

LOAN AGREEMENT

by and between

THE CITY OF SAN LEANDRO

and

MTLG, LLC

2539 Grant Avenue, San Leandro, CA 94579

APN:

Exhibits

- A Property Description
- B Promissory Note
- C Deed of Trust
- D Insurance Requirements

LOAN AGREEMENT

This Loan Agreement (this “**Agreement**”) is entered into effective as of _____, 2018 (the “**Effective Date**”) by and between MTLG, LLC, a California limited liability company, (the “**Borrower**”) and the City of San Leandro, a California charter city (the “**Lender**”). Lender and Borrower are hereinafter collectively referred to as the “**Parties.**”

RECITALS

A. Borrower is the owner of that certain real property located at 2539 Grant Avenue, San Leandro, CA 94579, APN 80G-910-15 (the “**Property**”). The Property is more particularly described in Exhibit A, attached hereto and incorporated herein by reference.

B. On April 1, 2013, the Lender approved Borrower’s proposed wind energy conversion project and height variance (“**Project**”) to be located on the Property.

C. On May 8, 2013, interested persons (“**Petitioners**”) filed a writ of mandate pursuant to the California Environmental Quality Act (“**CEQA**”) in Alameda County Superior Court, Case No. RG13677840, alleging that Lender, in its regulatory capacity, had failed to comply with CEQA and CEQA Guidelines in approving the Project (the “**Litigation**”).

D. On April 14, 2014, the Alameda County Superior Court entered judgment in favor of the Petitioners, and the court issued a writ of mandate to the Lender. Thereafter, the court awarded Petitioner’s counsel attorney’s fees.

E. The Lender and Borrower appealed the award of attorney’s fees, but on January 12, 2018, the Court of Appeal upheld the trial court’s award of attorney’s fees and awarded Petitioner attorney’s fees for the appeal action.

F. Upon commencement of the Litigation, Borrower agreed to pay all costs incurred by the Lender in defending approval of the Project and related litigation. The Lender has expended, or has agreed to expend, \$186,382.25 for appeal fees and \$232,425.65 in trial court fees, and Borrower owes the Lender an additional \$36,299.46 in other outstanding fees (collectively, “**Litigation Costs**”).

G. Lender has agreed to pay the Litigation Costs, and Borrower has agreed to repay to Lender an amount equal to the Litigation Costs, totaling Four Hundred Fifty Five Thousand One Hundred Seven Dollars and Thirty Sixty Cents (\$455,107.36.) (the “**Loan**”) pursuant to the terms and conditions hereof for the purposes contained in this Agreement.

H. Concurrently herewith, Borrower shall execute a promissory note (the “**Note**”) in the amount of the Loan, and a Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (“**Deed of Trust**”), which shall provide Lender with a

security interest in the Property. This Agreement, the Note, and the Deed of Trust are collectively hereinafter referred to as the “**Loan Documents.**”

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows.

ARTICLE I

LOAN TERMS

1.1 LOAN AND NOTE. Lender agrees to loan to Borrower, and Borrower agrees to borrow from and repay to Lender, the sum of Four Hundred Fifty Five Thousand One Hundred Seven Dollars and Thirty Six Cents (\$455,107.36.) upon the terms and conditions and for the purposes set forth in this Agreement. The Loan shall be evidenced by the Note, which shall be dated as of the Effective Date and executed by Borrower substantially in the form attached hereto as Exhibit B. The Note shall be secured by the Deed of Trust executed by Borrower as Trustor for the benefit of the Lender substantially in the form attached hereto as Exhibit C. Lender shall disburse Loan Proceeds only for the purposes set forth in Section 2.1.

1.2 INTEREST RATE; PAYMENT DATES; MATURITY DATE.

(a) Interest. Interest shall accrue on the outstanding principal balance of the Loan at the rate of two percent (2%) simple interest per annum commencing upon the Effective Date and continuing through the date that all indebtedness and other amounts payable under this Agreement and the Note are paid in full. Interest shall be calculated on the basis of three hundred sixty five (365) days, and charged for the actual number of days elapsed.

(b) Payment Dates; Maturity Date. Commencing July 1, 2019, and annually on July 1 thereafter through the Maturity Date (each, a "Loan Repayment Date") Borrower shall make annual payments of principal and interest in the amount of at least Fifty Thousand Six Hundred Fifty Five Dollars and Fifty Two Cents (\$50,655.52)("Loan Repayment Amount"). The entire indebtedness including any remaining interest and the principal, shall be due and paid in full upon the Maturity Date (defined below). The entire outstanding principal balance of the Loan, together with any accrued interest and all other sums accrued hereunder shall be payable in full on the tenth (10th) anniversary of the Effective Date of this Loan (the “**Maturity Date**”). Payments shall be credited first to any unpaid late charges and other costs and fees then due, and then to accrued interest. In no event shall any amount due under this Loan become subject to any rights, offset, deduction, or counterclaim on the part of Borrower.

(c) Late Payment Penalty. In the event Borrower fails to pay the Loan Repayment Amount by the close of business on the tenth (10th) business day after the Loan Repayment Date, Borrower shall pay to Lender as a late fee 5% of the Loan Repayment Amount (the “Late Payment Penalty”).

1.3 SECURITY. As security for repayment of the Note, Borrower shall execute the Deed of Trust in favor of Lender as beneficiary pursuant to which Lender shall be provided a lien against Borrower's interest in the Property. The Deed of Trust shall be dated as of the Effective Date, shall be substantially in the form attached hereto as Exhibit C, and shall be recorded in the Official Records of Alameda County ("Official Records"). The Deed of Trust may be subordinated to only such liens and encumbrances as Lender shall approve in writing. Notwithstanding the foregoing, the Deed of Trust may be subordinated to a deed of trust or other security filing arising from the refinancing of any loan(s) secured by a deed of trust senior to the Deed of Trust, as long as the principal amount secured as a result of such refinanced loans does not exceed two million five hundred thousand dollars (\$2,500,000).

1.4 PREPAYMENT; ACCELERATION.

(a) Prepayment. Borrower may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due on the Loan under this Agreement provided that each such payment is accompanied by accrued interest on the amount of principal prepaid calculated to the date of such payment. Prepayments shall be applied first to any unpaid late charges and other costs and fees then due, then to accrued but unpaid interest, and then to principal.

(b) Due on Transfer. Unless Lender agrees otherwise in writing, the entire unpaid principal balance and all interest and other sums accrued on the Loan under this Agreement shall be due and payable upon the Transfer, absent the prior written consent of Lender, of all or any part or interest in the Property. "**Transfer**" shall include any assignment, sale, or other conveyance of the Property, but shall exclude encumbrances junior to the Deed of Trust and leases of the Property.

ARTICLE II

USE AND DISBURSEMENT OF PROCEEDS

2.1 USE OF PROCEEDS. The proceeds of the Loan ("**Loan Proceeds**") shall be used solely to repay Borrower the Litigation Costs. Borrower and Lender acknowledge and agree that the Lender has already paid, or will pay, the full amount of the Litigation Costs, and that no portion of the Loan Proceeds shall be disbursed to Borrower, and that Borrower will have no direct possession or control over the Loan Proceeds.

2.2 CONDITIONS PRECEDENT TO DISBURSEMENT OF PROCEEDS.

Lender's obligation to fund the Loan is conditioned upon the satisfaction of all of the following conditions:

(a) Borrower's execution and delivery to Lender of this Agreement, the Note, and the Deed of Trust;

(b) Recordation of the Deed of Trust in the Official Records of Alameda County;

(c) No material adverse change as determined by Lender in its reasonable judgment shall have occurred in the condition of the Property or in the financial or other condition of Borrower since the date of this Agreement.

2.3 NO OBLIGATION TO DISBURSE PROCEEDS UPON DEFAULT.

Notwithstanding any other provision of this Agreement, the Lender shall have no obligation to disburse or authorize the disbursement of any portion of the Loan Proceeds following:

- (i) the failure of any of Borrower's representations and warranties set forth in this Agreement to be true and correct in all material respects;
- (ii) the termination of this Agreement by mutual agreement of the Parties;
- (iii) the conditions to disbursement of the Loan set forth in Section 2.2 have not been satisfied within seven (7) days following the Effective Date, unless an extension of such date is approved by Lender in writing; or
- (iv) the occurrence of any Event of Default hereunder.

ARTICLE III

REPRESENTATIONS, WARRANTIES AND COVENANTS

3.1 Borrower makes the following representations, warranties and covenants and acknowledges that Lender is relying thereupon in making the Loan:

(a) LEGAL STATUS; AUTHORITY; OWNERSHIP. Borrower is the owner of the Property, subject only to liens, encumbrances, easements, restrictions, conditions and other matters of record or disclosed in writing to Lender.

(b) NO VIOLATION. The execution of the Loan Documents and Borrower's performance thereunder do not and will not result in a breach of or constitute a default under any agreement, indenture or other instrument to which Borrower is a party or by which Borrower may be bound.

(c) AUTHORIZATION. The Loan Documents and the transactions contemplated thereby have each been duly authorized by Borrower, and when executed and delivered will each constitute a valid and binding obligation of Borrower, enforceable in accordance with the respective terms thereof.

(d) LITIGATION. There are no pending or to Borrower's knowledge, threatened actions or proceedings before any court or administrative agency which may adversely affect the financial condition or operation of Borrower or Borrower's interest in the Property.

(e) COMPLIANCE WITH LAWS. To Borrower's reasonable knowledge, Borrower is in compliance in all material respects with all local, state, and federal laws, rules, regulations, orders and decrees which are applicable to the Property or to Borrower in relation thereto ("**Applicable Law**") including without limitation, all environmental, health and safety, and employment laws. Borrower has received no notice from any governmental authority regarding any threatened or pending zoning, building, fire, or health code violation, or violation of other governmental regulations concerning the Property that has not been corrected, and no condition on the Property violates any Applicable Law.

(f) DISCLOSURE. No representation or warranty made by Borrower in this Agreement or in the Loan Documents contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements therein not misleading. There is no fact known to Borrower which has or might reasonably be anticipated to have a material adverse effect on the assets or financial condition of Borrower which has not been disclosed to Lender in writing.

ARTICLE IV

AFFIRMATIVE COVENANTS

4.1 USE OF FUNDS. Borrower covenants that the Loan Proceeds will be used solely for the purpose set forth in Section 2.1. Borrower acknowledges and agrees that no portion of the Loan Proceeds shall be disbursed to Borrower, and that Borrower shall not have direct possession or control over the Loan Proceeds.

4.2 PUNCTUAL PAYMENT. Borrower covenants to punctually pay the principal balance of the Loan and interest (if any) accrued thereon at the times and place and in the manner specified in the Agreement.

4.3 ACCOUNTING RECORDS; PROPERTY INSPECTION. Borrower covenants to maintain accurate books and records relating to the Loan in accordance with standard accounting principles consistently applied, and to permit the Lender, during business hours and upon reasonable notice to inspect, audit, and examine such books and records, and to inspect the Property during normal business hours upon reasonable notice to ensure compliance with this Agreement.

4.4 COMPLIANCE WITH LAWS. Borrower covenants to comply with all federal, state, and local laws, regulations, ordinances and rules applicable to the Property. Without limiting the generality of the foregoing, Borrower shall comply with all applicable requirements of state and local building codes and regulations, and all applicable statutes and regulations relating to accessibility for the disabled.

4.5 INSURANCE. Borrower shall maintain and keep in force at Borrower's expense insurance coverage with respect to the Property in accordance with the requirements set forth in Exhibit D attached hereto and incorporated herein.

4.6 FACILITIES. Borrower shall keep the Property and any improvements thereon, and the personal property used in Borrower's operations, in good repair and condition, and from time to time make necessary repairs, renewals, and replacements thereto so that the Property and improvements shall be preserved and maintained.

4.7 INDEMNIFICATION. Borrower shall indemnify, defend (with counsel approved by Lender), and hold harmless Lender and its elected officials, officers, agents, and employees, consultants, and contractors (collectively, the "**Indemnitees**"), from and against, and shall pay on demand, any and all losses, liabilities, damages, costs, claims, demands, penalties, fines, orders, judgments, actions, suits, judicial or administrative proceedings, injunctive or other relief, expenses and charges (including attorneys' fees and court costs) (collectively "**Claims**") arising directly or indirectly in any manner in connection with or as a result of (a) any breach of Borrower's covenants under the Loan Documents, (b) any failure of Borrower's representations and warranties to be true and correct in all material respects when made, (c) injury or death to persons or damage to property or other loss occurring on the Property, whether caused by the negligence or any other act or omission of Borrower or any other person or by negligent, faulty, inadequate or defective design, building, construction, maintenance or any other condition or otherwise, or (d) any claim, demand or cause of action, or any action or other proceeding, whether meritorious or not, brought or asserted against any Indemnitee which relates to or arises out of the Property, the improvements thereon, the Loan, the Loan Documents, or any transaction contemplated thereby, or any failure of Borrower to comply with all applicable state, federal, and local laws and regulations, in connection with the Property. The obligations of Borrower under this Section shall survive the expiration or termination of this Agreement and the making and repayment of the Loan.

4.8 TAXES AND OTHER LIABILITIES. Borrower shall pay and discharge when due any and all indebtedness, obligations, assessments, taxes, including federal and state payroll and income taxes which are the obligations of Borrower in relation to the Property except those that Borrower may in good faith contest or as to which a bona fide dispute may arise, provided provision is made to the satisfaction of Lender for eventual payment thereof in the event that it is found that the same is an obligation of Borrower.

ARTICLE V

EVENTS OF DEFAULT

The occurrence of any one or more of the following events shall constitute an event of default hereunder ("**Event of Default**"):

(a) If Borrower fails to pay when due the principal and interest payable under the Note and such failure continues for ten (10) days after Lender notifies Borrower thereof in writing.

(b) If, pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors (“**Bankruptcy Law**”), Borrower (i) commences a voluntary case or proceeding in bankruptcy; (ii) consents to the entry of an order for relief against Borrower in an involuntary case; (iii) consents to the appointment of a trustee, receiver, assignee, liquidator or similar official for Borrower; (iv) makes an assignment for the benefit of its creditors; or (v) admits in writing its inability to pay its debts as they become due.

(c) If a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against Borrower in an involuntary case, (ii) appoints a trustee, receiver, assignee, liquidator or similar official for Borrower or substantially all of Borrower’s assets, (iii) orders the liquidation of Borrower, or (iv) issues or levies a judgment, writ, warrant of attachment, or similar process against the Property or the Improvements, and in each case the order or decree is not released, vacated, dismissed, or fully bonded within sixty (60) days after its issuance.

(d) If the Borrower fails to maintain insurance as required pursuant to the Loan Documents, and Borrower fails to cure such default within ten (10) calendar days of receipt of notice from Lender.

(e) If any representation or warranty contained in the Loan Documents or any certificate furnished in connection with the foregoing or in connection with any request for disbursement of Loan Proceeds is false or misleading in any material adverse respect when made.

(f) A default arises under any loan secured by a mortgage, deed of trust, or other security instrument recorded against the Property and remains uncured beyond any applicable cure period such that the holder of such security instrument has the right to accelerate repayment of such loan.

(g) If the Borrower defaults in the performance of any term, provision, covenant or agreement (other than an obligation enumerated in this Article V) contained in this Agreement or in any other Loan Document, and unless such document specifies a shorter cure period for such default, the default continues for ten (10) days in the event of a monetary default or thirty (30) days in the event of a nonmonetary default after the date upon which Lender shall have given written notice of the default to Borrower (or such longer time as Lender may agree upon in writing), provided that in each case Borrower commences to cure the default within thirty (30) days and thereafter prosecutes the curing of such default with due diligence and in good faith.

ARTICLE VI

REMEDIES

6.1 REMEDIES AND RIGHTS UPON DEFAULT. Upon the occurrence of an Event of Default, Lender shall have all remedies available to it under law or equity, including, but not limited to the following, and Lender may, at its election, without notice to or demand upon Borrower, except for notices or demands required by law or

expressly required pursuant to the Loan Documents, exercise one or more of the following remedies:

- i) Accelerate and declare the balance of the Note and interest accrued thereon immediately due and payable;
- ii) Seek specific performance to enforce the terms of the Loan Documents;
- iii) Foreclose on the Property pursuant to the Deed of Trust;
- iv) Pursue any and all other remedies available under law or equity to enforce the terms of the Loan Documents and Lender's rights thereunder.

6.2 **REMEDIES CUMULATIVE.** Each of the remedies provided herein is cumulative and not exclusive of, and shall not prejudice any other remedy provided in any other Loan Document. Lender may exercise from time to time any rights and remedies available to it under applicable law, in addition to, and not in lieu of, any rights and remedies expressly granted in this Agreement or in any other instrument or notice, demand, or legal process of any kind.

ARTICLE VII

MISCELLANEOUS

7.1 **NOTICES.** All notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other Party in accordance with this Section. All such notices shall be sent by:

(a) personal delivery, in which case notice shall be deemed delivered upon receipt;

(b) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered two (2) business days after deposit, postage prepaid in the United States mail;

(c) nationally recognized overnight courier, in which case notice shall be deemed delivered one (1) day after deposit with such courier; or

(d) facsimile transmission, in which case notice shall be deemed delivered on transmittal, provided that a transmission report is generated reflecting the accurate transmission thereof.

Lender: City of San Leandro
835 East 14th Street
San Leandro CA 94577
Attn: City Manager

Borrower: MTLG, LLC
c/o Louis A. Rigaud
2539 Grant Avenue
San Leandro, CA 94579

7.2 COUNTERPARTS. This Agreement may be executed in multiple counterparts each of which shall be an original and all of which taken together shall constitute one and the same instrument.

7.3 SEVERABILITY. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties are materially altered or abridged by such invalidation, voiding, or unenforceability.

7.4 LEGAL ACTIONS; ATTORNEYS' FEES. In the event any legal action is commenced to interpret or to enforce the terms of this Agreement or to collect damages as a result of any breach thereof, the Party prevailing in any such action shall be entitled to recover against the other Party all reasonable attorneys' fees and costs incurred in such action.

7.5 CAPTIONS; INTERPRETATION. The captions of the Sections and Articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions herein contained. The language of this Agreement shall be construed as a whole according to its fair meaning and not strictly for or against any Party. Time is of the essence in the performance of this Agreement.

7.6 FURTHER ASSURANCES. The Parties agree to execute, acknowledge, and deliver such other documents and instruments, and take such other actions as either shall reasonably request may be necessary to carry out the intent of this Agreement.

7.7 PARTIES NOT CO-VENTURERS. Nothing in this Agreement is intended to or shall establish the Parties as partners, co-venturers, or principal and agent with one another.

7.8 GOVERNING LAW; VENUE. This Agreement shall in all respects be construed and enforced in accordance with the laws of the State of California without regard to principles of conflicts of laws. The Parties consent to the jurisdiction of any federal or state court in the jurisdiction in which the Property is located (the "**Property Jurisdiction**"). Borrower agrees that any controversy arising under or in relation to this Agreement or any other Loan Document shall be litigated exclusively in courts having jurisdiction in the Property Jurisdiction. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other

venues to which it might be entitled by virtue of domicile, habitual residence, or otherwise.

7.9 WAIVER; MODIFICATION AND AMENDMENT. No failure or delay on the part of the Lender in exercising any right, power, or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power, or remedy preclude any other or further exercise thereof or the exercise of any other right, power, or remedy hereunder. No modification or waiver of any provision of this Agreement, nor any consent to any departure by Borrower therefrom, shall in any event be effective unless the same shall be in writing, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. No notice to or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in similar or other circumstances. No amendment to or modification of this Agreement shall be effective unless and until such amendment or modification is in writing, properly approved in accordance with applicable procedures, and executed by the Parties.

7.10 ASSIGNMENT. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. Notwithstanding the foregoing, Lender's obligation to make the Loan is personal to Borrower, and shall not be assignable by Borrower by operation of law or otherwise absent the express written consent of Lender, and any such assignment by operation of law or otherwise shall be void.

7.11 NO THIRD PARTY BENEFICIARIES. There shall be no third party beneficiaries to this Agreement.

7.12 ENTIRE AGREEMENT; EXHIBITS. This Agreement, together with the other Loan Documents, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior or contemporaneous oral or written agreements and negotiations between the Parties with respect thereto. Exhibits A through D attached hereto are incorporated herein by reference as though fully set forth herein.

7.13 SURVIVAL. All representations made by Borrower herein and the provisions of Sections 4.7 and 4.8 hereof shall survive the expiration or termination of this Agreement and the making and repayment of the Loan. The representations of Borrower made herein have been or will be relied upon by the Lender, notwithstanding any investigation made by the Lender or on its behalf.

SIGNATURES ON NEXT PAGE

IN WITNESS WHEREOF, the Parties have each caused this Agreement to be duly executed as of the date first written above.

BORROWER:

MTLG, LCC

Louis A. Rigaud

Title:_____

LENDER:

CITY OF SAN LEANDRO

Jeff Kay, City Manager

Attest:

Leticia I. Miguel, City Clerk

Approved as to budget authority:

David Baum, Finance Director

Approved as to form:

Richard D. Pio Roda, City Attorney

Account Number

Exhibit A

PROPERTY DESCRIPTION

Exhibit B

PROMISSORY NOTE

Exhibit C

FORM OF DEED OF TRUST

Exhibit D

INSURANCE REQUIREMENTS

Unless Lender agrees otherwise in writing, Borrower shall, at Borrower's sole cost and expense, throughout the term of the Note dated as of the date hereof and executed by Borrower for the benefit of Lender (the "**Note**") shall keep and maintain the following policies of insurance. Capitalized terms used without definition in this Exhibit D shall have the meaning ascribed to such terms in the Loan Agreement of which this Exhibit is a part.

A. Property Insurance. Insurance for the risks of direct physical loss, naming Lender as loss payee as its interests may appear, with minimum coverage being the perils insured under the standard Causes of Loss - Special form (ISO Form CP 10 30) or its equivalent, covering all Improvements, all fixtures and equipment located on or in, or constituting a part of, the Property, in an amount equal to one hundred percent (100%) of the full replacement cost of all such property. The insurance shall (a) cover explosion of steam and pressure boilers and similar apparatus, if any, located on the Property, and (b) cover floods if the Property is in a Special Hazard Area, as determined by the Federal Emergency Management Agency or as shown on a National Flood Insurance Program flood map. The insurance required hereunder shall be in amounts sufficient to prevent Borrower from becoming a co-insurer under the terms of the applicable policies, with not more than a Ten Thousand Dollars (\$10,000) deductible (or such higher deductible approved by the Lender) from the loss payable for any casualty. The policies of insurance carried in accordance with this Paragraph A shall contain a "replacement cost endorsement," an "increased cost of construction endorsement," and an endorsement covering underground work, if applicable to the Project.

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