

# FUNDING AGREEMENT

City Manager's Office  
701 Laurel St., Menlo Park, CA 94025  
tel 650-330-6620



**#3403**

This Funding Agreement ("Agreement") is made this day of 10/11/2021, ("Execution Date") by and between the City of Menlo Park ("City") and the 1540 ECR Owner, LLC, a Delaware Limited Liability Company ("Owner"), each of which is referred to herein individually as "Party" and jointly as "Parties."

## RECITALS:

WHEREAS, the Owner owns real property commonly known as 1540 El Camino Real, Menlo Park, California ("Property"); and

WHEREAS, the 1540 El Camino Real project is currently under construction; and

WHEREAS, the 1540 El Camino Real project is proposing to design and construct median island improvements along El Camino Real, between Glenwood Avenue and Encinal Avenue, in consultation with the City, as specified in Exhibit 1 subject to all the terms and conditions set forth in this Agreement.

NOW, THEREFORE, the Parties agree as follows:

## SECTION 1: SCOPE OF WORK AND REPORTING

- 1.1 Owner shall be responsible for the following Scope of Work:
  - 1.1.1 Owner shall hire a consultant for designing the Project, hire a licensed Contractor to perform the work and pay for all such work
  - 1.1.2 Owner shall be responsible for procuring and handling all material required for the completion of the Project.
  - 1.1.3 Owner shall be responsible for removing all existing trees (excluding the narrower nose ends), as specified in Exhibit 1, within the wider median island on ECR between Glenwood Avenue and Encinal Avenue, reinstalling new landscaping and trees, and modifying existing irrigation (and other improvements) as necessary, to the satisfaction of the Public Works Director.
  - 1.1.4 Owner shall deliver copies of all invoices to the City.
  - 1.1.5 Owner is responsible to fund the entire project and will be reimbursed 75%, not to exceed \$135,243. The owner's contribution may exceed 25%.
  - 1.1.6 Owner acknowledges that public funds are being used for this project and shall ensure that any contract it enters into for the installation of the Median Island Improvements shall require the payment of prevailing wages as defined and required by law.

**SECTION 2: ACCESS TO RECORDS AND RECORD RETENTION**

2.1 At all reasonable times, Owner will permit, upon request, the City to access and use all reports, designs, drawings, plans, specifications, schedules and other materials prepared, or in the process of being prepared, for the work by Owner or any contractor or consultant of Owner. Owner will provide copies of any documents and Autocad drawings described in this Section to the City upon request and the City may use them for construction of the work without further approval from Owner or its consultants. Owner and the City will retain all records pertaining to the work for at least three years after completion of the Work.

**SECTION 3: FUNDING AND PAYMENT**

3.1 Upon completion of the improvements and receiving receipt of all invoices, the City shall pay the Owner 75 percent of the median island improvements cost, not to exceed \$135,243. The proposed median island improvements are estimated to cost \$180,324.

3.2 In the event that the Owner diligently pursues completion of the landscaping improvements, but for reasons outside of their control, for example Caltrans does not grant the necessary approval, the installation of all median island landscaping is not completed within five years from the first temporary certificate of occupancy, Owner will be relieved of the responsibility to construct the improvement and the required bond would be released by the City after the funds equal to 25 percent of the bid construction cost to the City are submitted. The City would then be able use the developer's funds for other landscaping improvements elsewhere in the City.

**SECTION 4: TERM**

4.1 This Agreement shall commence upon the issuance of a Notice to Proceed to a General Contractor to perform the work specified in the 1540 El Camino Real Project ("Project"). This Agreement may be terminated by either party in writing with sixty (60) days advance written notice. This Agreement shall end upon completion of services and payment by the City unless terminated earlier.

**SECTION 5: INDEMNIFICATION AND INSURANCE**

5.1 Owner agrees, while engaged in the work provided for in this Agreement, to place and maintain suitable safeguards sufficient to prevent injury to any persons and to indemnify, defend and save harmless the City, its officers, representatives, and employees from and against any and all claims for loss, injury or damage resulting from the prosecution of said work except to the extent any claim arises out of the sole negligence or willful misconduct of the City. To the full extent required by applicable federal and state law, Owner and its contractors and agents shall comply with California Labor Code Section 1720 et seq. and the regulations adopted pursuant thereto ("Prevailing Wage Laws"), and shall be solely responsible for carrying out the requirements of such provisions. Owner shall indemnify, defend and hold the City and its elected and appointed officers, officials, employees, agents, consultants, and contractors (collectively, the "Indemnitees") harmless from and against all liability, loss, cost, expense (including without limitation attorneys' fees and costs of litigation), claim, demand, action, suit, judicial or administrative proceeding, penalty, deficiency, fine, order, and damage which directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with, or relate to, the payment or requirement of payment of prevailing wages.

5.2 City agrees, while engaged in the work provided for in this Agreement, to place and maintain suitable safeguards sufficient to prevent injury to any persons and to indemnify, defend and save harmless Owner, its officers, representatives, and employees from and against any and all claims for loss, injury or damage resulting from the prosecution of said work except to the extent any claim arises out of the negligence or willful misconduct of Owner

**SECTION 6: MISCELLANEOUS**

6.1 Notices. All notices required or permitted to be given under this Agreement must be in writing and mailed postage prepaid by certified or registered mail, return receipt requested, or by personal delivery or overnight courier to the appropriate address indicated below or at such other place(s) that either Party may designate in written notice to the other. Notices are deemed received upon delivery if personally served, one day after mailing if delivered via overnight courier, or two days after mailing if mailed as provided above.

To Owner: 1540 ECR Owner, LLC  
Attn: Rich Ying

[REDACTED]  
[REDACTED]

To the City: City of Menlo Park,  
Attn: Public Works Director  
701 Laurel Street  
Menlo Park, California 94025-3409

Cc: City of Menlo Park  
Attn: City Attorney  
Burke, Williams & Sorensen, LLP  
181 Third Street, Suite 200  
San Rafael, CA 9490

6.2 No Waiver. No waiver of any default or breach of any covenant of this Agreement by either Party will be implied from any omission by either Party to take action on account of such default if such default persists or is repeated. Express waivers are limited in scope and duration to their express provisions. Consent to one action does not imply consent to any future action.

6.3 Assignment. The Parties are prohibited from assigning, transferring or otherwise substituting their interests or obligations under this Agreement without the written consent of all other Parties, provided however, Owner shall have the right to assign this Agreement to an affiliated entity of Owner that is the owner of the Property without the prior approval or consent of the City.

6.4 Governing Law. This Agreement is governed by the laws of the State of California as applied to contracts that are made and performed entirely in California.

6.5 Compliance with Laws. In performance of this Agreement, the Parties must comply with all applicable Federal, State and local laws, regulations and ordinances.

6.6 Modifications. This Agreement may only be modified in a writing executed by both Parties.

6.7 Relationship of the Parties. It is understood that this Agreement does not create the relationship of agent, servant, employee, partnership, joint venture or association between the parties.

6.8 Ownership of Work. All reports, designs, drawings (including Autocad files), plans, specifications, schedules, studies, memoranda, and other documents assembled for or prepared by or for, in the process of being assembled or prepared by or for, or furnished to Owner under this Agreement are the property of the City. The City may use all reports, designs, drawings (including Autocad files), plans, specifications, schedules, studies, memoranda, and other documents assembled for or prepared by or

for under this agreement with Owner to construct the work. The Parties are entitled to copies and access to these materials during the progress of the work and upon completion or termination of the work or this Agreement. Owner may retain a copy of all material produced under this Agreement for its use in its general activities.

6.9 Warranty of Authority to Execute Agreement. Each Party to this Agreement represents and warrants that each person whose signature appears hereon is authorized and has the full authority to execute this Agreement on behalf of the entity that is a Party to this Agreement.

6.10 Severability. If any portion of this Agreement, or the application thereof is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining portions of this Agreement, or the application thereof, will remain in full force and effect.

6.11 Counterparts. This Agreement may be executed in counterparts.

6.12 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to its subject matter and supersedes any prior or contemporaneous written or oral agreement between the parties on the same subject.

(Signatures on following page)

IN WITNESS WHEREOF, the Parties have hereunder subscribed their names the day and year indicated below.

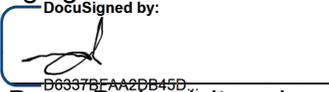
1540 ECR OWNER, LLC  
a Delaware Limited Liability Company

By: 1540 ECR Holdings, LLC  
a Delaware limited liability company  
its Managing Member

By: FCP ECR JV, LLC,  
a Delaware limited liability company,  
its Managing Member

By: FCP ECR Manager, LLC,  
a Delaware limited liability company,  
its Managing Member

By: Four Corners Properties, LLC,  
a Delaware limited liability company,  
its Managing Member

By:   
Bruce Burkard, its sole member

CITY OF MENLO PARK, a municipal corporation

**APPROVED AS TO FORM:**

  
Nira F. Doherty, City Attorney

9/28/2021  
Date

**CITY OF MENLO PARK:**

  
Starla Jerome-Robinson, City Manager

10/11/2021  
Date

**ATTEST:**

  
Judi A. Herren, City Clerk

10/11/2021  
Date

Attachments: Exhibit 1, Improvement Plan

**Exhibit 1  
(Improvement Plan)**

