

**RESOLUTION NO. 20-8897**

**A RESOLUTION OF THE CITY OF SANTA CLARA, CALIFORNIA  
APPROVING AN AFFORDABLE HOUSING AGREEMENT  
BETWEEN THE CITY OF SANTA CLARA AND ZAEN PARTNERS,  
LLC, FOR THE PROJECT LOCATED AT 2302 CALLE DEL  
MUNDO, SANTA CLARA**

**BE IT RESOLVED BY THE CITY OF SANTA CLARA AS FOLLOWS:**

**WHEREAS**, ZAEN Partners, LLC (“Developer”), is the project sponsor for three infill, mixed-use projects that would cumulatively include approximately 969 rental apartment units, parking garages, up to 30,000 square feet of retail space, approximately 4,500 square feet of leasing space, and approximately 55,000 square feet of amenity space (collectively, the “ZAEN Tasman East Projects”);

**WHEREAS**, On July 17, 2019, the City approved the first project, known as the “Station Project,” which includes 503 residential rental units and approximately 23,870 square feet of retail space located at 5123 Calle Del Sol (Parcels 19/29). The second project proposed by Developer includes 150 residential rental units with approximately 5,000 square feet of retail located at 2302 Calle Del Mundo (the “Parcel 24 Project”); the Parcel 24 Project received architectural control approval on January 15, 2020. The third project proposed by Developer would include 316 residential rental units located at 2263 Calle Del Mundo (the “Parcel 60/61 Project”) and is also currently under review by City staff and is expected to hold its public hearing for architectural control approval on October 21, 2020.

**WHEREAS**, Tasman East Urban Housing, LLC and Tasman East Holdco, LLC (“Developer 2”), is the project sponsor for two infill, mixed-use projects that would cumulatively include approximately 1,409 residential units, 191 home for the ambulatory aged residential units, parking garages, approximately 31,000 square feet of commercial space, and approximately 78,000 square feet of amenity space (collectively, the “Related Tasman East Projects”);

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**WHEREAS**, On December 4, 2019, the City approved the first project, which includes 509 residential units, 191 home for the ambulatory aged units and approximately 31,000 square feet of commercial space located at 5150 Calle Del Sol and 2350 Calle De Luna (the “Developer 2 Phase 1 Project”). The second project proposed by Developer 2 would include approximately 900 residential units located at 2101 Tasman Drive (the “Developer 2 Phase 2 Project”), which may be developed in multiple phases and is currently under review by City staff;

**WHEREAS**, Developer intends to develop a 100% affordable housing project on Parcel 24 that includes one hundred fifty (150) rental units with the required unit mix of studio, one bedroom and two bedroom units, and consisting of thirty (149) affordable units one manager’s unit (1) and related facilities;

**WHEREAS**, thirty of the one-hundred and forty-nine (149) very low-income units on the Parcel 24 Site are intended to satisfy the Affordable Housing Requirements for all 969 units associated with the ZAEN Tasman East Projects and fifty-four (54) units of the one-hundred and forty-nine (149) very low-income units on the Parcel 24 Site are intended to satisfy the Affordable Housing Requirements for all 1,600 residential units associated with Tasman East Urban Housing, LLC and Tasman East Holdco, LLC Projects. In order to ensure that the affordable units are provided concurrently with the market rate units, the City will not issue any Certificate of Occupancy (Temporary or Final) for the Station Project, the Parcel 60/61 Project, or the Related Tasman East Projects until such time as a building permit is issued for the Parcel 24 Project, unless otherwise approved by the City Manager. Otherwise, Developer and Developer 2 will elect to default to the original conditions of approval (i.e., provide 10% onsite inclusionary units at 100% AMI for the Station Project, the Parcel 60/61 Project, and the Related Tasman East Projects or, subject to Community Development Director approval, pay the Affordable Housing Rental Residential Impact Fee as per the City’s Municipal Fee Schedule);

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**WHEREAS**, the Loan Agreement contemplates that implementation of the Project will require myriad permits, approvals, entitlements, agreements, permits to enter, utility services, subdivision maps, building permits, and other authorizations in order to implement the Project, including but not limited to a Loan Agreement, Deed of Trust, Promissory Note, Affordable Housing Agreement and Regulatory Agreement (together, the "Project Documents"); and,

**WHEREAS**, the development of units as contemplated by the Project Documents will help address the City's housing needs at very low-income levels by providing the City with one-hundred and forty-nine (149) affordable units. The distribution of these units shall be fifteen (15) units rented to households with incomes at or below 30% AMI, fifty-seven (57) units rented to households with incomes at or below 50% AMI, sixty-seven (67) units rented to households with incomes at or below 70% AMI, and ten (10) units rented to households with incomes at or below 80% AMI and one (1) unrestricted manager's unit.

**NOW THEREFORE, BE IT FURTHER RESOLVED BY THE CITY OF SANTA CLARA AS FOLLOWS:**

1. That the City Council hereby finds that the above Recitals are true and correct.
2. That the City Council hereby approves and authorizes the City Manager to execute the Loan Agreement, substantially in the form attached hereto as Exhibit "Loan Agreement," subject to such minor and clarifying changes consistent with the terms thereof as may be approved by the City Attorney prior to execution thereof.
3. That this Resolution, including the Loan Agreement approval described in Section 2 above, is based on the findings set forth above.

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4. That the City Manager and/or designee is hereby authorized and directed to perform all acts to be performed by the City in the administration of the Loan Agreement pursuant to the terms of the negotiated Term-sheet. The City Manager is further authorized and directed to perform all other acts, negotiate, amend and execute all documents (including deeds of trust, promissory notes, and affordable housing agreement) necessary or convenient to close escrow and carry out the purposes of this Resolution and the Loan Agreement.

5. Effective date. This resolution shall become effective immediately.

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE COPY OF A RESOLUTION PASSED AND ADOPTED BY THE CITY OF SANTA CLARA, CALIFORNIA, AT A REGULAR MEETING THEREOF HELD ON THE 27<sup>TH</sup> DAY OF OCTOBER, 2020, BY THE FOLLOWING VOTE:

AYES:	COUNCILORS:	Chahal, Davis, Hardy, O'Neill, and Watanabe, and Mayor Gillmor
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NOES:	COUNCILORS:	None
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ABSENT:	COUNCILORS:	None
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ABSTAINED:	COUNCILORS:	None
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ATTEST:

  
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NORA PIMENTEL, MMC  
ASSISTANT CITY CLERK  
CITY OF SANTA CLARA

Attachments incorporated by reference:

1. Draft Affordable Housing Agreement
2. Draft Loan Agreement
3. Draft Promissory Note

RECORD WITHOUT FEE  
PURSUANT TO GOVERNMENT CODE § 6103

RECORDING REQUESTED BY  
AND  
WHEN RECORDED MAIL TO:  
City of Santa Clara  
City Clerk's Office  
1500 Warburton Avenue  
Santa Clara, California 95050

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

AMENDED AND RESTATED  
AFFORDABLE HOUSING AGREEMENT

by and between

THE CITY OF SANTA CLARA

and

ZAEN Partners, LLC

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AMENDED AND RESTATED  
AFFORDABLE HOUSING AGREEMENT

This AMENDED AND RESTATED AFFORDABLE HOUSING AGREEMENT ("**Agreement**"), dated for reference purposes as of [ ] 1, 2020, is entered into by and between the CITY OF SANTA CLARA, a chartered California municipal corporation (the "**City**") and ZAEN Partners, LLC, a California limited liability company ("**Developer**"). City and Developer may be referred to individually as a "**Party**" or collectively as the "**Parties**" or the "**Parties to this Agreement**". City and Developer agree as follows:

ARTICLE 1 SUBJECT OF AGREEMENT

Section 1.1 Purpose of the Agreement

a. The purpose of this Agreement is to enter into a binding agreement with persons having legal or equitable interest in real property for the development of such property, in order to, among other things, increase, improve and preserve the supply of housing in the community for very low income households, as defined in Attachment No. 3, Agreement Containing Covenants and Restrictions, attached hereto (the "**Restrictions**").

b. Pursuant to City of Santa Clara Resolution 20-8811 ("**Resolution 20-8811**"), Developer previously obtained approval of the development of (1) an apartment community containing 503 residential units and approximately 23,780 square feet of commercial space to be constructed (in two phases) on the real property at 5123 Calle de Luna in the City of Santa Clara (the "**Parcels 19 and 29 Project**"); (2) 316 residential units on the real property at 2263 Calle Del Mundo (the "**Parcels 60 and 61 Project**"); and (3) 150 residential units on the real property (the "**Site**") at 2302 Calle de Mundo (the "**Project**"; together with the Parcels 19 and 29 Project and Parcels 60 and 61 Project, the "**Station Project**"). Resolution 20-8811 allowed the Station Project to satisfy its inclusionary housing requirements to be satisfied by requiring the Parcel 24 Project to be restricted as follows: thirty two (32) units rented to households with income levels at or below 50% AMI, eighty seven (87) units rented to households with income levels at or below 60% AMI, fifteen (15) units rented to households with income levels at or below 80% AMI, fifteen (15) units rented to households with income levels at or below 100% AMI and one (1) unrestricted manager's unit (the "**Previous Restrictions**"). The Previous Restrictions were reflected in that certain Affordable Housing Agreement recorded in the official records of Santa Clara County on April 24, 2020 as document 24463516 (the "**Existing Agreement**")

c. Tasman East Urban Housing, LLC ("**Related**") is the owner of certain real property located at 5151 Lafayette St, 2300 Calle De Luna, 5122 Calle Del Sol, and 5102 Calle Del Sol, [address for vacant land] Santa Clara, California (Santa Clara County APNs 097-46-016, 097-46-017, 097-46-018, 097-46-028, 097-05-056 and 097-05-057) (collectively, the "**Related Property**"). Pursuant to City of Santa Clara Resolution 20-[ ] ("**Resolution 20-[ ]**"), Developer and Related have obtained approval to meet the



inclusionary housing requirements applicable to the Station Project and Related Property by satisfying the following conditions precedent on or prior to May 1, 2023 (the “**Related Inclusionary Conditions**”): (1) the City and Developer shall enter into and record in the official records of Santa Clara County this Agreement, which provides for deeper affordability at the Project than as provided in the Existing Agreement, as shown in the chart below) and provide evidence reasonably acceptable to the City that this Agreement is, and shall continue to be, senior to all deeds of trust, mortgages and similar liens; (2) Related shall deposit \$6,000,000 in immediately available funds in an escrow account for the benefit of the City, which funds shall be used by the City to fund a \$6,000,000 loan to Developer for the development of the Project (the “**City Loan**”), pursuant to documents mutually agreed to between Developer and the City (collectively, the “**City Loan Documents**”); (3) Related and Developer shall have mutually agreed upon any additional financial assistance from Related to Developer for the development of the Project; (4) Developer shall have closed upon construction financing to finance the construction of the Project; and (5) Developer has either (a) pulled the building permits with respect to the construction of the Project, (b) provided evidence to the City that sufficient funds have been set aside for the issuance of such building permits and has irrevocably committed to pull such permits within thirty (30) days of the closing of the City Loan, or (c) the City has approved in writing, in its reasonable discretion, an alternative arrangement proposed by Borrower to ensure issuance of such permits within thirty (30) days of the closing of the City Loan.

	Studio	1-bedroom	2-bedroom	3-bedroom	<i>Total:</i>
30% AMI Household(s)	8	5	2	3	15
50% AMI Household(s)	32	14	8	3	57
70% AMI Household(s)	41	18	8	0	67
80% AMI Household(s)	7	3	0	0	10
<b>“Management Unit(s)”</b>	0	0	1	0	1
<b>Total:</b>	<b>88</b>	<b>40</b>	<b>19</b>	<b>3</b>	<b>150</b>

d. The development of the Site to include the provision of affordable housing opportunities pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of the City and the health, safety, morals, and welfare of its residents, and in accord with the public purposes and provisions of applicable federal, state, and local laws and requirements under which the Project is to be undertaken and is being assisted.

e. The full term of the affordability covenants shall be for a total period



of fifty-five (55) years (the “**Affordability Period**”), effective from the date the Certificate of Occupancy is issued. “**Certificate of Occupancy**” shall mean a temporary certificate of occupancy issued by the City for all 150 residential units of the Project.

f. If any general provision of this Section 1.1 conflicts with a more specific provision of this Agreement, the more specific provision shall prevail.

#### Section 1.2 The City

a. The City is a chartered California municipal corporation, exercising governmental functions and powers, and organized and existing under the laws of the State of California.

b. The address of City for purposes of notice hereunder is at 1500 Warburton Avenue, Santa Clara, California 95050.

c. City as used in this Agreement includes the City of Santa Clara, California and any assignee of or successor to its rights, powers and responsibilities.

#### Section 1.3 The Developer

a. The Developer of the Project is ZAEN Partners, LLC, a California limited company.

b. The address of ZAEN Partners, LLC a California limited company, for purposes of receiving notices pursuant to this Agreement is:

ZAEN Partners, LLC  
c/o Ensemble Investments  
444 West Ocean Boulevard, Suite 650  
Long Beach, CA 90802

c. Wherever the term Developer is used herein, such term shall include any permitted nominee, assignee or successor in interest as herein provided.

#### Section 1.4 Assignment of this Agreement

Upon a sale or transfer of the Site, the Developer shall assign its rights and obligations under this Agreement to such successors or assigns in and to the Site. The terms, covenants, and conditions of this Agreement shall run with the land to the Site and shall inure to the benefit of, apply to, and shall bind the successors and assigns of Developer. Upon an assignment, the assigning Developer will be released from the obligations of Developer under this Agreement which relate to the period from and after the date of the assignment, including, without limitation, the obligations in Section 2.1 and Section 3.1 hereof.

## ARTICLE 2            DEVELOPMENT OF THE SITE

### Section 2.1    Scope of Development; Schedule of Performance

In accordance with Developer's business plan for the Site, Developer shall complete construction of the Project, including the provision of the Affordable Housing Units, in accordance with the Scope of Development (Attachment No. 2).

### Section 2.2    Permits

Before commencement of construction or development of any buildings, structures or other work of improvement upon any portion of the Site, the Developer shall, at its own expense, secure or cause to be secured, any and all permits which may be required by the City or any other governmental agency affected by such construction, development or work.

### Section 2.3    Zoning and Land Use Requirements

It is the responsibility of Developer, without cost to City, to ensure that zoning of the Site and all applicable City land use requirements will be such as to permit the development of the Project and the use, operation and maintenance of such Project in accordance with the provisions of this Agreement. Developer acknowledges that this Agreement is not a Development Agreement pursuant to Government Code Section 65865 et seq.

### Section 2.4    Construction Financing

Developer hereby represents that no City funds (other than the City Loan) shall be used for construction of the Project.

### Section 2.5    Relationship of City and Developer

Nothing contained in this Agreement or in any other document or instrument made in connection with this Agreement shall be deemed or construed to create a partnership, tenancy in common, joint tenancy, joint venture or co-ownership by or between the City and the Developer. The City shall not be in any way responsible or liable for the debts, losses, obligations or duties of the Developer with respect to the Site or otherwise.

## ARTICLE 3

## USE OF THE SITE

### Section 3.1 Uses

a. In accordance with Developer's business plan for the Site, the Developer covenants and agrees for itself, its successors, its assignees and every successor in interest to the Site or any part thereof, that Developer, its successors and assignees shall develop the Project on the Site (including, without limitation, one hundred forty nine (149) Affordable Housing Units and one manager's unit) and use the Site for the development and occupancy of residential dwelling units, as provided in the Approved Plans.

b. In addition, the Developer agrees to restrict the occupancy of the one hundred forty nine (149) affordable Units on the Site as rental units at an Affordable Housing Cost, as defined in Attachment No. 3, titled Agreement Containing Covenants and Restrictions, attached hereto, it being agreed that this Agreement shall terminate upon issuance of the Certificate of Occupancy, and the Agreement Containing Covenants and Restrictions shall thereafter constitute the sole affordable housing obligations owed by Developer in favor of the City with respect to the Project. During the term of rental use, the Agreement Containing Covenants and Restrictions shall be recorded against the Project, substantially in the form attached hereto as Attachment No. 3. The Agreement Containing Covenants and Restrictions shall be binding on the Developer and any successor in interest to the Affordable Housing Units or any part thereof for the benefit and in favor of the City. The obligations set forth in the Agreement Containing Covenants and Restrictions shall remain in effect for the respective time period set forth in the Agreement Containing Covenants and Restrictions. ***[Allow restructuring of this Agreement so that Restrictions are springing covenants rather than a new recorded agreement.]***

### Section 3.2 Maintenance of the Site

Developer, its successors in interest or assignees, shall reasonably maintain the Project on the Site and shall keep the Site in good condition and repair free from any accumulation of debris or waste materials.

## ARTICLE 4

## DEFAULTS, REMEDIES AND TERMINATION

### Section 4.1 Defaults - General

a. Except as provided in Section 5.4, failure by either Party to perform any material obligation set forth in any term or provision of this Agreement constitutes a default under this Agreement. The Defaulting Party must immediately commence to cure, correct or remedy such failure or delay and shall complete such cure, correction or remedy with reasonable diligence.

b. The Non-Defaulting Party shall give written notice of default to the

Defaulting Party, specifying the default. Failure or delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failures or delays by either party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by either party in asserting any of its rights and remedies shall not deprive either party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

c. If the default is reasonably capable of being cured within thirty (30) days of notice, as set forth in Section 4.1(b), the Defaulting Party shall have such period to effect a cure prior to exercise of remedies by the Non-Defaulting Party. If the default is such that it is not reasonably capable of being cured within thirty (30) days, and the Defaulting Party (1) initiates corrective action within said period, and (2) diligently, continually, and in good faith works to effect a cure as soon as possible, then the Defaulting Party shall have such additional time as is reasonably necessary to cure the default prior to exercise of any remedies by the Non-Defaulting Party. In no event shall the Non-Defaulting party be precluded from exercising remedies if its rights become or are about to become materially jeopardized by any failure to cure a default or the default is not cured within ninety (90) days after the first notice of default is given.

#### Section 4.2 Institution of Legal Actions

Subject to the notice and cure provisions of Section 4.1, in addition to any other rights or remedies (and except as otherwise provided in this Agreement), either Party may institute legal action to cure, correct or remedy any material default, to recover damages for any material default, or to obtain any other remedy for a material default consistent with the purpose of this Agreement. Such legal actions must be instituted in the Superior Court of the County of Santa Clara, State of California or in the United States District Court for the Northern District of California.

#### Section 4.3 Applicable Law

The laws of the State of California shall govern this Agreement.

#### Section 4.4 Acceptance of Service of Process

a. In the event that any legal action is commenced by the Developer against the City, service of process on the City shall be made by personal service upon the City Clerk or in such other manner as may be provided by law.

b. In the event that any legal action is commenced by the City against the Developer, service of process on the Developer shall be made by personal service upon the Developer (or upon an officer of the Developer), or in such manner as may be provided by law.

#### Section 4.5 Rights and Remedies Are Cumulative

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

#### Section 4.6 Damages

If either Party materially defaults with regard to any of the provisions of this Agreement, subject to the notice and cure provisions of Section 4.1, the Defaulting Party shall be liable to the Non-Defaulting party for any damages caused by such default, and the Non-Defaulting party may, after such notice and opportunity to cure (but not before) commence an action for damages against the Defaulting Party with respect to such default.

#### Section 4.7 Specific Performance

If either Party materially defaults with regard to any of the provisions of this Agreement, subject to the notice and cure provisions of Section 4.1, the Non-Defaulting party, at its option, may, after such notice and opportunity to cure (but not before) commence an action for specific performance of the terms of this Agreement pertaining to such default.

#### Section 4.8 Termination by Either Party; Term of this Agreement

Either Party shall have the right to terminate this Agreement in the event the other party is in Default of any material term or provision of this Agreement, and, following notice, fails to cure such default within the time provided in Section 4.1.

Notwithstanding any provision herein to the contrary, this Agreement shall terminate and be of no further force or effect upon the City's issuance of permanent certificate(s) of occupancy for the Project, it being the intent of the parties that the Agreement Containing Covenants and Restrictions shall thereafter constitute the sole affordable housing obligations owed by Developer in favor of the City with respect to the Project.

### ARTICLE 5 GENERAL PROVISIONS

#### Section 5.1 Notices, Demands and Communications between the Parties

Formal notices demands and communications between the City or the Developer shall be sufficiently given if dispatched by registered or certified mail, postage prepaid, return receipt requested, to the principal offices of the City or the Developer, as

designated in Sections 1.2 and 1.3 hereof. Such written notices demands and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by mail as provided in this Section 5.1.

#### Section 5.2 Conflicts of Interest

Developer certifies that to the best of its knowledge, no City officer, employee or authorized representative has any financial interest in the business of Developer and that no person associated with Developer has any interest, direct or indirect, which could conflict with the faithful performance of this Agreement. Developer is familiar with the provisions of California Government Code section 87100 and certifies that it does not know of any facts which would violate these code provisions. Developer will advise City if a conflict arises.

#### Section 5.3 Nonliability of City Officials and Employees

No member, official, employee or consultant of the City shall be personally liable to the Developer or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Developer or to its successor, or on any obligations under the terms of this Agreement.

#### Section 5.4 Force Majeure: Extension of Time of Performance

In addition to specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, Acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, third party litigation, unusually severe weather, inability to secure necessary labor, materials or tools, delays of any contractor, subcontractor or supplies, acts of the other party, acts or failure to act of the City or any other public or governmental agency or entity (except that an act or failure to act of the City shall not excuse performance by the City) or any other causes beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any such cause (a "**Force Majeure Delay**") shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the party claiming such extension is sent to the other party within thirty (30) days of knowledge of the commencement of the cause. Notwithstanding the foregoing, none of the foregoing events shall constitute a Force Majeure Delay unless and until the party claiming such delay and interference delivers to the other party written notice describing the event, its cause, when and how such party obtained knowledge, the date the event commenced, and the estimated delay resulting therefrom. Times of performance under this Agreement may also be extended in writing by the City and the Developer.

#### Section 5.5 Approvals



Approvals required of the City or the Developer shall not be unreasonably withheld.

#### Section 5.6 Compliance with Laws

Developer shall comply with all applicable laws and regulations of the federal, state and local government, including but not limited to "The Code of the City of Santa Clara, California" ("SCCC"). In particular, Developer's attention is called to the regulations regarding Campaign Contributions (SCCC Chapter 2.130), Lobbying (SCCC Chapter 2.155), Minimum Wage (SCCC Chapter 3.20), Business Tax Certificate (SCCC section 3.40.060), and Food and Beverage Service Worker Retention (SCCC Chapter 9.60), as such Chapters or Sections may be amended from time to time or renumbered. Additionally, Developer has read and agrees to comply with City's Ethical Standards (<http://santaclaraca.gov/home/showdocument?id=58299>).

#### Section 5.7 Hold Harmless/Indemnification

a. To the extent permitted by law, Developer agrees to protect, defend, hold harmless and indemnify City, its City Council, commissions, officers, employees, volunteers and agents from and against any claim, injury, liability, loss, cost, and/or expense or damage, including all costs and attorney's fees in providing a defense to any such claim or other action, and whether sounding in law, contract, tort, or equity, in any manner arising from, or alleged to arise in whole or in part from, or in any way connected with the Services performed by Developer pursuant to this Agreement – including claims of any kind by Developer's employees or persons contracting with Developer to perform any portion of the Scope of Services – and shall expressly include passive or active negligence by City connected with the Services. However, the obligation to indemnify shall not apply if such liability is ultimately adjudicated to have arisen through the sole active negligence or sole willful misconduct of City; the obligation to defend is not similarly limited.

b. Developer's obligation to protect, defend, indemnify, and hold harmless in full City and City's employees, shall specifically extend to any and all employment-related claims of any type brought by employees, contractors, subcontractors or other agents of Developer, against City (either alone, or jointly with Developer), regardless of venue/jurisdiction in which the claim is brought and the manner of relief sought.

### ARTICLE 6 ENTIRE AGREEMENT, WAIVERS, AMENDMENTS, AND CEQA

#### Section 6.1 Counterparts

This Agreement may be executed in duplicate originals each of which is deemed to be an original. This Agreement includes twelve (12) pages and three (3) attachments, including all exhibits appended to such attachments, which constitute the entire understanding and agreement of the Parties.

#### Section 6.2 Integration



This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the Site.

#### Section 6.3 Waivers

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City or the Developer, and all amendments hereto must be in writing and signed by the appropriate authorities of the City and the Developer. This Agreement and any provisions hereof may be amended by mutual written agreement by the Developer and the City.

#### Section 6.4 Mortgagee Protection

No breach of this Agreement shall defeat or render invalid the lien of any deed of trust or mortgage recorded against the Developer's Site. No lender taking title to the Site through foreclosure or deed in-lieu of foreclosure shall be liable for any defaults or monetary obligations of Developer arising prior to acquisition of possession of such property by such lender. Any lender who has recorded a deed of trust or mortgage against the Site shall have the right, but not the obligation, during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the condition of default claimed or the areas of noncompliance set forth in City's notice. No lender who takes title to the Site through foreclosure or deed in-lieu of foreclosure shall be obligated to construct or continue with construction of the Project on the Site.

#### Section 6.5 Execution and Effective Date

The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. The Effective Date is the date that the final signatory executes the Agreement. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

#### Section 6.6 California Environmental Quality Act Compliance

The parties acknowledge that the endorsement of this agreement does not commit the City to approving any particular project in the future. The parties further acknowledge that this MOU does not foreclose the possibility of the City considering alternatives to any specific proposal, potential mitigation measures, or future decisions to disapprove any particular project proposal until after conducting and completing appropriate environmental review under the California Environmental Quality Act ("CEQA"). The parties will not take any discretionary actions committing the City to a particular course of action with respect to any proposed project until the City, in its capacity as a lead or responsible agency, has considered environmental documentation required by CEQA and adopted appropriate CEQA findings.

Section 6.7 Restatement of the Existing Agreement

This Agreement restates in its entirety the Existing Agreement. Notwithstanding anything to the contrary set forth herein, if the Related Inclusionary Conditions have not been satisfied on or before May 1, 2023, which date may be extended by the mutual agreement of the City and Developer, in each of their sole and absolute discretion, this Agreement shall terminate and the Existing Agreement shall be reinstated.

[signatures appear on following page]

**CITY:**

**CITY OF SANTA CLARA,**  
a chartered California municipal corporation

By: \_\_\_\_\_  
Deanna J. Santana, City Manager

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Brian Doyle, City Attorney

[SIGNATURES MUST BE NOTARIZED]

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

DEVELOPER:

ZAEN Partners, LLC,  
a California limited liability company

By: Ensemble Investments, LLC,  
an Arizona limited liability company,  
its manager

By: \_\_\_\_\_  
Kambiz Babaoff, its \_\_\_\_\_

[SIGNATURES MUST BE NOTARIZED]

Local  
Address: 444 W. Ocean Boulevard, Suite 560, Long Beach, CA  
Email  
Address: TSayles@ensemble.net  
Telephone: (562) 628-0587  
Fax: \_\_\_\_\_

**ATTACHMENT NO. 1**  
**AFFORDABLE HOUSING AGREEMENT**

**LEGAL DESCRIPTION - SITE**

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

Parcel 9, as shown on that certain map filed on February 27, 1976 in book 368 of maps, at pages 14 and 15 in the Santa Clara County Records.

**ATTACHMENT NO. 2**  
**AFFORDABLE HOUSING AGREEMENT**

**SCOPE OF DEVELOPMENT**  
**Parcel 24**

The project site is 0.99 acres located at 2302 Calle Del Mundo (APN# 097-46-024) in Santa Clara within the Center District of the adopted Tasman East Specific Plan. The proposed project consists of 150 affordable apartment units with approximately 86,520 rentable square feet and approximately 5,000 square feet of general retail.

The proposed project consists of a mix of studios, 1-bedroom, 2-bedroom, and 3-bedroom units ranging in size from approximately 420 square feet to 1,207 square feet. The affordability levels would be restricted in accordance with this Agreement. The site is conveniently located two blocks north of the Tasman VTA light rail stop, and within close proximity to other public transit options.

The site is bound to the north by Calle Del Mundo and to the east by the proposed Calle Del Sol extension. A public park is proposed immediately north of the site. Furthermore, the southern boundary of the site will include a 20' greenway that will connect to the broader Tasman East district area.

The residential units will be constructed in a 5-story Type IIIA wood-frame building above two floors of Type IA structured parking that is at-grade. The site design incorporates landscaped entryways at the retail corners, activating sidewalks and providing a retail streetscape experience with outdoor seating areas. The building design will complement the high-density transit-oriented urban environment envisioned for the Tasman East area, built with high quality materials and finishes. The building exterior includes various massing and design elements incorporated in the project's façade and architecturally addresses its primary street frontage on Calle Del Mundo.

The project aims to promote a healthy, resilient community, through reduction of on-site resource usage, drought tolerate landscape approaches, storm water solutions, shaded open spaces, onsite electrical vehicle charging stations and green building strategies. Common area amenities include a courtyard and outdoor terraces, barbecue and lounge areas, a fitness center, lobby and clubroom.

**ATTACHMENT NO. 3  
AFFORDABLE HOUSING AGREEMENT**

**AGREEMENT CONTAINING COVENANTS AND RESTRICTIONS  
(Including Affordable Housing Restrictions for Rental Units)**

[behind this page]



OFFICIAL BUSINESS

Document entitled to free  
recording per Government  
Code Section 6103

Recording Requested By and  
When Recorded Mail To:

CITY OF SANTA CLARA  
Housing & Community Services Division  
1500 Warburton Avenue  
Santa Clara, California 95050  
Attention: Division Manager

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SPACE ABOVE THIS LINE FOR RECORDER'S USE

**AGREEMENT CONTAINING COVENANTS AND RESTRICTIONS  
(Including Affordable Housing Restrictions for Rental Units)**

THIS AGREEMENT CONTAINING COVENANTS AND RESTRICTIONS, Including Affordable Housing Restrictions ("Agreement") is made by and between ZAEN Partners, LLC, a California Limited Liability Company ("Developer"), and THE CITY OF SANTA CLARA ("City"). City and Developer may be referred to individually as a "Party" or collectively as the "Parties" or the "Parties to this Agreement". The City and the Developer agree as follows with reference to the following facts:

**RECITALS**

- A. Developer is the legal owner of the real property at 2302 Calle Del Mundo, (Parcel 24) as further described in Exhibit A attached hereto. In order to satisfy all the Affordable Housing Requirements for the 969 units being developed the Tasman East Properties, Developer agreed to provide one hundred forty nine (149) affordable rental housing units to be developed on Parcel 24, a .76 acre site owned by Developer and approved for one hundred fifty (150) rental apartment units. The one hundred forty-nine (149) affordable rental housing units shall be provided in the Parcel 24 according to the terms herein stated. The distribution of these units shall be as follows:

		Studio	1- bedroom	2- bedroom	3- bedroom	<i>Total:</i>
30% Household(s)	AMI	8	5	2	0	15
50% Household(s)	AMI	32	14	8	3	57
70% Household(s)	AMI	41	18	8	0	67
80% Household(s)	AMI	7	3	0	0	10
<b>"Management Unit(s)"</b>		0	0	1	0	1
<b>Total:</b>		<b>88</b>	<b>40</b>	<b>19</b>	<b>3</b>	<b>150</b>

- B. All one hundred forty nine (149) proposed affordable rental housing units shall be made available at Below Market Rate (BMR) rents that do not exceed an Affordable Housing Cost.
- C. It is the intention of the City and Developer to set forth and apply these covenants, conditions and restrictions to satisfy the conditions of approval for the Project as well as to satisfy the affordable housing obligations of Developer (or its successors and assigns) and Tasman East Urban Housing, LLC as provided in City Council Resolution 20-**11**.

NOW, THEREFORE, in consideration of valuable land use and economic benefits and approvals by City allowing development of the Project and to satisfy its obligations to provide affordable housing for very low-income households (as defined in Section 1(b) below) at rent below market rate, the Developer and City hereby agree that the Project shall be subject to the following covenants and conditions which shall run with the land, and be binding on all parties having any right, title or interest in Project, their respective heirs, legatees, devisees, administrators, executors, successors and assigns, and shall inure to the benefit of the City and their respective successors and assigns.

#### 1. Definitions

In addition to terms that are otherwise defined herein, the following terms shall have the following respective meanings:

"Affordable Housing Cost" shall mean a monthly rent paid by the household legally occupying a Unit, plus a reasonable utility allowance, that does not exceed the following:

- (a) For a Extremely Low-Income Household, the product of thirty percent (30%) times thirty percent (30%) of the Area Median Income adjusted for family size appropriate for the Unit divided by twelve (12).
- (b) For a Very Low-Income Household, the product of thirty percent (30%) times fifty percent (50%) of the Area Median Income adjusted for family size appropriate for the Unit divided by twelve (12).
- (c) For a Low-Income Household, the product of thirty percent (30%) times seventy percent (70%) of the Area Median Income adjusted for family size appropriate for the Unit divided by twelve (12).
- (d) For a Low-Income Household, the product of thirty percent (30%) times eighty percent (80%) of the Area Median Income adjusted for family size appropriate for the Unit divided by twelve (12).

"Affordability Period": shall mean the length of time that this recorded agreement and tenant incomes and rents for the Affordable Housing Units are limited, as described below. This period shall be for fifty-five (55) years from the date the Certificate of Occupancy is issued for the property.

"Affordable Housing Unit" or sometimes "Unit" shall mean one of the one hundred forty nine (149) Below Market Rate rental units, of which all one hundred forty nine (149) units shall be designated to be occupied or made available for occupancy exclusively to an Income-Qualified Household, as defined in this Agreement.

"Annual Income" shall mean the annual income limits established by the California Department of Housing and Community Development; provided, if the Project is financed in whole or in part through the use of low-income housing tax credit program under Section 42 of the Internal Revenue Code ("Tax Credits"), as administered pursuant to the regulations of the California Tax Credit Allocation Committee ("CTCAC") and/or the proceeds of tax-exempt bonds or other obligations the interest on which are exempt from tax under the Internal Revenue Code and which are issued under the volume limitations pursuant to Section 146 of the Internal Revenue Code ("Tax-Exempt Bonds"), then "Annual Income" means the annual income limits established by CTCAC.

"Below Market Rate" or "BMR" shall mean the provision of a dwelling unit at rent levels less than market rates.

"City" shall mean the City of Santa Clara, California.

"Area Median Income" shall mean the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision; provided, if the Project is financed in whole or in part through the use of Tax Credits, as administered pursuant to the regulations of CTCAC and/or the proceeds of Tax-Exempt Bonds, then

"Area Median Income" means the annual median income for Santa Clara County, adjusted for household size, as published periodically by CTCAC.

"Household" shall mean one or more persons occupying a housing unit.

"HCD" shall mean the California Department of Housing and Community Development.

"Income-Qualified Household" shall mean a household with an income that does not exceed the following (except as provided in Section 2(b)(4) below):

- (a) For a Extremely Low-Income BMR Unit, fifty percent (30%) of the Area Median Income adjusted for family size.
- (b) For a Very Low-Income BMR Unit, fifty percent (50%) of the Area Median Income adjusted for family size.
- (c) For a Low-Income BMR Unit, seventy percent (70%) of the Area Median Income adjusted for family size.
- (d) For a Low-Income BMR Unit, eighty percent (80%) of the Area Median Income adjusted for family size.

"Project" shall mean the one hundred fifty (150) unit residential apartment facility located upon the real property described in the Legal Description attached hereto as Exhibit A, inclusive of one hundred forty nine (149) units rented at a Below Market Rate Monthly Rent, as defined below, together with structures, improvements, equipment, fixtures, and other personal property owned by the Developer and located on or used in connection with all such improvements and all functionally related and subordinate facilities.

"Below Market Rate Monthly Rent" or "Monthly Rent" shall mean, for purposes of this Agreement, an amount that is no greater than the following (except as provided in Section 2(b)(4) below):

- (a) For a Very Low-Income Household, thirty percent (30%) of fifty percent (50%) of the Area Median Income divided by twelve (12), and adjusted for household size appropriate for the Unit, less the Utility Allowance.
- (b) For a Low-Income Household, thirty percent (30%) of seventy percent (70%) of the Area Median Income divided by twelve (12), and adjusted for household size appropriate for the Unit, less the Utility Allowance.
- (c) For a Low-Income Household, thirty percent (30%) of eighty percent (80%) of the Area Median Income divided by twelve (12), and adjusted for household size appropriate for the Unit, less the Utility Allowance.

"Utility Allowance" shall be based upon schedules issued from time to time by the Santa Clara County Housing Authority, unless a federal standard applicable to the development (such as the Tax Credit program administered pursuant to the

regulations of CTCAC) provides for the use of a different utility allowance, in which case the federal utility allowance standard shall apply. The Utility Allowance applies to all tenant-paid costs that are listed on that schedule.

## 2. Uses

- a. General. The Developer covenants and agrees for itself, its successors, its assigns and every successor in interest to the Project or any part thereof, that the Developer shall use the Project only for residential operation pursuant to all of the terms and conditions of this Agreement. The Project shall consist of one hundred fifty (150) residential dwelling units, one hundred forty nine (149) of which shall be Affordable Housing Units for Very Low Income, Low Income and Median Income-Qualified Households, as provided in Recital A.
- b. Affordability Covenants. The Developer covenants and agrees for itself, its successors, its assigns and every successor in interest to the Project or any part thereof, for a term of fifty-five (55) years, that one hundred forty nine (149) Affordable Housing Units shall be rented or leased to or held available for rental or occupancy by Very Low Income-Qualified Households.

(1) Units Generally.

All the rental Units at Project that shall be designated as Affordable Housing Units and shall be occupied or held available for occupancy by Income-Qualified Households on a continuous basis for the Affordability Period.

(2) Affordable Housing Unit Rents

- (a) Developer agrees it shall not charge or collect from any tenant of an Affordable Housing Unit a monthly amount in exchange for occupancy of the Affordable Housing Unit that exceeds the Affordable Housing Cost applicable to the Affordable Housing Unit. Notwithstanding the foregoing, nothing in this Agreement prohibits Developer from charging tenants of any Affordable Housing Unit any fees or charges which are for services or items that the tenant of the Unit voluntarily signs up for and which are available to all tenants at the Project, and the amount of such fees will be in addition to the applicable Affordable Housing Cost.
- (b) For so long as the Project are encumbered by a Tax Credit and/or Tax-Exempt Bond low-income regulatory agreement, Affordable Housing Cost for the Affordable Housing Units and all rent increases thereafter shall be charged strictly in accordance with the rent schedules published by CTCAC, and the Developer shall provide the City with notice annually of the then-applicable Affordable Housing Cost levels. At any time this Agreement is the sole encumbrance recorded against title to the Improvements setting forth rent and income restrictions for the Affordable Housing Units, the Affordable Housing Cost for the Affordable Housing Units shall be based upon schedules issued from time to time by HUD and modified and published by HCD. At any time this Agreement is the sole encumbrance recorded against title to the Project setting forth rent and income restrictions for the Affordable Housing Units, upon request, City shall notify the Developer of the applicable area rents based on number of bedrooms.
- (c) At any time this Agreement is the sole encumbrance recorded against title to the Project setting forth rent and income restrictions for the Affordable Housing Units rent increases, which may occur not more frequently than annually, shall not exceed the annual increase, if any, in Area Median Income, and Affordable Housing Cost for the Affordable Housing Units exceed the amount derived by the Affordable Housing formula set forth in this Agreement. The City shall receive a copy of all rent increase notices for the designated Affordable Housing Units at least 30 days prior to the new rents taking effect. Rent increases may only be implemented in compliance with applicable law.

(3) Income Qualification of Affordable Housing Unit Tenants

- (a) Developer shall establish and maintain a file for each tenant residing in an Affordable Housing Unit including, at minimum, documents identified below. Developer shall make a good faith effort to verify that the income provided by an applicant in an income certification is accurate.
- (b) For so long as the Project is encumbered by a Tax Credit and/or Tax-Exempt Bond low-income regulatory agreement, determination of income of each Affordable Housing Unit tenant shall be determined and certified strictly in accordance with the requirements of CTCAC. At any time this Agreement is the sole encumbrance recorded against title to the Improvements setting forth rent and income restrictions for the Affordable Housing Units, the income of each Affordable Housing Unit tenant must be determined and certified prior to occupancy of that unit, using the definition of Annual Income established by the California Department of Housing and Community Development, and the Developer may certify initial income qualification using one of the following two source documentation methods:
  - (i) Obtain a written statement from the administrator of a government program under which the household receives benefits and which examines each year the annual income of the household; or
  - (ii) Examine the source documents evidencing annual income for the household. Developer shall use good faith efforts to obtain all applicable source documents to include in the tenant's file: Pay stub for the most recent pay period; Income tax return for the most recent tax year; Income verification form from the applicant's current employer; Income verification form from the Social Security Administration and/or the California Department of Social Services if the applicant receives assistance from either of those agencies; and, any statement documenting unearned income received by the household.
- (c) For so long as the Project is encumbered by a Tax Credit and/or Tax-Exempt Bond low-income regulatory agreement, income of each Affordable Housing Unit tenant shall be determined and certified strictly in accordance with the requirements of CTCAC. At any time this Agreement is the sole encumbrance recorded against title to the Improvements setting forth rent and income restrictions for the Affordable Housing Units, annually, Developer shall determine the income of all tenants residing in an Affordable Housing Unit and Developer may choose to use either of the two methods described above or may obtain from the household a written statement of the amount of the households income and family size along with a signed certification by the tenant that the information is complete and accurate. The certification must state that the household will provide source documentation upon request.



- (d) For so long as the Project is encumbered by a Tax Credit and/or Tax-Exempt Bond low-income regulatory agreement, income limits for Affordable Housing Unit tenant shall be determined and certified strictly in accordance with the requirements of CTCAC. At any time this Agreement is the sole encumbrance recorded against title to the Improvements setting forth rent and income restrictions for the Affordable Housing Units, income limits, adjusted for household size, will be based off of the Area Median Income for Santa Clara County, which is published periodically by HCD and, upon request, City shall notify the Developer of the applicable area median income limits.

#### (4) Over-Income Tenants in Affordable Housing Units

- (a) For so long as the Project is encumbered by a Tax Credit and/or Tax-Exempt Bond low-income regulatory agreement, determination of over-income tenants and rent charged to such over-income tenants shall be determined and certified strictly in accordance with the requirements of CTCAC, and no resident that occupies a unit subject to a regulatory agreement with respect to the Tax Credits, shall be evicted as a result of such resident being over income except as and when allowed by Federal law, including 26 U.S.C. §42. At any time this Agreement is the sole encumbrance recorded against title to the Improvements setting forth rent and income restrictions for the Affordable Housing Units, subsections (b) and (c) below shall apply.
- (b) Any Affordable Housing Unit tenant whose income no longer qualifies for the Affordable Housing Unit at their current Monthly Rent may continue to reside in the Unit. However, subject to Section 4(b), they must pay rent at the lesser of:
  - i. Thirty percent (30%) of the household annual income, divided by twelve (12), less the Utility Allowance; or
  - ii. The current market rent being charged in a comparable unit not subject to this Agreement.
- (c) Affordable Housing Units occupied by tenants whose income no longer qualifies as an Income-Qualified Household are considered in temporary “non-compliance” with this Agreement. To bring the Affordable Housing Unit back into compliance, the Developer must:
  - (i) Rent the next vacant Unit of the same size (i.e.: 2-bedroom) to an Income Qualified Household for a BMR Unit whose Annual Income would qualify them for the “non-compliant” Affordable Housing Unit at the original level of affordability (i.e., Very Low-Income, Low-Income, Median-Income or Moderate-Income) as the “non-compliant” Affordable Housing Unit (however, using the then current Area Median Income as adjusted for family size). Such Unit replaces the “non-compliant” Affordable Housing Unit; and

- (ii) Re-designate the original Affordable Housing Unit that was in non-compliance as a market rate unit in Project. The tenants may be charged rents comparable to existing market rate units in the Project.
- c) Subject to the provisions of Section 1(b) above, Developer shall maintain a distribution of the affordable housing units in Exhibit B.

(5) Waiting List for Affordable Housing Units

- (a) Developer shall maintain a written Waiting List of households that have contacted Developer and expressed an interest in an Affordable Housing Unit. That list shall include appropriate contact information for notifying the interested households when a vacancy in an Affordable Housing Unit occurs. Names on the Waiting List will be listed in order of the date of receipt of notice of interest and contact information from the prospective applicant. This Waiting List will be kept in Developer's offices and shall be available for City review with reasonable notice.
- (b) Subject to Developer's use and application of its customary leasing criteria that is applied to all tenants at the Project (including, without limitation, credit checks, references, etc.), Developer shall select new tenants for the Affordable Housing Units in chronological order (oldest listing first). Developer shall provide evidence of attempts to contact households on the Waiting List.

(6) Lease Provisions

- (a) Tenants in the Affordable Housing Units shall be subject to the same lease document and requirements of tenants in the market rate units, with the exception of those additional stipulations described below. A copy of the Project's standard lease form(s) shall be provided to the City prior to initial occupancy and within thirty (30) days of any changes.
- (b) The lease shall not contain any terms prohibited by applicable law.
- (c) Each lease or rental agreement shall provide that the Developer will not discriminate on the basis of race, creed, color, sex, national origin, ancestry, religion, marital status, disability or receipt of public assistance or housing assistance, or any other characteristic protected by law in connection with the rental of a Unit in Project, or in connection with the employment or application for employment of persons for operation and management of Project, and all contracts, applications and leases entered into for such purposes shall contain similar non-discrimination clauses to such effect.
- (d) The Developer shall not require rental deposits in excess of one-month's rent for any Affordable Housing Unit, but may require refundable deposits

for pet damages, and keys, and similar items, consistent with applicable laws.

- (e) The Developer shall include provisions in leases or rental agreements for all Affordable Housing Units which authorize the Developer to immediately terminate the tenancy of any tenant occupying an Affordable Housing Unit where one or more of such tenants have misrepresented any fact material to the qualification of such an individual or household as an Income-Qualified Household, including, but not limited to, persons 18 years of age and older that reside in the household that are not listed on the lease. Each lease or rental agreement for an Affordable Housing Unit shall also provide that the tenants of such Affordable Housing Unit shall be subject to annual certification or re-certification of income, as required by the City, and shall be subject to rental increases in accordance with this Agreement.
- (f) The provisions relating to certification and re-certification of income in the form of lease or rental agreement used by the Developer for the lease or rental of the Affordable Housing Units shall be subject to prior review and approval by the City, the approval of which shall not be unreasonably withheld or delayed.

(7) Initial Leasing, Marketing and Tenant Selection Procedures.

- (a) No later than ninety (90) days prior to the start of accepting applicants, Developer or an Affiliate approved by City of Santa Clara shall prepare and submit to the City for reasonable approval a marketing and outreach program for the Affordable Housing Units ("Marketing") which shall contain, among other things: (i) how a potential Income-Qualified Household would apply to rent an Affordable Housing Unit in the Project, including where to apply, applicable income limits and rent levels; (ii) a description of procedures and media Developer will use to publicize vacancies in Project, including notice in newspapers of general circulation, at least one of which shall be a foreign language newspaper; (iii) provide monthly leasing reports until all one hundred forty nine (149) Affordable Housing Units have been leased up and occupied, and (iv) mailing notices of vacancies to or contacting by telephone potential tenants on the Waiting List maintained by Developer. Marketing of the Affordable Housing Units shall be done through outreach that affirmatively furthers fair housing in accordance with all federal and State fair housing laws.
- (b) A copy of Developer's standard tenant selection procedure, applicable to all Units in Project, shall be provided to the City prior to initial occupancy and within thirty (30) days of any changes. Any special procedures related to tenant selection for an Affordable Housing Unit shall be specified and are limited to procedures reasonably related to implementation of the

requirements of this Agreement and in compliance with State Fair Housing regulations

- (c) Developer must give prompt, written notice to any rejected applicant for an Affordable Housing Unit, specifying the grounds for rejection.
- (d) Operating Covenant Agreement. The Developer covenants and agrees to operate Project in conformity with all applicable laws, rules, regulations and ordinances, including without limitation, all applicable federal and state labor standards.
- (e) Obligation to Refrain from Discrimination. There shall be no discrimination against or segregation of any person, or group of persons, on account of race, color, religion, national origin, ancestry, sex, or marital status in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of Project, or any part thereof, nor shall the Developer itself 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, subtenants, sub-lessees, or vendees of Project.
- (f) Form of Non-discrimination and Non-segregation Clauses. The Developer shall refrain from restricting the rental, sale or lease of Project on the basis of race, color, religion, ancestry, national origin, sex, or marital status of any person. All such deeds, leases or contracts shall contain or be subject to substantially the following non-discrimination or non-segregation clauses:
  - (1) In deeds: "The grantee herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through him, that there shall be no discrimination against or segregation of, any person or group of persons on account of race, color, religion, ancestry, national origin, sex, or marital status in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land herein conveyed, nor shall the grantee himself or any person claiming under or through him, 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, sub-lessees or vendees in the land herein conveyed. The foregoing covenants shall run with the land".
  - (2) In leases: "The lessee herein covenants by and for himself, his heirs, executors, administrators and assigns, and all persons claiming under or through him, and this lease is made and accepted upon and subject to the following conditions:

That there shall be no discrimination against or segregation of any person or group of persons, on account of race, color, religion, ancestry, national origin, sex, or marital status in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the land herein leased nor shall the lessee himself, or any person claiming under or through him, 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, sub-lessees, subtenants, or vendees in the land herein leased."

- (3) In contracts: "There shall be no discrimination against or segregation of any person, or group of persons on account of race, color, religion, ancestry, national origin, sex, or marital status in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the land, nor shall the transferee himself or any person claiming under or through him, establish or permit any such practice or practices of discrimination or segregation with reference to the lessees, subtenants, sub-lessees or vendees of the land."

### 3. Monitoring/Annual Report

- (a) Not later than ten (10) days prior to the commencement of marketing, Developer shall assign a single person as Project Manager, who shall have overall responsibility for the progress and execution of this Agreement. Subsequent to that assignment, Developer shall notify City of any change in the name and/or contact information of the Project Manager.
- (b) Once leasing at the Project has commenced, the Developer for itself, its successors, its assigns and every successor in interest to Project or any part thereof, covenants and agrees to submit to the City an annual report (the "Annual Report"). The first Annual Report shall be due one year after leasing at the Project has commenced. The Annual Report format shall be approved by the Housing & Community Services Division Manager and shall include a signed and certified statement of its accuracy upon annual submission to the City.
- (c) The Developer shall submit the Annual Report on or before September 30 of each year following the fiscal year (Period July 1 to June 30) covered by the Annual Report and a certified statement by Developer that to the knowledge of the Developer, no default has occurred under the provisions of this Agreement.
- (d) The City has a standard reporting form which consists of two parts: Part I, information on tenants in residence on June 30 of the reporting year; Part II, information on tenants who moved in and out during the reporting year. The City has a standard form for income/rent reporting. A reasonable facsimile, pre-approved by the City may be substituted as long as it contains all the required information. For each Affordable

Housing Unit, the following information is required (based on tenants in residence as of June 30):

- (1) Apartment Number or other unit designation.
- (2) Number of bedrooms.
- (3) Household Size.
- (4) Tenant Income (certified annually).
- (5) Tenant-Paid Rent.
- (6) Rent Subsidy, if any (e.g., Section 8 or other third party voucher).
- (7) Explanation of any change in the designated affordable units, and reason for change that occurred in the previous fiscal year (July 1 to June 30).

(e) Developer shall provide, within thirty (30) days of request, additional information concerning the Affordable Housing Units and/or Unit Allocation reasonably requested by the City in writing. The City shall have the right to examine and make copies of all books, records or other documents maintained by Developer or by any of Developer's agents that pertain to any Affordable Housing Unit and/or this Agreement.

(f) Developer shall pay City on an annual basis, on or before July 1<sup>st</sup> of each year following the issuance date of the Certificate of Occupancy for the building, a multi-family monitoring fee per Affordable Housing Unit (the "**Monitoring Fee**"). The Monitoring Fee is published in the City's Municipal Fee Schedule and updated from time to time. "**Certificate of Occupancy**" shall mean a temporary certificate of occupancy issued by the City for all 150 residential units of the Project.

#### 4. Enforcement

The City of Santa Clara is deemed to be the beneficiary of the terms and provisions of this Agreement and the covenants herein, both for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, for whose benefit this Agreement and the covenants running with the land have been provided. The City shall have the right if any covenants set forth in this Agreement are breached, to exercise all available rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it is entitled. No remedy herein conferred upon or reserved by the City is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law, in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of such right or power, but any such right or power may be exercised from time to time and as often as City may deem expedient. In order to entitle the City to exercise any remedy reserved to it in this Agreement, it shall not be necessary to give

any notice, other than such notice as may be herein expressly required or required by law to be given.

Developer agrees that, if a breach is not cured within thirty (30) days after written notice by City is provided to Developer, or if such breach cannot be reasonably cured within the thirty (30) day period and Developer has not commenced the curing of such Default, then City shall have all rights and remedies at law or in equity to enforce the curing of such Default.

Additionally, if Developer collects rents from Income-Qualified Households occupying the Affordable Housing Units that require such Income-Qualified Household tenants to pay rent in excess of what is permitted pursuant to this Agreement, and to the extent such excess rents are not required to be reimbursed to the tenants of such Affordable Housing Units, Developer agrees and covenants to reimburse such tenants within ten (10) business days of City's written demand, provided if such tenants cannot be located then the Developer shall pay to the City the full amount of such excess to the City. Developer and City agree that the payment of such excess rent shall be in addition to City's rights and remedies at law or equity.

If the City provides Developer with a written notice of violation of this Agreement and Developer has not cured or responded to such notice of violation within ninety (90) days, then in addition to City's rights and remedies set forth herein, City shall thereafter have the right to impose a fine of \$150 per month per non-compliant unit until Developer has cured or responded to the notice of violation. Developer shall pay such fine within thirty (30) days of City's written demand.

## 5. Defaults

Failure or delay by Developer to perform any material obligation set forth in any term or provision of this Agreement, if such failure or delay is not cured within thirty (30) days after written notice by City to Developer, or if such failure or delay cannot be reasonably cured within the thirty (30) day period and Developer has not commenced curing the same, then such failure or delay constitutes a default.

- (a) The City shall give written notice of default to the Developer, specifying the default. Delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default.
- (b) Any failures or delays by the City in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by the City in asserting any of its rights and remedies shall not deprive the City of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.



- (c) If a non-monetary event of default occurs, prior to exercising any remedies hereunder, City shall give Developer notice of such default. If the default is reasonably capable of being cured within thirty (30) days, Developer shall have such period to effect a cure prior to exercise of remedies by the City. If the default is such that it is not reasonably capable of being cured within thirty (30) days, and Developer (1) initiates corrective action within said period, and (2) diligently and in good faith works to effect a cure as soon as possible, then Developer shall have such additional time as is reasonably necessary to cure the default prior to exercise of any remedies by City. In no event shall City be precluded from exercising remedies if its remedies become or are about to become materially jeopardized by any failure to cure a default or the default is not cured within ninety (90) days after the notice of default is first given.
- (d) Developer shall not be in Default where Developer's performance under this Agreement is affected by force majeure. In the context of these terms and conditions, "force majeure" is any event that the Developer could not, even with due care, reasonably foresee or avoid. These events include but are not limited to war, threat of war, riot, civil commotion or strife, hostilities, industrial dispute, natural disaster, fire, acts of god, terrorist activity, nuclear disaster, adverse weather, government action, City caused delays, delays caused by third parties, technical problems with transportation or other events outside the Developer's control.

## 6. Indemnification

The Developer shall indemnify, hold harmless and defend the City, and its officers, officials, appointees, employees and agents from and against (a) any Default by Developer under this Agreement; (b) any and all loss, costs, damages, actions and liabilities of whatever nature directly or indirectly resulting from or arising out of the design, construction, occupancy or ownership of Project or any written statement or representation provided to the City, or to prospective or actual tenants or purchasers of Project with respect to the Developer's performance hereunder. The foregoing obligations of Developer shall exclude claims, loss, costs, damages, actions and liabilities to the extent arising from City's gross negligence, willful misconduct or breach of this Agreement by the City. If any such claim is asserted, or any such impositions or charges are sought to be imposed, the City shall give prompt notice to Developer and Developer shall have the sole right and duty to assume, and will assume, the defense thereof, with full power to litigate, compromise and settle the same in its sole discretion, provided that the City shall have the right to review and reasonably approve or disapprove any such settlement or compromise if (1) such settlement or compromise would require the City to pay any money in connection with such settlement; or (2) the City would remain a litigant after such settlement or compromise is entered into. In addition, Developer shall pay upon demand all of the reasonable expenses paid or incurred by City in enforcing the provisions hereof.

## 7. General Provisions

(a) City as Beneficiaries

- (1) All covenants and conditions contained in this Agreement shall be covenants running with the land, and shall, in any event, and without regard to technical classification or designation, legal or otherwise, be, to the fullest extent permitted by law and equity, binding for the benefit and in favor of, and enforceable by the City, and their respective successors and assigns, against the Developer and its heirs, legatees, devisees, administrators, executors, successors and assigns.
- (2) In amplification and not in restriction of the provisions set forth hereinabove, it is intended and agreed that the City shall be deemed beneficiary of the covenants provided for in this Agreement, both for and in its own right and also for the purposes of protecting the interests of the community. All covenants set forth herein without regard to technical classification or designation, shall be binding for the benefit of the City, and such covenants shall run in favor of the City for the entire period during which such covenants shall be in force and effect, without regard to whether the City is or remains an owner of any land or interest therein to which such covenants relate. City shall have the right, in the event of any material breach of any such covenant or condition, to exercise all the rights and remedies, and to maintain any actions at law or suit in equity or other proper proceedings to enforce the curing of such breach of covenant or condition.

(b) Irrevocability; Term of Agreement

This Agreement shall be irrevocable by the Developer, its successors and assigns to the Property or any portion thereof. The covenants against discrimination set forth above shall remain in effect in perpetuity. All other covenants contained in this Agreement shall remain in effect for the Affordability Period.

(c) Amendment of Agreement

Only the City, its successors and assigns, and the Developer, and the heirs, legatees, devisees, administrators, executors, successors and assigns of the Developer in and to the fee title to Project (or portion thereof) shall have the right to consent and agree to changes in, or to eliminate in whole or in part, any of the covenants or conditions contained in this Agreement, or to subject the Property or any Affordable Housing Unit to additional covenants or conditions, without the consent of any renter, lessee, easement holder, licensee, or any other person or entity having an interest less than a fee in Project (or portion thereof) or any Affordable Housing Unit.

(d) Severability

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity or unenforceability of any one provision shall not affect the validity or enforceability of any other provision.

(e) Interpretation

The provisions of this Agreement shall be liberally construed and interpreted to effectuate its purposes. Failure to enforce any provision hereof shall not constitute a waiver of the right to enforce said provision or any other provision hereof.

(f) Applicable Law

This Agreement and the lien created hereby shall be governed by and construed according to the laws of the State of California.

(g) Number, Gender and Headings

As used in this Agreement, the singular shall include the plural and the masculine shall include the feminine and the neuter, unless the context requires the contrary. All headings are not a part hereof, and shall not affect the interpretation of any provision.

(h) Notices

Formal notices, demands and communications between the City and the Developer shall be sufficiently given if dispatched by first class mail, registered or certified mail, postage prepaid, return receipt requested, or by electronic facsimile transmission followed by delivery of a "hard" copy, or by personal delivery (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service) to the principal offices of the City and the Developer, as follows:

City of Santa Clara  
Housing & Community Services Division  
1500 Warburton Avenue  
Santa Clara, California 95050  
Attn: Division Manager

**1**  
ZAEN Partners, LLC  
c/o Ensemble Investments  
444 West Ocean Boulevard, Suite 650  
Long Beach, CA 90802

Such written notices, demands and communications may be sent in the same manner to such other addresses as either party may from time to time designate by mail as provided in this Section.

(i) Rights and Remedies Are Cumulative

The rights and remedies of the City with respect to the enforcement of the obligations contained in this Agreement are cumulative, and the exercise by the City of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default hereunder.

(j) Dispute Resolution

- (1) Any controversies between the City and Developer regarding the construction or application of this Agreement, and claims arising out of this Agreement or its breach, shall be submitted to mediation within thirty (30) days of the written request of one party after the service of that request on the other party.
- (2) The parties may agree on one mediator. If they cannot agree on one mediator, the party demanding mediation shall request the Superior Court of Santa Clara County to appoint a mediator. The mediation meeting shall not exceed one day (eight (8) hours). The parties may agree to extend the time allowed for mediation under this Agreement.
- (3) The costs of mediation shall be borne by the parties equally.
- (4) Mediation under this Section is a condition precedent to filing an action in any court. In the event of litigation or mediation which arises out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees, expert witness costs and cost of suit, regardless of the outcome the litigation.

(k) Counterparts

This instrument may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages of one or more counterpart copies may be removed from such counterpart copies and all attached to the same copy of this Agreement, which, with all attached signature pages, shall be deemed to be an original Agreement.

- (l) Mortgagee Protection. No breach of this Agreement shall defeat or render invalid the lien of any deed of trust or mortgage recorded against the Project. No lender taking title to the Project through foreclosure or deed in-lieu of foreclosure shall be liable for any defaults or monetary obligations of Developer arising prior to

acquisition of possession of the Project by such lender. Any lender who has recorded a deed of trust or mortgage against the Project shall have the right, but not the obligation, during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the condition of default claimed or the areas of noncompliance set forth in City's notice. No lender who takes title to the Project through foreclosure or deed in-lieu of foreclosure shall be obligated to construct or continue with construction of the Project.

[signatures appear on following page]

The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date first set forth above.

**CITY OF SANTA CLARA, CALIFORNIA,  
a chartered California municipal corporation**

APPROVED AS TO FORM:

\_\_\_\_\_  
BRIAN DOYLE  
City Attorney

\_\_\_\_\_  
DEANNA J. SANTANA  
City Manager

Date: \_\_\_\_\_

"CITY"

**ZAEN Partners, LLC  
a California Limited Liability Company**

By: [Rethink Entity], a California limited liability company, its co-general partner

By: \_\_\_\_\_  
Steve Edwards

By: [Ensemble Entity], a California limited liability company, its managing general partner

By: \_\_\_\_\_  
Tyson Sayles

Local  
Address: 444 W. Ocean Boulevard, Suite 560, Long Beach, CA  
Email  
Address: TSayles@ensemble.net  
Telephone: (562) 628-0587  
Fax: \_\_\_\_\_

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California                    )  
County of                                )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they  
executed the same in his/her/their authorized capacity(ies), and that by his/her/their  
signature(s) on the instrument the person(s), or the entity upon behalf of which the  
person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California            )  
County of                        )

On \_\_\_\_\_ before me, \_\_\_\_\_,  
personally appeared \_\_\_\_\_, who  
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they  
executed the same in his/her/their authorized capacity(ies), and that by his/her/their  
signature(s) on the instrument the person(s), or the entity upon behalf of which the  
person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (Seal)



## **EXHIBIT A**

### **LEGAL DESCRIPTION**

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

Parcel 9, as shown on that certain map filed on February 27, 1976 in book 368 of maps, at pages 14 and 15 in the Santa Clara County Records.

**LOAN AGREEMENT**

**(AFFORDABLE HOUSING PROJECT)**

**by and between**

**THE CITY OF SANTA CLARA,**

**and**

**SANTA CLARA 701, L.P.**

## LOAN AGREEMENT

THIS LOAN AGREEMENT (this “**Agreement**”) is entered into by and between THE CITY OF SANTA CLARA (“**City**”) and Santa Clara 701, L.P., a California limited partnership (“**Borrower**”) or its Assignee, as of December 1, 2020. City and Borrower agree as follows:

### PART 1. SUBJECT OF AGREEMENT

#### Section 1.1 Purpose of Agreement

a. 2302 Calle Del Mundo, an affordable residential rental development, is to be constructed at 2302 Calle Del Mundo, Santa Clara, APN: 097-46-024 (the “**Property**”), and the proposed project consists of 150 affordable apartment units with approximately 86,520 rentable square feet and approximately 5,000 square feet of general retail (the “**Commercial Space**”). The apartments units shall be leased as follows:

	Studio	1-bedroom	2-bedroom	3-bedroom	<i>Total:</i>
30% AMI Household(s)	8	5	2	0	15
50% AMI Household(s)	32	14	8	3	57
70% AMI Household(s)	41	18	8	0	67
80% AMI Household(s)	7	3	0	0	10
“ <b>Management Unit(s)</b> ”	0	0	1	0	1
<b>Total:</b>	<b>88</b>	<b>40</b>	<b>19</b>	<b>3</b>	<b>150</b>

The foregoing units to be developed on the Property, excluding the Management Unit, are referred to herein as the “**Affordable Units**”. Borrower’s fee interest in the Property and the improvements to be constructed on the Property (including the Affordable Units and the Management Unit), together with the development thereof in accordance with this Agreement, is referred to herein as the “**Project**”.

b. The residential units will be constructed in a 5-story Type IIIA wood-frame building above two floors of Type IA structured parking that is at-grade. The site design incorporates landscaped entryways at the retail corners, activating sidewalks and providing a retail streetscape experience with outdoor seating areas. The building design will complement the high-density transit-oriented urban environment envisioned for the Tasman East area. The building exterior includes various massing and design elements incorporated in the project’s façade and architecturally addresses its primary street frontage on Calle Del Mundo.

c. The project will conform to the existing design, environmental, and efficiency standards set in the approved Conditions of Approval with just a few minor revisions to the original development scope. Common area amenities will include a courtyard and outdoor terraces, barbecue and lounge areas, a fitness center, lobby and clubroom.

b. City is concurrently herewith making a loan to Borrower in the original principal amount of Six Million Dollars (\$6,000,000) (the “**City Loan**”) to provide financial assistance for the development of the Project. The City Loan is evidenced by that certain Promissory Note in the original principal amount of Six Million Dollars (\$6,000,000) dated as of even date herewith made by Borrower in favor of City (the “**City Note**”) and secured by that certain Subordinated Deed of Trust, Security Agreement and Fixture Filing (With Assignment of Rents), in which Borrower is the Trustor, First American Title Company is the Trustee, and City is the Beneficiary, dated as of the date hereof (the “**City Deed of Trust**”) and encumbering the Project.

c. City and Borrower have agreed to enter into this Agreement to memorialize their understanding regarding their respective rights and obligations in respect of the City Loan and the construction and operation of the Project.

## Section 1.2 Definitions

For purposes of this Agreement, the following capitalized terms shall have the following meanings:

“**30% AMI Household(s)**” shall mean a household whose aggregate gross income equals 30% or less of AMI, as adjusted for family size. For purposes of this definition, “adjusted for family size” means the actual number of persons in the applicable household.

“**50% AMI Household(s)**” shall mean a household whose aggregate gross income equals 50% or less of AMI, as adjusted for family size. For purposes of this definition, “adjusted for family size” means the actual number of persons in the applicable household.

“**70% AMI Household(s)**” shall mean a household whose aggregate gross income equals 70% or less of AMI, as adjusted for family size. For purposes of this definition, “adjusted for family size” means the actual number of persons in the applicable household.

“**80% AMI Household(s)**” shall mean a household whose aggregate gross income equals 80% or less of AMI, as adjusted for family size. For purposes of this definition, “adjusted for family size” means the actual number of persons in the applicable household.

“**Affiliate**” shall mean (1) any Person directly or indirectly controlling, controlled by or under common control with another Person; (2) any Person owning or controlling ten percent (10%) or more of the outstanding voting securities of such other Person; or (3) if that other Person is an officer, director, member or partner, any company for which such Person acts in any such capacity. The term “control” as used in the immediately preceding sentence, shall mean the power to direct the management or the power to control election of the board of directors. It shall be a presumption that control with respect to a corporation or limited liability company is the right to exercise or control, directly or indirectly, more than fifty percent (50%) of the voting rights attributable to the controlled corporation or limited liability company, and, with respect to any individual, partnership, trust, other entity or association, control is the possession, indirectly or directly, of the power to direct or cause the direction of the management or policies of the controlled entity. For purposes of this definition, any general partner shall be considered an “Affiliate” of Borrower.

**“Affordable Rent”** shall mean an amount of monthly rent, including a reasonable utility allowance, that does not exceed the maximum rent to be charged by Borrower and paid by the Qualified Tenant occupying the Affordable Units as determined pursuant to the TCAC Regulations. The tenant utility allowance, if any, shall be determined by the Santa Clara County Housing Authority. The calculation of Affordable Rent shall be performed annually.

**“AMI”** shall mean the median family income figures and standards (adjusted for actual Household size) utilized by TCAC.

**“Annual Project Budget”** is defined in Section 5.4.

**“Business Day(s)”** shall mean Monday through Friday, except for federal and state holidays.

**“Certificate of Occupancy”** shall mean a temporary certificate of occupancy issued by the City for the Project.

**“Change Order”** shall mean any individual change order which results in a change made to, or any amendments of, the Construction Contract or the Plans and Specifications.

**“City”** shall mean the City of Santa Clara, California

**“City Assignment of Agreements”** shall mean the Assignment of Agreements between Borrower and City dated as of the date hereof.

**“City Assignment of Rents and Leases”** shall mean the Assignment of Rents and Leases between Borrower and City dated as of the date hereof.

**“City Deed of Trust”** shall mean the Subordinated Deed of Trust, Security Agreement and Fixture Filing (With Assignment of Rents), in which Borrower is the Trustor, Chicago Title Company is The Trustee, and City is the Beneficiary, which secures the City Loan, dated as of the date hereof.

**“City Environmental Indemnity”** shall mean the Environmental Indemnity executed by Borrower for the benefit of the City, dated as of the date hereof.

**“City Indemnitees”** shall mean City and its departments, divisions, agencies, elected officials, boards, officers, employees, representatives and agents.

**“City Loan”** shall mean the loan of from the City to Borrower, in the amount and pursuant to the terms and conditions described in this Agreement, secured by the City Deed of Trust and having a lien on the Property that is junior in priority to the lien of the Senior Loan Deed of Trust.

**“City Loan Documents”** shall mean this Agreement, the City Promissory Note, the City Deed of Trust, the City Assignment of Rents and Leases, the City Assignment of Agreements, the City Environmental Indemnity and the City Regulatory Agreement, any amendments and modifications thereto, and any other instruments and agreements executed by Borrower with respect to the City Loan.

**“City Note”** shall mean the Promissory Note, evidencing the City Loan, made by Borrower and payable to City, dated as of the date hereof.

**“City Regulatory Agreement”** means the [Affordable Housing Agreement made as of the date hereof between City and Borrower and recorded against the Project, and the Agreement Containing Covenants between City and Borrower to be recorded against the Project in accordance with the Affordable Housing Agreement].

**“Closing Requirements”** shall mean the requirements attached to this Agreement as Attachment No. 6 which are incorporated herein by this reference.

**“Completion”** shall mean the point in time when all of the following shall have occurred: (1) issuance of a Certificate of Occupancy by the City of Santa Clara; (2) recordation of a Notice of Completion by Borrower or its contractor; (3) certification by the project architect that construction of the Improvements as provided in the (with the exception of minor “punchlist” items) has been completed in a good and workmanlike manner and substantially in accordance with the Scope of Development; (4) payment, settlement or other extinguishment, discharge, release, waiver, bonding or insuring against any mechanic’s liens that have been recorded or stop notices that have been delivered; and (5) the City shall have been issued a CLTA 101 endorsement (or an alternative endorsement reasonably acceptable to the City) to its policy of title insurance.

**“Construction Budget”** shall mean the schedule of construction expenses actually and expected to be incurred by Borrower in connection with the Project and reasonably approved by the City, as may be amended or modified pursuant to the City Loan Documents.

**“Construction Loan”** shall mean the loan for the construction of the Project made to Borrower from [TBD] (**“Construction Lender”**), secured by the Construction Loan Deed of Trust.

**“Construction Loan Deed of Trust”** shall mean the deed of trust securing the Construction Loan that is first in priority.

**“Construction Loan Documents”** shall mean any agreements and documents evidencing or securing the Construction Loan and includes all attachments, modifications and amendments thereto.

**“Construction Period”** shall mean the period of time commencing upon the date hereof and ending upon the Conversion.

**“Conversion”** shall mean the point in time that both (a) either (i) all of the conditions precedent to the funding of the Permanent Loan have been satisfied and the Construction Loan has been repaid in full, as evidenced by the recording against the Project of a reconveyance of the Construction Loan Deed of Trust or (ii) the Construction Loan is converted to the Permanent Loan pursuant to the terms of the Construction Loan Documents and the Permanent Loan Documents, and (b) the Conversion Requirements set forth on Attachment No. 7 are satisfied.

**“Conversion Requirements”** shall mean the requirements attached to this Agreement as Attachment No. 7 which are incorporated herein by this reference.

**“Developer Fee”** means the developer fee to USA Multifamily Development, Inc, a California corporation, as **“Developer”**, in an amount not to exceed the amount allowed by applicable TCAC Regulations. No interest is allowed on the deferred fee.

**“Development Costs”** shall mean the total cost of developing and constructing the Improvements on the Property, as set forth in the Project Budget.

**“Eligible Project Costs”** shall mean all costs and expenses permitted and approved pursuant to this Agreement as set forth in the Construction Budget which are customarily incurred and shall have been actually incurred by Borrower for the development and construction of the Project and shall include, without limitation, the following: construction costs; a Developer Fee in an amount not to exceed that permitted by the TCAC Regulations; property taxes and assessments; security services; utilities fees; insurance; and such other costs, fees and expenses, as agreed to in writing by the City; provided, however, that payment to parties related to Borrower for Eligible Project Costs must not exceed reasonable and customary market rates.

**“Environmental Laws”** shall have the meaning set forth in the Environmental Indemnity.

**“Force Majeure”** or **“Force Majeure Event”** shall mean the following events, provided that they actually delay and interfere with the timely performance of the matter to which it would apply and despite the exercise of diligence and good business practices are or would be beyond the reasonable control of the party claiming such interference: war; insurrection; strikes; lockouts; riots; floods; earthquakes; fires; casualties; acts of God; acts of the public enemy; acts of terrorism; epidemics; quarantine restrictions; freight embargoes; lack of transportation; governmental restrictions or priority; litigation, arbitration, administrative proceedings, initiatives and/or referenda, including challenges to the validity of this transaction or the approvals for the Project, or any element thereof, or any portion thereof; unusually severe weather; inability to secure necessary labor, materials or tools; delays of any contractor, subcontractor, or suppliers; acts of the other party; acts or failure to act of any Governmental Authority (except acts or failure to act of the City shall not excuse performance by the City); the imposition of any applicable moratorium by a Governmental Authority; or any other causes which despite the exercise of diligence and good business practices are or would be beyond the reasonable control of the party claiming such delay and interference. Notwithstanding the foregoing, none of the foregoing events shall constitute a Force Majeure Event unless and until the party claiming such delay and interference delivers to the other party written notice describing the event, its cause, when and how such party obtained knowledge, the date the event commenced, and the estimated delay resulting therefrom. Any party claiming a Force Majeure Delay shall deliver such written notice within thirty (30) days after it obtains actual knowledge of the event.

**“Force Majeure Delay”** shall mean any delay in taking any action required by this Agreement, proximately caused by the occurrence of any Force Majeure Event.

**“Governmental Approvals”** shall mean and include any and all general plan amendments, zoning approvals or changes, required approvals and certifications under the California Environmental Quality Act, tentative and final tract maps, variances, conditional use permits, demolition permits, excavation/foundation permits, grading permits, building permits, inspection reports and approvals, certificates of occupancy, and other approvals, permits, certificates,

authorizations, consents, orders, entitlements, filings or registrations, and actions of any nature whatsoever required from any Governmental Authority in order to commence and complete the construction of the Project.

**“Governmental Authority”** means the United States, the State of California, the County of Santa Clara, the City of Santa Clara or any other political subdivision in which the Property is located, and any court or political subdivision, City or instrumentality having jurisdiction over the Property.

**“Governmental Regulations”** shall mean any applicable local, state, and federal laws, ordinances, rules, requirements, resolutions, policy statements and regulations (including, without limitation, those relating to land use, subdivision, zoning, Environmental Laws, labor relations, prevailing wage, notification of sale to employees, Hazardous Materials, occupational health and safety, water, earthquake hazard reduction and building and fire codes; and including the National Environmental Policy Act (NEPA) and all Environmental Laws) bearing on the demolition, alteration, replacement, repair, refurbishing, improvement, construction, maintenance, management, use, or operation of the Affordable Project.

**“Hazardous Substances”** shall have the meaning set forth in the Environmental Indemnity.

**“Household”** shall mean one or more persons occupying an Affordable Unit.

**“Improvements”** shall mean and includes any buildings, structures, fixtures, foundations, excavation, parking, landscaping, or underground installations to be constructed on, under, or over the Property pursuant to the Scope of Development and in accordance herewith, including, without limitation, the Affordable Units.

**“Investor Limited Partner”** shall mean [TBD], or any other Person who will be an investor limited partner in Borrower’s limited partnership and who will purchase the Low Income Housing Tax Credits and own a 99.99% interest in the Borrower.

**“Legal Description”** shall mean the legal description of the Property attached to this Agreement as Attachment No. 1 which is incorporated herein by this reference.

**“Limited Partnership”** shall mean the single purpose entity referred to herein as **“Borrower”**, formed for the ownership, development and operation of the Project.

**“Limited Partnership Agreement”** shall mean the agreement governing the Limited Partnership and shall include the Limited Partnership Agreement as amended and restated on the admission of the Investor Limited Partner.

**“Low Income Housing Tax Credits”** shall mean tax credits authorized by the Tax Reform Act of 1986 and governed by Section 42 of the Internal Revenue Code.

**“Management Agreement”** shall mean a written agreement between the Borrower and the Property Manager as described in Section 5.3.



**“Management Plan”** shall mean the plan for the management and operation of the Project.

**“Management Unit(s)”** is defined in Section 1.1(a).

**“Permanent Loan”** shall mean the loan, in an amount not to exceed the Construction Loan except as reasonably approved by the City, for the Project to be made to Borrower by [TBD] or other lenders as reasonably approved by the City (**“Permanent Lender”**) and the Project Pro Forma following Conversion, secured by the Permanent Loan Deed of Trust.

**“Permanent Loan Deed of Trust”** shall mean the deed of trust securing the Permanent Loan that is first in priority.

**“Permanent Period”** shall mean the period of time from and after Conversion.

**“Permanent Pro Forma”** shall mean a revised Project Pro Forma as of the date of the Conversion.

**“Permitted Transfer”** shall mean any of the following:

- a. An assignment of this Agreement and all of Borrower’s interests in the Property to an Affiliate;
- b. A conveyance of a security interest in the Property or any portion thereof or interest therein or interest in the Borrower in connection with any Senior Loan and any transfer of title by foreclosure, deed or other conveyance in lieu of foreclosure in connection therewith;
- c. The inclusion of equity participation in the Borrower by addition of limited partners to Borrower’s partnership or similar mechanism, and any transfers of limited partnership interests in Borrower’s partnership;
- d. The lease for occupancy of all or any part of the Improvements on the Property;
- e. The granting of easements or permits to facilitate the development of the Property in accordance with this Agreement;
- f. The withdrawal, removal and/or replacement of a general partner of Borrower pursuant to the terms of the Borrower’s partnership agreement, provided that any required substitute general partner is reasonably acceptable to City and is selected with reasonable promptness. The Investor Limited Partner or an Affiliate thereof is an acceptable successor general partner of Borrower;
- g. the assignment or replacement of the original managing general partner in the Borrower with a nonprofit public benefit corporation or Affiliate thereof, provided that any new general partner is reasonably acceptable to City; and
- h. The sale, transfer or pledge of any limited partnership interest in Borrower or of any partnership interest in the Investor Limited Partner.

**“Person”** shall mean an individual, partnership, limited partnership, trust, estate, association, corporation, limited liability company or other entity, domestic or foreign.

**“Plans and Specifications”** shall mean any and all plans, drawings, studies, reports and related documents concerning the construction of the Project submitted by Borrower to City, and approved by City, including, without limitation, all architectural and engineering plans, and all approved amendments, modifications, supplements, general conditions and addenda thereto.

**“Project Budget”** shall mean the schedule of sources and uses attached to this Agreement as Attachment No. 5.

**“Project Pro Forma”** shall mean the financial information to be prepared by Borrower, and any updates and amendments thereto, including without limitation, the Construction Budget, estimated sources and uses of financing, and the Project’s operating budget and reasonably approved by the City.

**“Property”** shall mean the real property described in Section 1.1(a) hereof.

**“Property Manager”** shall mean a property manager engaged by Borrower to manage the Project.

**“Qualified Tenant(s)”** shall mean a Household who qualifies as a 30%, 50%, 70% or 80% AMI Household, as applicable.

**“Release of Construction Covenants”** shall mean the certificate to be issued by the City in accordance with Section 3.25 of this Agreement.

**“Rent Schedule”** shall mean the schedule calculating the Affordable Rent for the Project.

**“Restricted Period”** shall mean the period beginning on the date of the Conversion and continuing until the date that is fifty-five (55) years after the Conversion.

**“Schedule of Performance”** shall mean the document attached to this Agreement as Attachment No. 2 which is incorporated herein by this reference.

**“Scope of Development”** shall mean the document attached to this Agreement as Attachment No. 3 which is incorporated herein by this reference.

**“Senior Lender”** shall mean the maker of any Senior Loan, any construction lender, credit enhancer or construction period guaranty facility, including but not limited to the Construction Lender and the Permanent Lender.

**“Senior Loan”** shall mean, during the Construction Period, the Construction Loan and during the Permanent Period, the Permanent Loan.

**“Senior Loan Documents”** shall mean, as applicable, the Construction Loan Deed of Trust and the Permanent Loan Deed of Trust, loan agreements, promissory notes, financing statements,

guaranties, security agreements, assignments, and similar documents and instruments to be executed by Borrower in connection with the Senior Loans.

**“Subordination Agreement”** shall mean an agreement between each Senior Lender and the City in such form as is reasonably approved by the Senior Lender and the City that subordinates the City Loan and City Loan Documents to the Senior Loan and Senior Loan Documents; provided, however, that the City Regulatory Agreement shall not be subordinated to Senior Lender or to any other lender, loan or monetary lien.

**“TCAC”** shall mean the California Tax Credit Allocation Committee.

**“TCAC Regulations”** shall mean the California Tax Credit Regulations Implementing the Federal and State Low Income Housing Tax Credit Laws, California Code of Regulations, Title 4, Division 17, Chapter 1.

**“Title Company”** means First American Title Insurance Company.

#### Section 1.3 The Property

The Property is owned by Borrower, as described in the “Legal Description of the Property” (attached hereto as Attachment No. 1).

#### Section 1.4 City

City is a California municipal corporation existing under the laws of the State of California. The address of the City for purposes of receiving notices pursuant to this Agreement shall be:

To the City: Housing & Community Services Division  
City of Santa Clara  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Attention: Division Manager

Copy to: City Attorney’s Office  
City of Santa Clara  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Attention: City Attorney

Copy to: Carle, Mackie, Power & Ross LLP  
100 B Street, Suite 400  
Santa Rosa, CA 95401  
Attention: Henry Loh II

“City” as used in this Agreement includes the any assignee or successor to the rights, powers and responsibilities of City hereunder.

#### Section 1.5 Borrower

Borrower is Santa Clara 701, L.P., a California limited partnership. The address of Borrower for purposes of receiving notices pursuant to this Agreement is as follows:

To the Borrower: Santa Clara 701, L.P.  
c/o USA Properties Fund, Inc.  
3200 Douglas Blvd., Suite 200 Roseville, CA 95661  
Attention: Geoffrey Brown

Copy to: The Pinyon Group LLC  
949 S. Hope Street, Suite 100  
Los Angeles, CA 90015  
Attention: Jay Stark

Copy to: Bocarsly Emden Cowan Esmail & Arndt LLP  
633 W. 5th Street, 64th Floor  
Los Angeles, CA 90071  
Attention: Kyle Arndt, Esq.

Whenever the term “**Borrower**” is used herein, such term shall mean and include: (1) the Borrower as of the date hereof; and (2) any assignee of or successor to its rights, powers and responsibilities approved by the City or permitted by this Agreement.

#### Section 1.6 Assignments and Transfers

The qualifications and identity of the Borrower are of particular concern to the City. It is because of those qualifications and identity that the City has entered into this Agreement with the Borrower. No voluntary or involuntary successor in interest of the Borrower shall acquire any rights or powers under this Agreement except as expressly set forth herein.

Except for Permitted Transfers, the Borrower shall not assign all or any part of this Agreement without the prior written approval of the City. The City agrees to reasonably give such approval if in the reasonable determination of the City, the proposed assignee is comparable in all material respects (including experience, character and financial capability) to the Borrower. Any such change (or assignment of this Agreement in connection therewith) shall be by instruments satisfactory to the City, and be subject to the approval by the City of evidence of the proposed assignee’s qualifications to meet the obligations of the Borrower under this Agreement.

For the reasons cited above, the Borrower represents and agrees for itself and any successor in interest that, except for Permitted Transfers, without the prior written approval of the City, which shall not be unreasonably withheld, there shall be no cumulative change in ownership interest of any general partner of greater than 49%, or with respect to the identity of the parties in control of the Borrower or the degree thereof, by any method or means.

The Borrower shall promptly notify the City of any and all changes whatsoever in the identity of the parties in control of the Borrower or the degree thereof, of which it or any of its officers have been notified or otherwise have knowledge or information.

The Borrower shall not, except for Permitted Transfers, assign or attempt to assign this Agreement or any right herein, nor make any total or partial sale, transfer, conveyance or assignment of the whole or any part of the Property (referred to hereinafter as a “**Transfer**”) or any interest in Borrower, without prior written approval of the City, except as expressly permitted by this Agreement and the other City Loan Documents. Consent to one such transaction shall not be deemed to be a waiver of the right to require consent to future or successive transactions. Any such proposed transferee shall have the qualifications and financial responsibility necessary and adequate as may be reasonably determined by the City, to fulfill the obligations undertaken in this Agreement by the Borrower. Any such proposed transferee, by instrument in writing satisfactory to the City and in a form recordable among the land records, for itself and its successors and assigns, and for the benefit of the City shall expressly assume all of the obligations of the Borrower under this Agreement and agree to be subject to all conditions and restrictions applicable to the Borrower in this Agreement. There shall be submitted to the City for review all instruments and other legal documents proposed to affect any such transfer; and if approved by the City its approval shall be indicated to the Borrower in writing.

In the absence of specific written agreement by the City, no unauthorized Transfer, or approval thereof by the City, shall be deemed to relieve the Borrower or any other party from any obligations under this Agreement.

Notwithstanding this Section 1.6, Borrower shall have the right to make Permitted Transfers and execute deeds of trust and other instruments granting a security interest in the Property for the purposes of financing the Development Costs.

## PART 2. CITY LOAN

### Section 2.1 City Loan

City agrees to lend to the Borrower, and Borrower agrees to borrow from City, the City Loan. Concurrently with the execution of this Agreement, City and Borrower have executed and delivered the City Loan Documents.

### Section 2.2 Disbursement

Upon satisfaction of the Closing Requirements, the City Loan in a single lump sum shall be disbursed to Borrower in accordance with this Agreement. Notwithstanding anything to the contrary herein, the City shall not be obligated to provide the City Loan if the closing of the City Loan does not occur on or prior to such date.

City shall have no obligation to disburse any additional proceeds after the initial disbursement of the City Loan.

### Section 2.3 [Intentionally deleted.]

### Section 2.4 Subordination

City agrees that the City Loan and City Loan Documents (except the City Regulatory Agreement) shall be subordinate to the lien of each Senior Loan. City agrees to make such

modifications to this Agreement, and to execute such estoppel certificates, as may reasonably be requested by a Senior Lender and the Investor Limited Partner, provided that such modifications or certificates are consistent with the purpose of this Agreement and do not materially adversely affect the receipt of any material benefit by City hereunder. The City shall execute such Subordination Agreements as may reasonably be requested by any Senior Lender.

#### Section 2.5 Construction Loan

The Construction Loan is secured by Borrower's interest in the Project and the Improvements located thereon. In no event may the Construction Loan be cross-defaulted with any loan secured by property other than the Project or assets attached to property other than the Project.

#### Section 2.6 [Intentionally deleted.]

#### Section 2.7 [Intentionally deleted.]

#### Section 2.8 No Prepayment of Junior Debt

Borrower covenants and agrees that, unless and until all principal and interest outstanding under the City Loan are paid in full, Borrower shall not make any prepayment of amounts due on any debt secured by a lien junior in position to the City Deed of Trust. The foregoing shall not prohibit Borrower from making regularly scheduled payments of principal and interest on the any junior loan.

#### Section 2.9 No Pledging of City's Credit

Under no circumstances shall the Borrower have the authority or power to pledge the credit of the City or incur any obligation in the name of the City. Borrower shall save and hold harmless the City, its officers, employees, boards and commissions for expenses arising out of any unauthorized pledges of the City's credit by the Borrower under this Agreement. Under no circumstances shall the City have the authority or power to pledge the credit of the Borrower or incur any obligation in the name of the Borrower. City shall save and hold harmless the Borrower, its partners and members for expenses arising out of any unauthorized pledges of the Borrower's credit by the City under this Agreement.

#### Section 2.10 Acknowledgement of City Contributions; Use of City Name or Logo

Borrower agrees, at its own cost and expense, to acknowledge the contributions of the City in information released to the public or interested parties regarding the Project, including but not limited to brochures and press releases. However, the Borrower shall not use the City's name or insignia in such information, or in any other publicity pertaining to the services rendered under this Agreement, in any magazine, trade paper, newspaper or other medium without first obtaining the express written consent of the City.

#### Section 2.11 Ground Breaking and Grand Openings

To ensure proper protocol and recognition of the City staff and/or the City Council, Borrower shall cooperate with the City staff in the organization of any Project-related ground breaking, grand openings or any other such inaugural events/ceremonies sponsored by Borrower and celebrating the development which is the subject of this Agreement by providing the City staff with at least sixty (60) calendar days prior written notice of any such event.

### PART 3. DEVELOPMENT OF THE PROPERTY

#### Section 3.1 Land Use Approvals; Land Use Restrictions

It is the responsibility of the Borrower, without cost to City, to ensure that zoning of the Property and all applicable City land use requirements will be such as to permit development of the Property and construction of the Improvements and the use, operation and maintenance of such Improvements in accordance with the provisions of this Agreement. Nothing contained herein shall be deemed to entitle Borrower to any City of Santa Clara permit or other City approval necessary for the development of the Property, or waive any applicable City requirements relating thereto. This Agreement does not (a) grant any land use entitlement to Borrower, (b) supersede, nullify or amend any condition which may be imposed by the City of Santa Clara in connection with approval of the development described herein, (c) guarantee to Borrower or any other party any profits from the development of the Property, or (d) amend any City laws, codes or rules. This is not a Development Agreement as provided in Government Code Section 65864. Without cost to City, City shall provide appropriate technical assistance to Borrower in connection with Borrower's obtaining all necessary entitlements, permits and approvals for the construction of the Improvements.

Borrower shall construct the Project consistent with applicable Governmental Regulations, all applicable covenants, conditions and restrictions applicable to the Project, and all zoning, planning and design review requirements of the City and all permits and entitlements relating thereto.

#### Section 3.2 Permits and Entitlements

Prior to commencement of any work of improvement upon the Project, Borrower shall, at its own expense, secure or cause to be secured any and all permits, entitlements or approvals which may be required by the City in accordance with the Santa Clara City Code and land use entitlement process and by any other governmental entity with jurisdiction over the Project in accordance with applicable Governmental Regulations. The execution of this Agreement does not constitute the granting of or a commitment to obtain or grant any required land use entitlements or approvals required by the City.

#### Section 3.3 Condition of the Property

City makes no representation or warranty, express or implied regarding any conditions of the Property. It shall be the sole responsibility of the Borrower, at the City's expense, to investigate and determine all conditions of the Property and its suitability for the uses to which the Property is to be put in accordance with this Agreement. If the conditions of the Property are not in all respects entirely suitable for the use or uses to which the Property will be put, then it is

the sole responsibility and obligation of the Borrower, without cost to City, to take such action as may be necessary to place the Property in all respects in a condition entirely suitable for its development and use in accordance with this Agreement.

Borrower agrees to perform and be solely responsible for the clean-up of any Hazardous Substances on, in, under or within the Property, at the sole cost, risk and expense of Borrower, except to the extent that City had previous knowledge about such Hazardous Substances and failed to disclose such information to Borrower prior to the closing of the City Loan. Borrower shall defend, indemnify and hold harmless the City and its officers, agents, employees, contractors and attorneys from any claims, liability, injury, damages, costs and expenses (including, without limiting the generality of the foregoing, the cost of any required clean up of Hazardous Substances, and the cost of reasonable attorneys' fees) which may be sustained as the result of the presence or clean up of Hazardous Substances on, in, or under the Property.

#### Section 3.4 Scope of Development; Modification of Closing Requirements

The Property shall be developed in accordance with and within the limitations established in the Scope of Development attached to this Agreement as Attachment No. 3 and the permits issued by the City for the Project. The Scope of Development shall not be materially modified or amended except with the prior written consent of the City. Borrower shall not materially modify and shall construct, operate and maintain the Project in accordance with the Closing Requirements, or any matter approved by the City under the Closing Requirements, without the prior written approval of the City.

#### Section 3.5 Design; Architectural Quality

Borrower acknowledges and understands that the materials, workmanship, finish, design, components and general architectural quality of the Improvements to be constructed by Borrower under this Agreement will have a significant and continuing impact on the Project and the surrounding community and that the City's agreement to participate in assisting this Project is based upon Borrower's representation that the Project will be of high quality in design, construction and finish. Accordingly, Borrower understands and agrees that it will be required to develop the Project (i) by means of materials, workmanship and an overall design that will result in a residential development that is of high quality and of benefit to the Project and the community, and (ii) in accordance with applicable design guidelines. Borrower assumes all responsibility for the design and construction of, and shall let contracts for (or cause contracts to be let for), the construction of the Project. The City shall not be responsible to Borrower or to third parties in any way for any defects in the design of the Project, nor for any structural or other defects in any work done according to the approved design of the Project, nor for any delays reasonably caused by the review and approval of any items by the City under the City Loan Documents.

#### Section 3.6 Cost of Construction

The cost of planning, designing, developing and constructing the Project shall be borne solely by Borrower. Borrower will begin and complete all construction, development and other tasks specified therein within the times specified in the Schedule of Performance, subject to Force



Majeure Delay. The Schedule of Performance may be subject to revision from time to time as mutually agreed on in writing between Borrower and the City.

Borrower has proposed, and City has approved, the Project Budget appended to this Agreement. Borrower acknowledges that City is relying on Borrower's experience and expertise in establishing the costs for the Project, and Borrower represents that the Project Budget is based on the best, good faith estimate of Borrower of the costs that are likely to be incurred for the Project.

### Section 3.7 Schedule of Performance; Construction of Improvements

Borrower shall begin and complete all construction and development within the times specified in the Schedule of Performance, with such reasonable extensions of said times as may be granted by the City and subject to Force Majeure Delay. The Schedule of Performance is subject to revision from time to time as mutually agreed upon in writing by Borrower and City. In the event that the sum of the proceeds of the City Loan available for disbursement together with any other sources to complete the construction of the Improvements are, or at any time become, in the reasonable judgment of the City, insufficient to pay all costs to achieve Completion in accordance with this Agreement, then Borrower will pay such costs.

Borrower shall prosecute to completion the construction of the Improvements as provided in Plans and Specifications and this Agreement. During periods of construction, Borrower shall submit to the City a written report of the progress of the construction when and as requested by the City. The report shall be in such form and detail as may be reasonably required by the City and shall include a reasonable number of construction photographs (if requested) taken since the last report by Borrower.

### Section 3.8 Construction Contract

The City shall have the right, but not the obligation, to cure defaults under the Construction Contract and to assume Borrower's obligations and rights under the Construction Contract; provided that, such right to cure and assume the Construction Contract shall be subject to the rights, if any, of any Senior Lender with respect to such Construction Contract. Further, the Construction Contract shall set forth a reasonably detailed schedule for completion of each stage of construction.

The City approval of the Construction Contract shall not constitute a waiver by the City of any breach or violation of this Agreement that is a result of acts that are or purport to be in compliance with or in furtherance of said Construction Contract.

### Section 3.9 Subcontracts

All contracts with subcontractors shall be entered into with duly licensed and insured subcontractors. City shall have the right to request copies of the contracts with subcontractors.

### Section 3.10 Role of Architect

Borrower shall use commercially reasonable efforts to cause, and its written agreements with the architect for the Project shall require, that the architect supervise the construction of the Project, attend all draw meetings, and sign off on all Change Orders and construction draws with respect to the Project. Borrower shall provide the City with copies of all written agreements with the architect.

### Section 3.11 Commercial Space

Upon closing of the Loan, the Property and the Project will consist of two air condominium units: (a) the Commercial Space, and (b) the balance of the Property. For purposes of the City Loan Documents, the “**Property**” and the “**Project**” shall include the Commercial Space and, upon the disposition of the Commercial Space in accordance with this Agreement, the terms “**Property**” and the “**Project**” shall no longer the Commercial Space.

The Commercial Space shall be constructed by Borrower and transferred to [name] or its successors and assigns (the “**Commercial Space Owner**”) upon completion of the Commercial Space in exchange for a purchase price of \$1,800,000 (the “**Commercial Space Purchase Price**”) pursuant to the [describe agreement governing sale], a copy of which has been provided to the City (the “**Commercial Space PSA**”). Developer shall cause the Commercial Space to be sold in accordance with the Commercial Space PSA. Upon the transfer of the Commercial Space to the Commercial Space Owner and the payment of the Commercial Space Purchase Price, the City shall release any security interest held thereby in the Commercial Space, and shall release the Commercial Space from the City Regulatory Agreement.

Except with the written approval of the City, which shall no be unreasonably withheld, conditioned or delayed, Borrower shall comply with the Commercial Space PSA and shall not dispose, sell, lease or otherwise transfer or convey any interest in the Commercial Space or any portion thereof except in accordance with the Commercial Space PSA.

***[Revisit and modify terms as necessary prior to loan closing.]***

### Section 3.12 Prevailing Wages and Davis Bacon Act; Indemnity Regarding Labor Standards and Construction of Project

Borrower shall cause the construction of the Project and the payment of all wages in connection therewith to be in accordance with the provisions of California Labor Code §§ 1720 through 1861 (collectively, the “**Prevailing Wage Law**”), to the extent applicable to the Project.

To the fullest extent permitted by law, Borrower shall indemnify, defend and hold harmless the City Indemnitees from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys’ fees and court costs), where the same arise out of, are a consequence of, are in connection with, or are in any way attributable to, in whole or in part, to: (i) Borrower’s or the contractor’s failure to comply with all applicable laws, including all applicable federal and state labor standards, including, without limitation, the requirements of the Prevailing Wage Law, if applicable, (ii) defects in the design or construction of the Project, including (without limitation) the violation of any laws, and for defects in any work done according to the City approved plans, or (iii) any breach or failure to perform or act pursuant to this Agreement by Borrower, or by any individual or entity that Borrower shall engage in connection with the Project, including but not

limited to officers, agents, employees or contractors of Borrower. Notwithstanding the foregoing, Borrower shall not be required to indemnify and hold harmless the City Indemnitees for liability attributable to the gross negligence or intentional misconduct of the City Indemnitees.

### Section 3.13 Compliance with Law

Borrower shall comply with all Governmental Regulations in the construction, use and operation of the Project, including all applicable federal, state and local statutes, ordinances, regulations and laws, including without limitation, all applicable federal, state, and local labor standards, City zoning and development standards, building, plumbing, mechanical and electrical codes, and all other provisions of the Santa Clara City Code, and all applicable disabled and handicapped access requirements, including without limitation (as currently exists or may be amended from time to time) the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq., Government Code § 4450, et seq., and Government Code § 11135, et seq.

### Section 3.14 Nondiscrimination During Construction

Borrower certifies and agrees that all persons employed or applying for employment by it, its affiliates, subsidiaries, or holding companies, and all contractors, bidders and vendors, are and will be treated equally by it without regard to, or because of race, color, religion, ancestry, national origin, sex, age, pregnancy, childbirth or related medical condition, medical condition (cancer related) or physical or mental disability, and in compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq., the Federal Equal Pay Act of 1963, 29 U.S.C. § 206(d), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq., the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b, et seq., 42 U.S.C. § 1981, the California Fair Employment and Housing Act, Government Code § 12900, et seq., the California Equal Pay Law, Labor Code § 1197.5, Government Code § 11135, the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (applicable to those with fifteen (15) or more employees), Executive Order 11246-Equal Employment Opportunity, as amended, its implementing regulations at 41 CFR Part 60, and all other applicable anti-discrimination laws and regulations of the United States and the State of California as they now exist or may hereafter be amended. Nondiscrimination notices shall be included in all job postings and posted in a visible place in the offices of all applicable parties.

### Section 3.15 General Indemnity

To the maximum extent permitted by law, Borrower agrees to and shall defend, indemnify and hold the City and the City Indemnitees harmless from and against all claims, liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) arising from, in connection with or as a result of the death of any person or any accident, injury, loss, or damage whatsoever caused to any person or to the property of any person resulting from the alleged negligent or intentional acts or omissions of Borrower, its officers, agents or employees in the performance of this Agreement or construction of the Project. This indemnification provision supplements and in no way limits the scope of the indemnification set out elsewhere in this Agreement. The indemnity obligation of Borrower under this section shall survive the expiration or termination, for any reason, of this Agreement.

Without affecting the rights of the City Indemnitees under any provisions of this Agreement, Borrower shall not be required to indemnify and hold harmless the City Indemnitees for liability attributable to the gross negligence or intentional misconduct of the City Indemnitees, provided such gross negligence or intentional misconduct is determined by agreement between the parties or by the findings of a court of competent jurisdiction. In instances where the City Indemnitees are shown to have been grossly negligent or to have acted with intentional misconduct and where the City Indemnitees' gross negligence or intentional misconduct accounts for only a percentage of the liability involved, the obligation of Borrower will be for that entire portion or percentage of liability not attributable to the gross negligence or intentional misconduct of the City Indemnitees.

### Section 3.16 Insurance Requirements

During the term of this Agreement or the City Regulatory Agreement, and for any time required thereafter as set forth below, the Borrower shall purchase and maintain in full force and effect, at no cost to the City, the following insurance policies:

- (1) Commercial general liability policy (bodily injury and property damage);
- (2) Comprehensive automobile liability policy; and
- (3) Workers' compensation and employer's liability policy.

Said policies shall be maintained with respect to employees and vehicles assigned to the performance of work under this Agreement with coverage amounts, required endorsements, certificates of insurance, and coverage verifications as defined in Attachment No. 4 entitled "Insurance Requirements" attached hereto.

### Section 3.17 Disclaimer of Responsibility by the City

Except as provided in this Agreement, the City neither undertakes nor assumes nor will have any responsibility, right or duty to Borrower or to any third party to review, inspect, supervise, pass judgment upon or inform Borrower or any third party of any matter in connection with the Property, whether with respect to the condition of the Property or its quality, adequacy or suitability to the Project, or with respect to any person furnishing services with regard to the Property, or otherwise. Borrower and all third parties shall rely upon its or their own judgment regarding such matters, and any review, inspection, supervision, exercise of judgment or information supplied to Borrower or to any third party by the City or the City in connection with such matter is for the public purpose of providing affordable housing, and neither Borrower (except for the purposes set forth in this Agreement) nor any third party is entitled to rely thereon.

### Section 3.18 Rights of Access

At any time prior to Completion, City and its representatives shall have the reasonable right of access to the Property, upon two (2) Business Days' written notice to Borrower (except in the case of an emergency, in which case City shall provide such notice as may be practical under the circumstances), without charges or fees, at normal construction hours during the period of construction for the purposes of this Agreement, including, but not limited to, the inspection of the

work being performed in constructing the Improvements. Such representatives of City shall be those who are so identified in writing by City.

### Section 3.19 Taxes and Assessments

Borrower shall pay prior to delinquency all ad valorem real estate taxes and assessments on the Project during Borrower's ownership thereof, subject to Borrower's right to contest in good faith any such taxes through the appropriate processes. Borrower shall remove or have removed any levy or attachment made on the Project or any part thereof, or assure the satisfaction thereof within a reasonable time. Nothing herein contained shall be deemed to prohibit the Borrower from (a) obtaining an abatement of real estate taxes under Revenue and Taxation Code Section 214(g) or (b) contesting the validity or amount of any tax assessment, encumbrance or lien, or to limit the remedies available to the Borrower in respect thereto.

### Section 3.20 Liens and Stop Notices

Except for the liens on the Project granted in connection with the City Loan, the Senior Loans and other approved loans that are included in the approved Project Pro Forma, Borrower shall not allow to be placed on the Project or any part thereof any lien or stop notice. If a claim of a lien or stop notice is given or recorded affecting the Project, Borrower shall within thirty (30) calendar days of such recording or service or within ten (10) Business Days of the City's demand, whichever last occurs: (a) pay and discharge the same (or cause the general contractor to do so); (b) effect the release thereof by recording and delivering to the City a surety bond in sufficient form and amount; (c) demonstrate to the City's reasonable satisfaction that One Hundred Twenty Five Percent (125%) of the stop notice amount is set aside in the unfunded portion of the Construction Budget to account for such claim; or (d) provide such other assurances which the City deems, in its sole discretion, to be satisfactory for the payment of such lien or bonded stop notice and for the full and continuous protection of the City from the effect of such lien or bonded stop notice.

### Section 3.21 Rights to Architectural Agreements and Plans and Specifications

Subject to the rights of the Senior Lenders, Borrower has assigned to City as security for Borrower's obligations hereunder (a) all environmental, architectural, design, engineering and development agreements, and any and all amendments, modifications, supplements, addenda and general conditions thereto, and (b) all reports, studies, plans and specifications, shop drawings, working drawings, amendments, modifications, changes, supplements, general conditions and addenda thereto, heretofore or hereafter prepared by any architect, engineer or other person or entity (collectively the "**Architect**"), for or on behalf of Borrower in connection with the construction of the Project pursuant to that certain Assignment of Agreements by Borrower for the benefit of City dated as of the date hereof.

### Section 3.22 Security Financing; Right of Holders

(a) City Approval of Financing Liens All mortgages and deeds of trust to be recorded against the Project prior to Conversion shall be approved by City.

(b) Holder Not Obligated to Construct Project Improvements The holder of any mortgage or deed of trust or other security interest recorded against the Project will in no way be obligated by the provisions of this Agreement to construct or complete the Improvements or to guarantee construction or completion.

(c) Notice of Default to Mortgage, Deed of Trust or Other Security Interest Holders; Right to Cure Whenever the City will deliver any notice or demand to Borrower with respect to any breach or default by Borrower in completion of construction of the Improvements, the City will at the same time deliver to each holder of record of any mortgage, deed of trust or other security interest recorded against the Project, provided that failure to provide such notice shall not affect the City's remedies hereunder. Each holder will (insofar as the rights of the City are concerned) have the right at its option within thirty (30) calendar days after the receipt of the notice, to cure or remedy or commence to cure or remedy any default and to add the cost to the security interest debt and the lien on its security interest. Nothing contained in this Agreement will be deemed to permit or authorize the holder to undertake or continue the construction or completion of the Improvements (beyond the extent necessary to conserve or protect the Improvements or construction already made) without first having expressly assumed Borrower's obligations to the City by written agreement satisfactory to the City. The holder in that event must agree to complete, in the manner provided in this Agreement, the Improvements to which the lien or title of such holder relates, and submit evidence satisfactory to the City that it has the qualifications and financial responsibility necessary to perform the obligations. Any holder properly completing the Improvements will be entitled, upon written request made to the City, to a Release of Construction Covenants from the City.

### Section 3.23 Liens on Personal Property

Other than in connection with the provision of vending, laundry, cable, satellite TV, or telecommunications services at the Project, Borrower shall not install in, or use in connection with, the Project, any personal property which any party other than the City or Senior Lenders have the right to remove or repossess under any circumstances, or on which any party other than the City or Senior Lenders has a lien (other than liens permitted in accordance with the terms of this Agreement).

### Section 3.24 Removal of Personal Property

Borrower shall not cause or permit the removal from the Project of any items of personal property owned by Borrower (other than tools and equipment used in the development of the Project) unless (i) there is no uncured event of default by Borrower under this Agreement, and (ii) Borrower promptly substitutes and installs on the Project other items of equal or greater value in the operation of the Project, all of which items shall be free of liens (other than liens permitted in accordance with the terms of this Agreement) and shall be subject to the lien of the City Deed of Trust, and Borrower executes and delivers to the City all documents reasonably required by the City in connection with the attachment of such liens to such items. Borrower shall keep detailed records of each such removal and shall make such records available to the City upon written request from time to time.

### Section 3.25 Release of Construction Covenants

Promptly after Completion of the Improvements, as generally and specifically required by this Agreement and in particular the Scope of Development, the City shall furnish Borrower with a Release of Construction Covenants upon written request therefor by Borrower. The City shall not unreasonably withhold such Release of Construction Covenants and such Release of Construction Covenants shall be issued so long as Borrower has constructed and developed the Property in accordance with this Agreement and substantially in accordance with the construction drawings approved by the City for the Project. Such Release of Construction Covenants shall be, and shall so state, conclusive determination of satisfactory completion of all of the construction obligations required by this Agreement. The Release of Construction Covenants shall be in a form mutually, reasonably, and in good faith agreed upon by City and Borrower and shall be a conclusive determination of satisfactory completion of the Project and all construction obligations required by this Agreement. Any party then owning or thereafter purchasing, leasing or otherwise acquiring any interest in the Project shall not (because of such ownership, purchase, lease or acquisition) incur any construction obligation or liability under this Agreement.

The Release of Construction Covenants shall be in such form as to permit it to be recorded in the Recorder's Office of Santa Clara County. Certificates of Completion of construction for less than the completed Improvements and development of the entire Property shall not be recorded.

If the City refuses or fails to furnish a Release of Construction Covenants for the Property after written request from Borrower, the City shall, within thirty (30) days of the written request, provide Borrower with a written statement of the reasons the City refused or failed to furnish a Release of Construction Covenants. The statement shall also contain the City's opinion of the action Borrower must take to obtain a Release of Construction Covenants. If the reason for such refusal is confined to the immediate availability of specific items or materials for landscaping, and/or minor items, the City will issue its Release of Construction Covenants upon the posting of a bond by Borrower with the City in an amount representing a fair value of the work not yet completed.

Such Release of Construction Covenants shall not constitute evidence of compliance with or satisfaction of any obligation of Borrower to the beneficiary of the Construction Loan Deed of Trust or any other Person. Such Release of Construction Covenants is not a notice of completion as referred to in Section 3093 of the California Civil Code.

### Section 3.26 Developer Fee

Borrower shall not receive payments of the Developer Fee in excess of the amounts or ahead of a written schedule contained in the Project Pro Forma approved by the City.

Borrower covenants and agrees that it shall not receive payments of Developer Fee beyond the first payment agreed to in the schedule described above unless and until it has demonstrated to the City's reasonable satisfaction that all applicable prevailing wage obligations with respect to the construction of the Project have been met in accordance with the terms and conditions of the City Loan Documents. Borrower further agrees that in the event any prevailing wage obligations, draw holdbacks or related fees that may become payable to the City hereunder cannot be funded from any other source, that such amounts shall be payable to the City from Developer Fee.



In the event that actual construction costs exceed the Construction Budget, Borrower shall defer the amount of the Developer Fee necessary to cover the actual construction costs to the extent unfunded by sources other than the City Loan and such portion of the Developer Fee shall be considered deferred Developer Fee for purposes of this Agreement.

#### PART 4. COMPLIANCE WITH LABOR LAWS

Borrower shall comply with all applicable prevailing wage requirements of the Davis-Bacon Act and implementing rules and regulations (40 U.S.C. 276a-276a-5); the Copeland "Anti-Kickback" Act (47 USC 276(c)) which requires that workers be paid at least once a week without any deductions or rebates except permissible deductions; the Contract Work Hours and Safety Standards Act – CWHSSA (40 USC 327-333) which requires that workers receive "overtime" compensation at a rate of 1-1/2 times their regular hourly wage after they have worked 40 hours in one week; and Title 29, Code of Federal Regulations, Subtitle A, parts 1.3 and 5 are the regulations and procedures issued by the Secretary of Labor for the administration and enforcement of the Davis-Bacon Act, as amended. Borrower shall also comply with all applicable provisions of California Labor Code and regulations promulgated thereunder (including without limitation, Sections 1720 et seq. and Title 8 of the California Code of Regulations Sections 16000 et seq.) governing the payment of prevailing wages, as determined by the Director of the California Department of Industrial Relations, in regards to work performed and/or funded under this Agreement.

Upon the written request of the City, Borrower shall provide written evidence of compliance with this Part 4.

#### PART 5. USE OF THE PROPERTY

##### Section 5.1 Use Covenants

Borrower covenants and agrees for itself, its successors, its assigns, and every successor in interest to the Project or any part thereof, that the Project shall be used, maintained and operated in compliance with the City Regulatory Agreement. Borrower further covenants and agrees for itself and its successors and assigns that the Affordable Units shall be continuously occupied or held vacant and made available to Qualified Tenants at an Affordable Rent during the Restricted Period. All uses conducted on the Project, including, without limitation, all activities undertaken by Borrower pursuant to this Agreement, shall conform to all applicable provisions of the Santa Clara City Code.

##### Section 5.2 Affordable Housing Requirements

###### (a) Affordable Units

Borrower covenants and agrees to make available, restrict occupancy to, and rent the Affordable Units solely to Qualified Tenants at an Affordable Rent during the Restricted Period.



(b) Duration of Affordability Requirements

The Affordable Units shall be subject to the requirements of this Section throughout the Restricted Period.

(c) Selection of Qualified Tenants

Prior to selecting any tenants for the Affordable Units, Borrower shall submit to the City the Management Plan (the terms of which shall comply with the City Regulatory Agreement) which shall include proposed tenant selection policies and criteria for the Affordable Units. The City shall review the Management Plan and approve or disapprove it within thirty (30) Business Days, provided that such approval shall not be unreasonably conditioned or withheld. City's failure to respond within the timeframe set forth in the preceding sentence shall be deemed approval. If the Management Plan is not approved by the City, the City shall set forth in writing and notify Borrower of the City's reasons for withholding such approval. Borrower shall thereafter submit a revised Management Plan for City approval within fifteen (15) Business Days, which approval shall be granted or denied within fifteen (15) Business Days in accordance with the procedures set forth above.

In addition, the tenant selection policies and criteria shall:

- (1) Be consistent with the purpose of providing housing for Qualified Tenants;
- (2) Be reasonably related to program eligibility and the applicants' ability to perform the obligations of the lease;
- (3) Provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable; and
- (4) Give prompt written notification to any rejected applicant of the grounds for any rejection.

Borrower shall manage and operate the Property in accordance with the approved Management Plan, including such amendments as may be approved in writing from time to time by the Borrower and the City, for the entire Restricted Period.

In addition, and to the extent permitted by any applicable Governmental Regulations, including without limitation, Fair Housing Laws and TCAC rules and regulations, preference shall also be given to tenant applicants residing in the vicinity of the Project first and then within the City limits.

In connection with its Qualified Tenant selection process, [Borrower agrees to obtain criminal background checks on all tenant applicants in accordance with all applicable Governmental Regulations.] Borrower shall determine, in accordance with all applicable Governmental Regulations, whether or not the tenant applicant's arrest and/or conviction record, if any, warrants denial of such tenant's application. Borrower shall maintain or destroy the results of such criminal background checks in accordance with all applicable Governmental Regulations.

(d) Income Requirements

In order to assure compliance with the rent and occupancy restrictions set forth in the City Regulatory Agreement, Borrower shall, prior to the initial leasing of an Affordable Unit, verify the income of the proposed Household. Thereafter, on an annual basis throughout the Restricted Period, Borrower shall obtain and cause to be submitted to the City, at Borrower's expense, a verification of all household sources of income as required by the City Regulatory Agreement demonstrating that such household constitutes a Qualified Tenant in accordance herewith and meets the eligibility requirements established for the Affordable Unit.

(e) Lease Requirements

Prior to rental of any of the Affordable Units, Borrower shall submit a standard lease form to the City for the City's approval, which approval shall not unreasonably be withheld, conditioned or delayed. The standard lease agreement shall not be amended in any material respects (except as required by applicable laws) without prior written the City approval. Borrower shall enter into a lease in the form approved by the City, and containing those provisions required by the City Regulatory Agreement, with each Qualified Tenant of an Affordable Unit.

Section 5.3 Long Term Management of the Project

Borrower and the Property Manager shall enter into a written agreement regarding the services of the Property Manager (the "**Management Agreement**"). Property management fees paid to the Property Manager shall not exceed nine percent (9%) of gross rents on an annual basis. The Management Agreement shall contain, inter alia, an express provision (a) obligating the Property Manager to cooperate fully with the City with respect to the on-site inspections to be made by the City pursuant to the City Regulatory Agreement, and (b) indicating that the term thereof shall not exceed twelve (12) months including a provision for termination by Borrower with or without cause at any time upon notice not to exceed thirty (30) days. Borrower shall obtain the City's written approval, not to be unreasonably withheld, conditioned or delayed, of the Property Manager prior to entering into any Management Agreement; provided that the City hereby approves USA Multifamily Management, Inc. as the initial Property Manager.

Section 5.4 Annual Budget and Quarterly Reporting

Borrower shall submit on or before the first day of each fiscal year after Completion of construction for the entire Restricted Period an estimated annual budget for management of the Property (the "**Annual Project Budget**") in accordance with the Management Plan. The Annual Project Budget shall include all necessary operating expenses, current maintenance charges, expenses of reasonable upkeep and repairs, taxes and special assessment levies, prorated amount required for insurance and all other expenses incident to the operation of the Project; and shall show the expected revenues to pay such expenses, including annual debt service requirements and reserve fund deposits and balances. Upon receipt by the City of a complete the Annual Project Budget, including any amendments proposed by the Borrower, shall be subject to the approval of the City, the City shall promptly review the same and approve or disapprove it within ten (10) Business Days, provided that such approval shall not be unreasonably conditioned or withheld. If the Annual Project Budget is not approved by the City, the City shall set forth in writing and notify Borrower of the City's reasons for withholding such approval. Borrower shall thereafter submit a

revised Annual Project Budget for City approval within ten (10) Business Days, which approval shall be granted or denied within ten (10) Business Days in accordance with the procedures set forth above. If the City does not disapprove in writing an Annual Project Budget or revision thereof within such ten (10) Business Day period, then such Annual Project Budget shall be deemed approved by the City.

Beginning on the date of first occupancy, for each fiscal year of the Restricted Period, Borrower shall also submit on a quarterly basis a quarterly report for the management of the Property (the “**Quarterly Report**”) in a form that is reasonably acceptable to the City. The Quarterly Report shall include a profit and loss statement, budget to date figures, and occupancy report. The City, in his sole discretion may waive the requirement of the Quarterly Report for one or more quarterly reporting periods. However, such waiver shall not operate to waive any subsequent requirement of the Quarterly Report for the Restricted Period upon written notice to Borrower by the City.

#### Section 5.5 Maintenance of the Property

Prior to the issuance of the Certificate of Occupancy, the Borrower shall prepare and submit to the City for review and approval a program (the “**Maintenance Program**”) for the exterior and interior maintenance of the Property and the Improvements. The Maintenance Program may be included within its Management Plan.

The Maintenance Program shall describe in reasonable detail the standards to be followed in maintaining the interior and exterior of the Improvements, including a schedule indicating the proposed frequency of each element of maintenance, and shall include, at a minimum, the following: periodic cleaning of the interior and exterior of the Improvements, including windows; removing graffiti; removing debris and waste materials and otherwise maintaining indoor and outdoor areas of the Property; maintaining any lawns, plants, shrubs and trees or other landscaping planted on the Property; performing inspections of all exterior features to determine whether repairs are required; conducting periodic protective treatments such as rust removal and caulking; conducting repairs to facades, roof, doors, windows and other exterior features; maintaining fencing and other security devices and systems; periodic repainting of the exterior; periodic repainting of the interior units and common areas; periodic replacing of the interior unit carpets; checking building systems, including, but not limited to the heating and cooling systems, smoke alarms and water heaters; checking interior unit appliances; and monitoring interior unit bathrooms for mold/mildew. The Maintenance Program, including any amendments proposed by the Borrower, shall be subject to the reasonable approval of the City.

At all times after Completion of construction during the Restricted Period, the Borrower shall maintain the Property and the Improvements in accordance with the approved Maintenance Program. To implement this requirement, Borrower agrees to budget sufficient funds to pay for all reasonably anticipated costs (as indicated in the Annual Maintenance Budget). In the event the Borrower fails to maintain the Property and the Improvements in accordance with the approved Maintenance Program, and does not cure such failure within thirty (30) days following notice from the City, the City shall have the right, but not the obligation, to enter the Property, correct any violation, and hold the Borrower responsible for the cost thereof, and such cost, until paid, shall constitute a lien on the Property. Prior to undertaking any work to correct any such maintenance

deficiency, the City shall provide written notice that the Borrower correct the deficiency within a reasonable time. The Borrower shall have a reasonable time in which to comply following such notice from the City.

#### Section 5.6 Nondiscrimination Covenants

Borrower covenants and agrees 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, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of any Unit or the Project nor shall Borrower establish or permit any such practice or practices of discrimination or segregation with reference to the location, subtenants, or vendees of any Unit or in connection with the employment of persons for the construction, operation and management of the Project.

Notwithstanding the foregoing paragraph, with respect to familial status, the foregoing paragraph shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in the foregoing paragraph shall 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 the foregoing paragraph.

All deeds, rental agreements, leases, or contracts made or entered into by Borrower as to the Units or the Project or any portion thereof, shall contain and be subject to the following nondiscrimination and nonsegregation clauses:

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, 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 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."

Notwithstanding the foregoing paragraph, with respect to familial status, the foregoing paragraph shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in the foregoing paragraph shall 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 the foregoing paragraph.

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 him or her, and this lease is made and accepted upon and subject to the following conditions: 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, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, 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, sublessees, subtenants, or vendees in the premises herein leased."

Notwithstanding the foregoing paragraph, with respect to familial status, the foregoing paragraph shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in the foregoing paragraph shall 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 the foregoing paragraph.

c. In contracts: "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, in connection with the performance of this contract nor shall the contracting party himself or herself, 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, sublessees, subtenants, contractors, subcontractors or vendees with respect to the premises."

Notwithstanding the foregoing paragraph, with respect to familial status, the foregoing paragraph shall not be construed to apply to housing for older persons, as defined in Section 12955.9 of the Government Code. With respect to familial status, nothing in the foregoing paragraph shall 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 the foregoing paragraph.

The covenants established herein shall, without regard to technical classification and designation, be binding on Borrower and any successors in interest to the Project, or any part thereof, for the benefit and in favor of the City and its successors and assigns. The covenants against discrimination shall run with the land and remain in effect in perpetuity.

#### Section 5.7 Conflict with the City Regulatory Agreement

In the event of a conflict between this Part 5 and the City Regulatory Agreement, the provisions of the City Regulatory Agreement shall control.

## Section 5.8 Reserves

(a) Operating Reserve. If requested by any Senior Lender or Investor Limited Partner, Borrower covenants and agrees to fund an operating reserve in the amount required by the Senior Lender or Investor Limited Partner ("**Operating Reserve**") upon completion of construction. Such amounts shall be held in a separate bank account. Funds in the Operating Reserve shall be used solely to cover cash flow deficiencies of the Project. All withdrawals from the Operating Reserve are subject to the prior written consent of the City, which such consent shall not be unreasonably withheld or delayed.

(b) Replacement Reserves. If requested by any Senior Lender or Investor Limited Partner, Borrower covenants and agrees to fund a replacement reserve in a capitalized amount as of the Conversion from operating income on monthly basis in amount required by the Senior Lender or Investor Limited Partner ("**Replacement Reserve**"). Such amounts shall be held in a separate bank account. Funds in the Replacement Reserve shall be used solely to cover capital replacements for the Project. All withdrawals from the Replacement Reserve are subject to the prior written consent of the City, which such consent shall not be unreasonably withheld or delayed.

## Section 5.9 Hazardous Substances

Concurrently with the execution of this Agreement, City and Borrower have entered into the City Environmental Indemnity.

## Section 5.10 City Monitoring Fee

On or before July 1 of each year, commencing on the July 1 following Conversion until the expiration of the Restricted Period, Borrower covenants and agrees to pay to the City the Monitoring Fee (as defined in the City Regulatory Agreement) for the immediately preceding calendar year or portion thereof, prorated for the number of months in the partial year.

## Section 5.11 Effect of Violation of the Terms and Provisions of this Agreement

The City is deemed a beneficiary of the terms and provisions of this Agreement and the covenants herein, both for and in its own right and for the purposes of protecting the interests of the community and other parties, public or private, for whose benefit this Agreement and the covenants running with the land have been provided. The City shall have the right if the covenants contained in this Agreement are breached and such breach is not cured within the time periods set forth in Section 6.1, to exercise all rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breaches to which it or any other beneficiaries of this Agreement and covenants are entitled.

## PART 6. DEFAULTS, REMEDIES, AND TERMINATION

### Section 6.1 Defaults — General

Subject to the Force Majeure Delay and any extensions of time approved in writing by the parties, failure or delay by either party to perform any term or provision of this Agreement at the time indicated in this Agreement constitutes a default under this Agreement. As provided, hereinbelow, the party who so fails or delays must immediately commence to cure, correct or remedy such failure or delay and shall complete such cure, correction or remedy with reasonable diligence. The injured party shall give written notice of default to the party in default, specifying the default complained of by the injured party. Failure or delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default. Except as otherwise expressly provided in this Agreement, any failures or delays by either party in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by either party in asserting any of its rights and remedies shall not deprive either party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

If a monetary event of default occurs, prior to exercising any remedies hereunder, the injured party shall give the party in default written notice of such default. The party in default shall have a period of thirty (30) days after such notice is given within which to cure the default prior to exercise of remedies by the injured party.

If a non-monetary event of default occurs, prior to exercising any remedies hereunder, the injured party shall give the party in default notice of such default. If the default is reasonably capable of being cured within thirty (30) days, the party in default shall have such period to effect a cure prior to exercise of remedies by the injured party. If the default is such that it is not reasonably capable of being cured within thirty (30) days, and the party in default (i) initiates corrective action within said period, and (ii) diligently, continually, and in good faith works to effect a cure as soon as possible, then the party in default shall have such additional time as is reasonably necessary to cure the default prior to exercise of any remedies by the injured party.

If Borrower fails to take corrective action or cure the default within a reasonable time, the City shall give the Senior Lender and the Investor Limited Partner notice thereof. Subject to the terms of the Borrower's partnership agreement, the Investor Limited Partner may take such action, including removing and replacing the general partner or managing member of the Borrower with a substitute general partner or member, who shall effect a cure within a reasonable time thereafter in accordance with the foregoing provisions. The City agrees to accept cures tendered by any Senior Lender or Investor Limited Partner within the cure periods provided in the Note. Additionally, in the event the Senior Lender or Investor Limited Partner is precluded from curing a non-monetary default due to a bankruptcy, injunction, or similar proceeding by or against Borrower or the general partner of Borrower, the City agrees to forbear from completing a foreclosure (judicial or nonjudicial) during the period during which the Senior Lender or Investor Limited Partner is so precluded from acting, not to exceed 90 days, provided such Investor Limited Partner and Senior Lender are otherwise in compliance with the foregoing provisions. In no event shall the City be precluded from exercising remedies if its rights become or are about to become materially jeopardized by any failure to cure a default or the default is not cured within one hundred eighty (180) days after the first notice of default is given.

In the event of a default by Borrower of any of its obligations under the City Loan Documents and expiration of any applicable grace, notice and/or cure periods, Borrower shall pay

to City interest on the outstanding principal of the City Loan, at an annual rate equal to the lesser of (i) ten percent (10%) or (ii) the highest interest allowed by law, from the date of the default until the date that the default is cured or the City Loan is repaid in full.

City shall send to the Investor Limited Partner a copy of all notices of default and all other notices that City sends to Borrower, at the address for the Investor Limited Partner as provided by written notice to City by Borrower.

#### Section 6.2 Institution of Legal Actions

Subject to the notice and cure provisions of Section 6.1, in addition to any other rights or remedies (and except as otherwise provided in this Agreement), either party may institute legal action to cure, correct or remedy any default, to recover damages for any default, or to obtain any other remedy consistent with the purpose of this Agreement. Such legal actions must be instituted in the Superior Court of the County of Santa Clara, State of California, in any other appropriate court of that county.

#### Section 6.3 Applicable Law

The laws of the State of California shall govern the interpretation and enforcement of this agreement.

#### Section 6.4 Acceptance of Service of Process

In the event that any legal action is commenced by the Borrower against the City, service of process on the City shall be made by personal service upon the City Manager of the City, or in such other manner as may be provided by law.

In the event that any legal action is commenced by the City against the Borrower, service of process on the Borrower shall be made by personal service upon the Borrower (or upon a general partner, managing member or officer of the Borrower) and shall be valid whether made within or without the State of California, or in such manner as may be provided by law.

#### Section 6.5 Rights and Remedies Are Cumulative

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

#### Section 6.6 Damages

If either party defaults with regard to any of the provisions of this Agreement, subject to the notice and cure provisions of Section 6.1 and the non-recourse provisions of Section 6.10, the defaulting party shall be liable to the non-defaulting party for any damages caused by such default, and the non-defaulting party may, after such notice and opportunity to cure (but not before) commence an action for damages against the defaulting party with respect to such default.



Notwithstanding the foregoing, neither Borrower nor City shall have the right to recover any punitive, consequential, or special damages.

#### Section 6.7 Specific Performance

If either party defaults with regard to any of the provisions of this Agreement, subject to the notice and cure provisions of Section 6.1, the non-defaulting party, at its option, may, after such notice and opportunity to cure (but not before) commence an action for specific performance of the terms of this Agreement pertaining to such default.

#### Section 6.8 Termination by Either Party

Either party shall have the right to terminate this Agreement in the event the other party is in default of any material term or provision of this Agreement, and, following notice, fails to cure such default within the time provided in Section 6.1.

#### Section 6.9 Automatic Termination

This Agreement shall automatically terminate upon repayment of the City Loan in full.

#### Section 6.10 Limited Recourse Obligations

Subject to the provisions and limitations of this Section 6.10, the obligation to repay the City Loan is a nonrecourse obligation of the Borrower and (a) neither Borrower nor any general partner or limited partner of Borrower shall have any personal liability for repayment of the City Loan, except as provided in this Section 6.10, and (b) the sole recourse of City shall be the exercise of its rights against the Property and any related security for the City Loan.

Provided, however, that the foregoing shall not (a) constitute a waiver of any obligation evidenced by the City Note or the City Deed of Trust; (b) limit the right of the City to name Borrower as a party defendant in any action or suit for judicial foreclosure and sale under the City Note or the City Deed of Trust or any action or proceeding thereunder so long as no judgment in the nature of a deficiency judgment shall be asked for or taken against Borrower; (c) release or impair the City Note or the City Deed of Trust; (d) prevent or in any way hinder City from exercising, or constitute a defense, an affirmative defense, a counterclaim, or other basis for relief in respect of the exercise of, any other remedy against the mortgaged Property or any other instrument securing the City Note or as prescribed by law or in equity in case of default; (e) prevent or in any way hinder City from exercising, or constitute a defense, an affirmative defense, a counterclaim, or other basis for relief in respect of the exercise of, its remedies in respect of any deposits, insurance proceeds, condemnation awards or other monies or other collateral or letters of credit securing the City Note; (f) relieve Borrower of any of its obligations under any indemnity delivered by Borrower to City; or (g) affect in any way the validity of any guarantee or indemnity from any person other than the Borrower of all or any of the obligations evidenced and secured by the City Note or the City Deed of Trust. The foregoing provisions of this paragraph are limited by the provision that in the event of the occurrence of a default, Borrower shall have personal liability hereunder for any deficiency judgment, but only if and to the extent Borrower, its principals, shareholders, partners received rentals, other revenues, or other payments or proceeds in respect of the mortgaged Property after the occurrence of such default, which rentals, other revenues, or

other payments or proceeds have not been used for the payment of ordinary and reasonable operating expenses of the Property, ordinary and reasonable capital improvements to the Property, debt service, real estate taxes in respect of the Property and basic management fees, but not incentive fees, payable to an entity or person unaffiliated with Borrower in connection with the operation of the Property, which are then due and payable. Notwithstanding the first sentence of this paragraph, City may recover directly from Borrower or from any other party:

(A) any damages, costs and expenses incurred by City as a result of fraud or any criminal act or acts of Borrower or any partner, shareholder, officer, director or employee of Borrower, or of any member or general partner of Borrower, or of any general or limited partner of such member or general partner;

(B) any damages, costs and expenses incurred by City as a result of any misappropriation of funds provided for the construction of the Improvements, rents and revenues from the operation of the Improvements or proceeds of insurance policies or condemnation proceeds; and

(C) all court costs and attorneys' fees reasonably incurred in enforcing or collecting upon any of the foregoing exceptions (provided that City shall pay Borrower's reasonable court costs and attorneys' fees if Borrower is the prevailing party in any such enforcement or collection action).

#### Section 6.11 Borrower Representations and Warranties

Borrower represents and warrants as of the effective date of this Agreement (1) that it has access to professional advice and support to the extent necessary to enable Borrower to fully comply with the terms of this Agreement; (2) that it and its general partners are duly organized, validly existing and in good standing under the laws of the State of California; (3) that it has the full power and authority to undertake the Project and to execute this Agreement; (4) that the persons executing and delivering this Agreement are authorized to execute and deliver such documents on behalf of Borrower; (5) except as disclosed to the City in writing, there are no actions or proceedings pending or, to the best of the Borrower's knowledge, threatened against the Borrower or Borrower's general partners before any court or administrative agency in any way connected with the Property or the Project which could adversely affect the Borrower's ability to perform the activities contemplated hereunder; (6) neither this Agreement nor anything provided to be done hereunder violates or shall violate any contract, agreement or instrument to which the Borrower or a general partner of Borrower is a party or which affects the Project or any part thereof; (7) the Borrower is not in default in respect of any of its obligations or liabilities pertaining to this Agreement, nor is there any state of facts or circumstances or conditions or events which, after notice, lapse of time, or both, would constitute or result in any such default under this Agreement; and (8) neither the Borrower nor its general partners has entered into any agreements which will adversely affect the Borrower's right to develop and use the Project as provided in this Agreement, and neither the Borrower nor its general partners will enter into any such agreements after the date hereof.

## PART 7. GENERAL PROVISIONS

#### Section 7.1 Notices

Formal notices, demands and communications between the City and the Borrower and Investor Limited Partner shall be sufficiently given if dispatched by registered or certified mail, postage prepaid, return receipt requested, to the principal offices of the City and the Borrower and Investor Limited Partner, as designated in Sections 1.4 and 1.5 hereof. Such written notices, demands and communications may be sent in the same manner to such other addresses as either party may from time to time designate by mail as provided in this Section 7.1. Any notice that is transmitted by electronic facsimile or electronic mail transmission followed by delivery of a "hard" copy, shall be deemed delivered upon its transmission; any notice that is personally delivered (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), shall be deemed received on the documented date of receipt by the recipient; and any notice that is sent by registered or certified mail, postage prepaid, return receipt required shall be deemed received on the date of receipt thereof.

#### Section 7.2 Conflicts of Interest

No member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement nor shall any such member, official or employee participate in any decision relating to the Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is, directly or indirectly, interested.

The Borrower warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement.

#### Section 7.3 Nonliability of City Officials and Employees

No member, official, employee or consultant of the City shall be personally liable to the Borrower, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Borrower or to its successor, or on any obligations under the terms of this Agreement.

#### Section 7.4 Force Majeure

In addition to specific provisions of this Agreement, performance by either party hereunder shall not be deemed to be in default where delays or defaults are due to Force Majeure Events.

#### Section 7.5 Inspection of Books and Records

The Borrower shall maintain complete, accurate, and current records pertaining to the Property for a period of five (5) years after the creation of such records, and shall permit any duly authorized representative of the City to inspect and copy records, during regular business hours upon reasonable advance notice. Records must be kept accurate and current.

#### Section 7.6 Approvals

Except as otherwise expressly provided in this Agreement, approvals required of City or Borrower in this Agreement, including the attachments hereto, shall not be unreasonably withheld or delayed. All approvals shall be in writing. Except as otherwise expressly provided in this Agreement, failure by either party to approve a matter within the time provided for approval of the matter shall not be deemed a disapproval, and failure by either party to disapprove a matter within the time provided for approval of the matter shall not be deemed an approval. Any approval or deemed approval by the City shall not waive any obligation of Borrower under the City Loan Documents.

#### Section 7.7 Administration

This Agreement shall be administered by the City Manager of the City or his or her designated representative (collectively, the “**City Representative**”) following execution of this Agreement by the City. Whenever a reference is made in this Agreement to an action, finding or approval to be undertaken by the City, the City Representative or his or her designee are authorized to act on behalf of the City unless specifically provided otherwise or the context should require otherwise. The City Representative or his or her designee shall have the authority to issue interpretations, waive provisions and enter into amendments of this Agreement and to negotiate and finalize all agreements and documents referred to herein on behalf of the City, so long as such actions do not substantially change the uses or development permitted on the Project, or add to the costs of the City as specified herein or as agreed to by the City Council or other authorized body. Notwithstanding the foregoing, the City Representative or his or her designee may in their sole and absolute discretion refer any matter to the board of the City and/or other authorized body for action, direction or approval.

#### Section 7.8 No Third Party Beneficiaries

This Agreement is made solely and specifically between the City and Borrower and their respective successors and assigns; and, except as expressly provided otherwise in this Agreement, no other person will have any rights, interest or claims under this Agreement or be entitled to any benefits under or on account of this Agreement as a third party beneficiary or otherwise.

#### Section 7.9 Reimbursement of Expenses

Borrower shall reimburse the City for all reasonable costs and expenses (including, without limitation, reasonable attorneys’ fees, and the allocated cost of the City staff and resources) incurred by the City in connection with the provision and administration of the City Loan and the City Loan Documents.

#### Section 7.10 Borrower Authority

Borrower hereby represents that the person executing this Agreement on behalf of Borrower has full authority to do so and to bind Borrower to perform pursuant to the terms and conditions of this Agreement.

#### Section 7.11 No Partnership

Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture, or any other similar relationship between the parties hereto or cause City to be responsible in any way for the debts or obligations of Borrower or any other Person.

#### Section 7.12 Compliance with Law

Borrower agrees to comply with all the requirements now in force, or which may hereafter be in force, of all municipal, county, state and federal authorities, pertaining to the development and use of the Property and the Improvements, as well as operations conducted thereon.

#### Section 7.13 Binding Effect

This Agreement, and the terms, provisions, promises, covenants and conditions hereof, shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns.

#### Section 7.14 Incorporation by Reference

Each of the attachments and exhibits attached hereto is incorporated herein by this reference.

#### Section 7.15 Counterparts

This Agreement may be executed by each party on a separate signature page, and when the executed signature pages are combined, shall constitute one single instrument.

#### Section 7.16 Mutual Cooperation

Each party agrees to cooperate with the other in this transaction and, in that regard, to sign any and all documents which may be reasonably necessary, helpful or appropriate to carry out the purposes and intent of this Agreement.

#### Section 7.17 Construction and Interpretation of Agreement

The language in all parts of this Agreement shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret, and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of this Agreement, this Agreement shall not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction shall be utilized.

If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by any party hereunder, shall be held by a court

of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each other term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the parties hereto that in lieu of each clause or provision of this Agreement that is illegal, invalid, or unenforceable, there be added as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid, or unenforceable clause or provision as may be possible.

The captions of the articles, sections and subsections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

References in this instrument to this "Agreement" mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by this reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation, and/or undertaking "herein," "hereunder," or "pursuant hereto" (or language of like import) shall mean, refer to, and include the covenants, obligations, and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, and attachments or other documents affixed to or expressly incorporated by reference in this instrument.

As used in this Agreement, and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

#### PART 8. ENTIRE AGREEMENT, WAIVERS AND AMENDMENTS

This Agreement shall constitute the entire understanding and agreement of the parties.

This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the Property.

All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City or the Borrower, and all amendment hereto must be in writing and signed by the appropriate authorities of the City and the Borrower. This Agreement and any provisions hereof may be amended by mutual written agreement by the Borrower and the City.

*[Signatures appear on next page.]*

IN WITNESS WHEREOF, the City and Borrower have signed this Agreement as of the date and year first above written.

**CITY:**

**CITY OF SANTA CLARA,**  
a chartered California municipal corporation

By: \_\_\_\_\_  
Deanna J. Santana, City Manager

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Brian Doyle, City Attorney

[SIGNATURE PAGE TO LOAN AGREEMENT]

[PAGE 1 OF 2]

**BORROWER:**

Santa Clara 701, L.P.,  
a California limited partnership

[To be completed]

[SIGNATURE PAGE TO LOAN AGREEMENT]

[PAGE 2 OF 2]



**ATTACHMENT NO. 1**

**LEGAL DESCRIPTION**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE CITY OF SANTA CLARA, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA AND IS DESCRIBED AS FOLLOWS:

Parcel 9, as shown on that certain map filed on February 27, 1976 in Book 368 of Maps, at Pages 14 and 15 in the Santa Clara County Records.

**ATTACHMENT NO. 2**

**SCHEDULE OF PERFORMANCE**

Construction Start ..... [TBD]  
Construction Completion ..... [TBD]  
PIS ..... [TBD]  
100% Occupied ..... [TBD]  
Conversion ..... [TBD]  
8609 Certification ..... [TBD]

### **ATTACHMENT NO. 3**

#### **SCOPE OF DEVELOPMENT**

The project site is 0.99 acres located at 2302 Calle Del Mundo (APN# 097-46-024) in Santa Clara within the Center District of the adopted Tasman East Specific Plan. The proposed project consists of 150 mixed-income apartment units with approximately 86,520 rentable square feet and approximately 5,000 square feet of general retail.

There is a mix of studios, 1-bedroom, 2-bedroom, and 3-bedroom units ranging in size from 420 square feet to 1,207 square feet.

## ATTACHMENT NO. 4

### INSURANCE REQUIREMENTS

Without limiting Borrower's indemnification of the City, and prior to closing the City Loan under this Agreement, Borrower shall provide and maintain in full force and effect, at its sole cost and expense, the following insurance policies with at least the indicated coverages, provisions and endorsements:

#### A. COMMERCIAL GENERAL LIABILITY INSURANCE

1. Commercial General Liability Insurance policy which provides coverage at least as broad as Insurance Services Office form CG 00 01. Policy limits are subject to review, but shall in no event be less than, the following:
  - \$5,000,000 Each occurrence
  - \$5,000,000 General Aggregate
  - \$5,000,000 Products/Completed Operations Aggregate
  - \$5,000,000 Personal Injury
  - \$5,000,000 Project Aggregate
2. Exact structure and layering of the coverage shall be left to the discretion of Contractor; however, any excess or umbrella policies used to meet the required limits shall be at least as broad as the underlying coverage and shall otherwise follow form.
3. The following provisions shall apply to the Commercial Liability policy as well as any umbrella policy maintained by the Contractor to comply with the insurance requirements of this Agreement:
  - a. Coverage shall be on a "pay on behalf" basis with defense costs payable in addition to policy limits;
  - b. There shall be no cross liability exclusion which precludes coverage for claims or suits by one insured against another; and
  - c. Coverage shall apply separately to each insured against whom a claim is made or a suit is brought, except with respect to the limits of liability.

#### B. BUSINESS AUTOMOBILE LIABILITY INSURANCE

Business automobile liability insurance policy which provides coverage at least as broad as ISO form CA 00 01 with policy limits a minimum limit of not less than five million dollars (\$5,000,000) each accident using, or providing coverage at least as broad as, Insurance Services Office form CA 00 01. Liability coverage shall apply to all owned, non-owned and hired autos.

In the event that the Work being performed under this Agreement involves transporting of hazardous or regulated substances, hazardous or regulated wastes and/or hazardous or regulated materials, Contractor and/or its subcontractors involved in such activities shall provide coverage with a limit of five million dollars (\$5,000,000) per accident covering transportation of such materials by the addition to the Business Auto Coverage Policy of Environmental Impairment Endorsement MCS90 or Insurance Services Office endorsement form CA 99 48, which amends the pollution exclusion in the standard Business Automobile Policy to cover pollutants that are in or upon, being transported or towed by, being loaded onto, or being unloaded from a covered auto.

C. WORKERS' COMPENSATION

1. Workers' Compensation Insurance Policy as required by statute and employer's liability with limits of at least one million dollars (\$1,000,000) policy limit Bodily Injury by disease, one million dollars (\$1,000,000) each accident/Bodily Injury and one million dollars (\$1,000,000) each employee Bodily Injury by disease.
2. The indemnification and hold harmless obligations of Contractor included in this Agreement shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefit payable by or for Contractor or any subcontractor under any Workers' Compensation Act(s), Disability Benefits Act(s) or other employee benefits act(s).
3. This policy must include a Waiver of Subrogation in favor of the City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents.

D. POLLUTION LIABILITY

In the event that this contract involves hazardous or regulated wastes and/or hazardous or regulated materials, Contractor and/or its subcontractors shall provide a Contractor's Pollution Liability Insurance policy with coverage limits not less than five million dollars (\$5,000,000) each claim in connection with the Work performed under this Contract. All activities contemplated in this agreement shall be specifically scheduled on the policy as "covered operations." Any deductible must be declared to and approved by City. Such policy shall cover, at a minimum, liability for bodily injury, damage to and loss of use of property, and clean-up costs arising from sudden, accidental and gradual pollution and remediation in connection with the Work under this Agreement. Contractor will use its best efforts to have the City, Council, officers, employees and volunteers added as additional insureds under this policy. The following provisions shall apply:

1. The policy shall provide coverage for the hauling of waste from the project site to the final disposal location, including non-owned disposal sites.
2. Products/completed operations coverage shall extend a minimum of 3 years after project completion.
3. Coverage shall be included on behalf of the insured for covered claims arising out of the actions of independent contractors.

4. If the insured is using subcontractors the Policy must include work performed “by or on behalf” of the insured.
5. Policy shall contain no language that would invalidate or remove the insurer’s duty to defend or indemnify for claims or suits expressly excluded from coverage. Policy shall specifically provide for a duty to defend on the part of the insurer.

E. COMPLIANCE WITH REQUIREMENTS

All of the following clauses and/or endorsements, or similar provisions, must be part of each commercial general liability policy, and each umbrella or excess policy.

1. Additional Insureds. City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents are hereby added as additional insureds in respect to liability arising out of Contractor’s work for City, using Insurance Services Office (ISO) Endorsement CG 20 10 11 85 or the combination of CG 20 10 10/01 and CG 20 37 10/01, or its equivalent.
2. Primary and non-contributing. Each insurance policy provided by Contractor shall contain language or be endorsed to contain wording making it primary insurance as respects to, and not requiring contribution from, any other insurance which the indemnities may possess, including any self-insurance or self-insured retention they may have. Any other insurance indemnities may possess shall be considered excess insurance only and shall not be called upon to contribute with Contractor’s insurance.
3. General Aggregate. The general aggregate limits shall apply separately to Contractor’s work under this Agreement providing coverage at least as broad as Insurance Services Office (ISO) Endorsement CG 2503, 1985 Edition, or insurer’s equivalent (CGL);
4. Cancellation.
  - a. Each insurance policy shall contain language or be endorsed to reflect that no cancellation or modification of the coverage provided due to non-payment of premiums shall be effective until written notice has been given to City at least ten (10) days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least ten (10) days prior to the effective date of non-renewal.
  - b. Each insurance policy shall contain language or be endorsed to reflect that no cancellation or modification of the coverage provided for any cause save and except non-payment of premiums shall be effective until written notice has been given to City at least thirty (30) days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least thirty (30) days prior to the effective date of non-renewal.

5. Other Endorsements. Other endorsements may be required for policies other than the commercial general liability policy if specified in the description of required insurance set forth in Sections A through E of this Document 00820.

F. ADDITIONAL INSURANCE RELATED PROVISIONS

Contractor and City agree as follows:

1. Requirements of specific insurance coverage features described in this Agreement shall not be construed to be a limitation of liability on the part of Contractor or any of its subcontractors, nor to relieve any of them of any liability or responsibility under the Contract Documents, as a matter of law or otherwise. Such requirements are not intended by any Party to be limited to providing coverage for the vicarious liability of the City or to the supervisory role, if any, of City. All insurance coverage provided pursuant to this Agreement in any way relating to City is intended to apply to the full extent of the policies involved.
2. Contractor shall maintain all required insurance policies in full force and effect during entire period of performance of the Services under this Agreement of Contract Documents. Contractor shall also keep such insurance in force during warranty and guarantee periods. At time of making application for extension of time, Contractor shall submit evidence that insurance policies will be in effect during requested additional period of time.
3. City reserves the right, at any time during the term of this Agreement to change the amounts and types of insurance required by giving the Contractor thirty (30) days advance written notice of such change. If such change results in substantial additional cost to the Contractor, the City will negotiate in good faith additional compensation proportional to the increased benefit to City.
4. Any type of insurance or any increase of limits of liability not described in this Exhibit which Contractor requires for its own protection or in compliance with applicable statutes or regulations, shall be Contractors' responsibility and at its own expense.
5. No liability insurance coverage provided by Contractor to comply with the terms of this Agreement shall prohibit Contractor, or Contractor's employees, or agents, from waiving the right of subrogation prior to a loss. Contractor waives its right of subrogation against Indemnitees. Any property insurance policies affected by Contractor shall be endorsed to delete the subrogation condition as to indemnitees or shall specifically allow Contractor to waive subrogation prior to a loss. Contractor hereby waives any right of recovery against the indemnitees and agrees to require any subcontractor to do so.
6. Contractor agrees to ensure that subcontractors, and any other party involved with the Services who is brought onto or involved in the performance of the Services by Contractor, provide the same minimum insurance coverage required of Contractor, except as with respect to limits. Contractor agrees to monitor and

review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this Agreement. Contractor agrees that upon request by City, all agreements with, and insurance compliance documents provided by, such subcontractors and others engaged in the project will be submitted to City for review.

7. Contractor shall cooperate fully with City and Contractor's insurance companies in any safety and accident prevention program and claims handling procedures as established for the performance of Services under this Agreement.
8. All coverage types and limits required under this Agreement are subject to approval, modification and additional requirements by the City, as the need arises. Contractor shall not make any reductions in scope of coverage which may affect City's protection without City's prior written consent.
9. For purposes of applying insurance coverage only, all contracts pertaining to the performance of services will be deemed to be executed when finalized and any activity commences in furtherance of performance under this agreement.
10. Contractor acknowledges and agrees that any actual or alleged failure on the part of City to inform Contractor of non-compliance with any of the insurance requirements set forth in this Agreement in no way imposes any additional obligations on City nor does it waive any of the City's rights under this Agreement or any other regard.
11. Any provision in this Agreement dealing with the insurance coverage provided pursuant to these requirements, is subordinate to and superseded by the requirements contained herein. These insurance requirements are intended to be separate and distinct from any other provision in this Agreement and are intended by the Parties here to be interpreted as such.
12. Contractor agrees to be responsible for ensuring that no contract used by any party involved in any way with the project reserves the right to charge City or Contractor for the cost of additional insurance coverage required by this Agreement. Any such provisions are to be deleted with reference to City. It is not the intent of City to reimburse any third party for the cost of complying with these requirements. There shall be no recourse against City for payment of premiums or other amounts with respect thereto.
13. Contractor agrees to obtain and provide to City evidence of Professional Liability insurance for Architects or Engineers if engaged by Contractor to perform any of the Services required under this Agreement. City shall determine the minimum coverage and policy limits required, after consultation with Contractor.
14. The City acknowledges that some insurance requirements contained in this Agreement may be fulfilled by self-insurance on the part of the Contractor. The Contractor's insurance obligations under this Agreement under may be satisfied in whole or in part by adequately funded self-insurance retention, but only after



approval from the City Attorney's Office upon satisfactory evidence of financial capacity.

15. The City reserves the right to withhold payments from the Contractor in the event of material noncompliance with the insurance requirements set forth in this Agreement.

#### G. EVIDENCE OF COVERAGE

Prior to commencement of any Services under this Agreement, Contractor, and each and every subcontractor (of every tier) shall, at its sole cost and expense, provide and maintain not less than the minimum insurance coverage with the endorsements and deductibles indicated in this Agreement. Such insurance coverage shall be maintained with insurers, and under forms of policies, satisfactory to City and as described in this Agreement. Contractor shall file with the City all certificates and endorsements for the required insurance policies for City's approval as to adequacy of the insurance protection.

#### H. EVIDENCE OF COMPLIANCE

Contractor or its insurance broker shall provide the required proof of insurance compliance, consisting of Insurance Services Office (ISO) endorsement forms or their equivalent and the ACORD form 25-S certificate of insurance (or its equivalent), evidencing all required coverage shall be delivered to City, or its representative as set forth below, at or prior to execution of this Agreement. Upon City's request, Contractor shall submit to City copies of the actual insurance policies or renewals or replacements. Unless otherwise required by the terms of this Agreement, all certificates, endorsements, coverage verifications and other items required to be delivered to City pursuant to this Agreement shall be mailed to:

EBIX Inc.

City of Santa Clara [\*insert City department name here]

P.O. Box 100085 – S2

or

1 Ebix Way

Duluth, GA 30096

John's Creek, GA 30097

Telephone number: 951-766-2280

Fax number: 770-325-0409

Email address: ctsantaclara@ebix.com

#### I. QUALIFYING INSURERS

All of the insurance companies providing insurance for Contractor shall have, and provide written proof of, an A. M. Best rating of at least A minus 6 (A- VI) or shall be an insurance company of equal financial stability that is approved by the City or its insurance compliance representatives.

**ATTACHMENT NO. 5**

**PROJECT BUDGET**

(To Be Attached)

## ATTACHMENT NO. 6

### **CLOSING REQUIREMENTS**

The following are the Closing Requirements:

1. Closing Documents. Developer and any third party shall have executed and delivered to Title Company, as escrow agent:
  - a. The City Loan Documents, duly executed and acknowledged where appropriate.
  - b. Any other documents or other deliverables reasonably requested by the City or the Title Company (which may be deposited with Title Company one (1) Business Day prior to the Closing date).
2. City Loan Funds. Tasman East Urban Housing, LLC, or its successor or assign, shall have deposited \$6,000,000 with the Title Company on behalf of the City in satisfaction of its inclusionary housing requirements as provided under **[City Council Resolutions No. [October]]**, which shall constitute the City Loan funds
3. Funds. Sufficient funds to pay costs of escrow and title to effect the conveyance of the Property to Borrower (which amounts may be deposited with Escrow on the Closing date), including, without limitation, any costs or expenses of the City due from Borrower under this Agreement.
4. Evidence of Financing. Developer shall have submitted and the City Representative shall have approved Developer's Evidence of Financing in accordance with this Agreement.
5. City Lender Policies. The City shall have received from Title Company an irrevocable commitment to issue a 2006 ALTA extended coverage lender's policy, together with such endorsements as are reasonably requested by the City (collectively, the "**City Lender Policy**"), insuring the lien of the City Deed of Trust to be a first priority lien on the Project after the lien of the Senior Loans, and containing such endorsements as the City may reasonably require, which may include zoning, survey, access, parcel contiguity, environmental, tax parcel, and subdivision endorsements, subject only to the (A) the lien of non-delinquent real property taxes and assessments, (B) agreements expressly required by this Agreement to be recorded at the Closing, (C) the lien of the Senior Lenders, and (D) any exception to title which may be approved by the City in its reasonable discretion.
6. City Regulatory Agreement. The City shall have received evidence reasonably acceptable to it that the City Regulatory Agreement is, and shall continue to be after closing of the City Loan, senior to all deeds of trust, mortgages and similar liens, which may include a subordination agreement between the City and the holder of any such lien in form and substance reasonably approved by the City.
7. Entitlements. The City shall have received evidence reasonably acceptable to it that Developer has obtained all Entitlements necessary for the construction of the Project, provided that ready-to-issue letters with respect to building permits shall be acceptable.

8. Commercial Space Documentation. The City shall have received and approved, which approval shall not be unreasonably withheld, conditioned or delayed, any and all agreements, whether or not recorded, that governs the relationship between the Commercial Space and the Project following the disposition of the Commercial Space (including, without limitation, any declaration of covenants, conditions and restrictions, a shared use agreement, easements, or any maintenance agreement).
9. Labor Compliance. The City shall have received evidence reasonably acceptable to it that the construction of the Project and the payment of all wages in connection therewith shall be in accordance with the Prevailing Wage Law, to the extent applicable to the Project.
10. No Litigation. No litigation shall be pending or threatened by any third parties which seeks to enjoin the transactions contemplated herein or challenge or overturn the Entitlements.
11. No Default. There shall exist no condition, event or act which would constitute an Event of Default under this Agreement, or which, upon the giving of notice or the passage of time, or both, would constitute an Event of Default.
12. Representations and Warranties. All representations and warranties of Developer herein contained and contained in this Agreement shall be true and correct in all material respects as if made on and as of the date of Closing.
13. Construction Budget and Construction Loan. Borrower shall have submitted and obtained the City's approval of the Construction Budget and Construction Loan, showing the construction costs of the Improvements and a sources-and-uses statement showing that the projected funding sources will be available as needed to fund all such projected costs at the time incurred. The City approval of the Construction Loan shall not constitute a waiver by the City of any breach or violation of this Agreement that is a result of acts that are or purport to be in compliance with or in furtherance of said Construction Loan.
14. Project Pro Forma. Borrower shall have submitted and the City shall have approved the Project Pro Forma.
15. Construction Bonds. To the extent that the Construction Lender and/or the Investor Limited Partner requires payment and performance bonds in connection with the construction of the Project, Borrower shall have obtained and delivered to the City copies of the bonds meeting the Construction Lender's and/or the Investor Limited Partner's requirements for such bonds and naming City as co-obligee.
16. Construction Package. Borrower shall have submitted and the City have approved all material aspects of the construction process, including, without limitation, lists of subcontractors, and other construction related documentation which may be reasonably requested by the City.
17. Plans and Specifications. Borrower shall have submitted and the City shall have approved the Plans and Specifications for the Project.

18. Insurance Requirements. Borrower, at its cost, shall have procured and be maintaining in full force and effect insurance consistent with the Insurance Requirements, and shall have provided City with evidence of such insurance.
19. Architectural Contract. Borrower shall have delivered, and the City shall have approved, a contract with the architect of the Project.
20. Corporate Authority; Good Standing. Borrower shall have delivered to the City satisfactory evidence of Borrower's authority to enter into the City Loan Documents, and good standing certificates for the Borrower and its partners dated within thirty (30) days of Closing.
21. Miscellaneous. Borrower shall have delivered to the City any other item reasonably deemed necessary by the City and shall have fulfilled any other condition reasonably required by the City.

## ATTACHMENT NO. 7

### **CONVERSION REQUIREMENTS**

1. No Default. Subject to applicable notice and cure periods, there shall be no condition, event or act which would constitute an event of default by Borrower under the City Loan Documents, the Construction Contract, the Construction Loan, the Limited Partnership Agreement, or any other agreement secured by an interest in the Project or providing financing for the Project, or which upon the giving of notice or the passage of time, or both, would constitute such an event of default.
2. Representations and Warranties. All representations and warranties of Borrower herein contained in this Agreement shall be true and correct in all material respects as and when made and as of the proposed date of conversion to a permanent loan.
3. No Stop Notice. No stop notice (whether bonded or not) shall have been served upon or otherwise delivered to Borrower, the City or Construction Lender in connection with the development of the Project or otherwise in connection with the City Loan, unless Borrower shall have (or shall be with the proceeds of a requested disbursement) (a) paid and discharged the same, or (b) effected the release thereof by delivering to the City a surety bond complying with the requirements of applicable Governmental Regulations for such release.
4. No Liens. No claim of lien, notice and claim of mechanic's lien or other similar document or instrument shall have been recorded against the Project or any portion thereof, unless Borrower shall have (or shall with the proceeds of the requested disbursement) (a) paid and discharged the same, (b) effected the release thereof by delivering to the City a surety bond complying with the requirements of applicable Governmental Regulations for such release, or by insurance over the same, or (c) caused the Title Company to commit in writing to issue a policy of title insurance showing such lien not to be an exception to title. City shall have received (i) a copy of the recorded notice of completion, and (ii) either (A) evidence that the statutory lien period has expired, or (B) lien waivers from the Contractor and any subcontractors that previously filed a preliminary notice that they are performing work on the Project that may be subject to mechanic's liens
5. Governmental Regulations. There shall be no condition, event or act existing in connection with the Project which constitutes, or would, with the passage of time, constitute a material violation of any applicable Governmental Regulation.
6. Annual Reporting Forms. Borrower shall have submitted all annual reporting forms required to be submitted to City pursuant to the City Regulatory Agreement as of the date of Conversion.
7. Evidence of Equity Contribution. Borrower shall have provided evidence that Borrower has received capital contributions from the Investor Limited Partner in an amount not less the amount required by the Limited Partnership Agreement. Borrower shall have demonstrated to the City's reasonable satisfaction that such monies have been spent in

substantial accordance with the Project Pro Forma or will be spent in accordance with the Project Pro Forma.

8. Rent Schedule; Permanent Pro Forma; Annual Project Budget. Borrower shall have submitted, the following for the Project, all prepared as of the completion of construction: (a) the Rent Schedule; (b) a Permanent Pro Forma; and (c) an Annual Project Budget.
9. Management Plan. Borrower shall have submitted, and City shall have approved, the Management Plan.
10. Social Services Plan. Borrower shall have submitted a social services plan for the Project, including a budget therefor incorporated into the Annual Project Budget.
11. Insurance. Borrower, at its cost, shall have procured and be maintaining in full force and effect insurance consistent with the Insurance Requirements and in the amounts specified therein.
12. Construction Loan. The Construction Loan shall be paid in full with all available funds, or paid down, as applicable, and converted to a permanent loan. Any documents required to be recorded in connection therewith shall be executed and recorded in the Official Records.
13. Reserves. Borrower shall have deposited or will be concurrently depositing any reserves required by this Agreement and the Project Pro Forma into one or more separate interest-bearing accounts to be used solely for the Project.
14. Final Cost Certificate. Borrower shall have provided City with a copy of the Final Cost Certificate.*[Change to draft cost cert if final not required by investor.]*
15. Commercial Space. The Commercial Space shall have been sold as provided in Section 3.11 of this Agreement.

**PROMISSORY NOTE**  
(this "Note")

\$6,000,000

Santa Clara, California

☐ 1, 20\_\_

FOR VALUE RECEIVED, Santa Clara 701, L.P., a California limited partnership ("**Borrower**"), hereby promises to pay to the CITY OF SANTA CLARA ("**City**"), a public body, corporate and politic, or order, a principal amount of \$6,000,000 (the "**City Loan**"). This Note is given pursuant to that certain Loan Agreement of even date herewith, between Borrower and the City (the "**City Loan Agreement**") and evidences the City Loan to Borrower, which provides part of the financing for the development of that certain real property located at 2302-2314 Calle Del Mundo in the City of Santa Clara, California and legally described in the City Deed of Trust (the "**Property**"). The obligation of Borrower to City hereunder is subject to the terms of the City Loan Agreement, this Note and the other City Loan Documents. Said documents are public records on file in the offices of City. The Borrower shall pay interest at the rate, in the amount and at the time hereinafter provided.

Definitions. Any capitalized term not otherwise defined herein shall have the meaning ascribed to such term in the City Loan Agreement. In addition, the following terms shall have the following meanings:

"**Annual Financial Statement**" shall mean the annual audited financial statement of Revenue and Operating Expenses and balance sheet for the Improvements, prepared at the Borrower's expense, by an independent certified public accountant reasonably acceptable to the City, which shall form the basis for determining the Residual Receipts.

"**City's Proportionate Share**" shall mean 25%.

"**Operating Expenses**" shall mean all reasonable and actual costs and expenses of operating, managing and maintaining the Project including without limitation:

1. debt service, reserves and other payments currently due or payable on a non-optional basis on the Permanent Loan, the Monitoring Fee (as defined in the City Regulatory Agreement) and any administrative fee payable pursuant to the issuer of any bonds related to the Project.
2. payments for supportive services to Project residents, including without limitation the salary of on-site service coordinators and supervision of such service staff and any other costs related to any services required by any regulatory agreement or similar document or as approved by the City;
3. payments for property management staffing, including without limitation the salary of on-site property managers and supervision of such managers and any other costs related to any property management function required by any regulatory agreement or similar document or as approved by the City;



4. Property management, service management, and accounting and administration fees, and reimbursements in amounts in accordance with industry standards for similar developments, which shall not include tax credit shortfall payments or similar payments or indemnities in favor of the limited partner(s) of Borrower; provided that the aggregate amounts under items 3 and 4 shall not exceed [9]% of Revenues;
5. deposits to operating, replacement reserve, or any other reserve accounts which are either (i) commercially reasonable, or (ii) required by the Permanent Lender or as required under the Limited Partnership Agreement;
6. costs of restoring the Project after damage, destruction or condemnation;
7. Project organizational costs (e.g., annual franchise tax payments) and direct costs associated with accounting, tax preparation and legal fees of Borrower incurred in the ordinary course of business;
8. any extraordinary costs or expenses approved by City;
9. maintenance and repair including but not limited to pest control, landscaping and grounds maintenance, painting, and decorating, cleaning, common systems repairs, general repairs, janitorial supplies, and others, and costs of restoring the Project after damage, destruction or condemnation;
10. Project real estate taxes (if property tax welfare exemption become ineligible) and other taxes, assessments and impositions that are not exempt under the welfare exemption;
11. Payment of any previously unpaid portion of the Developer Fee for the Project;
12. general administrative expenses including but not limited to advertising, marketing, security services and systems, professional fees for legal, audit, accounting and tax returns, and other;
13. current and accrued partnership management fee with annual earnings in the amount of \$[ ] increasing by up to [3]% annually, and current and accrued limited partner investor services fee with annual earnings in the amount of \$[15,000] increasing by [3]% annually, beginning the first calendar year the Project receives rental income; repayment of any limited partner loans and general partner operating deficit loans pursuant to the Limited Partnership Agreement, any advances by partners required under the Limited Partnership Agreement, if applicable, of Borrower and any fees to partners required under the Partnership Agreement; tax credit adjustor payments, taxes owed on taxable income allocated to the limited partner, replenishing of the Operating Reserve as required pursuant to the Limited Partnership Agreement;

14. Tenant resident services in the annual amount of \$[26,742 with respect to calendar year 2022] and increasing by no more than [2]% each calendar year, or as otherwise agree to in writing;
15. utility services not paid for directly by the tenants, including but not limited to water, sewer, trash collection, gas and electricity; and
16. Premiums for property damage and liability insurance.

**“Residual Receipts”** shall mean (a) the Revenue minus (b) the Operating Expenses. All calculations of Residual Receipts shall be subject to verification and reasonable approval by the City.

**“Revenue”** shall mean all income derived from the Project (excluding loan proceeds, insurance proceeds (except those for loss of business), capital contributions, tenant security deposits, and any interest earned on said deposit), and includes, without limitation:

1. All rents (including rent on commercial or common space within the Project) and rent subsidies, if any;
2. interest on reserves, unless such interest remains in the applicable reserve account;
3. receipts from laundry, parking, or other services for which a fee is charged; and
4. insurance proceeds or condemnation awards actually received by Borrower after casualty to or condemnation of the Project; provided, however, Borrower shall not be deemed to have “received” (nor shall Operating Revenues include) all or any portion of insurance proceeds or condemnation award that is applied by a senior lender of Sources of Funding towards payment of costs and expenses or in payment of outstanding principal, interest, and/or charges under the senior lender’s loan or deed of trust securing the loan.

**“Term”** of this Note shall mean fifty-five (55) years from Conversion.

1. This Note evidences the obligation of the Borrower to the City for the repayment of the City Loan. None of the funds provided pursuant to the City Loan were funded directly or indirectly with any obligation the interest on which is exempt from tax under Section 103 of the Internal Revenue Code of 1986, as amended, or pursuant to any United States government federal source.

2. This Note is payable at the principal office of the City, 1500 Warburton Avenue, Santa Clara, California 95050, or at such other place as the holder hereof may inform the Borrower in writing, in lawful money of the United States.

3. This Note shall be secured by the City Deed of Trust.

4. This Note shall bear simple interest at the rate of 0% per annum, which shall begin to accrue upon disbursement. Upon and during the occurrence of an event of default (after the expiration of all applicable notice, cure and grace periods) under the City Loan Documents, the monetary obligations under the City Loan Documents shall bear interest at the lesser of ten percent (10%), compounded annually, or the highest rate permitted by law.

5. Except as described in Sections 6 and 7 hereof, no payments shall be due and payable under this Note.

6. The entire unpaid principal balance of this Note and any accrued but unpaid interest shall be due and payable upon the expiration of the Term hereof, or immediately upon the occurrence of either of the following:

(a) if the Property or any portion thereof or interest therein is sold, transferred, assigned or refinanced, without the prior written approval of the City, except as otherwise permitted in this Note or the City Loan Agreement; or

(b) if there is an event of default by the Borrower under the terms of this Note or any of the City Loan Documents, the Lease, or any deed of trust or other instrument securing the Senior Loan or other obligations secured by a deed of trust on the Property, which is not cured within the respective time period provided herein and therein.

7. Prior to the expiration of the Term hereof, Borrower shall be obligated to repay the City Loan as follows:

(a) Principal and/or interest will only be payable to the extent of available Residual Receipts generated from and after the date of Conversion. For any year that it is determined that there are available Residual Receipts, the City will be paid an amount equal to the City's Proportionate Share of Residual Receipts for such fiscal year. No later than December 1st of each year, Borrower will provide to the City a projected budget for the following calendar year, which shall include an estimate of Residual Receipts (the "**Operating Budget**"). No later than April 1st of each year, Borrower will provide to the City Borrower's calculation of Residual Receipts for the previous calendar year, accompanied by such supporting documentation as City may reasonably request, including without limitation an independent audit prepared for the Project by a certified public accountant. Notwithstanding the preceding sentence, the Borrower shall have an additional 30 days, until May 1st, to provide the City all required materials for the Residual Receipts calculation for the first such required submittal. Commencing on June 1st of the first year for which there are available Residual Receipts, and each anniversary thereafter until the Due Date, Borrower will make annual payments to City in an amount equal to City's Proportionate Share of Residual Receipts of the Project for the calendar year most recently ended. While these dates are absolute, City staff in their sole discretion may adjust these dates annually on a case by case basis provided the Borrower has submitted a written request prior to the April 1st deadline and City staff has provided a one-time waiver in writing prior to June 1st.

(b) All payments to City shall be applied first to the payment of all expenses, charges, costs and fees incurred by or payable to City by Borrower pursuant to the terms of the City Loan Documents (in such order and manner as City, in its sole discretion, may elect), then to

the payment of all interest accrued to the date of such payment, if any, and then to reduce the principal amount owed. All prepayment of principal on this Note shall be applied to the most remote principal installment or installments until paid. Notwithstanding anything to the contrary contained herein, after the occurrence and during the continuation of a default under the City Deed of Trust (after expiration of all applicable notice and cure periods), all amounts received by City from any party shall be applied in such order as City, in its sole discretion, may elect.

8. Prior to the repayment in full of the City Loan, the Borrower shall not assign or attempt to assign the City Loan Agreement or any right therein, nor make any total or partial sale, transfer, conveyance or assignment of the whole or any part of the Property, except as permitted in the City Loan Agreement.

9. Subject to the provisions and limitations of this Section 9, the obligation to repay the City Loan is a nonrecourse obligation of the Borrower. Neither Borrower nor any general partner of Borrower shall have any personal liability for repayment of the City Loan, except as provided in this Section 9. The sole recourse of City against Borrower or any general partner shall be the exercise of its rights against the Property and any related security for the City Loan. Provided, however, that the foregoing shall not (a) constitute a waiver of any obligation evidenced by this Note or any of the City Loan Documents; (b) limit the right of the City to name Borrower as a party defendant in any action or suit for judicial foreclosure and sale under this Note and the City Deed of Trust or any action or proceeding hereunder so long as no judgment in the nature of a deficiency judgment shall be asked for or taken against Borrower; (c) release or impair this Note or any of the City Loan Documents; (d) prevent or in any way hinder City from exercising, or constitute a defense, an affirmative defense, a counterclaim, or other basis for relief in respect of the exercise of, any other remedy against the mortgaged Property or any other instrument securing this Note or as prescribed by law or in equity in case of default; (e) prevent or in any way hinder City from exercising, or constitute a defense, an affirmative defense, a counterclaim, or other basis for relief in respect of the exercise of, its remedies in respect of any deposits, insurance proceeds, condemnation awards or other monies or other collateral or letters of credit securing this Note; (f) relieve Borrower of any of its obligations under any indemnity delivered by Borrower to City; or (g) affect in any way the validity of any guarantee or indemnity from any person other than the Borrower of all or any of the obligations evidenced and secured by this Note or any of the City Loan Documents. The foregoing provisions of this paragraph are limited by the provision that in the event of the occurrence of an event of default after expiration of all applicable cure period, Borrower shall have personal liability hereunder for any deficiency judgment, but only if and to the extent Borrower, its principals, shareholders, partners received rentals, other revenues, or other payments or proceeds in respect of the Property after the occurrence of such event of default after expiration of all applicable cure periods, which rentals, other revenues, or other payments or proceeds have not been used for the payment of ordinary and reasonable operating expenses of the Property, ordinary and reasonable capital improvements to the Property, debt service, real estate taxes in respect of the Property and basic management fees, but not incentive fees, payable to an entity or person unaffiliated with Borrower in connection with the operation of the Property, which are then due and payable. Notwithstanding the first sentence of this paragraph, City may recover directly from Borrower or from any other party:

(A) any damages, costs and expenses incurred by City as a result of fraud or any criminal act or acts of Borrower or any general partner, shareholder, officer, director or employee

of Borrower, or of any member or general partner of Borrower, or of any general or limited partner of such member or general partner;

(B) any damages, costs and expenses incurred by City as a result of any misappropriation of rents and revenues from the operation of the Project, or proceeds of insurance policies or condemnation proceeds by Borrower or any of its partners;

(C) any and all amounts owing by Developer pursuant to the indemnification regarding Hazardous Substances pursuant to the Environmental Indemnity; and

(D) all court costs and reasonable attorneys' fees reasonably incurred in enforcing or collecting upon any of the foregoing exceptions (provided that City shall pay Borrower's reasonable court costs and attorneys' fees if Borrower is the prevailing party in any such enforcement or collection action).

10. Borrower waives presentment for payment, demand, protest, and notices of dishonor and of protest; the benefits of all waivable exemptions; and all defenses and pleas on the ground of any extension or extensions of the time of payment or of any due date under this Note, in whole or in part, whether before or after maturity and with or without notice. Borrower hereby agrees to pay all costs and expenses, including reasonable attorney's fees, which may be incurred by the holder hereof, in the enforcement of this Note, any of the City Loan Documents, or any term or provision of either thereof.

11. Upon any event of default under the terms of this Note or any of the City Loan Documents, or any deed of trust securing a Senior Loan or other obligations secured by a deed of trust on the Property and after expiration of the applicable cure period, the holder may exercise its rights or remedies hereunder or thereunder.

12. (a) Subject to the extensions of time set forth in Section 13, and subject to the further provisions of this Section 12, failure or delay by Borrower to perform any material term or provision of this Note or any of the City Loan Documents, constitutes a default under this Note.

(b) City shall give written notice of default to Borrower, specifying the default complained of by the City. Delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default.

(c) Any failures or delays by City in asserting any of its rights and remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by City in asserting any of its rights and remedies shall not deprive City of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

(d) If a monetary event of default occurs under the terms of this Note or any of the City Loan Documents, prior to exercising any remedies hereunder or thereunder City shall give Borrower and each of the general and limited partners of Borrower's partnership, as identified in Borrower's partnership agreement, simultaneous written notice of such default. Borrower shall have a reasonable period of time after such notice is given within which to cure the default prior to exercise of remedies by City under this Note and/or the City Loan Documents. In no event shall



City be precluded from exercising remedies if its security becomes or is about to become materially impaired by any failure to cure a default or the default is not cured within ten (10) calendar days after the notice of default is received or deemed received.

(e) If a non-monetary event of default occurs under the terms of any of the City Loan Documents, prior to exercising any remedies hereunder or thereunder, City shall give Borrower and each of the general and limited partners of Borrower's partnership, as identified in Borrower's partnership agreement, simultaneous notice of such default. If the default is reasonably capable of being cured within thirty (30) calendar days after such notice is received or deemed received, Borrower shall have such period to effect a cure prior to exercise of remedies by the City under the City Loan Documents. If the default is such that it is not reasonably capable of being cured within thirty (30) days, and Borrower (i) initiates corrective action within said period, and (ii) diligently and in good faith works to effect a cure as soon as possible, then Borrower shall have such additional time as is reasonably necessary to cure the default prior to exercise of any remedies by City.

(f) If Borrower fails to take corrective action or to cure the default within a reasonable time, City shall give Borrower and each of the general and limited partners of Borrower's partnership written notice thereof, whereupon the limited partner, subject to the terms of the Borrower's partnership agreement, may remove and replace the general partner with a substitute general partner who shall effect a cure within a reasonable time thereafter in accordance with the foregoing provisions. The City agrees to accept cures tendered by any Senior Lender or the limited partner within the time period provided herein. Additionally, in the event the Senior Lender or limited partner is precluded from curing a non-monetary default due to an inability to remove the general partner as a result of a bankruptcy, injunction, or similar proceeding by or against the Borrower or its general partner, City agrees to forbear from completing a foreclosure (judicial or nonjudicial) during the period during which the Senior Lender or limited partner is so precluded from acting, not to exceed ninety (90) days, provided such Senior Lender and limited partner are otherwise in compliance with the foregoing provisions. In no event shall City be precluded from exercising remedies if its security becomes or is about to become materially jeopardized by any failure to cure a default or the default is not cured within one hundred eighty (180) days after the notice of default is received or deemed received.

(g) Any notice of default that is transmitted by electronic facsimile transmission followed by delivery of a "hard" copy, shall be deemed delivered upon its transmission; any notice of default that is personally delivered (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), shall be deemed received on the documented date of receipt by Borrower to the address set forth in the Loan Agreement; and any notice of default that is sent by registered or certified mail, postage prepaid, return receipt required shall be deemed received on the date of receipt thereof. Notices to the limited partner shall be sent to the following address:

[Investor Limited Partner]

13. Notwithstanding specific provisions of this Note, Borrower shall not be deemed to be in default for failure to perform any non-monetary performance hereunder where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties,

acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, litigation, unusually severe weather, inability to secure necessary labor, material or tools, delays of any contractor, sub-contractor or supplier, acts of the City or any other public or governmental authority or entity, or any causes beyond the control or without the fault of the Borrower. An extension of time for any such cause (a “**Force Majeure Delay**”) shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by Borrower is sent to the City within thirty (30) days of knowledge of the commencement of the cause. Notwithstanding the foregoing, none of the foregoing events shall constitute a Force Majeure Delay unless and until the Borrower delivers to the City written notice describing the event, its cause, when and how Borrower obtained knowledge, the date and the event commenced, and the estimated delay resulting therefrom. Borrower shall deliver such written notice within thirty (30) days after it obtains actual knowledge of the event. Times of performance under this Note may also be extended in writing by the City and Borrower.

14. If the rights created by this Note shall be held by a court of competent jurisdiction to be invalid or unenforceable as to any part of the obligations described herein, the remaining obligations shall be completely performed and paid.

15. City agrees that the lien of the City Deed of Trust shall be subordinate to any extended low-income housing commitment (as such term is defined in Section 42(h)(6)(B) of the Internal Revenue Code) (the “**Extended Use Agreement**”) recorded against the Project; provided that such Extended Use Agreement, by its terms, must terminate upon foreclosure under the City Deed of Trust or upon a transfer of the Project by instrument in lieu of foreclosure or comparable conversion of the loan, in accordance with Section 42(h)(6)(E) of the Internal Revenue Code. The following rule contained in Section 42(h)(6)(E)(ii) of the Internal Revenue Code of 1986, as amended, shall also apply: for a period of three (3) years from the date of foreclosure, with respect to any unit that had been regulated by the Extended Use Agreement, (i) none of the tenants occupying those units at the time of foreclosure may be evicted or their tenancy terminated (other than for good cause), (ii) nor may any rent be increased except as otherwise permitted under Section 42 of the Code. Borrower acknowledges and agrees that any default, event of default, or breach (however such terms may be defined) under the Extended Use Agreement shall be an event of default under this Note and the City Deed of Trust and that any costs, damages or other amounts, including reasonable attorneys’ fees incurred by City as a result of an event of default by Borrower, and any amounts paid by City to cure any default under the Extended Use Agreement shall be an obligation of Borrower and become a part of the debt evidenced by this Note and secured by the City Deed of Trust.

16. In any approval, consent or other determination by City required under this Note or any of the other City Loan Documents, City shall act reasonably and in good faith.

17. Borrower shall have the right to prepay the obligation evidenced by this Note, or any part thereof, without penalty or premium.

18. Notices hereunder shall be given as provided in the City Loan Agreement.

*[Remainder of Page Intentionally Left Blank.]*

IN WITNESS WHEREOF, Borrower has executed this Note as of the day and year set forth above.

**BORROWER:**

Santa Clara 701, L.P.,  
a California limited partnership

[To be completed]