
MEMORANDUM OF AGREEMENT

by and between

CITY OF ONTARIO

and

NMC BUILDERS, LLC

Dated as of July 21, 2015

**City of Ontario
New Model Colony
Community Facilities Districts**

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT (this “Agreement”), dated as of July 21, 2015, is by and between the CITY OF ONTARIO, a general law city organized and existing under and by virtue of the laws of the State of California (the “City”), and NMC BUILDERS, LLC, a limited liability company organized and existing under the laws of the State of California (“NMC Builders”).

WITNESSETH:

WHEREAS, certain real property within the boundaries of the City located generally south of State Route 60 is commonly known as the New Model Colony;

WHEREAS, the City has approved a General Plan for the New Model Colony (the “General Plan”) and has certified an Environmental Impact Report in connection with the General Plan (the “Environmental Impact Report”);

WHEREAS, the City has specified in the General Plan and the Environmental Impact Report the major backbone transportation, water, sewer, storm drainage, parks and public safety infrastructure required to serve the New Model Colony;

WHEREAS, the members of NMC Builders (the “Members”) own and intend to develop certain of the property within the New Model Colony;

WHEREAS, the City, NMC Builders and the Members desire to provide a mechanism to fund, in a timely manner, the costs of certain of such major backbone infrastructure required to serve the New Model Colony (the “Facilities”) so that such development may occur;

WHEREAS, in order to provide such a mechanism, the City anticipates that it will, pursuant to the Mello-Roos Community Facilities Act of 1982 (the “Act”), establish one or more community facilities districts, each of which will include only property that is within the New Model Colony and that is subject to a development agreement between the City and a Member (each, a “Community Facilities District”);

WHEREAS, it is anticipated that, pursuant to the Act, the proceedings of the City Council of the City and an election held within each Community Facilities District, each Community Facilities District will be authorized to issue special tax bonds (the “Bonds”) secured by special taxes (“Special Taxes”) levied within such Community Facilities District to finance certain of the Facilities;

WHEREAS, it is anticipated that, from time to time, Bonds will be issued by the Community Facilities Districts;

WHEREAS, concurrently with the execution and delivery of this Agreement, the City and NMC Builders are entering into the Acquisition Agreement, dated as of the date hereof (the “NMC Acquisition Agreement”), with respect to the Facilities;

WHEREAS, pursuant to the First Amended and Restated Agreement for Financing and Construction of Limited Infrastructure Improvements to Serve an Easterly Portion of the New Model Colony (the "Construction Agreement"), made as of August 21, 2012, by and between the City and NMC Builders, the City and NMC Builders have agreed that the City shall be the sole and exclusive lead agency in the formation of any community facilities district, assessment district or other public financing mechanism within the Property (as defined in the Construction Agreement); provided however, that the proceeds of any such community facilities district, assessment district, or financing mechanism may be used, subject to restrictions that may be imposed by applicable law, for the purposes of acquiring, constructing or maintaining public facilities to be owned or operated by other public agencies, including, without limitation those facilities owned or operated by a school district;

WHEREAS, Section 53312.7 of the Act provides that a local agency may initiate proceedings to establish a community facilities district pursuant to the Act only if it has first considered and adopted local goals and policies concerning the use of the Act, which policies must include the statements described in said Section;

WHEREAS, in accordance with Section 53312.7 of the Act, the City has adopted its Mello-Roos Community Facilities Act of 1982 Local Goals and Policies (the "Policies");

WHEREAS, the Policies include policies regarding project eligibility, priorities for facilities to be financed through the City's use of the Act and the maximum total tax burden for parcels within community facilities districts established by the City under the Act;

WHEREAS, the Policies provide that the City may, in its discretion and to the extent provided by law, waive any of the policies set forth in the Policies in particular cases;

WHEREAS, the City and NMC Builders desire to set forth their mutual understanding and agreement as to how certain of the policies in the Policies are to be applied to the Community Facilities Districts, the order of priority in which proceeds of the Special Taxes and Bonds will be applied to the costs of the Facilities and certain other matters;

WHEREAS, the provisions hereof apply only to Community Facilities Districts, as defined herein, which are community facilities districts established by the City under the Act, each of which includes only property that is within the New Model Colony and that is subject to a development agreement between the City and a Member; and

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, the parties hereto agree as follows:

Section 1. Definitions. Capitalized undefined terms used herein have the meanings ascribed thereto in the NMC Acquisition Agreement. In addition, the following term shall have the meaning specified below.

"Member Specific Improvements" means, with respect to a Community Facilities District (a) the Facilities that, pursuant to a Development Agreement to which property within the boundaries of such Community Facilities District is subject, the Member that is party to such Development Agreement is obligated to construct or cause to be constructed as a condition of

development of such property, and (b) which Facilities are constructed by or on behalf of such Member singly and not jointly or in conjunction with another Member or NMC Builders.

Section 2. Eligibility. An application to the City for Community Facilities District financing, the property within which Community Facilities District is being developed by a single landowner, will be considered by the City if such property is proposed to be developed with at least 175 residential units. An application to the City for Community Facilities District financing, the property within which Community Facilities District is being developed by multiple landowners, will be considered by the City if the property being developed by all such landowners is (a) within the same general area, (b) has substantially equivalent estimated development timelines, and (c) is proposed to be developed with at least 175 residential units.

Section 3. Eligible CFD Facilities. With respect to the Community Facilities Districts, “backbone infrastructure,” for purposes of the Policies, shall mean (a) fire suppression facilities, vehicles and equipment, (b) streets, signals and bridges, (c) water source, storage and distribution facilities, (d) storm drainage collection system facilities, (e) sewer collection system facilities, (f) library facilities and collection, (g) fiber optic communications system facilities, (h) public park facilities, (i) pavement, curb and gutter, sidewalks and street lighting improvements for the lane adjacent to the curb on public street segments, which public street segments are included in the DIF Program (as defined in the Construction Agreement), and (j) landscaped parkways and neighborhood edge facilities on public street segments, which public street segments are included in the DIF Program (collectively, “Eligible CFD Facilities”). Eligible CFD Facilities shall not include any facilities that constitute in-tract infrastructure.

Section 4. Financing Priorities. The Net Proceeds of each Community Facilities District shall be applied in the following order of priority:

First Priority. To pay, or to provide for the payment of, the costs of Eligible CFD Facilities that are Member Specific Improvements with respect to such Community Facilities District, in an amount equal to the lesser of (i) the estimated amount of such costs, and (ii) the amount of such Net Proceeds.

Second Priority. If Net Proceeds remain after satisfying the requirements of the First Priority, such Net Proceeds shall be applied to pay, or to provide for the payment of, the costs of Eligible CFD Facilities that are intended to be acquired by the City from NMC Builders pursuant to the NMC Acquisition Agreement, including Eligible CFD Facilities, the costs of which have been advanced by a single Member or group of Members, in an amount equal to the lesser of (i) the estimated amount of such costs, and (ii) the amount of such remaining Net Proceeds.

Third Priority. If (i) Net Proceeds remain after satisfying the requirements of the Second Priority, and (ii) the City has acquired from one or more Members two parcels to be used as a City park, one of which parcels is described as Parcel 5 of Tentative Tract Map 19560 and the other of which is described as Assessor’s Parcel Number 0218-241-22-0-000, such Net Proceeds shall be applied to pay, or to provide for the payment of, costs of public improvements constructed by or on behalf of the City, in an amount equal to the lesser of (i) an amount equal to the remainder of (A) the amount of the Parkland

Acquisition and Facilities Fee imposed with respect to the development of the property within such Community Facilities District pursuant to the DIF Program (the "Park Fee"), minus (B) the amount, if any, of such Park Fee against which a credit has previously been granted, and (ii) the amount of such remaining Net Proceeds (such lesser amount being referred to as the "Available Park Fee Credit Amount"). Upon such application of such remaining Net Proceeds (i) if all or a portion of such Park Fee has previously been paid (other than by way of a deemed payment resulting from a credit previously granted), an amount equal to the lesser of (A) the amount of the Park Fee so paid, and (B) the Available Park Fee Credit Amount shall be refunded by the City to the payor of such Park Fee, and (ii) such property shall receive a credit against the Park Fee in an amount equal to the remainder of (A) the Available Park Fee Credit Amount, minus (B) the amount so refunded to such payor.

Fourth Priority. If (i) Net Proceeds remain after satisfying the requirements of the Third Priority, and (ii) all Conditions of Approval for the property within such Community Facilities District have been fully satisfied, other than subdivision improvement agreement conditions for specific units, the construction of which has not been completed, and other than such other conditions of such Conditions of Approval that the City has agreed in writing need not be satisfied for purposes of this Fourth Priority, such Net Proceeds shall be applied to pay, or to provide for the payment of, costs of Eligible CFD Facilities constructed by or on behalf of the City, in an amount equal to the lesser of (A) the remainder of (I) the amount of the development impact fees imposed with respect to the development of the property within such Community Facilities District pursuant to the DIF Program (the "DIF Fees), minus (II) the amount, if any, of such DIF Fees against which a credit has previously been granted, and (ii) the amount of such remaining Net Proceeds (such lesser amount being referred to as the "Available DIF Fees Credit Amount"). Upon such application of such remaining Net Proceeds (i) if all or a portion of such DIF Fees has previously been paid (other than by way of a deemed payment resulting from a credit previously granted), an amount equal to the lesser of (A) the amount of the DIF Fees so paid, and (B) the Available DIF Fees Credit Amount shall be refunded by the City to the payor of such DIF Fees, and (ii) such property shall receive a credit against the DIF Fees in an amount equal to the remainder of (A) the Available DIF Fees Credit Amount, minus (B) the amount so refunded to such payor.

Fifth Priority. If (i) Net Proceeds remain after satisfying the requirements of the Fourth Priority, and (ii) all Conditions of Approval for the property within such Community Facilities District have been fully satisfied, other than subdivision improvement agreement conditions for specific units, the construction of which has not been completed, and other than such other conditions of such Conditions of Approval that the City has agreed in writing need not be satisfied for purposes of this Fourth Priority, such Net Proceeds shall be applied to pay, or to provide for the payment of, costs of street, sewer, water and storm drain facilities (A) that are backbone infrastructure to be owned or operated by the City that are not identified in an infrastructure master plan or the City's DIF Program, but are identified in a Specific Plan or other appropriate document approved by the City as a major backbone infrastructure element, (B) are not in-tract facilities, and (C) are constructed by or on behalf of an owner of the property in such Community Facilities District or the Member that previously owned such property,

in an amount equal to the lesser of (i) the estimated amount of such costs, and (ii) the amount of such remaining Net Proceeds. Any such facilities financed pursuant to this Fifth Priority shall be acquired by the City from such property owner or Member, as applicable, pursuant to an acquisition agreement between such parties.

The City and NMC Builders acknowledge that the costs of Eligible CFD Facilities to which Net Proceeds are to be applied pursuant to the First Priority and Second Priority may exceed the amount of Net Proceeds available for such purpose and that, even if, ultimately, such available amounts are greater than such costs, it will likely be several, or many, years before Net Proceeds will be available to be applied pursuant to the Third Priority, Fourth Priority or Fifth Priority.

Section 5. Purchase Prices. The purchase price of Eligible CFD Facilities to be acquired by the City, whether pursuant to the NMC Acquisition Agreement or pursuant to an acquisition agreement between the City and a Member or other owner of property within a Community Facilities District, shall be the lesser of (a) the estimated costs of such Eligible CFD Facilities, as determined pursuant to the Construction Agreement, and (b) the actual, reasonable costs of acquiring, constructing and installing such Eligible CFD Facilities incurred by NMC Builders, such Member or such property owner.

Section 6. Total Tax Burden. (a) An application to the City for Community Facilities District financing will be considered by the City if the Total Tax Burden (as defined in the Policies) on any parcel in such Community Facilities District on which a for-sale detached residential unit has been, is being or is to be constructed does not exceed 1.95% of the estimated base sales price of such parcel upon completion of the public and private improvements relating thereto.

(b) An application to the City for Community Facilities District financing will be considered by the City (i) if the sum of (A) the Total Tax Burden, plus (B) the anticipated annual property owners' association fee or charge on any parcel in a Community Facilities District on which a for-sale detached residential unit has been, is being or is to be constructed (the amount of which anticipated fee or charge shall be demonstrated to the reasonable satisfaction of the City), may exceed 2.15% of the estimated base sales price of such parcel upon completion of the public and private improvements relating thereto, and (ii) if and to the extent that the City determines that the enhanced level of amenities to be provided by the property owners' association in such Community Facilities District justifies allowing such sum to exceed said 2.15%.

(c) An application to the City for Community Facilities District financing will be considered by the City (i) if the sum of (A) the Total Tax Burden, plus (B) the anticipated annual property owners' association fee or charge on any parcel in a Community Facilities District on which a for-sale attached residential unit has been, is being or is to be constructed (the amount of which anticipated fee or charge shall be demonstrated to the reasonable satisfaction of the City), may exceed 2.55% of the estimated base sales price of such parcel upon completion of the public and private improvements relating thereto, and (ii) if and to the extent that the City determines that the enhanced level of amenities to be provided by the property owners' association in such Community Facilities District justifies allowing such sum to exceed said 2.55%.

Section 7. Policies Amendments. The City shall not arbitrarily or capriciously amend the Policies (as in effect on the date of this Agreement).

Section 8. Binding on Successors and Assigns. Neither this Agreement nor the duties and obligations of NMC Builders hereunder may be assigned to any person without the written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. Neither this Agreement nor the duties and obligations of the City hereunder may be assigned to any person, without the written consent of NMC Builders, which consent shall not be unreasonably withheld, conditioned or delayed. The agreements and covenants included herein shall be binding on and inure to the benefit of any partners, permitted assigns, and successors-in-interest of the parties hereto.

Section 9. Amendments. This Agreement may be amended by an instrument in writing executed and delivered by the City and NMC Builders.

Section 10. Waivers. No waiver of, or consent with respect to, any provision of this Agreement by a party hereto shall in any event be effective unless the same shall be in writing and signed by such party, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which it was given.

Section 11. Third-Party Beneficiaries. Each Member is a third-party beneficiary of this Agreement.

Section 12. Notices. Any written notice, statement, demand, consent, approval, authorization, offer, designation, request or other communication to be given hereunder shall be given to the party entitled thereto at its address set forth below, or at such other address as such party may provide to the other party in writing from time to time, namely:

City: City of Ontario
303 East "B" Street
Ontario, California 91764
Attention: Finance Director

NMC Builders: NMC Builders, LLC
c/o SC Ontario Development Corporation
1156 North Mountain Avenue
Upland, California 91786
Attention: Administrative Member

Each such notice, statement, demand, consent, approval, authorization, offer, designation, request or other communication hereunder shall be deemed delivered to the party to whom it is addressed (a) if given by courier or delivery service or if personally served or delivered, upon delivery, (b) if given by telecopier, upon the sender's receipt of an appropriate answerback or other written acknowledgment, (c) if given by registered or certified mail, return receipt requested, deposited with the United States mail postage prepaid, 72 hours after such notice is deposited with the United States mail, or (d) if given by any other means, upon delivery at the address specified in this Section.

Section 13. Attorneys' Fees. If any action is instituted to interpret or enforce any of the provisions of this Agreement, the party prevailing in such action shall be entitled to recover from the other party thereto reasonable attorney's fees and costs of such suit (including both prejudgment and postjudgment fees and costs) as determined by the court as part of the judgment.

Section 14. Jurisdiction and Venue. Each of the City and NMC Builders (a) agrees that any suit, action or other legal proceeding arising out of or relating to this Agreement shall be brought in a state or local court in the County of San Bernardino or in the Courts of the United States of America in the district in which said county is located, (b) consents to the jurisdiction of each such court in any such suit, action or proceeding, and (c) waives any objection that it may have to the laying of venue of any suit, action or proceeding in any of such courts and any claim that any such suit, action or proceeding has been brought in an inconvenient forum. Each of the City and NMC Builders agrees that a final and non-appealable judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

Section 15. Usage of Words. As used herein, the singular of any word includes the plural, and terms in the masculine gender shall include the feminine.

Section 16. Governing Law. This Agreement and any dispute arising hereunder shall be governed by and interpreted in accordance with the laws of the State of California.

Section 17. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original.

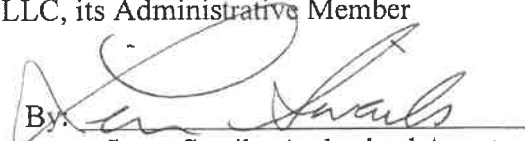
IN WITNESS WHEREOF, the parties hereto have executed this Acquisition Agreement as of the day and year first hereinabove written.

CITY OF ONTARIO

By: _____
Al C. Boling, City Manager

NMC BUILDERS, LLC, a California
limited liability company

By: SC Ontario Development Company
LLC, its Administrative Member

By: 
Leon Swails, Authorized Agent