

**CONSTRUCTION AND PERMANENT LOAN AGREEMENT  
BETWEEN THE CITY OF SAN JOSE AND  
ALUM ROCK, LP  
(1860 Alum Rock Apartments)**

This Loan Agreement ("**Agreement**") is dated for reference as of the 1st day of May, 2023, by and between the **CITY OF SAN JOSE**, a California municipal corporation (the "**City**") and **Alum Rock, L.P.**, a California limited partnership (the "**Developer**").

**RECITALS**

A. The County of Santa Clara, a political subdivision of the State of California ("**County**"), has purchased certain real property located at 1860 Alum Rock Avenue in the City of San José, County of Santa Clara, State of California (the "**Property**"). The Developer has leased the Property from the County pursuant to a 55-year ground lease (the "**Ground Lease**") dated on or about May 1, 2023 and memorialized by a memorandum of lease dated on or about May 1, 2023 to be recorded in the Official Records of the County of Santa Clara (the "**Memorandum of Lease**"). The Developer's leasehold interest in the Property is more particularly described in **EXHIBIT A.**

B. 1860 Alum Rock is comprised of sixty (60) rental dwelling units, fifty-nine (59) of which are to be made available to eligible households at affordable rents as follows: thirty (30) units restricted to 30% of Area Median Income ("**AMI**") (including nine (9) studio units, seventeen (17) one bedroom units, two (2) two bedroom units; and two (2) three bedroom units; twenty-nine (29) units restricted to 50% of AMI (including one (1) studio unit, two (2) one bedroom units, thirteen (13) two bedroom units, and thirteen (13) three bedroom units (collectively, the "**Assisted Units**"); plus one (1) unrestricted manager's unit, along with improvements, including but not limited to sidewalks, sewer pipes and landscaping (collectively, the "**Improvements**", or the "**Project**"). The City will also require the Developer to memorialize these affordability requirements for the Assisted Units in a leasehold affordability restriction of even date herewith (the "**Restriction**") to be recorded in the Official Records of the County of Santa Clara.

C. Developer is a limited partnership formed pursuant to that Agreement of Limited Partnership dated as of February 10, 2020, as amended and restated by that Amended and Restated Agreement of Limited Partnership dated on or about May 16, 2022 (the "**Partnership Agreement**") entered into by Alum Rock Charities, LLC, a California limited liability company ("**General Partner**"), and Charities Housing Development Corporation of Santa Clara County, a California nonprofit public benefit corporation, the withdrawing limited partner, Hudson Alum Rock LP, a Delaware Limited Partnership, (the "**Limited Partner**"), and Hudson SLP LLC, a Delaware Limited Liability Company (the "**Special Limited Partner**"). The term "Partnership Agreement" shall include any amendments thereto approved in writing by City.

D. Pursuant to the terms and conditions set forth in this Agreement, City is making a

construction and permanent loan to the Developer for the development of the Project in the amount of up to **EIGHT MILLION EIGHTY-SEVEN THOUSAND SEVEN HUNDRED FIFTY-THREE AND NO/100 DOLLARS (\$8,087,753.00)** (the “**Loan**”) to be funded from the City’s Measure E Funds (“**Measure E**”) pursuant to City Council Policy 1-18, and other sources at the City’s discretion.

E. It is the City's intent to implement its Measure E funds in a manner that is substantially congruous with its Low and Moderate Income Housing Asset Funds (“**LMIHAF**”), except with respect to any Moderate Income units that may be funded by Measure E, where applicable. This means that the notices and funding tracking disbursement requirements required for LMIHAF will be applied to Measure E loans, as a matter of City policy and as a condition of the Loan.

F. Until the Conversion Date as defined in Section 1.02, the maximum principal amount of the Loan shall be up to \$7,850,000.00 (the “**Construction Loan**”) and on and after the Conversion Date, the maximum principal amount of the Loan (including any capitalized interest accrued prior to the Conversion Date) shall be up to \$8,087,753.00 (the “**Permanent Loan**”).

G. Developer has been awarded a private activity bond allocation from the California Debt Limit Allocation Committee (“**CDLAC**”) and a preliminary reservation of 4% low income housing tax credits (“**LIHTC**” or “**Tax Credits**”) from the California Tax Credit Allocation Committee (“**TCAC**”). In addition to the Loan, the Developer intends to obtain financing from City as a governmental note issuer (the “**Note Issuer**”), as authorized by Chapter 7 of Part 5 of Division 31 of the California Health and Safety Code, pursuant to which the City will be issuing its tax-exempt multifamily housing note designated as “City of San José Multifamily Housing Revenue Note (1860 Alum Rock), Series 2023A-1, and a City of San José Multifamily Housing Revenue Note (1860 Alum Rock), Series 2023A-2 (Taxable),” in an aggregate principal amount not to exceed \$29,468,877 (the “**Revenue Notes**”) for the purpose of loaning the proceeds for the construction and permanent financing of the Project (the “**Revenue Note Loan**” or “**Senior Construction Loan**”) which will close concurrently herewith.

H. Multifamily housing bonds or notes are issued to finance the development by private developers of certain affordable rental apartment projects. The City will issue the Revenue Note as a tax-exempt obligation which will be purchased by Citibank, N.A. (“**Bondholder**” or “**Noteholder**”) after which the City will loan the proceeds of the Revenue Note to the Developer. The Revenue Note will not be paid from or secured by the general taxing power of the City or any other City asset.

I. All right, title and interest of the Note Issuer in connection with the Revenue Note Loan, other than its reserved rights, will be transferred in trust by the Note Issuer to U.S. Bank Global Corporate Trust, a national banking association, as fiscal agent (the “**Fiscal Agent**”) pursuant to that certain funding loan agreement dated May 1, 2023 between the Note Issuer and the Fiscal Agent (“**Funding Loan Agreement**”) for the benefit of the

Noteholder.

J. Developer's obligation to make debt service payments on the Revenue Note will be secured by, among other items, a Multifamily Deed of Trust Assignment of Rents, Security Agreement and Fixture Filing, executed by Developer and recorded against the Project and Developer's leasehold interest in the Property ("**Revenue Note Deed of Trust**") and a Promissory Note ("**Revenue Note Promissory Note**") (collectively with all other documents securing the Revenue Note Loan, the "**Revenue Note Mortgage Documents**"). In addition to the Revenue Note Mortgage Documents, a Bond Regulatory Agreement, a Borrower Construction and Permanent Loan Agreement (Back to Back), and all other documents or agreements executed in connection with the Revenue Note shall be collectively referred to as the "Revenue Note Loan Documents".

K. It is estimated that the construction cost of the Project will be funded with: (i) the Construction Loan; (ii) a loan of up to \$28,917,579.00 of Revenue Note proceeds ("**Senior Construction Loan**" or "**Revenue Note Loan**"); (iii) a taxable construction loan of up to \$2,345,543 , (iv) County of Santa Clara Measure A funds in the amount of approximately \$8,600,000.00 ("**County Loan**"); (v) Apple Affordable Housing Fund, administered by Housing Trust of Silicon Valley ("**HTSV**"), in the amount of approximately \$2,700,000.00 ("**HTSV Apple Loan**"); and (vi) approximately \$3,554,700 of total capital contributions. The foregoing items (i) through (v) shall be collectively referred to herein as the "**Construction Financing**" and the documents pertaining to such financing, the "**Construction Financing Documents**".

L. After completion of the construction, it is estimated that the Project costs will be funded with: (i) the Permanent Loan; (ii) a loan of up to \$9,675,000.00 of Revenue Note proceeds ("**Senior Permanent Loan**" and collectively with the Senior Construction Loan, the "**Senior Loan**" ); (iii) the County Loan; (iv) the Apple Affordable Housing Fund administered through Housing Trust Silicon Valley; (v) a state tax credit loan from Charities Housing Development Corporation of Santa Clara County in the amount of approximately \$681,540 ("**Sponsor Loan**"); (vi) \$25,351,041 of total capital contributions; and (vii) a deferred developer fee in the approximate amount of \$1,480,404. The foregoing items (i) through (vii) shall be collectively referred to herein as the "**Permanent Financing**" and the documents pertaining to such financing, the "**Permanent Financing Documents**".

M. Developer's obligation to repay the Loan to City will be secured by, among other items, a leasehold deed of trust, assignment of rents, and fixture filing of even date herewith to be recorded against the Developer's leasehold interest in the Property in the Official Records of the County of Santa Clara (the "**Deed of Trust**" or "**Leasehold Deed of Trust**").

## AGREEMENT

### ARTICLE I LOAN TO DEVELOPER

#### **Section 1.01.        Loan; Use of Proceeds; City Funded Costs.**

(a) Subject to the terms and conditions set forth in this Agreement, City agrees to make, and Developer agrees to accept, the Loan, subject to the provisions herein. The Loan shall be funded only from the *Measure E* funds plus other sources at the City's discretion and is not an obligation of the City's General Fund. Developer agrees to cause the proceeds of the Loan to be used solely for the portion of the costs of the Project that are that are identified as City funded costs in the Proforma (as defined in Section 2.01 below). The City funded improvements must directly benefit the residents of the Assisted Units, and must be a reasonable and fundamental component of the housing units. City funds must not be used for costs connected with any ground floor commercial retail space ("Commercial Space") except for those Measure E funds in the maximum amount of \$587,053.00 or City of San Jose's Housing Director's approval of the loan increase for this purpose under their Delegation of Authority under Chapter 5.06 of the San Jose Municipal Code.

(b) Loan proceeds shall only be disbursed for the Project's eligible costs. In a mixed use project, the maximum percentage of the total cost of any on-site or offsite improvements paid for with Measure E funds shall be determined by dividing the cost of the Assisted Units by the total cost of the Project. In addition to any other provisions hereof, only costs that are necessary, reasonable, and adequately supported shall be considered eligible City costs. City's determinations regarding eligible costs shall be made in City's sole discretion and shall be final and non-appealable. Developer acknowledges and agrees that Developer is obligated to repay to City any funds not used in accordance herewith upon City's written demand.

#### **Section 1.02.        Loan Terms.**

(a) **General.** Developer's obligation to repay the Loan shall be evidenced by a promissory note, of even date herewith, in the principal amount of up to \$8,087,753 executed by the Developer for the benefit of the City (the "**Note**"). The Loan proceeds shall be disbursed, consistent with the provisions herein, as the Construction Loan commencing upon the Closing Date (as defined in Section 2.01). On the Construction Loan Maturity Date, the Construction Loan interest and Construction Loan principal shall be due and payable. The Construction Loan principal shall be repaid from the proceeds of the Permanent Loan as described herein. Subject to Developer satisfying the preconditions for conversion in the Loan Documents, including those conditions listed in Section 2.01, the Construction Loan shall convert into the Permanent Loan on the date (the "**Conversion Date**") which is the earlier of: (a) thirty-one (31) months from the Closing Date with one up to six (6) month extension which shall be approved in

writing within 30 days after Developer's written request if necessary to make the Construction Loan coterminous with the Senior Construction Loan; or (b) the conversion date pursuant to the Revenue Note Loan Documents. Performance of the Developer's obligations under this Agreement and the Note shall be secured by the Deed of Trust. This Agreement; the Note; the Deed of Trust; the Hazardous Materials Agreement of even date herewith, the Assignment of Plans and Specifications of even date herewith, the Completion Guaranty of even date herewith, the Assignment of Construction Contract of even date herewith, Architect's Consent and Certification dated on or about the date hereof, and the Contractor's Acknowledgment and Consent dated on or about the date hereof and any other documents which City may reasonably request as necessary to protect the City's security interest in the Property, shall hereinafter be collectively referred to as the "**Loan Documents**".

**(b) Interest, Maturity Date, and Repayment.** The Loan shall bear interest at the rate described in the Note, which interest shall accrue as set forth in the Note; provided, however, that commencing upon the occurrence of an Event of Default and continuing to and including the date such default is cured, the entire unpaid principal shall bear interest at the Default Rate (as defined in the Note). The maturity date for the Construction Loan ("**Construction Loan Maturity Date**") and the maturity date for the Permanent Loan ("**Maturity Date**") shall be as defined in the Note and the Loan shall be repaid upon the terms set forth in the Note.

**(c) Construction and Project Cost Savings.**

**(1) Construction Cost Savings.**

i. Construction Contract. The construction contract(s) (collectively, "**Construction Contract**") between Developer and Developer's general contractor, Brown Construction, Inc. (the "**General Contractor**") shall be a standard American Institute of Architects ("**AIA**") cost plus fee contract (as modified pursuant to the City's requirements) with a negotiated guaranteed maximum price of \$36,090,899. The Developer's contingency reserves shall not be included in the negotiated guaranteed maximum price. The City approved schedule of values incorporated in the Construction Contract (the "**Construction Budget**") shall include the work covered by the Construction Contract, broken down into specific items of work as required by City, with each item listed on a separate line (each a "**Line Item**"). The Construction Contract shall provide that the General Contractor shall deliver to Developer any Final Construction Cost Savings that have been disbursed to the General Contractor.

ii. Definition of Construction Cost Savings and Final Construction Cost Savings. (A) Construction Cost Savings shall mean the positive difference between the amount of a Line Item in the Construction Budget (as adjusted by City approved change orders) and the amount expended for work (including materials) under such Line Item provided such work shall have been completed without the expenditure of the entire amount allocated in the Construction Budget to such Line

Item, and all contractors, subcontractors, material suppliers and other persons have been paid in full for work performed and materials provided with respect to such work, in each case as approved by City. (B) Final Construction Cost Savings shall be the positive difference between the guaranteed maximum price of the Construction Contract adjusted by any City approved change orders less the total cost for all Construction Contract Line Items which shall finally be determined at, and contained in, the final certified cost audit submitted for the issuance of IRS Form 8609 for the Project.

iii. Updates to the Construction Budget. Whenever a subcontract is executed or amended, or a change order is approved, the Construction Budget shall be adjusted to reflect the change in the applicable Line Item(s).

iv. Construction Budget Reallocation - General Contingency Line Items. Prior to completion of construction, Developer may, upon approval by City, revise the Construction Budget from time to time to move amounts available under any Line Item for Hard Costs (i.e., costs for physical construction, including, but not limited to, grading, excavation, concrete, framing, electrical, carpentry, roofing, and landscaping) to another Hard Cost Line Item in the Construction Budget, and any Line Item for Soft Costs (i.e., non-physical construction costs including but not limited to architectural, engineering, financing, insurance, easements, and legal fees) to another Line Item for Soft Costs in the Construction Budget; provided, however, upon request Developer shall provide the City with satisfactory evidence that adequate funds remain for each particular Line Item. Developer's hard cost construction contingency reserves shall not be less than five percent (5%) of each of the following: hard construction costs: garage cost, general contractor profit and overhead, general requirements, and site improvement cost.

v. Construction Budget Reallocation - Cost Savings Contingency. If there is a Construction Cost Savings in a particular Line Item of the Construction Budget, Developer may upon approval by City, reallocate such savings to a "Cost Savings Contingency" Line Item. Developer may also upon approval by City, reallocate amounts available under the "Cost Savings Contingency" to a Construction Contract Line Item. Developer shall in no event or under any circumstances have the right to reallocate any portion of the Line Items for interest, fees or other expenses hereunder to any Line Item designated as "Cost Savings Contingency".

vi. Construction Budget Reallocation - Allocation from Cost Savings Contingency. Developer may upon approval by City, revise the Construction Budget from time to time to move amounts available under the Developer Contingency items in the Construction Budget to any Line Item designated as "Cost Savings Contingency" and to Line Items other than the Developer Contingency Line Items.

vii. Construction Budget Reallocation - Budget Revisions. A copy of the Construction Budget updated to reflect any Construction Costs Savings

and/or reallocations shall be prepared for each disbursement request and after each reallocation and promptly delivered to the City.

**(2) Project Cost Savings and Final Construction Cost Savings.**

i. Definition of Project Cost Savings. Project Cost Savings shall be the difference between: (a) the sum of all construction sources including the Construction Loan, the outstanding principal amount of the Senior Construction Loan (as such amount is determined at the time of the Accounting Report), any other Project loan or grant proceeds, developer fee deferrals, all general partner and limited partner capital contributions, all unspent refunded deposits or advances made to any utility company during the construction period, development deposit refunds and income derived from operation of the Property or Project through the Conversion Date (all of the foregoing, collectively, "**Project Sources Income**") and (b) the actual cost for the development and operation of the Project through the Conversion Date including any required Senior Construction Loan debt service payments, the construction period interest on the Construction Loan, required deposits to the reserves described in Section 6.21 below, payment of the non-deferred portion of the developer fee, and ordinary and customary lease up costs and fees (all of the foregoing, collectively, "**Project Development Costs**"). Developer shall cause a third party report prepared by a certified public accountant, distinct from the 8609 cost certification, to be delivered to the City which shows in reasonable detail the Project Development Costs and the Project Sources Income through the date of the report and an estimate of the Project Sources Income and Project Development Costs through the Conversion Date ("**Accounting Report**").

ii. Calculation of Final Construction Cost Savings and Project Cost Savings. Sixty (60) days before the Conversion Date, Developer shall submit the Accounting Report to the City for approval.

iii. Disbursement. To the extent the General Contractor holds or has retained any Final Construction Cost Savings, the General Contractor shall deliver such Final Construction Cost Savings, if any, to the Developer. The Project Cost Savings shall be disbursed as to the City, the County, and HTSV in pro rata shares. The City shall apply such funds to pay any outstanding interest and principal on the Loan. Nothing in this section shall obligate the City to disburse Loan funds in the absence of a gap in funding. Not less than seventy-five percent (75%) of the estimated Project Cost Savings shall be paid by the Conversion Date, and the balance of the final amount shall be paid upon the earlier of 120 days after the Conversion Date or issuance of IRS Form 8609, unless a further delay is approved by the City, the County, and HTSV.

iv. Sources. Developer shall provide written notice to City within ten (10) days of Developer's receipt of notice of any new grants, loans or contracts which are proposed as sources of income for the Project.

**(3) Construction Inspection Consultant.**

The City will engage Roy Buis Construction Services, Inc. (“Construction Inspection Consultant”) for the purposes of reviewing construction documents, monitoring construction draws and reporting on construction progress. Compensation payable by Developer for these services is expected to be \$35,000 but may be higher depending upon the construction schedule and complexity of the Project. The Consultant will submit an invoice on or prior to the Closing Date in the amount of approximately \$5,280 and shall submit monthly invoices for \$1,100 for these services to be reimbursed by the Project, through the construction draw process. The Construction Inspection Consultant shall invoice the Project for these costs which Developer agrees to pay, provided however, the City shall approve all such invoices prior to payment. All General Contractor hard cost payment requests shall be submitted prior to the Developer’s draw request in order to provide sufficient time for the City Construction Inspection Consultant to complete its monthly construction progress report prior to funding of the draw request.

## **ARTICLE II DISBURSEMENT OF LOAN PROCEEDS**

### **Section 2.01. Construction Loan Funding Conditions.**

**(a) Construction Loan Disbursement Preconditions.** Subject to the terms of this Agreement, including without limitation Section 2.03 hereof, City shall disburse its Construction Loan proceeds only for the reimbursement of the City funded costs identified in the Proforma (as defined below) and only after all of the following conditions are met.

**(1) Executed City Documents.** City shall have received the Loan Documents, including the Hazardous Materials Agreement, and Restriction, each duly executed by Developer and any other necessary parties.

**(2) Construction Contracts.** The City shall have received and approved the executed Construction Contract between Developer and the General Contractor, the agreements between the Developer and the Architect and the other agreements pertaining to the Project that which are to be executed prior to the Closing Date.

**(3) Bonding.** General Contractor shall have provided City with a performance bond and a payment bond in form approved by City for 100% of the Construction Contract amount in multiple obligee form naming City as co-obligee. The bonding company shall be licensed to do business in California as a California admitted surety and shall be subject to the approval of the City.



(4) **Representations.** Developer shall not be in default in performance of any of the warranties, representations, covenants, or agreements contained herein and the representations set forth in Articles IV and VI shall be true and correct.

(5) **No Default.** Developer shall not be in default of any of the Loan Documents, or any amendments thereto, and Developer shall not be in default under the terms of the Partnership Agreement, the Ground Lease, the Senior Construction Loan documents or agreements with any other holder of a lien or encumbrance against the Property, Developer's leasehold interest in the Property, or the Project.

(6) **Title Insurance.** Stewart Title Company ("**Title Company**"), has issued or is irrevocably committed to issue, at Developer's expense, as of the date of the recordation of the Deed of Trust ("**Closing Date**"), an ALTA 2006 lenders extended coverage policy of title insurance ("**Title Policy**") delivered as of the Closing Date, for the amount of the Loan, showing the Deed of Trust in third lien position against Developer's leasehold interest in Property subject only to the Deed of Trust securing the Senior Construction Loan ("**Senior Deed of Trust**"), the County regulatory agreement, the Restriction and any City approved exceptions shown in the Title Policy, and including any title endorsements required by the City. Said coverage must provide for a re-write of the title policy at conversion and incorporate a foundation endorsement provision consistent with that required by the Senior Lender.

(7) **Appraisal.** Developer shall have provided City with a satisfactory current Senior Lender appraisal report.

(8) **Submittals-Proforma.** At least three (3) business days prior to the Closing Date, Developer shall have submitted to City for approval a proforma budget for Project development and operations the ("**Proforma Budget**"). The Proforma Budget shall include (a) sources and uses of funds for both the construction period and the permanent period; (b) 55 year income and operating expense cash flow reflecting actual interest rates and showing City monitoring and servicing fees and City bond monitoring fees; (c) the Developer's projection of the construction-permanent budget; and (d) a detailed cost breakdown which includes a detailed breakdown of the costs of constructing, financing, and developing the Project. Tenant rents shown on the Proforma Budget shall reflect the lowest rent required by any funding source. *Additionally, consistent with Health and Safety Code section 33334.2(e), the Proforma Budget shall identify the City Loan funded improvement costs, and for any City funding of improvements that will serve both the affordable housing project and the commercial space, the Proforma Budget shall show the percentage determined by dividing the cost of the Assisted Units by the total cost of the Project (including any commercial space). This percentage shall be the maximum amount of the improvement costs paid by City Measure E funds.* The Proforma Budget shall show a Developer Fee not to exceed the limits set forth in Section 4.12 below.

**(9) Pre-Construction and Prevailing Wage Meeting.** The Developer and General Contractor shall have attended a City preconstruction prevailing wage meeting with the City's Office of Equality Assurance, as well as a preconstruction meeting with City's construction consultant and the construction consultants of all other funders.

**(10) Financing Commitment in Place; Construction Funding Closed.** The Senior Construction Loan and all construction financing from other lenders must close concurrently with the Loan and the construction financing amounts shall be consistent with the Proforma Budget and financing commitments.

**(b) Construction Loan Period Funding Conditions.** During the time between the recording of the Deed of Trust and the Conversion Date, (the "**Construction Loan Period**"), the Developer shall ensure the following conditions are met:

**(1) Construction Contracts.** All agreements or contracts necessary to construct and complete the Project must be submitted to the City for approval at least two (2) weeks prior to the commencement of work by the contracting party, including, but not limited to, the agreements with the engineers, architects, and subcontractors. Provided however, if the agreement or contract and the form of the bond to be submitted to City are in a form previously approved by City in writing, then these documents may be submitted four (4) business days before the commencement of work by the contracting party. Any such contract shall include standard requirements for items to be furnished with regard to any pay requests, pay request meetings and closeout documentation. All amendments to such agreements or contracts must be submitted for approval by City prior to execution. The retention schedule, including early release items and prepayments, shall have been approved in writing by the City and its construction consultant and attached to and incorporated into the Construction Contract.

**(2) City Exhibits for Construction Contract.** The City's standard Construction Contract exhibits must be attached to and incorporated into the Construction Contract prior to execution.

**(3) Required Documents.** Each of the below listed documents, the documents listed in Section 4.11, and any other documents requested by City in writing must be completed and submitted to the City for approval at least five (5) days prior to the Closing Date, except as otherwise provided below.

1. Complete Construction Contract – the complete final contract with all exhibits (including the retention schedule) just prior to signature at least 10 days prior to the Closing Date.
2. Draft Management Plan pursuant to Section 6.12 for City approval at least 30 days prior to the Closing Date.
3. Utility will serve letters for gas, electric, sewer, water, telephone and cable.

4. Required site, encroachment and building permits (including those for off-site work) or permit ready letters if permits are not available.
5. Executed Construction Contract and Executed Architect's and Engineers' contracts, and amendments thereto on or prior to the Closing Date.
6. Executed consent of Architect and Consent of Contractor to Developer's assignments at least one (1) day prior to the Closing Date.
7. A market study at least 30 days before the Closing Date. The market study shall be completed within the previous 12 months and shall include, at a minimum, market rents for the affordable units, projected absorption, and competitive properties in the market area.
8. A current Phase I Environmental Site Assessment ("ESA") for the Property completed within the last 180 days, with any updates and a reliance letter acceptable to the City stating that ESA may be relied on by the City.
9. A copy of the draft Memorandum of Understanding between the Developer and the County of Santa Clara Department of Behavioral Health Services and the County Office of Supportive Housing ("County MOU") pursuant to which the County will provide referrals and supportive services under its Rapid Rehousing Program for thirty (30) units where the County will be providing referrals.
10. An executed copy of the Agreement to enter into a Housing Assistance Payments Contract between Developer and the Santa Clara County Housing Authority pursuant to which the Housing Authority agrees to enter into a contract with Developer pursuant to which the Housing Authority will provide project based vouchers for 26 units in the Project.
11. A draft Supportive Services Plan and Budget identifying the population being served and their needs; the services to be provided such as outreach, needs assessment, case management, mental health services, food services, transportation; the term of the services; and either minimum service provider qualifications or, if known, the service providers' identities 30 days prior to the Closing Date.
12. Draft form of agreement between Developer and the Supportive Service provider prior to the Closing Date, with the final version provided to City for review and approval 90 days prior to conversion.
13. Draft form of agreement between Developer and the Resident Service provider prior to the Closing Date, with the final version provided to City for review and approval 90 days prior to conversion.
14. A General Marketing Plan with Affirmative Fair Housing Marketing Plan (consistent with Section 8.04) for City approval.

15. Unless it is confirmed that the project is not in a FEMA Special Flood Hazard Area zone, evidence of flood insurance shall be provided prior to the Closing Date.
16. Construction schedule.
17. Detailed contractor schedule of values.
18. Overall hard cost construction budget.
19. Title report and ALTA survey.
20. Complete set of plans and specifications.
21. Prior to the commencement of construction, Developer shall submit a soils management plan and any other plans or submittals recommended in the Phase 1 ESA or Phase 2 ESA, if any, shall be submitted including those that addresses management and remediation.
22. At least 10 days before the first disbursement of Loan proceeds, a list of Project contractors, subcontractors and suppliers, setting forth the nature of the work to be performed or items to be supplied by each and the dollar value thereof.
23. Foundation Certificate (in the form provided by City) prior to release of retention.
24. Construction Cost Savings calculations prior to release of retention.
25. Architect's Certification letter prior to release of retention.
26. Copies of final inspections prior to release of retention.
27. Final Construction Budget prior to release of retention.
28. As Built Drawings (electronic) prior to release of retention.
29. Lender Closeout letters for construction loans as of the Conversion Date.
30. General Contractor's letter certifying that the Project is completed per approved plans and specifications prior to release of retention.
31. Conditional lien waivers upon Final Payment at release of retention and final unconditional lien waivers within 10 days after release.
32. A final Management Plan with City checklist to the City for review and approval, prior to the earlier of: 90 days prior to the lease of the first unit or 90 days prior to the Conversion Date.
33. A Management Agreement and revised final Services Plan(s) including all the service providers' identities, for City review and approval 90 days prior to the Conversion Date.
34. Public Works Clearance letter prior to the Conversion Date.
35. Evidence of outreach consistent with the approved Affirmative Marketing Plan, to the City's satisfaction 90 days prior to the Conversion Date and prior to the leasing of the first unit.
36. Once the first unit is leased, a monthly occupancy/lease-up status report on the City's form that reflects that progress is being made toward leasing of the Project.

**Section 2.02. Permanent Loan Funding Conditions.**

(a) **Permanent Loan Conversion Preconditions.** Prior to the Conversion Date, Developer shall fulfill or caused to be fulfilled to the City's satisfaction, or obtain the City's written waiver of, all of the following conditions:

(1) **Senior Loan.** The Senior Construction Loan shall have closed and no default has been declared and is continuing under the terms of the applicable related documents, and no event has occurred with the giving of notice or the passage of time or both that would constitute a default under the terms of such loan and related documents that would materially and adversely affect the operation of the Project the Project's affordability, the security for the Loan, or the repayment of the Loan.

(2) **Loan Documents.** The Loan Documents shall be in full force and effect.

(3) **Endorsement to Title Insurance.** Title Company shall have issued or shall be irrevocably committed to issue at Developer's expense a rewrite (or a date-down, at the City's election) of the Title Policy with any endorsements required by City, showing the Deed of Trust in Third lien position on the Property subject only to the deed of trust securing the Senior Construction Loan, the deed of trust securing the County Loan, the County's regulatory agreement, the Bond Regulatory Agreement, and the Restriction with only those exceptions shown in the Title Policy issued as of the Closing Date or arising since the Closing Date and approved by City.]

(4) **Certificates of Occupancy; Lien Waiver.** Developer shall have provided to City copies of the final certificates of occupancy issued for all the buildings comprising the Project (collectively, the "**Certificate of Occupancy**"), timely recorded Notices of Completion for the Project, final unconditional lien releases from the general contractor, subcontractors, and suppliers and any other evidence that City may reasonably request to evidence lien-free completion of the Project. Nothing in this Agreement shall in any way affect the City's customary and usual process applicable to the issuance of a Certificate of Occupancy by the City. The Project shall be considered by City for a Certificate of Occupancy subject to the same criteria as are applicable to any other similarly situated multifamily residential housing project, and the issuance of a Certificate of Occupancy shall not be affected solely by reason of this Agreement or the City's obligation to make the Loan as set forth herein.

(5) **Representations.** Developer shall not be then in default in performance of any of the material warranties, representations, covenants or agreements contained herein and the material representations set forth in Article IV and Article VI shall be true and correct.

(6) **Improvements.** The Project shall have been constructed substantially in accordance with the Plans and Specifications as defined in Section 5.04.

(7) **Damage.** The Project shall not have been materially damaged by fire or other casualty and not repaired, unless City is provided with evidence satisfactory to it that insurance proceeds or cash deposited by Developer are sufficient to pay for repair of improvements in a timely manner.

(8) **Default.** No default or Event of Default shall have been declared and be continuing under the terms of any of the Loan Documents, any Senior Loan Documents, the Ground Lease, the Partnership Agreement, or any obligation secured by a lien or encumbrance against the Property, the Developer's leasehold interest in the Property or the Project. No event shall have occurred that with the giving of notice or the passage of time or both would constitute a default or Event of Default under any of the Loan Documents, the Partnership Agreement, any Senior Loan Documents, the Ground Lease, or any obligation secured by a lien or encumbrance against the Property or the Project that would materially and adversely affect the operations of the Project, the Project's affordability, the security for the Loan, or the repayment of the Loan.

(9) **Management Plan and Marketing Plan.** Developer shall have submitted and obtained City approval of a Management Plan for the Project as set forth in Section 6.12 and affirmative marketing plan.

(10) **Proforma Budget.** Developer shall have submitted and obtained City approval of an updated Proforma Budget consistent with Section 8.03 (a) and the first year operating budget for the Project.

(11) **Environmental and Toxic Remediation.** During the construction phase, Developer shall submit evidence acceptable to City of the completion of any remediation work required under the Soils Management Plan, should conditions arise requiring such mediation.

(12) **Completion.** The Project shall be completed and have received all of its final unconditional Certificates of Occupancy.

(13) **Replacement Reserve Account.** Developer shall have established an account for the Replacement Reserve (as defined in Section 6.20) ("Replacement Reserve Account") held by a bank approved by Senior Permanent Lender and City during the term of the Senior Loan and by a bank approved by the City thereafter consistent with Section 6.20.

(14) **Conversion.** The Senior Permanent Loan and all other planned permanent financing shall close concurrently with the conversion of the Construction Loan to the Permanent Loan.

(15) **Notice.** Developer shall have given the City ninety (90) days' notice of the proposed conversion and at least sixty (60) days prior to the proposed conversion Developer shall have: (a) provided a preliminary title report re-write; (b) provided a draft

updated proforma budget, including the projected cash flow and sources and uses; (c) engaged an accountant to prepare the Accounting Report required under Section 1.02(c)(2); and (d) convened conversion calls.

**(16) Conversion Costs.** Developer shall pay all reasonable costs for City staff time associated with the conversion at the City's normal and customary rates including the conversion fee established in the City's adopted schedule of fees and charges. Developer shall also pay for any review by and opinions of Bond Counsel required by the City prior to conversion.

**(17) Capital Contributions.** All capital contributions as set forth in the Partnership Agreement or shown in the Proforma Budget as scheduled to be paid prior to or on the Conversion Date shall have been paid in accordance with the terms of the Partnership Agreement.

**(18) City Costs; Construction Savings.** All costs and charges due the City and any Final Construction Cost Savings due to City due prior to the Conversion Date under Section 1.02 (c)(2) shall have been paid.

**(19) Documents.** The Accounting Report and any outstanding documents under Section 2.01 (b) shall have been received and approved.

**(20) Reserves Funded at Conversion.** Any capitalized reserve described in Section 6.21 shall have been established and the initial funds deposited.

**(21) Lease Up Reports.** All monthly lease up reports as described in Section 6.05 shall have been timely submitted to the City commencing on the date the first unit is leased.

**(b) Permanent Loan Capitalization Conditions.** The outstanding principal balance of the Construction Loan shall be repaid by the Permanent Loan after the fulfillment of the conditions of this Loan Agreement. Accrued Construction Loan interest may be capitalized but only if and to the extent that the principal balance of the Permanent Loan including repayment of the Construction Loan and such accrued interest is equal to or less than the maximum Permanent Loan amount. Any excess accrued Construction Loan interest will not be capitalized and must be paid on or before the Conversion Date.

## **Section 2.03**            **Manner of Disbursement.**

City and Developer agree to meet at least once a month for an on-site construction draw meeting to evaluate the progress and status of the Project construction. Developer shall organize and schedule such meetings, at such times as are mutually satisfactory. At least five (5) days prior to the construction draw meeting, the Developer shall provide City an itemized statement segregating the City funded costs (consistent with Section 1.01) and showing the percentage of construction work completed since the last

construction draw meeting on a form acceptable to City which shall be used as a basis for reviewing disbursement requests. The City shall have ten (10) business days from the date City staff receives a complete request for disbursement of funds to request information or corrections.

Copies of all requests for disbursement of funds submitted by Developer to any lender must be provided to City and no request shall be considered complete until it includes all of the following:

**(a) Disbursement Request.** A disbursement request on a form prescribed and approved by the City with the applicable itemized statements discussed at the construction draw meeting. Materials shown on the request must be stored on site unless City gives advance written approval for payment for off-site materials.

**(b) Use of Prior Funds.** Certification by Developer that all proceeds of the Loan, the Senior Construction Loan, the equity contributions, and any other Project sources of income or revenue theretofore advanced have been spent in accordance with the prior disbursement requests applicable thereto, and paid to the General Contractor, contractors, subcontractors, and suppliers referred to in the prior disbursement requests. This requirement applies to both hard and soft costs.

**(c) Prevailing Wages.** Statement of Compliance current to billing date from the Office of City of San José Contract Compliance.

**(d) Project Status.** Certification by Developer that the Project has been and is being constructed in accordance with the Plans and Specifications and approved change orders.

**(e) Lien Waivers.**

**(1)** Unconditional lien waivers from all recipients of payments made from the preceding disbursement; said lien waivers shall pertain solely to work performed by recipients and shall certify that all of their contractors, subcontractors and material suppliers have been paid in full to date, less any retention withheld.

**(2)** Conditional Lien Releases from the General Contractor and subcontractors for the current disbursement request.

**(f) Original Invoices.** The originals, if available, or copies of all invoices for soft costs and for hard costs from contractors, subcontractors, and material suppliers to be paid from the proceeds of the requested disbursement, dated less than thirty (30) days prior to the date of the disbursement request unless submittal of an older invoice has been previously approved in writing by City; and a list of all contractors, subcontractors, and material suppliers for the Project with the amount to be paid to each contractor,



subcontractor, and material supplier from such disbursement. A payment application (e.g., AIA G702) alone is not sufficient to meet this requirement.

**(g) City Approval.** Developer shall submit a list of disbursement requests made to the other Project lenders and indicate whether the related disbursement was approved by the City. (All requests for disbursements of funds from any lender for and in connection with the Project must be approved by City prior to the disbursement.)

**(h) Other Lenders' Review.** Developer shall affirm in writing that a copy of the disbursement request was provided to the other Project lenders.

**(i) Additional Documentation.** Developer shall provide all documentation requested pursuant to City's periodic construction reviews, including but not limited to subcontractor invoices, copies of newly executed subcontractor contracts, previously undelivered or incomplete documentation, any items due under Section 2.01(c) and items listed on the attached **EXHIBIT B.**

**(j) Environmental and Toxic Remediation.** Prior to lease up, Developer shall have submitted a soils management plan compliance report providing evidence that acceptable to City that the soils management plan has been implemented, and all remediation and management work required under the Soils Management Plan has been satisfactorily completed and approved by any regulating agencies.

**Section 2.04**                      **Disbursement and Retention.**

**(a)** Upon City approval, with respect to City funded costs, City will allow disbursement of ninety percent (90%) of hard costs for balances expended and/or due, less prior disbursements (the remaining 10% held as "**retention**") and one hundred percent (100%) of soft costs for balances expended, less prior disbursements subject to the exceptions and reductions in the City approved retention schedule.

**(b)** The retention will only be disbursed after compliance with the retention requirements in this Article including and the following: (i) the Improvements are fully completed; (ii) recordation of a Notice of Completion applicable to the Improvements within 15 days of completion, which Notice is regular in form and which appears, after the City's inspection of the Property and Improvements, to be valid, (iii) City's receipt of copies of all Certificate(s) of Occupancy for the Project and (iv) Developer shall provide Conditional lien waivers upon Final Payment from the general contractor, subcontractors, and suppliers. Within ten (10) days following disbursement of such retention, Developer shall provide to City final unconditional lien releases from the general contractor, subcontractors, and suppliers, within 10 days thereafter, regardless of arrangements regarding funding from other sources.

### ARTICLE III FINANCING AGREEMENTS

#### **Section 3.01.      City Approval.**

(a) City agrees to permit leasehold deed(s) of trust, or other form(s) of conveyance of the Property or the Project as required for any reasonable method of financing (collectively, the "**Financing Agreements**"), but only for the purpose of securing loans of funds to be used for financing the development of the Project and holding it for rent. The City has approved the Construction Financing and Permanent Financing. Developer shall not enter into any Financing Agreements without the prior written approval of City, which approval City agrees to give if such Financing Agreements meet criteria set forth in Section 3.02 below and Section 6 of the Note; do not negatively impact the City's share of Net Cash Flow, do not significantly impair the Project's ability to be refinanced in the future and are on reasonable terms given by a responsible lending institution or institutions or other acceptable person or entity and do not amend the Loan Documents. Any such Financing Agreements approved by City pursuant to this Section shall not be subject to any amendment, or modification subsequent to City approval without City giving its prior written consent thereto, which consent shall not be unreasonably withheld. All loans or other obligations requiring repayment to the general partner or limited partner of Developer or to an affiliate of Developer's general partner shall require City's prior written consent.

#### **Section 3.02.      Conditions Precedent.**

City agrees to subordinate the lien of Leasehold Deed of Trust to the lien of a Financing Agreement upon satisfaction of the following terms and conditions:

(a) **Prior Approval.** The Financing Agreement in question shall be approved by City pursuant to Section 3.01 and Section 3.03.

(b) **Subdivision Approval.** Developer shall provide evidence of compliance with the Subdivision Map Act and related local ordinances in the event the Property (or any other security designated in the Deed of Trust) is divided for financing purposes.

(c) **Maximum Subordination Amount.** The total amount of funded principal to which the Loan will be subordinated shall not exceed \$38,057,157.00 prior to the Conversion Date and \$18,098,000.00 after the Conversion Date.

(d) **Lender's Consent.** The proposed holder of the lien created by the Financing Agreement in question provides its advance written approval of the terms and conditions contained in the Loan Documents, including, without limitation, the restrictions on use set forth in Section 8.01 hereof to be placed upon the Property by the Restriction.

(e) **Financing Terms.** The interest rate and the maturity date shall be those as set forth in the note and/or other applicable document accompanying such Financing Agreement, and unless otherwise agreed to by the City: (i) the other terms and conditions of the loan secured by the Financing Agreement in question shall meet the standards then in effect for loans of the type made by institutional lenders in the San José area for similar projects and expenditures and (ii) all refinancing proceeds in excess of a City-approved scope of rehabilitation work must be applied to repayment of the Loan.

(f) **No Default.** No event of default has been declared and is continuing under the terms of any of the Loan Documents, the Senior Loan Documents, the Ground Lease, or any other obligation secured by a lien or encumbrance against the Property, the Developer's leasehold interest in the Property, or the Project and no event has occurred with the giving of notice or the passage of time or both that would constitute an event of default under any of the Loan Documents, the Senior Loan Documents, the Ground Lease, or any other obligation secured by a lien or encumbrance against the Property, the Developer's leasehold interest in the Property, or the Project that would materially and adversely affect the operations of the Project the Project's affordability, the security for the Loan, or the repayment of the Loan..

### **Section 3.03. Refinancing.**

(a) **Approval Required.** City's prior written consent, shall be obtained prior to any refinancing, including approval of specific items to be paid for from such refinancing proceeds. Developer shall notify City no less than 120 days in advance of refinancing any senior permanent loans. Any proceeds that are in excess of the amount to retire the Senior Permanent Loan, the HTSV loan, and a City approved scope of work shall be paid to City and such funds used to pay down accrued interest and principal on the Loan. In any event, such refinancing may not (i) increase risk to, or burden, on City or (ii) significantly impair the Project's ability to be refinanced in the future. If more than one financing option satisfies such requirements, the City retains the right to approve the option which it determines to best satisfy the objective of maximizing loan refinancing proceeds and other loan terms.

(b) **Costs.** Developer shall pay all reasonable costs for City staff time associated with the refinancing at the City's normal and customary rates. Developer shall provide, at its own cost, a re-write of the City's title policy at the time of any such refinancing.

**ARTICLE IV  
REPRESENTATIONS AND WARRANTIES**

Developer makes all of the representation warranties, and covenants to City set forth in this Article IV. All such representations, warranties, and covenants shall be true as of the date of this Agreement, as of the Closing Date, and as of the Conversion Date. Developer acknowledges that City shall rely upon Developer's representations made herein notwithstanding any investigation made by or on behalf of City,

**Section 4.01.      Validity.**

This Agreement and all other Loan Documents, when executed and delivered, shall be valid and binding upon Developer and are enforceable in accordance with their respective terms, subject to bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws affecting creditors' rights, to the application of equitable principals and to the exercise of judicial discretion in appropriate cases. The persons executing and delivering the Loan Documents on Developer's behalf have the authority to do so.

**Section 4.02.      No Litigation.**

There is no litigation, proceeding or dispute pending or, to Developer's knowledge, threatened against Developer, any of its general partners or the Project that would materially adversely affect the completion of the Project.

**Section 4.03.      Approvals.**

No consent, approval or other action by or any notice to or filing with any court or administrative or governmental body is or will be necessary for the valid execution, delivery or performance by Developer of this Agreement or any of the Loan Documents to which it is or is to be a party, other than such consents and approvals which have heretofore been obtained or such consents and approvals which Developer reasonably expects to obtain in due course.

**Section 4.04.      Financial Condition.**

Any financial statements of Developer delivered to City pursuant to Section 6.05 will be accurate and complete in all material respects as of the respective dates of such financial statements, will fairly represent the financial condition of the subjects thereof in all material respects as of the respective dates of such financial statements, and no change which will have a material adverse effect on the Developer will have occurred in the conditions reflected therein since their respective dates.

**Section 4.05.      Utilities.**

Water, sewer, electricity and telephone and other utility service necessary for operation of the Project after the Completion Date will be available for its intended use. All necessary arrangements will be made by Developer with utility companies and local governments prior to the Closing Date to ensure the complete installation and use of such utilities.

**Section 4.06.**            **Government Approvals.**

The construction of the Project in accordance with the Plans and Specifications and its intended use will comply with all applicable laws, statutes, rules, regulations and codes, including without limitation occupancy regulations, subdivision regulations, zoning resolutions, building codes, flood plain regulations and environmental and land use laws and regulations.

**Section 4.07.**            **Permits.**

All building and construction permits required in connection with the construction of the Project will be obtained by Developer and all fees required in connection therewith will be paid by Developer prior to the commencement of any component of work with respect to which any such permit is required.

**Section 4.08.**            **Access - Roads.**

All roads and other access necessary for the development of the Property, as set forth in the site plan for the Project, and the construction and full utilization of the Project for its intended purposes as contemplated herein will have either been completed or the necessary rights-of-way therefor will have been acquired by the appropriate governmental authorities or will have been dedicated to public use and accepted by such governmental authorities and all necessary steps will have been taken by Developer or such governmental authorities to assure the complete construction and installation thereof by the date of the initial occupancy of the Project.

**Section 4.09.**            **Taxes.**

Developer has filed all federal, state and local tax returns which are required to be filed and has paid all taxes shown on such returns and all assessments received by it to the extent that such taxes and assessments have become delinquent. All federal, state and local income taxes and other taxes and assessments of any nature with respect to which Developer is obligated have been paid prior to delinquency or adequate accruals have been established therefor.

**Section 4.10.**            **No Liens or Encumbrances**

Title of the leasehold interest in and to the Property is vested solely in the Developer, free and clear of all liens and encumbrances except those approved by the City in writing.

**Section 4.11. Fulfillment of Loan Prerequisites.**

Prior to the start of construction and funding of the Loan the Developer has provided to City: (a) evidence that the Developer has obtained all of the necessary construction financing and permanent financing commitments for the Project; (b) a survey showing the location of all matters affecting the Property; (c) a relocation plan, or if the Property has been unoccupied since Developer's acquisition, a completed No Relocation Certificate with supporting documentation; (d) a current, updated Phase I ESA dated within 180 days of the Closing Date and a reliance letter expressly made for the benefit of the City; and (e) a list of currently engaged Project contractors, subcontractors and suppliers, that sets forth the nature of the work to be performed or items to be supplied by each and the dollar value thereof, which shall be updated by Developer when new contracts or amendments are entered into.

**Section 4.12. Developer Fee.**

(a) The "**Developer Fee**" means all funds paid, at any time, as compensation to a developer for developing a proposed project. It is intended to cover all costs and expenses of the developer associated with the project including, but not limited to, costs for development consulting, processing agents, as well as developer overhead and profit, and construction management oversight. If applicable the following fees and costs shall also be paid from the Developer Fee, personal guarantee fees, syndicator consulting fees, and cost of reserves in excess of those customarily required by multi-family housing lenders. "**Capitalized Developer Fee**" means the amount of Developer Fee that can be paid out of project development sources (i.e., a "project cost") consistent with TCAC and lender limits during the period up to the latest of permanent loan conversion or IRS form 8609 issuance. **Deferred Developer Fee** means the amount of the Developer Fee that is outstanding after the Capitalized Developer Fee has been paid.

(b) The Developer Fee shall not exceed the amount allowed under the TCAC regulations at the time of the application. The Capitalized Developer Fee shall not exceed \$ 2,500,000. The Deferred Developer Fee must be repaid only from the Developer's share of Net Cash Flow (as defined in the Note). *Provided, however that the Developer Fee may be paid to the extent of any capital contributions made by the General Partner up to the amount shown in the proforma.*

**Section 4.13. Property not in a Special Flood Hazard Area.**

The Property is not located in a Special Flood Hazard Area under the Federal Emergency Management Agency's ("**FEMA**") National Flood Insurance Program.

Special Flood Hazard Areas are defined by FEMA as the area that will be inundated by a flood event having a one percent (1%) chance of being equaled or exceeded in any given year.

**Section 4.14.**            **Conflicts of Interest.**

The Developer has no interest and shall not acquire any interest, financial or otherwise, direct or indirect, nor engage in any business transaction or professional activity or incur any obligation of any nature which would conflict in any manner with the performance of work required hereunder.

**Section 4.15.**            **Monitoring and Loan Servicing Fees.**

After the Conversion Date, Developer shall pay, on par with debt service on the Senior Permanent Loan and prior to the payment of permitted expenses pursuant to the Note: (i) the City's Restriction Monitoring Fee (as defined in the Restriction) and during the term of the Loan, and (ii) an annual loan servicing fee of \$73.41 per unit payable to City in advance on or prior to July 1, which fee shall increase annually by three percent (3%) commencing on the Closing Date. ("Loan Servicing Fee").

**Section 4.16.**            **No Related Parties.**

Developer will not admit partners nor enter into participation agreements nor otherwise take or allow any action that would lead to the violation of the requirements of Qualified Program Investment Requirements as defined in Section 147 of the Internal Revenue Code, or the requirements of applicable Treasury regulations.

**ARTICLE V  
CONSTRUCTION**

**Section 5.01.**            **Construction Work Completion.**

(a) Developer shall complete construction of the Project and obtain a final, unconditional Certificate of Occupancy as to all units before the earlier of: (i) the placed in service deadline set forth in the Partnership Agreement, or (ii) thirty-six months after the start of construction (the "**Completion Date**"). Developer shall record a Notice of Completion within fifteen (15) days of completion of construction of the Project. The time within which construction of the Project must be completed shall be extended for a period equal to the period of any delay directly affecting the construction work which is caused by fire, earthquake or other acts of God, strike, lockout, acts of public enemy, riot, insurrection, or other extraordinary events beyond the control of Developer, provided Developer furnishes

City with written notice of any such delay within fifteen (15) days from the initial occurrence of any such delay.

(b) Developer shall submit a monthly construction status report and timeline that reflects that progress is being made toward Project construction completion.

(c) The start of construction as evidenced by Developer's issuance of a notice to proceed shall occur within 30 days of the Closing Date and shall be followed by continuing construction progress.

**Section 5.02. Documents Become City Property.**

Subject to the rights, if any, of any holder of an approved Financing Agreement the parties agree that if City exercises the power of sale or otherwise forecloses under the Deed of Trust, all plans and drawings, permits and other development rights and assets shall belong to City, and Developer shall transmit all such documents to City upon demand by City.

**Section 5.03. Inspections of the Work.**

Developer shall permit City's agents or representatives to enter upon the Property to inspect the Improvements at any reasonable time. If any of the work, in the opinion of City, is not being performed in accordance with the Plans and Specifications, as defined below, City may direct Developer to stop work and order its replacement or correction, whether or not said unsatisfactory work has been completed. Failure of Developer to act and undertake such corrections within five (5) business days after demand from City and completion within a reasonable time as determined by City shall constitute a default hereunder.

**Section 5.04. Approval of Plans and Specifications.**

Developer will furnish to City two (2) sets of final plans and specifications along with all the changes from the Bid set of drawings, prepared by Architect and approved by every local agency having jurisdiction over the proposed construction. The final plans and specifications shall cover all of the Improvements, including site work, and shall be accompanied by true, accurate and complete cost breakdowns, by trade. If the final plans and specifications, including the cost breakdowns, are found acceptable, they shall be approved in writing by City (such approved plans and specifications being hereinafter collectively referred to as the "**Plans and Specifications**"). The Project will be constructed substantially in accordance with the Plans and Specifications and the Construction Budget and in the event that the latest estimate of construction costs shall exceeds the Construction Budget, Developer shall deposit such excess amount with City.

**Section 5.05. Compliance with Law and Plans.**



Developer shall coordinate the construction work and ensure that all work and materials shall be in accordance with good building practices and in conformity with all governmental laws, regulations, rules and codes and in strict accordance with the Plans and Specifications.

**Section 5.06. Developer's Responsibilities.**

To prevent and avoid construction defects, Developer shall inspect, review, supervise and assure the high quality, adequacy and suitability of: (a) Plans and Specifications and all changes and amendments thereto; (b) architects, contractors, subcontractors and materialmen employed or utilized in the construction; and (c) the progress and course of construction and its conformance with the Plans and Specifications, and any amendments, alterations and changes thereto.

**Section 5.07. Supervising Architect.**

The Improvements under construction shall, at Developer's expense, be subject to the supervision, inspection and approval of a licensed architect (“**Architect**”). Within ten (10) days of completion of construction the Architect shall furnish to City, at Developer's expense, a certification attesting to the completion of the Improvements in a good and workmanlike manner, and in accordance with the Plans and Specifications and with the Architectural Barriers Act of 1968 (42 U.S.C. §§4151-4157); the Uniform Federal Accessibility Standards, as set forth in Title 24 Code of Federal Regulations (“CFR”) Section 570.614; the Americans with Disabilities Act of 1990; and Section 504 of the Rehabilitation Act of 1973.

**Section 5.08. Lists of Contractors.**

Upon demand by City, Developer shall furnish to City, from time to time, correct lists of all contractors and subcontractors employed by the General Contractor in connection with the construction of the Improvements. Each said list shall show the name, address and telephone number of each such contractor or subcontractor, a general statement of the nature of the work to be done, the labor and materials to be supplied, the names of materialmen, if known, and the approximate dollar value of such labor or work with respect to each. City shall have the right, but neither the obligation nor the duty, to make direct contact with each contractor, subcontractor and materialmen to verify the facts disclosed by said list, or for any other purpose.

**Section 5.09. As Built Surveys; Foundation Endorsement.**

(a) Developer shall cause the Title Company to issue a foundation endorsement to the City's title policy acceptable to City or cause a survey satisfactory to City and the Title Company to be made, promptly after completion of the foundation and within the time required for the issuance of a Title Policy endorsement. Such survey shall show that the foundation is located entirely within the Property lines, and does not encroach upon any

easement or public or private right of way, or setback, or breach or violate any covenant, condition or restriction of record, or any building or zoning ordinance or permit.

**(b)** Developer shall cause a survey satisfactory to City and the Title Company to be made, promptly upon completion of the Improvements, showing that the Improvements are located entirely within the Property lines, and do not encroach upon any easement or public or private right of way, or breach or violate any covenant, condition or restriction of record, or any building or zoning ordinance or permit.

**(c)** Such surveys shall be provided to City within ten business (10) days of completion of the surveyor's field data collection, unless required earlier by City for title endorsement purposes.

**Section 5.10. Damage.**

Subject to the rights, if any, of any holder of an approved Financing Agreement, if the Project is materially damaged by fire or other casualty and not repaired, City shall receive insurance proceeds or cash deposited by Developer sufficient in City's judgment to pay for repair of the Improvements in a timely manner.

**Section 5.11. Project Status.**

Developer shall provide periodic reports to City, as requested by City, confirming that the Project is being constructed in accordance with the Plans and Specifications and approved change orders.

**Section 5.12. Compliance with Prevailing Wage Requirements.**

**(a)** Developer shall abide by all of the City's applicable prevailing wage requirements including but not limited to City Resolution Numbers 61716, 72518, 71584 and 76242, (collectively, such resolutions are the "**City Housing Prevailing Wage Policy**") and San José Municipal Code Chapter 14.09 during the construction of the Project and all applicable requirements of California Labor Code Section 1720 *et seq.* and the regulations adopted pursuant thereto, (and, if required by applicable federal law or regulations, the Davis Bacon Act and implementing regulations) (all of the foregoing, collectively, "**Prevailing Wage Laws**"). Developer shall pay, or cause to be paid, prevailing wages, for all construction work on the Project. For the purposes of this Agreement, "prevailing wages" means not less than the general prevailing rate of per diem wages, as defined in Section 1773 of the California Labor Code and Subchapter 3 of Chapter 8, Division 1, Title 8 of the California Code of Regulations (Section 16000 *et seq.*), and as established by the Director of the California Department of Industrial Relations ("**DIR**"), or in the absence of such establishment by the DIR, by the City's Office of Equality Assurance ("**OEA**"), for the respective craft classification. In any case where the prevailing wage is established by the DIR or by OEA, the general prevailing

rate of per diem wages shall be adjusted annually in accordance with the established rate in effect as of such date.

**(b)** In addition to State Law requirements regarding prevailing wages, City recognizes that payment of prevailing wages for work on the Project promotes the following goals: protection of job opportunities within the City of San José and stimulation of the economy by reducing the incentive to recruit and pay a substandard wage to workers from distant, cheap-labor areas; benefiting the public through the superior efficiency and ability of well-paid employees, thereby avoiding the negative impact that the payment of inadequate compensation has on the quality of services because of high turnover and instability in the workplace; payment of a wage that enables workers to live within the community, thereby promoting the health and welfare of all citizens of the City of San José by increasing the ability of such workers to attain sustenance, avoid poverty and dependence on taxpayer funded social services; and increasing competition by promoting a level playing field among contractors with regard to the minimum prevailing wages to be paid to workers.

**(c)** Developer's compliance with prevailing wage and the requirements herein is a material consideration of City in entering into this Agreement. City will monitor Developer's compliance with the Labor Code requirements and additional requirements of this Agreement through the City's Office of Equality Assurance.

**(d)** Developer shall:

- i. Require the General Contractor and subcontractors to complete and submit all prevailing wage initial compliance documentation to OEA.
- ii. Following commencement of construction, require the General Contractor and subcontractors to submit completed certified payroll records with each monthly pay request and General Contractor shall refuse to pay all or a portion of a pay request to the extent not supported by certified payroll documentation.
- iii. Require the General Contractor and subcontractors to complete signed timecards weekly, and provide those timecards to OEA upon request.
- iv. Require any subcontractor who did not attend the preconstruction prevailing wage meeting to attend a prevailing wage meeting with OEA prior to commencing work.
- v. Submit all General Contractor's and subcontractor's certified payroll reports and Statements of Non Performance to City on or before the fifteenth (15th) day of each month for any and all work performed during the previous month payroll due date. For example: for any work performed (or nonperformance) in the month of April, these submittals are due to OEA no later than May 15.

- vi. Require the contractor for the construction of the Project to grant City access to the Project site at reasonable times for the purpose of enforcing the provisions of this Section.
- vii. Provide City with documentation relating to compliance with this Section.
- viii. Indemnify, defend and hold City, its officials, officers, employees, contractors and agents harmless from any third party costs, claims, damages, liabilities, and expenses arising from the General Contractor's or any subcontractor's failure to pay prevailing wages or otherwise comply with applicable Prevailing Wage Laws. This section shall survive the expiration or termination of this Agreement.

(e) City and Developer recognize that Developer's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code, the City Housing Prevailing Wage Policy, and City's additional prevailing wage compliance provisions within this Agreement, will cause City damage by undermining City's goals in assuring timely payment of prevailing wages, and will cause City additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the workers paid less than the prevailing wage. City and Developer further recognize the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, City and Developer agree that:

- i. For each day beyond the payroll due date that Developer fails to submit contractor's certified payroll to City, Developer shall pay to City as **liquidated damages** the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
- ii. For each instance where City has determined that prevailing wage requirements were not met, Developer shall pay to City as **liquidated damages** the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.
- iii. any **liquidated damages** due the City shall only be paid from non-Project funds and shall not be considered Permitted Expenses as defined under the Note, or be eligible to be paid from Project Cost Savings.

  
\_\_\_\_\_  
CITY

\_\_\_\_\_  
DEVELOPER

**ARTICLE VI**  
**AFFIRMATIVE COVENANTS OF DEVELOPER**

**Section 6.01.      Inspections for Security.**

- vi. Require the contractor for the construction of the Project to grant City access to the Project site at reasonable times for the purpose of enforcing the provisions of this Section.
- vii. Provide City with documentation relating to compliance with this Section.
- viii. Indemnify, defend and hold City, its officials, officers, employees, contractors and agents harmless from any third party costs, claims, damages, liabilities, and expenses arising from the General Contractor's or any subcontractor's failure to pay prevailing wages or otherwise comply with applicable Prevailing Wage Laws. This section shall survive the expiration or termination of this Agreement.

(e) City and Developer recognize that Developer's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code, the City Housing Prevailing Wage Policy, and City's additional prevailing wage compliance provisions within this Agreement, will cause City damage by undermining City's goals in assuring timely payment of prevailing wages, and will cause City additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the workers paid less than the prevailing wage. City and Developer further recognize the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, City and Developer agree that:

- i. For each day beyond the payroll due date that Developer fails to submit contractor's certified payroll to City, Developer shall pay to City as **liquidated damages** the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
- ii. For each instance where City has determined that prevailing wage requirements were not met, Developer shall pay to City as **liquidated damages** the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.
- iii. any **liquidated damages** due the City shall only be paid from non-Project funds and shall not be considered Permitted Expenses as defined under the Note, or be eligible to be paid from Project Cost Savings.

\_\_\_\_\_  
CITY

\_\_\_\_\_  
DEVELOPER 

**ARTICLE VI  
AFFIRMATIVE COVENANTS OF DEVELOPER**

**Section 6.01. Inspections for Security.**

Developer shall permit City and its representatives, upon reasonable notice and during business hours, to enter upon the Property and observe the construction of the Project and all materials to be used in construction thereof; permit them to examine the Plans and Specifications; all detailed plans and shop drawings for the Project, and all of Developer's books, records, contracts and bills with respect to the Project; and cause the General Contractor and subcontractors to cooperate with City in this regard. Observation by City of construction shall be for the purpose of protecting the security of the Loan only, and such observation shall in no way be construed as an acknowledgment that the Plans and Specifications have been complied with or that the construction is free from defect or in compliance with the terms of this Agreement. City is under no obligation to supervise, inspect or inform Developer of the progress of construction, or to review or inspect books and records of General Contractor, subcontractors or materials suppliers, and Developer shall not rely upon City therefor. Any review or inspection by City is entirely for its purposes in determining whether and to what extent to advance money pursuant to this Agreement, and is not for the purpose of determining, or informing Developer of, the quality or suitability of construction.

**Section 6.02.**            **Alteration of Plans and Specifications; Construction Change Orders.**

Developer shall provide written notice to and obtain approval of City for any change in the Plans and Specifications. Developer shall provide written notice to and obtain approval of City for construction contract or other change orders which would cause an increase or decrease of more than \$25,000 in any Line Item in the Construction Budget or cause the aggregate change to the Construction Budget to exceed \$75,000. City staff shall have at least 10 business days to review and approve or deny the change order. Change orders may not be segmented or divided to reduce their impact on Line Items. All upgrades shall be approved by the City.

**Section 6.03.**            **Due Diligence.**

Developer has been awarded 4% low income housing tax credits ("LIHTC") tax credits and a tax-exempt bond allocation from the California Debt Limit Allocation Committee ("CDLAC"). Developer agrees to continue to perform all needed actions to comply with those awards, any applications or agreements implementing those awards and the applicable rules and regulations including fulfilling allocation and carryover requirements, where applicable.

**Section 6.04.**            **Insurance.**

At all times, Developer shall maintain the policies of insurance and bonds required in the Deed of Trust. Each such policy shall provide that the policy may not be canceled or modified in any material respect (including, without limitation, cancellation for non-

payment of premiums) without at least thirty (30) days' prior written notice to any and all insureds named thereon, including the City. Developer shall also maintain and ensure that its contractor and subcontractors maintain workers compensation insurance as required by State law.

**Section 6.05. Financial Information.**

Developer shall furnish to City such financial information as City may reasonably require, including without limitation all of the following:

**(a)** During the term of the Restriction, copies of federal income tax returns of Developer and its general partner(s) within one hundred twenty (120) days of the end of each fiscal year during the term of the Loan; and audited income and expense statements, a balance sheet, and a statement of cash flow, all signed by authorized parties, for the Developer and its general partner(s) within one hundred twenty (120) days after the end of their respective fiscal years.

**(b)** Prior to the Completion Date, audited income and expense statements and balance sheets for the guarantor, Charities Housing Development Corporation of Santa Clara County, a California nonprofit public benefit corporation, signed by the authorized parties, and each within one hundred twenty (120) days after the end its fiscal year.

**(c)** Commencing on the date the first unit is leased, and continuing until the month after 100% occupancy Developer shall prepare written monthly lease-up status/operating updates, including data on the sizes and income targeting of units have been leased that month and the rents to be charged. In addition, the monthly lease-up/operating status report shall provide details regarding the Project's operations, such as status of tenant services, number of hours of supportive services provided, any successes worth noting, and any emerging issues. The monthly lease-up/operating status report shall be due to City upon the first day of each month.

**(d)** After the first anniversary of the Completion Date and continuing through the term of the Loan, annual rent rolls and rent and expense operating statements as to the Property within one hundred twenty (120) days of the end of the Project's preceding fiscal year but not later than by May 1 for a Project with a fiscal year ending in June (or by October 31 for a Project with a fiscal year ending in December), in form and substance satisfactory to the City. Also, after the first anniversary of the Completion Date and continuing through the term of the Restriction, rent rolls within thirty (30) days of any written request by the City, in form and substance satisfactory to the City.

**(e)** During the term of the Loan, quarterly reports on all cash distributions.

The City reserves the right to review and approve financial information, credit information and references prior to the Closing Date for underwriting purposes.

**Section 6.06.**            **Further Documents.**

Developer shall furnish to City upon request all other instruments and documents in addition to those specifically referred to herein as may reasonably be required from time to time by the City, including documents or information related to any general partner loans or limited partner loans, and their terms.

**Section 6.07.**            **Developer's Existence.**

Developer shall maintain and preserve the existence of Developer under the laws of California and maintain its right to transact business in California and in all other states where its activities and ownership of assets are such that qualification to transact business is necessary under the laws of such states.

**Section 6.08.**            **Protection of Property.**

Developer shall employ reasonable efforts to protect the Property and all materials stored on the Property for installation on the Property, from removal, destruction and damage.

**Section 6.09.**            **Signs.**

Signs erected on the Property during construction listing the Developer shall also indicate financing has been provided by the City and include the logo of the City's Department of Housing.

**Section 6.10.**            **Payment of Taxes and Other Obligations.**

Developer shall:

**(a)** Duly and punctually pay and discharge all taxes, including without limitation the tax required by Chapter 4.76 of the San José Municipal Code, assessments and other charges against the Property, the Project, or Developer's leasehold interest in the Property prior to the date when they shall become delinquent, and all charges for labor, materials and supplies that if unpaid might become a lien encumbering the Property, the Developer's leasehold interest in the Property, or any part of the property of Developer, unless contested by the Developer in good faith and by appropriate proceedings after posting a bond or other security in amount and form satisfactory to the City.

**(b)** Duly and punctually pay principal and interest on all debt obligations of Developer and pay amounts due on all leases and other obligations of Developer.



**Section 6.11. Leases.**

Developer shall lease Assisted Units to tenants pursuant to a standard form lease, which standard form lease shall be acceptable in form and substance to the City, and Developer shall not materially modify such form without the written consent of City, which consent shall not be unreasonably withheld. Developer shall make the Assisted Units available as set forth in the Restriction and Article VIII hereof.

**Section 6.12. Management of Project.**

**(a) Management Agent and Management Plan.** The Project shall at all times be managed by an experienced manager (the "**Management Agent**") reasonably acceptable to the City, with demonstrated ability to operate residential rental properties like the Project in a manner that will provide decent, safe, and sanitary housing to the City, all pursuant to a Management Plan (the "**Management Plan**"). The management portion of the Management Plan shall address, at minimum: (i) personnel policies and responsible staffing arrangements; (ii) affirmative marketing and outreach policies and procedures; (iii) application process, rent-up and filling of vacancies; (iv) procedures for certifying and re-certifying incomes, including process for over-income tenants; (v) tenant-management relations, including appeals and evictions; (vi) occupancy rules including maximum transitional housing period; (vii) provision of social services for residents, on and off site; (viii) accounting and other financial procedures; (ix) Site security measures and requests for additional security; (x) temporary relocation procedures; (xi) direction to the Management Agent to follow the procedures listed in Section 8.06 and incorporation of the policies described in Section 8.06; (xii) a language access policy for tenants and prospective tenants with limited English proficiency; and (xiii) requirement for City's approval of amendments. The maintenance portion of the Management Plan shall include: (i) a written maintenance plan that will yield safe, sanitary and attractive living units and common areas; (ii) a reserve analysis identifying items that will eventually need replacement and their life expectancy, which Developer for itself, its successors, its assigns and every successor in interest to the Property or any part thereof, covenants and agrees to update at least every three years at time of Project Budget (as defined in Section 8.03 (b) submittal in accordance with Section 8.03 (b)); (iii) a five year plan for the planned use of the Replacement Reserve, which Developer agrees to update annually at the time of at time of Project Budget submittal; (iv) HOME or Housing Authority requirements, if applicable; (v) an inventory list of common area property, tools and equipment, and unit appliances, carpeting and drapes, and (vi) information regarding when a unit was last redecorated or updated, which Developer shall update annually at time of Project Budget submittal. The Management Plan will be complied with for the life of the Ground Lease. The Management Plan shall also include a management policy addressing rent burden that, to the extent feasible and in accordance with applicable law, provides a 5% limit for annual increases to existing tenants who are paying more than 50 percent of their gross income towards rent. Exceptions to the rent burden policy can be made based upon

factors such as physical structural needs, operating costs and property cash flow, in order to ensure asset preservation and health and safety of the community. Compliance will be monitored annually. The Developer shall submit for the City's approval the identity of any proposed Management Agent, as well the proposed Management Agreement and the proposed Management Plan and any amendment thereto. Charities Housing Development Corporation of Santa Clara County is the initial Management Agent. The Developer shall also submit such additional information about the background, experience and financial condition of any proposed Management Agent as is reasonably necessary for City to determine whether the proposed Management Agent meets the standard for a qualified Management Agent set forth above. If the proposed Management Agent meets the standard for a qualified Management Agent set forth above, and City agrees with the form of Management Plan, City shall approve the proposed Management Agent and Management Plan by notifying Developer in writing. Unless the proposed Management Agent and/or Management Plan is/are disapproved by City within thirty (30) days, they shall be deemed approved. If Developer or a general partner is to manage the Property, then a Management Plan indicating that fact must be submitted prior to the Closing Date. Developer's material failure to comply with the Management Plan, after the expiration of any applicable cure periods, shall result in the prompt removal of the Developer as the Management Agent.

**(b) Performance Review.** The Developer shall cooperate with City in an annual review of the management practices. The purpose of each annual review will be to enable City to determine if the Project is being operated and managed in accordance with the requirements and standards of this Agreement.

**(c) Replacement of Management Agent.** If as a result of the annual review, City determines in its reasonable judgment that the Project is not being operated and managed in accordance with any of the requirements and standards of this Agreement, City shall deliver notice to the Developer of its intention to cause replacement of the Management Agent. Within fifteen (15) days of receipt by the Developer of such written notice, City and the Developer shall meet in good faith to consider methods for improving the financial and operating status of the Project, including, without limitation, replacement of the Management Agent. Developer shall have 30 days from the date of such meeting to correct any issues raised by City and provide evidence of such correction to City.

If, after expiration of the 30 day period, City elects to proceed with the replacement of the Management Agent, City shall so notify the Developer in writing within fifteen (15) days following the end of the 30 day period. Thereupon, the Developer shall promptly dismiss the then current Management Agent, and shall appoint as the replacement Management Agent a person or entity meeting the standards for a Management Agent set forth in this Section and approved by City pursuant to this Section. If, City, and Developer cannot agree on a replacement Management Agent, the Developer shall promptly dismiss the Management Agent and City shall designate three (3) replacement Management Agents acceptable to the City, from which Developer shall appoint the

Management Agent. City acknowledges that the Developer may be required to obtain the consent of its lenders and limited partners prior to dismissing or hiring a Management Agent.

Any contract for the operation or management of the Project entered into by the Developer shall provide that the contract can be terminated as set forth above. Failure to remove the Management Agent in accordance with the provisions of this Section shall constitute an Event of Default under this Agreement, and City may enforce this provision through legal proceedings as specified in Article IX hereof.

**Section 6.13. No Discrimination.**

The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, or on the basis of actual or perceived gender identity in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, Developer's leasehold interest in the Property or the Project, nor shall the Developer or any person claiming under or through the Developer establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, Developer's leasehold interest in the Property or the Project, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

**(a) In Deeds:**

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, or on the basis of actual or perceived gender identity in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees,

subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

**(b)** In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, or on the basis of actual or perceived gender identity in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

**(c)** In Contracts:

"The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, or on the basis of actual or perceived gender identity in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in said property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."

Notwithstanding the foregoing, with respect to familial status, nothing herein shall be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code nor shall the foregoing be construed to affect Sections 51.2, 51.3, 51.4, 51.10, 51.11, and 799.5 of the Civil Code, relating to housing for senior citizens. Subdivision (d) of Section 51 and Section 1360 of the Civil Code and subdivisions (n), (o), and (p) of Section 12955 of the Government Code shall apply to this Section 6.13.

**Section 6.14.**      **Loan in Balance.**

Developer shall maintain the Loan in balance. The Loan is in balance when the amount of undisbursed Loan proceeds and any undisbursed proceeds of other financing described herein, plus any funds to be provided by Developer are sufficient, in the City's sole discretion, to pay the following through the Conversion Date: (a) all monies owed to consultants, suppliers or contractors and (b) all interest and other sums or costs that may accrue under the Loan Documents. Whenever the Loan is out of balance the Developer shall, upon City's request, deposit the amount needed to bring the Loan into balance into a developer's funds account acceptable to City. A developer's (or borrower's) funds account required by the Senior Lender shall be deemed a developer's funds account acceptable to City. The City reserves the right to review all Project expenditures, including those made prior to the Closing Date.

**Section 6.15. City Approval of Partnership Loans.**

(a) The Developer shall provide prior notice of and obtain City's advance written approval for all loans, advances or other obligations requiring repayment that are made to the Partnership or on behalf of the Partnership by General Partners or Limited Partners ("**Partner Loans**"). Except as provided in Section 6.15(b), repayment of Partner Loans shall be from Developer's share of the Net Cash Flow (as defined in the Note) and no interest may be charged or collected on Partner Loans.

(b) (1) Loans or advances made by a Limited Partner to the Developer under the Partnership Agreement ("**Limited Partner Loans**") may bear interest not to exceed the Prime Rate as published in the *Wall Street Journal*. Limited Partner Loans may be only repaid as Permitted Expenses (as defined in the Note) ahead of City's share of Net Cash Flow, if the loans are "**Operating Deficit Loans**".

(2) Operating Deficit Loans are loans made by the Limited Partner when required to: (i) preserve the availability of Tax Credits to the Developer and Limited Partner or (ii) pay operating expenses where Project income is not available if needed to prevent a default or to make any required payments under applicable City, or Senior Loan Documents to prevent a default or other material breach thereunder, and are subject to the applicable interest limitations, approval and notice requirements above.

**Section 6.16. Notice of Liens.**

The Developer shall provide notice to the City of any liens filed against the Property, Developer's leasehold interest in the Property, or the Project and any threats to file such lien within ten (10) days of its receiving notice thereof.

**Section 6.17. Approval of Expenditures.**

Expenditures from project sources or reserves for: (a) repairs or rehabilitation associated with latent construction defects or (b) capital improvements exceeding

\$10,000 in the aggregate are contingent on City's advance written approval. Approval of said expenditures for said capital improvements shall not be unreasonably withheld or delayed, provided improvements are in compliance with applicable building codes and the Project Plans and Specifications. Approval of said expenditures for said repairs or rehabilitation shall not be unreasonably withheld or delayed, provided that arrangements acceptable to the City are made for the recovery of costs and damages for said defects and the repairs or rehabilitation is in compliance with applicable building codes. Expenditures to be paid by withdrawals from the Replacement Reserve are subject to the additional requirements set forth in Section 6.20(d).

**Section 6.18.**            **Required Notice and Approval.**

Where the Developer's organizational documents, including but not limited to the Partnership Agreement, provide for notice to or approval by a lender, if required under the lender's loan documents, such notice or approval is required hereunder.

**Section 6.19.**            **Amendments to Organizational Documents.**

No amendment to the Developer's organizational documents shall alter the obligations of the Developer under the Loan Documents unless approved in writing by City.

**Section 6.20.**            **Replacement Reserve.**

**(a)** On or before the Conversion Date, Developer establish an interest-bearing account in a bank approved by City and the senior permanent lender ("**Replacement Reserve**"). Commencing on or before the Conversion Date, Developer shall make monthly deposits into the Replacement Reserve in the amount 1/12<sup>th</sup> of \$300.00 per unit which amount may be increased by a maximum of 3% per annum. However, City may allow an increase to this permitted amount with consent of the senior lender if needed to maintain the facilities as demonstrated by a third-party report acceptable to City. Funding of the Replacement Reserve to a level in excess of what is required by the senior lender must be approved by City in advance. Developer shall submit a five-year capital expenditure plan for the Replacement Reserve for approval by City on an annual basis consistent with Section 6.12.

**(b)** Notwithstanding the terms of the Senior Loan Documents or Partnership Agreement, the Replacement Reserve shall be maintained and funded until the Restriction expires. Any balance in the Replacement Reserve remaining at the time of any Limited Partner's exit from the partnership, or the sale of the Property or Project shall remain with the Project. Replacement Reserve deposits shall be due concurrently with payments under the Senior Permanent Loan, commencing on the date that the first scheduled payment under the Senior Permanent Loan is due on or after the Conversion Date. All interest earned on funds held in the Replacement Reserve shall be retained in such account and used consistent with this Section.

(c) Funds held in the Replacement Reserve may be applied to cover any costs of replacing Eligible Replacement Items (as defined herein) in connection with the Improvements. “**Eligible Replacement Items**” means Capital Improvement Items (as defined below), and other substantial items as approved by City in its reasonable judgment, but does not include maintenance and repairs undertaken during the normal course of business. “**Capital Improvement Items**” means items recognized as capital improvements in accordance with generally accepted accounting practices that require an outlay of funds for acquisition or improvement of a fixed asset which can be depreciated over its useful life and extends the life or increases the productivity of the Improvements.

(d) Any withdrawal from the Replacement Reserve is subject to City’s prior approval and may be subject to Senior Lender and Limited Partner approval requirements. City approval will be granted either in the annual budget process identified in Sections 6.12 and 8.03, or for requests outside of the annual budget process, if the following conditions have been satisfied in City’s reasonable judgment: (i) the withdrawal is for an Eligible Replacement Item; (ii) City must have received a written request signed by Developer together with such documentation and information related to the occurrence of such costs, including invoices, canceled checks, lien waivers and other evidence as City may require to show that Developer is in compliance with the Loan Documents; (iii) the Improvements must not have been materially damaged and not repaired; (iv) Developer must have provided such title insurance policy endorsements City may reasonably require to ensure absence of any mechanic’s, materialman’s or other liens except as previously approved in writing by the City; and (v) no Event of Default, or event that with notice or the passage of time could become an Event of Default shall have occurred and be continuing; and (vi) for any single withdrawal of over \$10,000.00 the Developer shall obtain not less than three (3) competitive bids for the expenditures.

(e) No annual cash flow distributions may be made to Developer or any of its partner(s) unless and until: (i) the Replacement Reserve has been funded for the year as required, and (ii) all payments required to be made to City under the terms of the Note for the year have been paid.

**Section 6.21. Capitalized Reserves.**

(a) No capitalized reserve account shall be established without City approval of the necessity for such reserve, the amount needed, and the account funding and disbursement process.

(b) Developer shall notify City within ten (10) days of disbursement from any capitalized reserve account and prior to the further disbursement or reallocation of that account. The notice shall include the amount disbursed.

- (c) Prior to the further disbursement or reallocation of the account, the Developer shall provide an accounting that shows how the account was funded and replenished and indicates what amounts were drawn from the annual Net Cash Flow each preceding year. The Developer shall calculate an equitable distribution of the account proceeds consistent with this accounting and submit it to the City for approval, which shall not be unreasonably refused. After such approval, the proceeds may be distributed accordingly.
- (d) Notwithstanding the terms of the Senior Loan Documents or Partnership Agreement, the Capitalized Reserve shall be maintained and funded until the Restriction expires. Any balance in the Capitalized Reserve remaining at the time of any Limited Partner's exit from the partnership, or the sale of the Property or Project shall remain with the Project
- (e) The following capitalized reserves have been approved:
  - i. *Capitalized Operating Reserve. An amount not to exceed \$630,000 to cover at least six (6) months of operating expenses, replacement reserves and debt service and satisfying applicable HCD and Tax Credit Allocation Committee regulations shall be deposited in a capitalized operating reserve account no later than the Conversion Date.*

## **ARTICLE VII CLOSING COSTS**

City shall incur no expenses for recording costs, escrow fees, and title insurance premiums paid in connection with the Loan. Developer shall pay all recording costs, escrow fees and title insurance premiums charged in connection with the Loan.

## **ARTICLE VIII OPERATION AND REPORTING**

### **Section 8.01. Operation.**

During the term of the Restriction, a total of fifty-nine (59) rental units will be made available as set forth in the Restriction. Developer shall operate the Property and the Project to provide clean, safe and decent housing to the persons described above at the highest possible occupancy rate at all times during the term of the Restriction. In furtherance of this objective:

- (a) The Property and the Project at all times will be managed by an experienced



Management Agent with demonstrated ability to operate projects like the Project in a manner that will provide decent, safe and sanitary housing to the occupants within the budget provided and for the funds available.

**(b)** After the Conversion Date, the Project will not be operated at less than 90% occupancy for more than six consecutive months unless market conditions otherwise dictate, as evidenced by a market study prepared by a consultant reasonably acceptable to the City.

**Section 8.02. Reporting.**

At all times during the term of the Restriction, the Developer will provide to City the reports described below together with any other information that City is required to provide pursuant to federal or state laws or regulations. Developer will provide the following information at the following times:

**(a)** In addition to the information described in Article VI, Developer shall provide City with an annual report regarding the Assisted Units which will include a census report and occupancy report which shall set forth the vacancy rate for the Property during the year just ended (and more frequently if requested by the City) and shall identify household name, household size, the income level of all occupants eighteen (18) years of age or older, unit size, move in dates and the amount of rent paid by each household so that City can verify that each household is an income eligible household who is paying only affordable rent as required under the Restriction. If the project has City HOME funds, the Developer shall provide a separate report for the HOME units in a form acceptable to City which shall include all information requested by City with respect to those units.

**(b)** Within ninety (90) days following the end of each fiscal year, Developer shall provide to City an annual report showing the annual census and occupancy rate for the Property and the annual vacancy rate for the Property.

**(c)** Within a reasonable time following receipt of request from the City, Developer shall deliver to the City, within a reasonable time for City to meet any deadlines imposed upon the City, all information which is required to be provided by City to a State or Federal Agency.

**(d)** Developer shall provide to City any other financial information, information regarding the occupancy rates or income levels of the Property or related to the Property, which may be reasonably requested by the City.

**(e)** If the project has City HOME funds, Developer shall provide all information and reports and permit inspections consistent with HOME Requirements.

**Section 8.03. Monitoring.**

(a) **Proforma Budget.** Developer shall submit to the City, in a form reasonably acceptable to the City, a Proforma Budget, to be attached to the Note containing the information set forth in Section 2.01(a)(8) including Developer's projections for the Project's budget during the construction and permanent phases, the sources and uses of funds, Developer's projections of estimated income and operating expense cash flow for the Project for the term of the Loan, and containing all details described in Section 3 of the Note. New fees or charges not shown in the Proforma Budget may only be added to subsequent budgets for new unduplicated services to the Project and addition of these fees or charges must be approved in writing in advance by the City, in its sole discretion. Increases in fees or charges shall be explained and require approval.

(b) **Project Operating and Capital Budget.** Prior to the Conversion Date Developer shall submit to the City for approval an operating budget for the first year of operation of the Project. After the first anniversary of the Completion Date, and continuing through the term of the Loan, each year Developer shall submit to City within thirty (30) days of the end of the Project's preceding fiscal year but not later than by May 1 for a Project with a fiscal year ending in June (and not later than October 31 for a Project with a fiscal year ending in December), the following: (i) a comparison of budgeted income and operating expenses with actual income and operating expenses for such fiscal year (with a trended estimate through the end of such fiscal year) and (ii) a detailed budget of estimated income and operating expenses for the Project's upcoming fiscal year (a "**Project Budget**") for the City's review and approval. The Project Budget shall also include the items identified under Section 6.12.

If City disapproves the Project Budget, City shall notify Developer in writing of such disapproval and the reasons thereof not later than 30 days of Developer's initial submittal. If City and Developer have not agreed on the Project Budget within 30 days of Developer's initial submittal, they shall meet or confer so as to resolve in good faith any outstanding issues and reach agreement on a mutually acceptable Project Budget. If a mutually acceptable Project Budget is not agreed to by 40 days after the initial submittal, Developer does not satisfy to City, in City's reasonable judgment, why the Project Budget should be approved, it shall be deemed disapproved.

During the Project's fiscal year, Developer may incur expenses ("**Emergency Expenses**") in excess of those included in the Project Budget if an emergency or other time critical situation arises for which, in the reasonable judgment of City and with City's prior written consent, it is necessary or advisable to incur Emergency Expenses. In the event Developer is unable to obtain the prior written consent of City, Developer agrees to take reasonable steps to resolve any such situation and will report such Emergency Expenses to City within five (5) business days of incurring such expenses. The Project Budget will be increased to reflect any Emergency Expenses when incurred only if City determines that the situation warranting the Emergency Expenses was an actual emergency.

In addition, if during any calendar year any unforeseen event, condition or circumstance arises which in the reasonable judgment of Developer warrants the incurrence of expenses ("**Unforeseen Expenses**") in excess of expenses included in the Project Budget, Developer shall submit a written request to City to adjust the Project Budget to take into account such Unforeseen Expenses. If City disapproves of any Unforeseen Expenses, City shall notify Developer in writing of such disapproval within five (5) business days after delivery of such notice. If City and Developer are not in agreement regarding the Unforeseen Expenses, they shall meet within a reasonable time in good faith as necessary to resolve such matter. If within fifteen (15) days of the delivery of such notice, Developer does not satisfy to City, in City's reasonable judgment, why the Unforeseen Expenses shall be approved, they shall be deemed disapproved.

(c) **Actual Operations Statement.** Not later than 150 days from the Project's fiscal year end date beginning with the first fiscal year after the Conversion Date, Developer shall deliver an audited financial statement of actual operations for the Project for the preceding Project fiscal year (the "**Financial Statement**") presenting operating results in detail, sufficient to compare with previously submitted and approved Project Budgets and showing the calculation of Net Cash Flow payments to City as defined in Note. If City disapproves of the determination of the Net Cash Flow payment, it shall deliver written notice to Developer of such disapproval within fifteen (15) days after its receipt of the Financial Statement. If City and Developer are not able to reach agreement on the Net Cash Flow payment, they shall meet within a reasonable time as necessary to resolve in good fa any outstanding issues regarding the determination of the Net Cash Flow payment. If within fifteen (15) days of City's receipt of the Financial Statement, Developer does not satisfy to City, in City's reasonable judgment, why the Net Cash Flow payment should be approved, it shall be deemed disapproved.

#### **Section 8.04**      **Use and Marketing; Waiting Lists.**

(a) Developer shall provide a general marketing plan and an affirmative fair housing marketing plan to the City for approval. Developer understands that its compliance, and that of its agents, with federal, state and City guidelines on affirmatively marketing to a wide array of potential tenants is required as a condition of City financing. At all times during the term of the Restriction, Developer shall affirmatively market the Project to eligible populations within the City of San José, and maintain and ensure that the Assisted Units are available at affordable housing cost as required in the Restriction. The Developer is not precluded by this Section from marketing the Project outside the City of San José.

(b) Developer shall create an account at (<https://partners.housingbayarea.org/sign-in>) and post each vacant Assisted Unit on the city-wide listing service site located at CSJ Affordable Search Portal (<https://housing.sanjoseca.gov/>) or such other site as may be requested by City within ten (10) days of Developer's Property Manager's or Management Agent's notice of an impending vacancy. Provided however, the Developer is not required to post openings for units reserved for the chronically

homeless as provided in Section 8.05 if they require direct tenant referrals provided by the Continuum of Care homeless housing program.

**Section 8.05.**            **Operation – Chronically Homeless Obligations.** Intentionally Omitted

**Section 8.06.**            **Disaster Displaced Households; Tenant Preference.**

(a) Subject to approval by the County, Developer agrees to work with City to establish an allocation or separate waitlist for rental of vacant units to income-qualified households referred by the City that have been displaced by a disaster declared by the City (a “**Disaster-Displaced Referral**”), subject to the applicable requirements of all lenders, limited partners, and funding sources including, without limitation, Section 42 of the Internal Revenue Code (a “**Disaster-Displaced Referral**”). These Disaster-Displaced Referral households will be not be placed in units reserved for the Chronically Homeless.

(b) In addition to disaster victims, the City is currently developing tenant preference policies for other displaced individuals, those who live or work in San José, and those residing in certain neighborhoods vulnerable to displacement. Subject to approval by other lenders, limited partners, and bond counsel, Developer agrees to implement these tenant preference procedures during application, lease-up, and on an ongoing basis, if the City Council has adopted the final policies prior to lease up, and if no delay of planned lease-up is caused by such implementation.

**Section 8.07.**            **Accessible Units; UFAS.**

The Project must comply with 25 CFR 8.22 which requires at least five percent (5%) of the units compliant with the Uniform Federal Accessibility Standards for mobility impaired tenants and an additional two percent (2%) of units must be accessible to the visually or hearing impaired and appropriate parking must be provided. The Developer shall maintain the accessibility of the Project consistent with the Architectural Barriers Act of 1968 (42 U.S.C. §§4151-4157); the Uniform Federal Accessibility Standards, as set forth in Title 24 CFR Section 570.614; the Americans with Disabilities Act of 1990; and Section 504 of the Rehabilitation Act of 1973 for the term of the Restriction.

**ARTICLE IX  
EVENTS OF DEFAULT; REMEDIES**

**Section 9.01. Remedies, Acceleration, Events of Default.**

**(a) Acceleration.** Upon the occurrence of an Event of Default (as defined in this Section) and the failure to remedy or cure any such default within ten (10) days of the date of the notice with respect to a monetary default or within twenty (20) days of the date of the notice with respect to a non-monetary default or, if such non-monetary default is not reasonably capable of being remedied or cured within the prescribed period, failure to submit a schedule of cure acceptable to City and commence and diligently proceed to remedy or cure such non-monetary default consistent with such schedule to the satisfaction of City, City shall be relieved from all further obligations hereunder and City shall have all remedies available to it under law or equity, and City may, at its election, without notice to or demand upon Developer (which are hereby expressly waived), except for notices or demands required by law or expressly required pursuant to the Loan Documents, accelerate and declare all unpaid principal and accrued interest on the Note, plus any applicable fees or charges due under any Loan Document immediately due and payable, time being of the essence.

**(b) Events of Default.** The following events of default shall be referred to herein as an “Event of Default”:

**(1) Monetary.** Developer's failure to pay when due any sums payable under the Note or any of the other Loan Documents; or

**(2) Commencement.** Developer fails to commence construction of the Project within 30 days of the Closing Date.

**(3) Construction.** (1) Any material deviation in the work of construction from the Plans and Specifications or the appearance or use of defective workmanship or materials in constructing the Improvements, and Developer's failure to remedy the same to City's satisfaction within thirty (30) days of City's written demand to do so, provided Developer commenced the cure during such (30) thirty day period; but if such cure is not possible within the time period, then an additional sixty (60) days, provided Developer is diligently working to cure the Default and provides a schedule of cure that is acceptable to the City and the Developer complies with such schedule; or (2) the cessation of construction of the Improvements prior to completion for a continuous period of more than twenty (20) days (except to the extent such delay is permitted under Article V, Construction); or (3) the prohibition, enjoining or delaying (in any manner) of the construction of any of the Assisted Units for a continuous period of more than thirty (30) days; or

**(4) Liens, Attachment; Condemnation.** (1) The recording of any claim of

lien against the Property or Project other than a lien securing the Construction Financing or Permanent Financing or the service on City of any bonded stop notice and the failure to, within twenty (20) days of such recording or service, either (a) discharge, satisfy or make provision, satisfactory to City in the City's sole and absolute discretion, for payment of such claim of lien or stop notice or (b) file a release bond satisfactory to the City in its sole discretion, which bond shall not be paid for from Project financing; or (2) the condemnation, seizure or appropriation of, or occurrence of an uninsured casualty with respect to any material portion of the Property not cured within a reasonable time, as such cure, time, and materiality is determined by City in its sole and absolute discretion; or (3) the sequestration or attachment of, or any levy or execution upon the Property or any of the units thereon; or

**(5) Performance of Obligations.** Developer's failure to perform any of its non-monetary obligations under any of the Loan Documents, Ground Lease, or other documents related to the Project if such failure remains uncured after notice and the expiration of any applicable cure period set forth in this Loan Agreement or the Lease as applicable; or

**(6) Other Default.** Any failure of performance or default or any declaration of default, after the expiration of any applicable cure periods under: (1) the Senior Loan Documents; (2) the Developer's organizational documents; or (3) any other obligation secured by a lien or encumbrance against the Property or the leasehold estate therein, the Project, or any other property designated as security in the Deed of Trust; or

**(7) Representations and Warranties.** Any of Developer's representations or warranties in any of the Loan Documents or in any financial statement, certificate or report submitted to the City in connection with the Loan Documents or Developer's request for disbursement of Loan proceeds proves to have been materially inaccurate, incomplete, false or misleading when made or when required to be true and correct under the terms of this Agreement; or

**(8) Voluntary Bankruptcy; Insolvency; Dissolution.** (1) Developer's filing of a petition for relief under the Bankruptcy Reform Act of 1978 as amended and recodified ("**Bankruptcy Act**"), or under any other present or future state or federal law regarding bankruptcy, reorganization or other relief to debtors (collectively, "**Debtor Relief Law**"); or (2) Developer's filing any pleading in any involuntary proceeding under the Bankruptcy Act or other Debtor Relief Law, which admits the jurisdiction of the court or the petition's material allegations regarding Developer insolvency; or (3) Developer's making a general assignment for the benefit of creditors; or (4) Developer's applying for, or the appointment of, a receiver, trustee, custodian or liquidator of Developer or any of its property which appointment is not dismissed or vacated within sixty (60) days; or (5) filing by Developer of a petition seeking the liquidation or dissolution of Developer or the commencement of any other procedure to liquidate, dissolve or terminate Developer; or (6) Developer's suspension of its business; or

**(9) Involuntary Bankruptcy.** Developer's failure to effect a full dismissal of any involuntary petition under the Bankruptcy Act or any other Debtor Relief Law, that is filed against Developer or in any way restrains or limits Developer or City regarding the Loan Documents, the Property or the Project, prior to the earlier of the entry of any order granting relief sought in the involuntary petition, or sixty (60) days after such petition is filed; or

**(10) Transfer Without Consent.**

(i) Subject to the express exceptions below, Developer's failure to obtain the City's prior written consent to any transfer, sale, lease, pledge, creation of a security interest or otherwise hypothecates or alienates all or any part of the Property, the leasehold interest in the Property or the Project whether or not the transfer, sale, lease, pledge, creation of a security interest or hypothecation or alienation occurs voluntarily, involuntarily or by operation of law.

(ii) As used in this Section, the term "transfer" includes, without limitation, the following transactions:

(1) Without limitation, any total or partial sale, assignment or conveyance, or creation of any trust or power, or any transfer in any other mode or form with respect to the Property or any part thereof or any interest therein, or any contract or agreement to do the same;

(2) The dissolution of Developer;

(3) Any merger, consolidation, sale or lease of all or substantially all of the assets of Developer; and

(4) The cumulative transfer of more than ten percent (10%) of the capital stock, partnership, profit and loss interest or other form of interest in Developer or the general partner of the Developer;

(5) Any transfer of a partnership interest in Developer; and

(6) Removal of the Developer's Managing General Partner.

(iii) Express Exceptions. The following are express exemptions to the Consent requirements of this section:

(a) Residential leases of the Assisted Units entered into in the ordinary course of business shall not require consent under this Section.

(b) The City has consented to the Construction Financing and the Permanent Financing.

(c) Developer's consent to subordinate the deeds of trust pursuant to a

subordination agreement in favor of any lender approved by City shall not require consent under this Section. The admission of the tax credit investor as a limited partner of the Developer at closing shall not require consent under this Section. The transfer of a limited partner's interest to an *affiliate of the limited partner* shall not require City consent.

d) Notwithstanding the above, the following transfers are permitted upon advance written notice to City unless the name or entity type of the Developer is changed by such transfer: 1) replacement of the investor limited partner by Charities Housing Development Corporation of Santa Clara County, a California nonprofit public benefit corporation (or a wholly owned subsidiary) at, up to two years prior to, or within two years following the end of the tax credit compliance period; the transfer of the Project and the leasehold estate to Charities Housing Development Corporation of Santa Clara County, a California nonprofit public benefit corporation (or a wholly owned subsidiary) concurrent with the above-described investor limited partner's exit from the partnership in connection with the end of the tax credit compliance period; 2) transfer of a limited partner's interest to an affiliate of the limited partner or any entity that has as its manager, managing member, or general partner an affiliate of Hudson Housing Capital LLC (the "Investor Sponsor"); 3) and the removal of the General Partner after a default under the limited partnership agreement, provided that the notice shall indicate the reasons for removal and the temporary replacement thereof for a period not to exceed six (6) months by the Special Limited Partner or its affiliate pursuant to the terms of the Amended and Restated Agreement of Limited Partnership in effect on the date hereof.

(iv) **Limitations; Default.** The consent by City to any sale, transfer, lease, pledge, encumbrance, creation of a security interest in, or other hypothecation of, all or any part of the Property, the leasehold interest in the Property or the Project shall not be deemed to constitute a novation or a consent to any further sale, transfer, lease, pledge, encumbrance, creation of a security interest in or other hypothecation or alienation. City may, at its option, declare the indebtedness secured by the Deed of Trust immediately due and payable, without notice to Developer or any other person or entity (except as expressly provided herein), upon any such sale, transfer, lease, pledge, encumbrance, creation of a security interest in, or other hypothecation or alienation in violation hereof. Without the written consent of City, no sale, transfer, lease, pledge, encumbrance, creation of a security interest in, or other hypothecation or alienation of, Property, the leasehold interest in the Property or the Project shall relieve or release Developer from primary liability under this Agreement, the Deed of Trust or the Note.

**(11) Use.** Developer fails at any time after the construction of the Project and



prior to the expiration of the Restriction to make the Project available at affordable housing cost as required by the Restriction; or

**(12) Completion.** Developer fails to complete construction of the Project and receive a final unconditional Certificate of Occupancy prior to the Completion Date.

**(13) Insurance.** Developer fails to maintain insurance as required pursuant to the Loan Documents, and Developer fails to cure such default within fifteen (15) days.

**(c) Cure by Limited Partner.** Notwithstanding anything to the contrary contained herein, City hereby agrees that any cure of any default made or tendered by one or more of Developer's Limited Partners shall be deemed to be a cure by Developer and shall be accepted or rejected on the same basis as if made or tendered by Developer.

### **Section 9.02. Additional Remedies.**

Subject to Section 9.03, in addition to the remedies set forth in Section 9.01 hereof, City may exercise from time to time any other rights and remedies available to it at law or in equity or by statute (including without limitation, the right to seek an order for specific performance to enforce the terms of the Loan Documents), in addition to, and not in lieu of, any rights and remedies expressly granted in the Loan Documents, in any other document executed by the City and the Developer or in any agreement guaranteeing the Loan or the completion of construction of the Project.

Without limiting the foregoing, upon the occurrence of an Event of Default, subject to any applicable cure periods, City shall have the right to do all or any of the following and Developer hereby irrevocably constitutes and appoints City as Developer's attorney-in-fact with full power of substitution and authority upon such an occurrence to do all or any of the following, if such power as attorney-in-fact is necessary to act:

**(a)** Take possession of and protect the Project in its own name or as attorney-in-fact for Developer; and

**(b)** Execute, acknowledge and deliver all instruments and documents in the name of Developer and do and perform all acts in the name of Developer that City deems necessary or appropriate to possess the Project including, but not limited to requesting, processing and disbursing funds held by any other lender.

### **Section 9.03. Remedies Cumulative; No Consequential Damages.**

Except as otherwise expressly stated in this Agreement, the rights and remedies of the City are cumulative, and the exercise by City of one or more of such rights or remedies shall not preclude City's exercise, at the same or different time, of any other rights or remedies for the same or any other default. Notwithstanding any contrary provision of

this Agreement, a party's right to recover damages in the event of a default shall be limited to actual damages and shall exclude consequential damages.

**Section 9.04.      Inaction Not a Waiver of Default.**

No failure or delay by City in asserting any of its rights and remedies as to any default shall operate as a waiver of such default or of any such rights or remedies, nor deprive City of its rights to institute and maintain any action or proceeding which it may deem necessary to protect, assert or enforce any such rights or remedies in the same or any subsequent default.

**ARTICLE X  
GENERAL PROVISIONS**

**Section 10.01.      Disclaimer.**

City is under no obligation to construct or supervise construction of the Project. The City's inspection of the Project is solely for the purpose of protecting the security for the Loan, and nothing in this Agreement is to be construed as a representation or warranty by City that the construction is or will be free from faulty material or workmanship, or that it is in accordance with any agreement between Developer and any contractor, subcontractor, purchasers, lessees, or that it is in accordance with any applicable permit.

**Section 10.02.      Litigation.**

City shall have the right, but not the obligation, to appear in or defend any action or proceeding purporting to affect the Property, the Project, or the rights or duties of the parties hereunder, or the payment of any funds in connection herewith, and in connection therewith may pay all necessary expenses, employ counsel and pay all reasonable fees, all of which Developer agrees to repay to City upon demand with interest at the Default Rate (as defined in the Note).

**Section 10.03.      No Other Third Party Beneficiaries.**

No person or entity, other than Developer, City, and their permitted successors and assigns shall have any right of action under the Loan Documents or any other City document executed in connection therewith, except to the extent conferred by statute.

**Section 10.04.      Waiver.**

Any waiver by City of any term, condition or requirement of any of the Loan Documents shall not constitute a waiver of any other term, condition or requirement hereof or constitute a waiver of the same term, condition or requirement in any other instance.

**Section 10.05.      Notices.**

Any notice or demand which shall be required or permitted by law or any provisions of this Agreement shall be in writing, and shall be deemed effective when personally delivered or deposited in the United States mail, certified, return receipt requested, postage prepaid, addressed as follows:

To the City:

City of San José  
Housing Department  
200 East Santa Clara Street, 12<sup>th</sup> Floor Tower  
San José, CA 95113  
Attn: Loan Management Administrator  
Re: 1860 Alum Rock Apartments

with copy to:

City of San José  
Office of the City Attorney  
200 East Santa Clara Street, 16<sup>th</sup> Floor Tower  
San José, CA 95113  
Attn: Housing Attorney  
Re: 1860 Alum Rock Apartments

To Developer:

Alum Rock L.P.  
C/O Charities Housing Development of Santa Clara County  
1400 Parkmoor Ave., Suite 190  
San Jose, CA 95126  
Attn: Executive Director  
Re: 1860 Alum Rock Apartments

with a copy to the Developer's Limited Partner:

Hudson Alum Rock LP  
Hudson SLP LLC  
c/o Hudson Housing Capital LLC  
630 Fifth Avenue, 28<sup>th</sup> floor  
New York, New York 10111  
Attention: General Counsel

Holland & Knight LLP  
10 St. James Avenue, 12<sup>th</sup> Floor

Boston, MA 02116  
Attention: Dayna M. Hutchins, Esq.

Parties listed above may change their addresses by sending notice thereof to the other parties in accordance with the requirements of this Section. Notice to the Developer's Limited Partner shall be given until fifteen (15) years after the Conversion Date.

**Section 10.06.**      **Time.**

Time is of the essence in this Agreement.

**Section 10.07.**      **Interpretation; Headings; Statutory References.**

The section headings and captions used herein are solely for convenience and shall not be used to interpret this Agreement. The parties acknowledge that this Agreement is the product of negotiation and compromise on the part of both parties, and the parties agree, that since both parties have participated in the negotiation and drafting of this Agreement, this Agreement shall not be construed as if prepared by one of the parties, but rather according to its fair meaning as a whole, as if both parties had prepared it. All references in the Loan Documents to particular statutes, regulations, ordinances or resolutions of the United States, the State of California, or the City of San José shall be deemed to include the same statute, regulation, ordinance or resolution as hereafter amended or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

In this Agreement personal pronouns shall be construed as though of the gender and number required by the context, the singular shall include the plural and the plural the singular as may be required by the context.

**Section 10.08.**      **Amendments.**

Amendments to this Agreement shall be effective only upon the mutual agreement in writing of the City and Developer. No amendment shall be binding upon City unless duly executed by appropriate officer of the City.

**Section 10.09.**      **Hold Harmless.**

Developer agrees to indemnify, defend and hold City and its officials, contractors, officers, employees, and agents (collectively, "**Indemnitees**") harmless from and against all suits, actions, claims, causes of action, liabilities, losses, costs, demands, expenses, judicial or administrative proceedings, penalties, deficiencies, fines, orders, judgments and liens (collectively "**Claims**") arising out of Developer's activity on the Property or the performance or non-performance by Developer under any of the Loan Documents or any other agreement executed pursuant thereto, or arising out of acts or omissions of any of Developer's contractors, subcontractors, or persons claiming under

any of the aforesaid. Developer shall promptly notify City of any Claims of which Developer has notice or knowledge. Developer shall indemnify, defend and hold harmless the Indemnitees, with respect to any Claims arising from any noncompliance by Developer with any applicable laws, ordinances, codes or regulations of any federal, state or local judicial, legislative or administrative body, or from any torts committed by Developer in connection with the acquisition and construction of the Project or the Property. Notwithstanding the foregoing, such indemnity shall not be required to the extent that Claims result from the sole, active negligence or willful misconduct on the part of the party seeking such indemnity.

Developer's obligations under this Section shall survive the expiration of earlier termination of this Agreement, any repayment or discharge of the Loan, any foreclosure proceeding, and any release of record of the Deed of Trust. Developer's obligations under this Section shall apply whether or not any insurance policies are determined to be applicable to any Claim.

**Section 10.10. Successors and Assigns.**

Developer binds itself and its successors and assigns to City with respect to all covenants, agreements, and obligations contained in the Loan Documents. Developer shall not assign this Agreement in whole or in part without the written consent of the City, nor shall Developer assign any moneys due or to become due to it hereunder without the previous written consent of the City.

**Section 10.11. Relationship.**

It is understood and agreed by and between the parties hereto that Developer in the performance of its obligations under the Loan Documents or any other agreement executed pursuant to this Agreement, shall not act, nor is it at any time authorized to act, as the agent or representative of City in any matter. Developer agrees that it will not, in any matter, hold itself out as the agent or representative of City in any manner, or act in such a fashion as would give the impression to a reasonable person, that Developer is acting in such a capacity. At all times Developer shall act as and shall be an independent entity and not an agent or employee of the City. In addition, the relationship between Developer and City is, and shall remain, solely that of borrower and lender and not a joint venture or partnership.

**Section 10.12. Integrated Document; Recitals and Exhibits.**

The Loan Documents together embody the agreement between City and Developer for the Loan and its terms and conditions. All recitals and Exhibits in each document are hereby incorporated into that document and into the Loan Documents. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations

contained in the Loan Documents. Any such verbal agreement shall be considered unofficial information and in no way binding upon the City.

**Section 10.13.**      **No Individual Liability.**

(a) No covenant or agreement contained herein shall be deemed to be the covenant or agreement of any officer, agent, employee, or representative of the Developer, in its, his or her individual capacity or, if Developer's General Partner is a corporation or limited liability company, any officer, director, shareholder, member, manager, agent, employee or representative of the Developer's General Partner, in its, his or her individual capacity.

(b) After the Conversion Date, neither the Developer nor Developer's General Partner shall be subject to any personal liability or accountability by reason of the execution hereof, whether by virtue of any constitution, statute or rule of law or by the enforcement of any assessment or penalty, or otherwise. Notwithstanding the foregoing, nothing contained herein is intended to negate any separate guaranty or relieve the Developer and Developer's General Partner, of liability for (i) fraud or willful misrepresentation; (ii) the failure to pay taxes, assessments or other charges which may create liens on the real property described in the Deed of Trust that are payable or applicable prior to any foreclosure under the Deed of Trust (to the full extent of such taxes, assessments or other charges); (iii) the misappropriation of any proceeds under any insurance policies or awards resulting from condemnation or the exercise of the power of eminent domain or by reason of damage, loss or destruction to any portion of the Property or Project; (iv) failure to maintain insurance on as required under the Loan Documents; or (v) any indemnity provisions in the Loan Documents.

(c) No officer, official, employee, contractor or agent of the City shall be personally liable to the Developer in the event of any default or breach by the City or for any amount which may become due to the Developer or its successors or on any obligation under the terms of this Agreement.

**Section 10.14.**      **Severability.**

If any provisions of this Agreement are held invalid, the remainder of this Agreement shall not be affected hereby, if such remainder would then continue to conform to the terms and requirements of applicable law.

**Section 10.15.**      **Conflict.**

If any term or provision in this Agreement expressly conflicts with any term or provision of the Note, the term or provision in the Note shall control.

**Section 10.16.**      **Counterparts.**

This Agreement may be signed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

**Section 10.17.      Estoppel Letter.**

City agrees to provide an estoppel letter to the Senior Lender or the Limited Partner confirming that as of the date indicated in the letter the City has not issued any notices of default and/or that any defaults for which notices have been issued have been cured, if those statements are correct, and providing the outstanding balance of the City's loans within thirty (30) days after Senior Lender's or the Limited Partner's written request.

**Section 10.18.      Survival.**

Developer's obligations pursuant to Sections 5.12 (d) and 10.09, and all other provisions that expressly so state, shall survive the expiration or termination of this Agreement.

**Section 10.19.      Governing Law.**

This Loan Agreement, and all the rights and duties of the parties arising from or relating in any way to the subject matter of this Loan Agreement or the transaction(s) contemplated by it, shall be governed by, construed and enforced in accordance with the law of the State of California (excluding any conflict of laws provisions that would refer to and apply the substantive laws of another jurisdiction). Any suit or proceeding relating to this Loan Agreement shall be brought only in Santa Clara County, California. EACH OF THE PARTIES CONSENT TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE COURTS, STATE AND FEDERAL, LOCATED IN SANTA CLARA COUNTY, CALIFORNIA.

**ARTICLE XI  
EXTENDED USE**

fCity acknowledges that Developer intends to enter into an "extended low income housing commitment" (the "Extended Use Agreement") within the meaning of Section 42(h)(6)(B) of the Internal Revenue Code, as amended (the "Code"). If such Extended Use Agreement is recorded and if City or its successors or assigns (collectively, the "Subsequent Owner") acquires the Property by foreclosure (or instrument in lieu of foreclosure), then the "extended use period" (as defined in Section 42(h)(6)(D) of the Code) under the Extended Use Agreement shall terminate, except for the obligation of the Subsequent Owner to comply with the limitations on evictions, termination of tenancy and increase in rents for the three year period following the Subsequent Owner's acquisition of the Property, as set forth in Section 42(h)(6)(E)(ii) of the Code.

Signatures appear on the following page.

WITNESS THE EXECUTION HEREOF:

CITY:


APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

By:

  
\_\_\_\_\_  
Christopher Alexander  
Deputy City Attorney

By:

  
\_\_\_\_\_  
Ragan Heninger  
Deputy Director of Housing

Date: 5/11/23

Signatures continue on the following page.



**DEVELOPER:**

Alum Rock, L.P., a California limited partnership


By: Alum Rock Charities LLC, a California limited liability company,

Its: general partner

By: Charities Housing Development Corporation of Santa Clara County, a California nonprofit public benefit corporation,

Its: sole member/manager

By:



---

Mark J. Miki  
Executive Director

**EXHIBIT A**

**Leasehold Legal Description**

Leasehold estate as created by that certain lease dated \_\_\_\_\_, 20\_\_\_\_, made by and between the County of Santa Clara, a political subdivision of the State of California, as lessor and \_\_\_\_\_, a California limited partnership, as lessee for the term of \_\_years and upon the terms and conditions contained in said lease and subject to provisions contained in the lease which limit the right of possession, a memorandum thereof recorded \_\_\_\_\_, 20\_\_, Document No. \_\_\_\_\_, in and to the following:

The land referred to is situated in the County of Santa Clara, City of San Jose, State of California, and is described as follows:

**Parcel One:**

Lot 1, as shown upon that certain Parcel Map which was filed for record on August 24, 2001 in [Book 742 of Maps, at Page\(s\) 3 and 4](#) in the Office of the Recorder of the County of Santa Clara, State of California.

**Parcel Two:**

Together with non-exclusive easements for vehicular access, pedestrian access, emergency access, ladder pads, landscaping and pathways, signage, solid waste receptacles, garbage collection, and a temporary construction easements, as granted on that certain instrument entitled "Easement Agreement" dated February 16, 2023 executed by and between HS San Jose, L.P., a California limited partnership as grantor and Alum Rock. L.P., a California limited partnership as grantee recorded February 21, 2023 as Instrument No. [25439824](#), of Official Records.

**Parcel Three:**

Together with a non-exclusive easement for Stormwater dated February 16, 2023 executed by and between HS San Jose, L.P., a California limited partnership as grantor and Alum Rock. L.P., a California limited partnership as grantee recorded February 21, 2023 as Instrument No. [25439825](#), of Official Records.

APN: 481-18-064

**EXHIBIT B**  
**CONSTRUCTION REVIEW DOCUMENTATION REQUIREMENTS**

1. Updated list of subcontractors.
2. Subcontracts issued since the last construction draw meeting.
3. Copies of conditional and unconditional lien releases from the general contractor, subcontractors and suppliers.
4. New change orders being considered since the last construction draw meeting.
5. Change order log.
6. Submittal log.
7. Request for Information (“RFI”) log.
8. If there was any change since the last schedule was issued, a current construction progress schedule showing the progress of construction and the projected sequencing and completion times for uncompleted work, all as of the date of the schedule.
9. Payment request with place for City to sign.
10. Meeting minutes for last construction draw meeting.
11. Status of Project’s green items.