adequacy of the General Contractor’s personnel, equipment and subcontractors, as well as the condition and availability of materials and supplies onsite. The Construction Manager shall thereafter report and make recommendations to the District relating thereto. The Construction Manager will not be responsible for making exhaustive inspections or otherwise supervising the performance of the work; however, Construction Manager will report any observed errors or problems to the District.

1.2.7 Change Orders. The Construction Manager shall develop and implement a system for the review and processing of Change Orders, and shall review requests for changes with the District and shall assist the District in negotiating adjustments to the contract price and/or the construction schedule. The Construction Manager shall not have authority to authorize any changes in the work or approve any change orders, changes to the construction schedule or modifications of the Construction Contract.

1.2.8 Shop Drawings, Samples and Requests for Information. The Construction Manager shall manage the implementation of procedures for the timely processing of shop drawings, samples and requests for information. The Construction Manager will be entitled to rely on the Architect and the General Contractor with respect to the review and approval as to the technical performance and compatibility of all submissions with the Project design.

1.2.9 Payments to General Contractor. The Construction Manager shall develop and implement a procedure for the review of the applications for payment from the General Contractor and shall make timely recommendations to the District with respect to approval and/or rejection of the applications for payment by the District.

1.2.10 Inspections. The Construction Manager shall retain and coordinate all third party inspections of the Project.

1.2.11 Substantial Completion. The Construction Manager shall, on behalf of the District, coordinate with the Architect and the General Contractor in confirming achievement of substantial completion of the work, including participation in the generation of punchlists of incomplete or unsatisfactory items and a schedule for their completion.

1.2.12 Final Completion. The Construction Manager shall manage and coordinate project close-out including but not limited to assembling the General Contractor's lien releases, warranties, as-build drawing and operating and maintenance manuals. The Project shall be deemed completed upon issuance of a Certificate of Occupancy by the City of Mountain View.

1.2.13 Insurance. The Construction Manager shall purchase and maintain, from an insurance company lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The property insurance coverage shall be no less than the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion unless otherwise agreed in writing by the parties to this Agreement. This insurance shall include the interests of the District, Construction Manager, General Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. The Construction Manager or the General Contractor shall be responsible for deductibles.

ARTICLE 2: THE DISTRICT'S RESPONSIBILITIES

2.1 District's Responsibilities.

2.1.1 Construction Contract Agreement. The Construction Contract between the District and the General Contractor requires the General Contractor to assume full responsibility for among other things: (1) all construction means, methods, techniques, sequences, procedures and safety precautions and programs in connection with the Work, (2) compliance with prevailing wage requirements as well as (3) any defects in the workmanship at the Project. The District understands and acknowledges that Construction Manager is not a licensed contractor, and will not be responsible for the means, methods, techniques, sequences, or safety precautions or programs in connection with the Work, nor for any defects in the workmanship at the Project.

2.1.2 Necessary Approvals. The District shall secure and pay for all necessary zoning, approvals, easements, permits, inspections, assessments and charges required for the construction, use and occupancy of the Project.

2.1.3 Payment of Obligations. The District shall be solely responsible for the payment of the Construction Manager and, under separate contracts, has payment obligations related to the General Contractor and the Architect for the Project as more fully described and in accordance with the Reimbursement Agreement between the District and Construction Manager dated November 29, 2020 (“**Reimbursement Agreement**”), as amended, which are incorporated herein by reference. To the extent that there is any conflict between this Agreement and the Reimbursement Agreement, as amended, the Reimbursement Agreement as amended shall control.

ARTICLE 3: TERM OF THE AGREEMENT

3.1 Construction Services. It is estimated that the Construction Phase Services will take approximately thirty-three (33) months to complete (the “**Construction Phase Duration**”). The Construction Phase Services shall commence in approximately July of 2022 and shall be deemed completed upon final completion of the Project and acceptance by the District.

ARTICLE 4: COMPENSATION

4.1 Payments During The Construction Phase Services. Payments to Construction Manager and District’s payment for any reimbursable costs shall be in accordance with the Reimbursement Agreement, as amended. The total compensation to Construction Manager for all of its services pursuant to this Agreement shall be the amount indicated as “Developer Overhead for Construction Phase” in the Reimbursement Agreement, as amended, plus reimbursable costs allowable under the Reimbursement Agreement, as amended by the parties.

ARTICLE 5: ALLOCATION OF RISK

5.1 Indemnification.

5.1.1 Construction Manager shall indemnify and save harmless the District, its board members, officers and employees (hereinafter collectively referred to as “Indemnitees”) and each of them, from any third party claims for damages, penalties, costs, expenses, reasonable attorneys’ fees, reasonable experts’ fees, reasonable consultants’ fees, judgments, losses or liabilities arising out of the performance of the Services by the Construction Manager provided such damages, penalties, costs, expenses, reasonable attorneys’ fees, reasonable experts’ fees, reasonable consultants’ fees, judgments, losses or liabilities is attributable to bodily injury, sickness or death or destruction to tangible property, but only to the extent caused by the gross negligence or willful misconduct of Construction Manager.

5.2 Insurance.

5.2.1 The District’s Insurance. The District shall be responsible for purchasing and maintaining liability insurance as will protect the District against claims which may arise from operations under this Agreement.

5.2.2 The Construction Manager’s Insurance. The Construction Manager shall procure and maintain during the term of this Agreement the following insurance coverages:

- i. Commercial general liability insurance in limits not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate (occurrence policy form) throughout the term of this Agreement and for a period of two (2) years thereafter insuring against bodily injury, property damage and personal injury arising out of the services provided under this Agreement. Coverage to be written on an occurrence form. Coverage to be at least as broad as ISO form CG 0001 (12/07), without endorsements that limit the policy terms with respect to: (1) the definition of an Insured Contract, (2) provisions for severability of interest, (3) explosion, collapse, underground hazard. District shall be named as an additional insured on Construction Manager's Commercial General Liability policy for any liability arising out of the Work.
- ii. Automobile liability insurance in limits not less than \$100,000 per occurrence and \$300,000 in the aggregate; to include property damage, and claims arising out of the ownership, maintenance and use of any motor vehicle, whether owned, non-owned or hired. The District shall be named as an additional insured on Construction Manager's Automobile Liability policy for any liability arising out of the Work;
- iii. Worker's Compensation insurance, including liability in accordance with all applicable laws with respect to Contractor's employees; and
- iv. Professional Liability in limits not less than \$1,000,000 per claim. This insurance shall cover the Construction Manager and its sub-consultant(s), if any, for professional liability in at least the amounts set forth herein above. Additionally, the policy must contain terms or endorsements extending coverage that requires the insurer to defend and indemnify for acts which happen before the effective date of the policy provided the claim is first made during the policy period, coverage to continue through completion of the Project plus "tail" coverage for two (2) years thereafter.

5.3 Limitation of Liability. In recognition of the relative risks and benefits of the Services to both District and Construction Manager, the risks have been allocated such that District agrees, to the fullest extent permitted by law, to limit the liability of Construction Manager arising out of or related to this Agreement and/or the Services provided hereunder, to the amount of \$1,000,000; provided, however, the foregoing limitation of liability shall not apply in the event of Construction Manager's gross negligence, willful misconduct or fraud. Further, District and Construction Manager hereby waive all claims against each other for special, incidental, indirect, punitive, or consequential damages, whether based on breach of contract, tort, or otherwise arising out of and/or related to this Agreement or the Services provided hereunder.

ARTICLE 6: TERMINATION

6.1 Termination by the Construction Manager. In the event that District fails to make payment when and as required under this Agreement, Construction Manager may, after thirty (30) days written notice to the District, terminate the Agreement. However, if the District cures the payment deficiency within the thirty (30) day notice period, then the Agreement shall continue in full force and effect. In the event of a termination by Construction Manager hereunder, Construction Manager shall be entitled to the balance of the Developer Overhead for the Construction Phase or an amount equal to two (2) monthly installment payments made by the District to the Construction Manager, whichever is less.

6.2 Termination by District. If the Construction Manager fails to perform any material obligations under this Agreement, the District may, after ten (10) days written notice to Construction Manager, terminate this Agreement, provided however, that any notice shall specify the claimed deficiency and if the

Construction Manager cures or commences a cure of such deficiency within the ten (10) day notice period, then the Agreement shall continue in full force and effect. In the event of a termination by District hereunder, Construction Manager shall be entitled to payment for all services performed prior to the date of termination, less previous monthly installment payments made by the District to the Construction Manager pursuant to this Agreement. In the event District elects to terminate this Agreement and retain a replacement construction manager, the District must secure Construction Manager's written consent to the replacement construction manager, which said consent shall not be unreasonably withheld.

ARTICLE 7: DISPUTE RESOLUTION

7.1 Dispute Resolution. For any dispute between the parties arising out of this Agreement, the following shall constitute the Alternative Dispute Resolution procedure adopted by the parties:

7.3.1 Mediation. Unless the parties mutually agree otherwise, any and all disputes or claims arising out of or related to this Agreement shall be submitted to mediation in accordance with the Commercial Rules of the American Arbitration Association ("AAA") currently in effect or to a mediator mutually agreed to by the parties. Request for mediation shall be sent in writing by the party requesting mediation to the other party and to the AAA. The parties shall share in the cost of the mediation, including the mediator's fee and any filing or administrative fees, equally. The mediation shall be held in the state and county in which the Project is located unless another location is mutually agreed upon by the parties. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

7.3.2 Mandatory Arbitration. Any and all disputes or claims arising out of or related to this Agreement shall, at the request of either party, be determined by arbitration. The arbitration shall be conducted in accordance with the Federal Arbitration Act (9 U.S.C. §§1-16 "FAA"), to the exclusion of state procedural law and any choice of law provision in the Contract Documents, and under the Construction Industry Rules of the American Arbitration Association ("AAA") to the extent the AAA Construction Industry Rules do not conflict with the FAA. In the event of any conflict between the AAA Construction Industry Rules and the FAA, the FAA shall prevail. The arbitrators shall give effect to the statute of limitations in determining any claim. Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s). Judgment upon the arbitration award may be entered in any court having jurisdiction. The arbitrator(s) shall apply the substantive law of the state where the Project is located in rendering their decision on the merits of any controversy or dispute. The decision of the arbitrator(s) shall be final, conclusive and binding on the parties. The institution and maintenance of an action for judicial relief or pursuit of a provisional or ancillary remedy shall not constitute a waiver of the right of any party, including the plaintiff, to submit the controversy or claim to arbitration if any other party contests such action for relief.

ARTICLE 8: MISCELLANEOUS PROVISIONS

8.1 No Third-Party Beneficiaries. The parties agree that this Agreement is entered into exclusively for the benefit of the District and Construction Manager, and not for the benefit of any third parties, including, without limitation, the Architect, Engineers, General Contractor, or subcontractors or suppliers of any tier. As such, nothing contained in this Agreement shall create a contractual relationship with, or a cause of action in favor of, any third-party against District or Construction Manager.

8.2 Independent Contractor. Construction Manager and District agree that Construction Manager is performing all of the Services under this Agreement as an independent contractor and not as an agent, employee, partner or joint-venturer of the District. Construction Manager shall retain complete control

over its employees and consultants, if any Construction Manager shall have complete control over the manner and means with which the Services are rendered.

8.3 Attorney's Fees. In the event that any litigation, arbitration, or other proceeding is commenced between the parties hereto or their personal representatives, successors or assigns concerning the enforcement or interpretation of any provision of this Agreement or the rights and duties of any party in relation thereto, the party or parties prevailing in such litigation, arbitration or other proceeding shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for attorneys' and experts' fees, which sum shall be determined by the Court in such litigation or by a separate legal action brought for that purpose. For the purposes of this paragraph, the "prevailing party" shall be determined in accordance with the provisions of California Civil Code §1717.

8.4 Time of Essence. Time is of the essence of each provision of this Agreement.

8.5 Notices. All notices, demands, statements and communications required under this Agreement shall be in writing and, if intended for District, shall be addressed to District at the address set forth opposite District's signature; and if intended for Construction Manager, shall be addressed to Construction Manager at the address set forth opposite Construction Manager's signature, or to such other address as either party may by written notice, given in accordance with this Section, advise the other party. Notices shall be transmitted by personal delivery, express or courier service, electronic mail, or certified mail. Notices shall be deemed to be delivered on the date received.

8.6 Additional Representations and Warranties.

8.6.1 Construction Manager represents and warrants that the individual(s) executing this Agreement on its behalf have the legal power, right and actual authority to bind the Construction Manager to the terms and conditions of this Agreement.

8.6.2 District represents and warrants that the individual(s) executing this Agreement on behalf of District have the legal power, right and actual authority to bind the District to the terms and conditions of this Agreement.

8.7 Successors and Assigns. This Agreement shall be binding on and inure to the benefit of the parties and their respective successors and assigns.

8.8 Assignment. Construction Manager shall not assign this Agreement without the prior written approval of District which approval may be refused or conditioned in District's absolute discretion. Construction Manager may assign this Agreement to an Affiliate (any corporation, limited liability company or other business organization or person who or which directly or indirectly through one or more intermediaries (a) is owned or controlled by Construction Manager, (b) owns or controls Construction Manager or (c) is under substantially common control with Construction Manager), but no such assignment shall release Construction Manager from its obligations under this Agreement or amend the obligations of Construction Manager under this Agreement.

8.9 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of California.

8.10 Integrated Agreement; Modification. This instrument contains the entire agreement of the parties and cannot be amended or modified except by a written Agreement, executed by each of the parties hereto.

8.11 Defined Terms. Unless and except as otherwise stated herein, capitalized terms used in this Agreement shall be construed in accordance with those definitions given for such terms in this Agreement.

8.12 Captions. The captions in this Agreement are for convenience purposes only, and shall have no effect on its construction or interpretation.

8.13 Severability. The unenforceability, invalidity, or illegality of any provision shall not render the other provisions unenforceable, invalid, or illegal.

8.14 Counterparts. This Agreement may be executed simultaneously in one (1) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

8.15 Rule of Construction. The language of all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for or against either party. Each of the parties acknowledges that it has reviewed the Agreement and participated in its drafting and therefore that the rule of construction that any ambiguities are to be resolved against the drafting party shall not be employed nor applied in the interpretation of this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the Effective Date first specified on the first page.

DISTRICT:

Mountain View Whisman School District

By: _____
Name: _____
Title: _____
Date: _____
Address: _____
Email: _____

CONSTRUCTION MANAGER:

Mountain View Owners, LLC, a Delaware limited liability company

By: _____
Name: _____
Title: _____
Date: _____
Address: _____
Email: _____

Exhibit A



Note: For landscape and grading, refer to landscape plan.
 For site information, refer to architectural site plan.
 For parking, storage, and bicycle stall walls, refer to enlarged garage plan and project summary.



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 SAN JOSE, CA 95128

777 WEST MIDDLEFIELD
 777 WEST MIDDLEFIELD
 SAN JOSE, CA 95128

FORMAL PLANNING REVIEW #3
 SHEET 11 OF 18



BUILDING C FLOOR PLAN
 SHEET 1

A3.3.0