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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

**AFFORDABLE HOUSING AGREEMENT**

by and between

**THE CITY OF SANTA CLARA**

and

**TOD BROKAW, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY**

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### ATTACHMENTS

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AFFORDABLE HOUSING AGREEMENT  
LOT 2

This AFFORDABLE HOUSING AGREEMENT ("Agreement") is entered into by and between the CITY OF SANTA CLARA, a chartered California municipal corporation (the "City") and TOD BROKAW, LLC, a California limited liability company (the "Developer"), whose address is 10121 Miller Avenue, Suite 200, Cupertino, California. 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:

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 low and median income households as defined in Attachment No. 3, Agreement Containing Covenants and Restrictions, attached hereto.

b. An apartment community containing 407 units as a rental apartment complex (hereinafter referred to as the "Project") is intended to be constructed on that certain real property located at 1205 Coleman Avenue in the City of Santa Clara, California described in Attachment No. 1 incorporated herein by this reference (the "Site"). As a Condition of Approval, Developer has agreed to provide 41 units within the Project that will be designated for low and median income residents and shall meet affordability requirements for low and median income residents for a period of 55 years (hereinafter referred to as "Affordable Housing Units" or "Units"). The proportion of Units shall be 20 median income and 21 low income. Median income shall be defined as one hundred percent (100%) of the Area Median Income (AMI) and low income shall be defined as eighty percent of the Area Median Income (80%) AMI.

c. 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.

d. 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 of the Issuance of Certificate of Occupancy for the Project.

e. 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 TOD Brokaw, LLC, a California limited liability company.

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

10121 Miller Avenue, Suite 200  
Cupertino, CA 95014

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

a. Upon a sale, ground lease, or transfer of the Site, the Developer's rights and obligations under this Agreement are deemed assigned 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, 3.1, and 5.7 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. The City shall provide appropriate assistance to the Developer in connection with obtaining these permits.

## 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. City acknowledges that the Parties entered into a Development Agreement, recorded on October 9, 2019 (24300322), in conjunction with other entitlements approved by City for a larger mixed-use development that includes the Project.

## Section 2.4 Construction Financing

Developer hereby represents that no City funds shall be used in this 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, 41 Affordable Housing Units) 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 41 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 permanent certificate(s) of occupancy for the Project, 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.

### 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 1.3 and 1.4 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

The Parties certify that to the best of their 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 following, 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 actions performed by Developer pursuant to this Agreement. However, the obligation to indemnify shall not apply if such liability is ultimately adjudicated to have arisen through the active negligence or 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 AND AMENDMENTS

### 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; Amendments

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 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.

[signatures appear on following page]

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

APPROVED AS TO FORM:

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

\_\_\_\_\_  
DEANNA J. SANTANA  
City Manager  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408) 615-2210  
Fax: (408) 241-6771

"CITY"

**TOD Brokaw, LLC,  
a California limited liability company**

By: H/S Brokaw, LLC,  
a California limited liability company  
Its: Manager

By: \_\_\_\_\_  
Name: Derek K. Hunter, Jr.\_  
Title: Manager

By: \_\_\_\_\_  
Name: Edward D. Storm  
Title: Manager

Local  
Address: \_\_\_\_\_  
Email  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_

"DEVELOPER"

**ATTACHMENT NO. 1**  
**AFFORDABLE HOUSING AGREEMENT**  
**LEGAL DESCRIPTION - SITE**


October 9, 2020  
Project No. A18034-17  
Page 1 of 1

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

All that certain real property situated in the City of Santa Clara, County of Santa Clara, State of California, being all of Lot Two as shown on that certain 14 lot subdivision Map of Tract 10532 for "Gateway Crossings", filed for record on October 6, 2020, in Book 933 at Pages 38 through 42, Official Records of Santa Clara County.

Legal Description prepared by Kier & Wright Civil Engineers and Surveyors, Inc.

10/9/20  
Date

  
\_\_\_\_\_  
Ryan M. Amaya, L.S. 8134



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Legal Description for Lot Two Gateway Crossings .doc

**ATTACHMENT NO. 2  
AFFORDABLE HOUSING AGREEMENT**

**SCOPE OF DEVELOPMENT**

The project consists of 407 apartment units, amenity space, ancillary retail space, and parking contained within five floors of wood-frame construction over a two-level structured parking podium.

**ATTACHMENT NO. 3  
AFFORDABLE HOUSING AGREEMENT**

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

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