



COUNCIL AGENDA: 12/05/17  
FILE: 17-399  
ITEM: 4.1

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Jacky Morales-Ferrand

**SUBJECT:** SEE BELOW

**DATE:** November 13, 2017

Approved

D. DSYL

Date

11/21/17

**COUNCIL DISTRICT: 3**

**SUBJECT: PUBLIC HEARING TO ACCEPT THE SUMMARY 33433 REPORT PURSUANT TO THE CALIFORNIA HEALTH AND SAFETY CODE SECTION 33433 FOR THE GROUND LEASING OF FUTURE CITY-OWNED PROPERTY TO AFFIRMED/PATH VENTURES AND RELATED ACTIONS FOR THE VILLAS ON THE PARK AFFORDABLE APARTMENTS IN DOWNTOWN SAN JOSE**

## RECOMMENDATION

Hold a Public Hearing and adopt a resolution:

1. Accepting the summary of costs and findings of the Summary Report pursuant to Section 33433 of the California Health and Safety Code for the disposition of a property located at 278 N. 2<sup>nd</sup> Street to be acquired by the City under an exercise of option to Affirmed/PATH Ventures under the terms and conditions of the proposed Ground Lease;
2. Authorizing the Director of Housing to negotiate and execute documents and document amendments related to a lease rider for a planned permanent supportive housing community for formerly-homeless individuals in favor of the California Tax Credit Allocation Committee and subject to satisfaction of certain conditions; authorizing the Director of Housing to execute a lender's consent to the Tax Credit Allocation Committee lease rider; and
3. Approving a change in the affordability mix of 278 N. 2<sup>nd</sup> Street, a 100% supportive housing community for formerly-homeless individuals to be comprised of 83 studio apartments: 42 units will be income-restricted at 30% of Area Median Income; 41 units will be price-restricted to 50% of Area Median Income; and one unit will be an unrestricted manager's unit. After 55 years, these restrictions will float up to 60% AMI for new residents.

## **OUTCOME**

Approval of the recommended actions will enable People Assisting the Homeless (“PATH”)/ PATH Ventures and Affirmed Housing (“Developer”) to assemble financing to build Villas on the Park, a new supportive housing community located at 278 N. 2<sup>nd</sup> Street (“Property”) in downtown San José (the “Project”). The Project will provide 83 income-restricted apartments, one unrestricted manager’s apartment, and an array of supportive services for residents who have experienced chronic homelessness.

## **BACKGROUND**

On January 10, 2017, and January 31, 2017, City Council approved the following actions to effectuate the Project, a new permanent supportive housing development to be located on the Property:

- Approved the Rezoning and Conditional Use Permit;
- Approved a Funding commitment of \$16,600,000; and
- Authorized of the Director of Housing to acquire the Property from the Developer and enter into a long-term ground lease (“Ground Lease”).

Detailed information on the Project, including the unit mix and development timeline, is provided as **Attachment A** – Villas on the Park Apartments Project Overview. A site map showing the location of the property is provided as **Attachment B**.

On June 28, 2017, the Developer submitted an application to the California Tax Credit Allocation Committee (“TCAC”) to be considered for federal low-income housing tax credits for the Project. On September 20, 2017, TCAC selected the Developer’s application and officially awarded 9% federal low-income housing tax credits for the Project.

Having received a tax credit allocation, the Developer is actively pursuing other funding sources for the Project. On September 26, 2017, the County of Santa Clara (“the County”) issued a Notice of Funding Availability (“NOFA”) for the Supportive Housing Development Fund. The NOFA is funded out of \$950 million General Obligation Bonds approved by the voters with the passage of the Measure A - Affordable Housing Bond. The Developer has applied for Measure A funds for the Project, which could lower the City’s total contribution. A funding decision from the County regarding Measure A funding is anticipated to occur by December 2017.

## ANALYSIS

### **33433 Summary Report**

In January 2017, the City Council granted the Director of Housing the authority to acquire the Property from the Developer for a price not to exceed the acquisition loan balance at time of transfer (\$4,500,000) and, after the acquisition, enter into a long-term Ground Lease of the Property to the Developer for affordable housing purposes. In order to complete these actions, the City must first comply with Section 33433 of the California Health and Safety Code ("Code").

Although redevelopment agencies have been dissolved, the redevelopment law still applies to Successor Housing Agencies as they develop and administer affordable housing assets financed by low and moderate income housing asset funds. The Housing Department used repayments of loans that were funded by low and moderate income housing asset funds to finance the Developer's acquisition of the site and thus the ground leasing of the Property to the Developer may only be done in compliance with Section 33433 of the State Health and Safety Code (redevelopment law) which requires that a summary report disclosing the financial aspects of the transaction be prepared and made available for public inspection at least two weeks prior to the date of the public hearing.

A Summary Report Pursuant to Section 33433 of the Code ("33433 Report") was prepared by Keyser Marston analyzing the costs and benefits related to the disposition of the Property to the Developer under the Ground Lease (See **Attachment C**). The 33433 Report was published in the *Post Record* on November 6, 2017, and November 13, 2017, as required under Code. The Summary Report and a copy of the Ground Lease was available for public inspection at the City Clerk's office and the Housing Department beginning on November 6, 2017.

Section 33433 also requires that the City make a finding that the consideration to be received by the City, as Housing Successor for the Property, is not less than the fair market value or the fair reuse value of the Property. The 33433 Report for this site concludes that the Property has a nominal reuse value until expiration of its recorded affordability restrictions. After acquisition of the Property, the City intends to Ground Lease the Property to the Developer for the value of \$1 (one dollar) per year. The report also finds that the Property will be used to provide restricted affordable housing for the term of the Ground Lease. Given these facts, the 33433 Report concludes that "the consideration to the City is not less than the fair reuse value of the land based on the current use and with the affordability and other covenants provided under the Ground Lease."

Therefore, the terms under which the Property will transfer satisfy the requirements of Section 33433.

## **TCAC Rider**

The City Council's initial approval of its loan and Ground Lease actions for the Project were completed prior to TCAC's adoption of the regulation requiring a lease rider ("TCAC Rider"). The approval did not contemplate a TCAC Rider or its potential terms and impact on Ground Lease terms between the City and Developer.

The City Council approval for the Project permitted the Director of Housing to negotiate and execute documents related to the Ground Lease. However, the City Council approvals did not authorize the Director to make the changes contemplated by the TCAC Rider. Although Chapter 5.06 of the San José Municipal Code authorizes the Director of Housing to amend loan documents if certain findings are made, the Director has no similar delegated authority to amend ground lease terms. Therefore, City Council authorization is required for the Director's execution of the TCAC Rider. This execution is expected to occur at or after conversion to permanent financing.

### Summary of Material Terms of the TCAC Rider

The TCAC Rider requires the City to waive any provision in the Ground Lease in favor of the TCAC Rider. TCAC has agreed to limit that waiver to the terms that are expressly in conflict with or would prevent the Developer from being compliant with the TCAC Regulatory Agreement.

The TCAC Rider requires the City to provide warranties regarding, amongst other things, the current status of the City's title, and the current compliance of the Developer's physical improvements to the Property with state law, local law, federal law, and agreements with public entities. The TCAC Rider also imposes an ongoing requirement for the City to certify various items, including any information relating to the condition of the Property, within 30 days from any reasonable request from TCAC. However, TCAC has agreed to edit the TCAC Rider to allow the City to satisfy its duty with respect to warranties and certificates regarding the condition of the Property and physical improvements, based on estoppel certificates from the Developer.

The TCAC Rider replaces the transfer provisions in the Ground Lease with its own transfer provisions. This could subject the City to conflicting requirements. TCAC has agreed to a provision exempting City transfers required by a senior lender under the Ground Lease from the TCAC Rider's transfer provisions.

### **Conditions Required for Execution of the TCAC Rider**

Staff is seeking authorization for the Director to negotiate and execute a TCAC Rider substantially in the form of the draft TCAC Rider (See **Attachment D**) after approval to form by the City Attorney's Office and fulfillment of the conditions listed below:

- Written consent of all lenders as is required for all amendments to the Ground Lease;
- Updated Lessor's title policy as required for the TCAC Rider's representation regarding title; and
- Agreement requiring the Developer to provide an estoppel certificate to the City during the term of the TCAC Rider.

### **Revised Unit Mix/Area Median Income Levels**

When the City Council approved a funding commitment to the Project in January 2017, the Project was expected to serve 78 Very Low-Income ("VLI") formerly-homeless households earning no more than 35% Area Median Income ("AMI"), with additional space for 10 to 20 interim housing beds serving formerly homeless individuals. Staff is recommending the following changes to the original Project:

- The option of providing interim beds was abandoned due to difficulties with potential lenders. The Developer will work with a shelter provider in the area to identify potential space to ensure that the needs of homeless individuals in Downtown are met. Since the interim beds are no longer feasible, the Developer identified an alternate plan which increases the number of supportive apartments in the Project from 78 to 83, without additional City subsidy.
- Many homeless individuals in our community earn incomes between \$28,650 and \$47,000 (30-50% AMI). This is most common in situations where formerly-homeless individuals receive benefits from multiple governmental agencies, such as in the case of veterans of the United States Armed Forces. While it is likely that most residents in the Project will earn below 30% AMI or \$28,650 for a household of one, the income restriction has been increased to 50% AMI for 41 apartments. This will provide added flexibility without compromising the intent or effectiveness of the Project (See Attachment A Table 3: Unit and Proposed Income Mix).
- Leasehold affordability restrictions will float up 60% AMI for new residents after expiration the 55<sup>th</sup> anniversary of the recording of notice of completion for the affordable units. Staff has determined that rents collected at 60% of the AMI would generate sufficient revenue to ensure the economic viability of the project.

### **Next Steps**

The Developer is committed to securing and closing all financial commitments for the Project by January 2018. If the Developer meets this goal, construction of the Project would begin shortly after. Assuming an 18-month construction timeline, it is anticipated that the Project may start serving formerly-homeless individuals in Mid-2019.

## **EVALUATION AND FOLLOW-UP**

The Department will exercise the option to acquire the Property with low and moderate income housing asset funds. If the recommended actions are approved and Villas on the Park successfully closes construction financing, the Department will include this project as part of its Production Reports that provide on the progress updates on affordable properties undergoing rehabilitation or construction. The Department periodically posts these reports to its website ([www.sjhousing.org](http://www.sjhousing.org)).

## **POLICY ALTERNATIVES**

To arrive at this proposal, Housing Department staff considered the following options:

### **Alternative #1 – Recommendations 1 & 2**

**Alternative:** *The City Council could deny the requests in this memorandum pertaining to the Section 33433 Study and the TCAC Lease Rider.*

**Pros:** By denying the requests in this memorandum, the Developer would be unable to receive tax credits to fund the development of the Project. Therefore, the City could invest the funds already committed to the Project in other affordable housing developments.

**Cons:** The City will lose this opportunity to provide permanent supportive housing for homeless individuals currently residing in the Downtown.

**Reason for not recommending:** Villas on the Park will help to meet the demand for affordable housing and permanent supportive housing that is available to the most vulnerable homeless individuals.

### **Alternative #2 – Recommendation 3**

**Alternative:** *The City Council could deny the Housing Department's recommendation to modify the Project's AMI levels.*

**Pros:** 100% of the Project's apartments would be income-restricted to ELI households for the term of the ground lease.

**Cons:** By limiting 100% of the Project's apartments to ELI households, the Developer may not have the ability to house members of the homeless population that earn incomes greater than 30% AMI.

***Reason for not recommending:*** While it is likely that most residents in the Project will earn below 30% AMI or \$28,650 for a household of one, the income restriction has been increased to 50% AMI for 41 apartments. This will provide added flexibility without compromising the intent or effectiveness of the Project

## **PUBLIC OUTREACH**

Prior to City Council's approval of the Project, the Developer implemented a comprehensive outreach plan to engage with the community, provide information, answer questions, and to better understand the concerns of neighborhood residents and businesses. Community meetings were held in November 2015, February 2016, and August 2016, and individual or small group meetings were convened with more than 150 individual attendees. In addition, the Developer communicated with the community via email, hard-copy mailings to more than 700 local residents, a website dedicated to providing information about the Project, and attendance at meetings of several Neighborhood and Business Associations, such as: The Horace Mann Neighborhood Association; the Hensley Historic Neighborhood Association; the San José Historic District Association; the SoFA Business Association; and the San José Downtown Residents Association.

In addition, this memorandum will be posted on the City's Council Agenda for December 5, 2017.

## **COORDINATION**

Preparation of this report was coordinated with the City Manager's Office and the Office of the City Attorney.

## **COMMISSION RECOMMENDATION/INPUT**

This item was not heard by the Housing and Community Development Commission, as approvals of affordable development financing do not fall under the functions, powers and duties of the Commission as delineated in Section 2.08.2840 of the San José Municipal Code.

## **FISCAL/POLICY ALIGNMENT**

This expenditure is consistent with the following policy documents: *The City's Envision 2040 General Plan* and the *2014-23 adopted Housing Element* in that it will help the City meet its Regional Housing Needs Allocation; the City's current *Housing Investment Plan* in that it increases San José's supply of affordable housing; the *City's 2015-20 HUD Consolidated Plan*

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in that it will provide rental apartments that are affordable to very low- and extremely low-income households; and the *Community Plan to End Homelessness* approved by the City Council in February 2015 in that it is providing supportive housing for formerly-homeless residents. It was also identified in the Department's adopted *Affordable Housing Investment Plan*.

### **COST SUMMARY/IMPLICATIONS**

There are no budgetary implications associated with recommendations in this memorandum.

### **CEQA**

Addendum to the San José Downtown Strategy 2000 Final Program Environmental Impact Report, and the Envision San José 2040 General Plan Final Program Environmental Impact Report and Supplemental Environmental Impact Report, File Nos. C16-020, CP16-014, and AT16-030.

/s/

JACKY MORALES-FERRAND  
Director, Housing Department

For questions, please contact Patrick Heisinger, Acting Division Manager at (408) 975-2647.

Attachment A: Villas on the Park Apartments Project Overview  
Attachment B: Villas on the Park Apartments Site Map  
Attachment C: 33433 Summary Report  
Attachment D: DRAFT TCAC Rider



## ATTACHMENT A

### Villas on the Park Apartments Project Overview

**Table 1: Development Team**

Developer	Affirmed/PATH Ventures
Limited Partnership	Villas on the Park San Jose, LP
Architect	The Dahlin Group
Service Provider	PATH (People Assisting the Homeless)
Property Management	John Stewart Company

**Table 2: Development Summary**

Address	278 N. 2 <sup>nd</sup> Street
General Plan Designation	Downtown
Development Type	New Construction
Construction Type	Type I/Type III
Parking Type Commercial Parking Spaces Other Parking Measures	Type I parking garage on first floor 12 spaces Transpiration passes to all residents/service employees – also 29 spaces for bicycles
Housing Type	Affordable plus Permanent Supportive Housing
Lot size	0.35 acres (15,246 SF)
Units	84 units including a two-bedroom manager unit
Density	240 Dwelling Units/Acre
Gross Building Area	62,378 SF
Leasing Office Area	1,654 SF
Parking Space	5,475 SF
Residential Space	31,488 SF
Number of Project Based Vouchers	83
Prevailing Wages?	Yes
Developer's Compliance History	First loan between the City and the team of Affirmed/PATH Ventures

**Table 3: Unit and Proposed Income Mix**

UNIT SIZE	30% AMI		50% AMI		Total
	Apts.	Max. income	Apts.	Max. Income	
Studios	42	\$25,100	41	\$41,800	83
Unrestricted 2-BR Manager Unit	NA	NA	NA	NA	1
<b>Total</b>	<b>42</b>		<b>41</b>		<b>84</b>

**ATTACHMENT A – Continued**

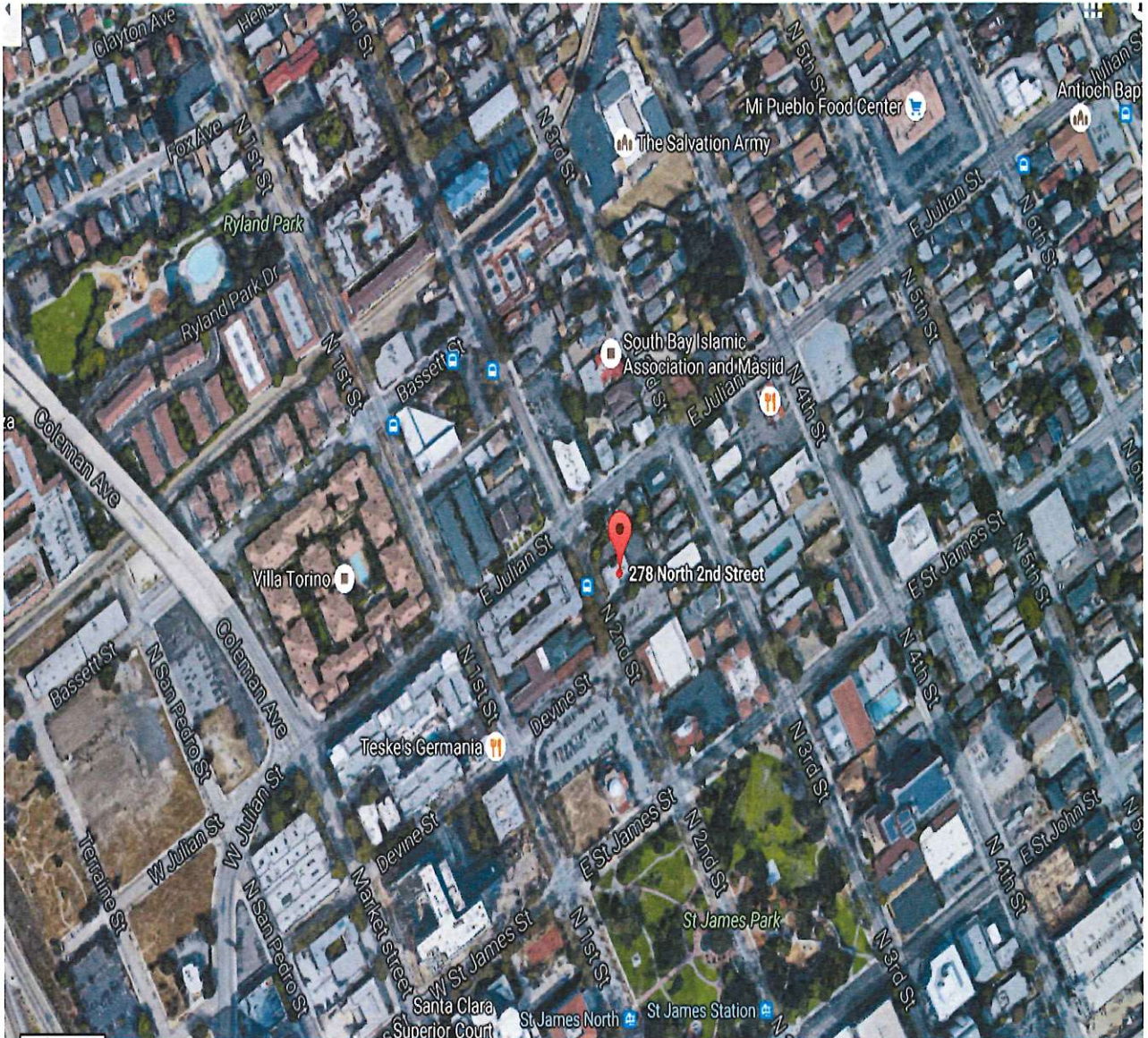
**Table 3: Construction/Permanent Sources for the Project**

<b>CONSTRUCTION SOURCES</b>	<b>Amount</b>
Construction Loan	\$19,819,123
City of San José Loan - Acquisition	\$4,500,000
City of San José Loan – Capital	\$2,699,213
County Measure A Loan	\$7,199,213
LP Equity	\$4,730,055
<b>TOTAL CONSTRUCTION SOURCES</b>	<b>\$38,947,604</b>

<b>PERMANENT SOURCES</b>	<b>Amount</b>
Tranche B – Perm Loan	\$4,200,000
City of San José Loan - Acquisition	\$4,500,000
City of San José Loan – Capital	\$2,699,213
County Measure A Loan	\$7,199,213
LP Equity	\$20,349,178
<b>TOTAL PERMANENT SOURCES</b>	<b>\$38,947,604</b>

## ATTACHMENT B

### Villas on the Park Apartments Site Map



**ATTACHMENT C**

**DRAFT TCAC Rider**

Free recording in accordance with  
California Government Code  
Section 27383

RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:

California Tax Credit Allocation  
Committee  
915 Capitol Mall, Rm 485  
Sacramento, CA 95814

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**CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE**

**LEASE RIDER  
AGREEMENT (TAX CREDITS)**

Ground Lease

TCAC NUMBER CA-  
PROJECT NAME

**THIS LEASE RIDER AGREEMENT** (the "Lease Rider Agreement") is dated this \_\_\_\_\_ day of \_\_\_\_\_, and is made and entered into for reference purposes only, by and among \_\_\_\_\_ (the "Lessor"), \_\_\_\_\_ (the "Lessee"), and the California Tax Credit Allocation Committee, a public agency of the State of California established under Section 50199.8 of the Health and Safety Code ("TCAC") in consideration of the following facts and circumstances:

A. Lessor is the fee simple owner of that certain real property described in Exhibit A attached hereto and incorporated herein (the "Property");

B. [OPTION A: PRIVATE LESSOR] Lessor and Lessee entered into the following ground lease of the Property: that certain ground lease dated \_\_\_\_\_ and recorded \_\_\_\_\_ in the official records of \_\_\_\_\_ County, California (the "Official Records") as Instrument No. \_\_\_\_\_ [and as amended by that certain First Lease Addendum dated \_\_\_\_\_ and recorded \_\_\_\_\_ as Instrument No. \_\_\_\_\_ ] (the "Lease");

[OPTION B: PUBLIC AGENCY LESSOR]: Lessor and Lessee entered into the following ground lease of the Property: that certain ground lease, which is on file with the Lessor as a public record (the "Lease") and a memorandum of which was recorded in the official records of \_\_\_\_\_ County, California, as Instrument No. \_\_\_\_\_ (the "Memorandum of Lease") [and as amended by that certain First Lease Addendum dated \_\_\_\_\_ and recorded \_\_\_\_\_ as Instrument No. \_\_\_\_\_ ] ("Memorandum of First Lease Amendment");

C. Pursuant to the Lease, Lessee has agreed to acquire a leasehold in the Property for a term described below in Paragraph 2.f. which is at least as long as the TCAC Regulatory Agreement and

to [develop, acquire, refinance, construct, rehabilitate], own, operate and manage a rental housing development on the Property consisting of not less than            residential rental units [and nonresidential space(s) approved by TCAC]. During the term of the Lease, Lessee is the owner of all of those certain buildings, improvements and fixtures now or hereafter erected on the Property described in the lease, and all ~~appurtenances, easements, and articles of property~~ appurtenances thereto now or hereafter affixed to, placed upon or used in connection with such real property and owned by Lessee or in which Lessee has an interest, together with all additions to, substitutions for, changes in our replacements of the whole or any part of said articles of property (collectively, the "Improvements"). Collectively, the Lessee's leasehold interest in the Property and its interest in the Improvements constructed pursuant to the Lease are hereinafter sometimes referred to as the Development (the "Development");

D. TCAC has authorized an allocation of federal [and state] low-income housing tax credits by a Reservation Letter dated            (the "Allocation") to Lessee to finance, in part, the Development, pursuant to the Low Income Housing Tax Credit Program ("Program"). The Allocation is subject to numerous terms and conditions, including without limitation, the execution and delivery of this Lease Rider Agreement and the TCAC Regulatory Agreement which sets forth certain use restrictions affecting the Development, which TCAC Regulatory Agreement is to be recorded in            County, as required by Section 42 of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder (collectively, "Section 42");

E. As a further condition of the Allocation and pursuant to the requirements of the Program, Lessee and TCAC [have entered] [will enter] into a Regulatory Agreement, including any amendments thereto (the "Regulatory Agreement"), securing performance related to the Allocation, and governing the use, occupancy, operation, management, and ownership of the Development. Consistent with the provisions of Section 17 hereof, Lessor and Lessee have agreed to waive any such provisions of the Lease expressly in conflict with or which would frustrate Lessee's compliance with the Regulatory Agreement in favor of the terms of the Regulatory Agreement.

F. In order to induce TCAC to make the Allocation, Lessor and Lessee have agreed to enter into and record this Lease Rider Agreement for the benefit of TCAC, its successors, and assigns.

G. It is the intent of TCAC that, except in unique circumstances, it will exercise its rights and remedies under this Lease Rider Agreement only after written notice of any Lease defaults have been provided to Lessor, any Senior Lender, the Tax Credit Partner, and any other party known by TCAC to have either an ownership or other equitable interest in the Development. In addition, it is the intent of TCAC that the exercise of its rights and remedies under this Lease Rider Agreement generally shall be undertaken as part of a judicial action in a court of competent jurisdiction unless Lessor and any Senior Lenders otherwise agree.

**NOW THEREFORE**, in consideration of the foregoing recitals and the mutual covenants hereinafter contained, TCAC, Lessee and Lessor hereby agree as follows:

1. Definitions and Lease Rider Term.

a. As used herein, "Leasehold" means all of Lessee's leasehold interest in the Property described in Exhibit A, in the Development, in the Improvements now or hereafter located on the Property, all options contained in the Lease or granted in connection with the Lease, all other rights of Lessee under the Lease, and all subleases entered into in connection with the Lease (the "Subleases").

b. For the purposes of this Lease Rider Agreement, if Lessor is a corporate or governmental entity, the obligation to assert facts related to the "Lessor's knowledge" shall include a duty [for the chief executive of the agency or corporation] to perform or otherwise be responsible for

pursuit of reasonably diligent efforts, including but not limited to use ONLY of an estoppel agreement executed by Lessee, to ascertain the existence or nonexistence of the facts asserted, contemporaneous to the assertion.

c. For the purposes of this Lease Rider Agreement, the holders of all mortgage liens set forth in the Report and any other lenders approved by TCAC pursuant to the Regulatory Agreement, and all successors and assigns thereof including the holders of any mortgage lien against the Improvements or Lessee's interest in the Leasehold are collectively referred to as "Senior Lenders."

d. Lease Rider Agreement Term. This Lease Rider Agreement becomes effective on the date the TCAC Regulatory Agreement is recorded and remains in effect for at least the term identified in Paragraph 2. (f) unless Lessor, Lessee, and TCAC agree to an extension thereof of the Regulatory Agreement. Upon the expiration or sooner termination of the TCAC Regulatory Agreement, this Lease Rider Agreement shall terminate and be of no further force or effect.

2. Representations and Warranties of Lessor and Lessee. Lessor and Lessee hereby represent and warrant to TCAC as of the date of this Lease Rider Agreement as follows:

a. Title. (1) By Lessor: Lessor warrants and represents to TCAC that, to the best of Lessor's knowledge and based on the Report identified in this Paragraph, Lessor's fee interest in the Property is free and clear of all liens, encumbrances, covenants, easements, licenses, judgments, or other matters of record except those shown as affecting the fee interest of the Property in that certain Policy of Title Insurance Final Report or, if one has not been issued, Preliminary Report regarding the Property issued on by, Order # by, Policy No. by (the "Report"). Lessor has not required or permitted, and has no knowledge of any other matters of record to be recorded that are not contained in the Report.

(2) By Lessee: [If applicable, OPTION 1:] Lessee has entered into an agreement with by ("the Agreement") dated by for a loan of \$ by to further assist the Development which will be secured by by, all as more fully described under the Agreement. Lessee warrants and represents that it [has provided/will provide] TCAC with a copy of the Agreement [which is subject to TCAC approval] [which previously was approved by TCAC] [and TCAC acknowledges receipt of such Agreement] prior to execution of this Lease Rider Agreement.]

[If applicable, OPTION 2:] Lessee has entered into one or more loan agreements ("the Agreement(s)") which will be secured as more fully described in the Agreement(s). Lessee warrants and represents that it [will provide/has provided] a true and correct copy of said Agreement(s) to TCAC as part of the final "Final Cost Certification" which, upon approval by TCAC, is/are the basis for TCAC's issuance of IRS Form 8609.

b. Priority. Lessor warrants and represents to TCAC that [except as otherwise referenced in the Report,] the Lease is superior to any and all mortgage liens on the Property and nothing encumbers fee title of the Property which would interfere with Lessee's ability to construct and operate the Development on the Property.

c. Transfers by Lessor. Lessor warrants and represents to the best of Lessor's knowledge that it has not assigned, mortgaged, or otherwise hypothecated or transferred, or agreed to assign, mortgage or otherwise hypothecate or transfer, its interest in the Property in whole or in part, except as referenced in the Report and except as security for any loans or any other liens, conditions, covenants, or restrictions on the Property identified in the Report and approved in writing by TCAC.

d. Status of Lease. Lessor warrants and represents that:

(1) Lessor is the current Lessor under the Lease. To the best of Lessor's knowledge, the Lease is in full force, the Lease is not void, voidable or terminable without an uncured default by Lessee except pursuant to Section 5 at the option of any party thereto or of any other person or entity claiming an interest in or to such Lease or the Development, and to the best of Lessor's knowledge, there has been no default thereunder on the part of Lessee nor has any event occurred which, with the giving of notice or the passage of time, or both, would be an event of default thereunder. Lessor has not given notice of any violation under the Lease to Lessee. Lessor has not been informed of and has not otherwise received notice from Lessee or from any other person or entity concerning any alleged default on the part of Lessor under the Lease. To the best of Lessor's knowledge, there exist no defenses or offsets to enforcement of the Lease by Lessee. [Optional, if applicable: Pursuant to the terms of the Lease, Lessor has waived its right to terminate the Lease during the Compliance Period (as defined in the Lease) for a non-monetary default by Lessee without the prior written consent and approval of the Tax Credit Partner and the Senior Lenders.]

(2) Any consent or approval of any third party (including any lender or government agency) that is required in order for Lessor to deliver this Lease Rider Agreement has been obtained.

(3) To the best of Lessor's knowledge, no alterations, improvements or additions now exist on the Property that have not been approved by the Lessor.

e. Other Agreements. All terms and conditions of the Lessee's tenancy under the Lease are set forth in the Lease and Lessor and Lessee each certify to the best of its knowledge that there have been no other agreements and no further or other supplements, amendments, modifications or extensions thereof except those submitted to and approved by TCAC.

f. Lease Term. The date of the commencement of the Lease term is \_\_\_\_\_ and will end on \_\_\_\_\_ unless terminated sooner pursuant to its terms and consistent with this Lease Rider Agreement. All conditions precedent to the effectiveness of the Lease or the exercise of any of Lessee's rights thereunder at the effective date of the Lease have been fully satisfied.

g. Development. To the best of Lessor's knowledge, the Improvements constructed, or to be constructed, by Lessee on the Property satisfy or are expected to satisfy all requirements affecting the design, use or characteristics of such Improvements imposed by Lessor under the Lease or otherwise, including a requirement by Lessor for Lessee to comply with any and all applicable provisions of federal, state and local laws, and all agreements with any public entities concerning the Development, as amended from time to time.

h. Insurance. All notices, certificates, binders, endorsements, copies of policies, and receipts required under the Lease have been delivered to and approved by Lessor.

3. Cancellation, Transfer of Interest.

a. [Subject to matters of record referenced in the Report, the rights of Senior Lenders and the Tax Credit Partner and the matters of record on the Lessee's Leasehold interest and only to the extent necessary or appropriate pursuant to such matters of record,] Lessor and Lessee agree that so long as TCAC, its successor or assigns holds the Regulatory Agreement encumbering the Development, no termination of the Lease or efforts by Lessor to terminate the Lease except a termination consistent with Section 5, and no subordination, cancellation, surrender, amendment or modification of the Lease shall be effective without the

prior written consent of TCAC, which consent shall be in TCAC's reasonable discretion and may be conditioned upon the satisfaction of such terms and conditions as TCAC may reasonably prescribe. TCAC shall have 30 days after its receipt of such a notice and any clarifications thereof requested by TCAC to consent to or deny any such variation from those obligations. Failure by TCAC to act within such a 30-day period shall constitute consent to such a variation. Any attempt by Lessor to take such action shall be void without TCAC's prior written consent or implied consent as provided for in this Section 3.a. Provided, however, that any action of the Lessor required by the Senior Lender or the Tax Credit Partner is not a violation of this Paragraph and Lessor shall provide notice to TCAC promptly upon receipt of such direction from the Senior Lender or Tax Credit Partner of the required action

b. [Subject to matters of record referenced in the Report, the rights of Senior Lenders and the Tax Credit Partner, and the matters of record on the Lessee's Leasehold interest and only to the extent necessary or appropriate pursuant to such matters of record,] Lessor agrees that it shall not transfer, convey, sell, hypothecate, assign, encumber or permit any liens against its interest, or any portion thereof, in the Property or the Development unless Lessor requires, and any purchaser, assignee, or transferee agrees, that the purchaser, assignee, or transferee will expressly assume all obligations of Lessor under the Lease and this Lease Rider Agreement by a written instrument recordable in the Official Records. Any variation from those obligations shall require prior written approval of TCAC, which consent shall be in TCAC's reasonable discretion, and may be conditioned upon the satisfaction of such terms and conditions as TCAC may reasonably prescribe. If Lessor or Lessor's successor is seeking a variation from these obligations, Lessor or Lessor's successors and assigns shall provide TCAC with copies of all documents related to the transfer, conveyance, sale, hypothecation, assignment, encumbrance or lien at least 30 days prior to the effective date of that transaction and TCAC shall have 30 days after its receipt to reasonably consent or deny any such variation from those obligations. Failure by TCAC to act within such a 30-day period shall constitute consent to such a variation.

c. Foreclosure. Nothing contained in this Lease Rider Agreement shall prevent a Senior Lender from foreclosing on its security interest or accepting a conveyance in lieu of foreclosure.

d. No Merger. There shall be no merger of the Lease or any interest in the Lease, nor of the Leasehold interest, with the fee estate in the Property if the Lease or such interest therein, or such Leasehold interest may be directly or indirectly held by or for the account of any person who shall hold the fee estate in the Property, or any interest in such fee estate, nor shall there be such a merger by reason of the fact that all or any part of the Leasehold interest created thereby may be conveyed or mortgaged in a leasehold mortgage, deed of trust, or other security instrument to a leasehold mortgagee that shall hold the fee estate in the Property or any interest of the Lessor under the Lease.

#### 4. Consent to Assignment, Payment of Rent.

a. [Subject to any matters of record as referenced in the Report, the rights of Senior Lenders, and the matters of record on the Lessee's Leasehold interest and only to the extent necessary or appropriate pursuant to such matters of record,] Lessor hereby consents to and approves the following to the extent such consents or approvals are required under the Lease:

- 1) Lessee's encumbering the Lease, the Leasehold and the Development by the Regulatory Agreement; possession of the Leasehold and any Development thereon by TCAC or by a receiver under the Regulatory Agreement; and sale of the



Leasehold and the Development pursuant to a court order or other agreement enforcing the Regulatory Agreement;

- 2) Assignments to TCAC or its designee of any subleases and any and all rents from such subleases; and
- 3) Sale or assignment of all or any part of any interest in the Leasehold to any purchaser or transferee pursuant to a court order or other agreement enforcing the Regulatory Agreement (such purchaser or transferee, including TCAC, is collectively referred to as the "Transferee"), and to any subsequent transfers (all such assignments, transfers, and subsequent transfers referred to in this Lease Rider Agreement as the "Transfer").

b. Nothing in this Lease Rider Agreement, in the Regulatory Agreement or in the Lease shall impose on TCAC the obligations of Lessee under the Lease or require TCAC to assume the Lease unless TCAC takes possession or ownership of the Development pursuant to a court order or other agreement under the Regulatory Agreement, or becomes the lessee under the Lease or a New Lease (defined in Section 6, below).

5. Notice of Defaults; Termination Notice.

a. Notice and Cure. Lessor shall provide concurrently to TCAC a written copy of all notices and demands, including, without limitation, notices of default or breach which Lessor gives, delivers, or sends to Lessee under the Lease. No notice or demand under the Lease shall be effective as to TCAC unless and until a copy of such notice is provided to TCAC as provided herein. Any notice of default under the Lease or this Lease Rider Agreement shall describe the default(s) with reasonable detail. TCAC shall have the right, but not the obligation, to cure any breach or default within the time period given in the Lease; provided that, if such notice to TCAC is not given or is delayed for any reason, the period of time within which TCAC may cure any such breach or default shall commence upon receipt by TCAC of such notice. Lessor and Lessee authorize TCAC to enter the Property and Improvements after reasonable prior written notice or pursuant to a court order for the purpose of mitigating defaults or exercising its right to cure and any other powers given TCAC under the Regulatory Agreement, this Lease Rider Agreement or the Lease.

b. Termination Notice. After the expiration of the grace period given Lessee under the Lease to cure a default, Lessor shall not terminate the Lease on account of such default but shall give TCAC a written notice (the "Termination Notice") that Lessee has failed to cure the default within the grace period and that, on account thereof, Lessor intends to terminate the Lease, which notice shall set a termination date not earlier than ninety (90) days after TCAC's receipt of the Termination Notice, provided that Lessor agrees to extend such termination date for a reasonable period if TCAC reasonably requires additional time to accommodate TCAC's taking possession of the Development where possession is necessary to cure Lessee's default, all of which is subject to any Senior Lender's security instruments. In the event the default results in the existence of an immediate or imminent serious health and safety threat to the residents or the public, Lessor may request TCAC to approve a shorter termination date which shall not be unreasonably denied. In addition, TCAC may waive its right to the 90-day period to cure under the Termination Notice after its receipt of the Termination Notice if TCAC determines that it will not take action to effect a cure for the default. No Termination Notice shall become effective to terminate the Lease if:

- (1) Except as provided in Section 5.c., within ninety (90) days after receipt of the Termination Notice, TCAC cures all defaults which can be cured by payment or

expenditure of money or without possession of the Development; or provides reasonable assurance and undertakings for the cure of such default. To effect a cure of Lessee's default, TCAC may, subject to the rights of all Senior Lenders, make any repair of improvement, do any other act or thing required of Lessee under the Lease, or do any act or thing which may be necessary or proper to prevent termination of the Lease. TCAC and its agents and contractors, subject to the rights of all Senior Lenders, shall have full access to the Development for purposes of accomplishing the curing of defaults under the Lease. Any of the foregoing done by TCAC shall be as effective to prevent a termination of the Lease as the same would have been if done by Lessee; or

(2) TCAC commences and diligently pursues judicial and/or administrative proceedings commenced under the Regulatory Agreement to cure a default.

(3) If TCAC has not cured a default upon the expiration of such Termination Notice pursuant to Subsection (1) above or fails to commence and diligently pursue a cure pursuant to Subsection (2) above, and subject to compliance with other provisions of this Section 5.b. and any limitations on termination in the Lease, Lessor may terminate the Lease and pursue such other remedies as are available under the terms of the Lease.

c. Defaults Not Susceptible to TCAC Cure. TCAC shall not be required to perform any act which is not susceptible to performance by TCAC, such as to cure a filing or condition of bankruptcy or insolvency or to cure or commence the cure of any default which is Lessee's failure to pay or comply with any lien, charge or encumbrance which is junior in priority to the Regulatory Agreement, or to pay any amount owed under an indemnity of Lessor by Lessee based on an event occurring prior to TCAC's possession of the Development. If any such act not susceptible to performance by TCAC constitutes a breach under the Lease, Lessor may resort to any and all of its remedies for such breach under the Lease.

d. Reimbursement of Lessor's Payment of Arrears. Lessor agrees that if Lessor cures Lessee's failure to make any payment due under the Lease or any loan identified in Section 2.a., it shall seek reimbursement of amounts so paid solely from Lessee and TCAC shall have no obligation to pay such amounts to Lessor.

e. Waiver of Breach or Default. Subject to the rights of Senior Lenders, on transfer of the Leasehold interest pursuant to a court order or other agreement enforcing the Regulatory Agreement, all violations, defaults and breaches by Lessee under the Lease occurring prior to such transfer, including, without limitation, nonpayment of rent or other amounts payable under the Lease, shall be deemed personal obligations of Lessee, and TCAC or other Transferee shall be entitled to the New Lease as described in Section 6 below without incurring or assuming any liability or obligation of, or claim against, Lessee under the Lease. However, upon transfer of the Leasehold interest, TCAC or the Transferee, as applicable, shall be responsible for correcting all defaults in existence at the time of the transfer; Lessor may exercise its rights under Section 5.b. if TCAC or the Transferee fails to correct any such default within a reasonable time. Nothing in this section shall be deemed a waiver of any claim by Lessor, TCAC, or other Transferee against Lessee under the Lease.

f. Enforcement Not a Breach. Any action taken by TCAC to enforce its rights under this Lease Rider Agreement with respect to Lessee with respect to any of the documents governing the Allocation including, without limitation, any actions taken to collect any amounts due and owing to TCAC or any action to appoint a receiver for the Development or

to otherwise ensure compliance with the Regulatory Agreement, shall not constitute or result in a breach or violation of the Lease.

g. Status Quo Ante. Any default by Lessee shall not prejudice TCAC if TCAC chooses to cure such default within the applicable grace period specified by this Lease Rider Agreement or the Lease, and Lessor acknowledges and agrees that upon TCAC's cure of any such default, the Lease shall be restored status quo ante.

6. New Lease.

a. Conditions. Section 5 hereof notwithstanding, [and subject to the rights of Senior Lenders as provided in their security instruments,] Lessor agrees to comply with the requirements of Section 6.b. if the following conditions specified in this Section 6.a. apply:

(1) The Lessee's Lease or a Transferee's New Lease is terminated for any reason whatsoever and TCAC or a subsequent Transferee acquires possession or ownership of the Development as a result of TCAC enforcing its remedies authorized by the Regulatory Agreement; and

(2) TCAC or other Transferee, whether or not such party has assumed the Lease, requests Lessor in writing pursuant to Section 6.b. to enter into a new lease (the "New Lease") of the Property within ninety (90) days after TCAC or the Transferee takes possession or ownership of the Development either as a result of a court order or other agreement under the Regulatory. The New Lease shall be at the rent of, and consistent with, the terms, provisions, covenants, options and agreements contained in the terminated ~~or original~~ Lease, [as amended,] or granted by the Lessor in connection with the Lease, all as modified or supplemented by this Lease Rider Agreement unless Lessor agrees to lower rent or less restrictive terms and conditions.

b. Obligations. If the conditions specified in Section 6.a. have been satisfied, [and subject to the provisions of matters of record as referenced in the Report and the rights of Senior Lenders in their security instruments,] Lessor shall:

(1) upon receipt of the request for New Lease described in Section 6.a.(2) above, enter into a New Lease of the Property with TCAC, its nominee, or its successor-in-interest or other Transferee, for the remainder of the term of the Lease, effective as of the date of the termination of the Leasehold or conveyance of the Development pursuant to a court order or other agreement under the Regulatory Agreement;

(2) convey to TCAC, its nominee or its successor-in-interest or other Transferee, all title and interest of the Lessee to the Improvements encumbered by the Regulatory Agreement, if any, which may become or have become vested in Lessor as a result of any termination of the Lease or conveyance by court order or other agreement under the Regulatory Agreement, so long as the New Lease contains provisions that require TCAC, its nominee, or its successor-in-interest or other Transferee to reconvey all title and interest conveyed by Lessor's grant deed in the Improvements at the termination of the term of the New Lease; and

(3) assign to TCAC, its nominee, or its successor-in-interest or other Transferee, all of Lessor's interest as landlord, if any, in all existing Subleases of all or any part of the Development and all attornments given by the sublessees under such Subleases, provided that TCAC, its nominee, or its successor-in-interest shall reconvey all such title

and interest conveyed by Lessor in all existing Subleases in all or any part of the Development at the termination of the New Lease.

c. Priority. The Leasehold interest and any other interest (if any) in the Development granted to TCAC, its nominee or its successor-in-interest or other Transferee under this Section 6 shall be prior to any mortgage or other lien, charge or encumbrance on the Development created by Lessor or Lessee, except for the liens of Senior Lenders or as approved in writing by TCAC or as referenced in the Report.

7. Successors to TCAC. Subject to Section 4 hereof, if the Leasehold is transferred pursuant to a court order or other agreement enforcing the Regulatory Agreement, Lessor shall recognize the Transferee as the tenant under the Lease, subject to the liens of Senior Lenders. Anything in the Lease notwithstanding, the rights and benefits of TCAC under this Lease Rider Agreement shall benefit and may be exercised by any Transferee. The holder of any mortgage or deed of trust which may be given to secure a portion of the purchase price in any sale by TCAC or its successor(s) after TCAC acquires the Leasehold interest or enters into a New Lease under this Lease Rider Agreement shall be entitled to rely on continuation of the same rights and benefits of TCAC under this Lease Rider Agreement.

8. Diligence of TCAC. So long as TCAC is prevented by any process or injunction issued by any court or by any statutory stay, or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Lessor or Lessee, from commencing or prosecuting its remedies under the Regulatory Agreement or other appropriate proceedings in the nature thereof, or undertaking or completing any of TCAC's rights or remedies under the Lease or this Lease Rider Agreement, TCAC shall not be deemed for that reason to have failed to commence such proceedings or to have failed to prosecute diligently such proceedings, provided, however, that TCAC shall use reasonable efforts to contest and appeal the issuance or continuance of any such process, stay or injunction.

9. Certificates.

(a) Certificate by Lessor. Within fifteen (15) [OPTION: for public Lessor, this may be "thirty (30)" ] calendar days after written request made by TCAC, Lessor shall execute and deliver to TCAC, or to any proposed purchaser, transferee, or encumbrancer of Lessee's Leasehold interest, a certificate declaring, to the best of Lessor's knowledge, (i) the existence and validity of the Lease, or New Lease as the case may be, and amendments thereto, if any, and that such Lease or New Lease remains in full force and effect; (ii) that all conditions under the Lease, or New Lease, have been satisfied, and that there are no defaults under the Lease or New Lease, or if there has been a default under the Lease or New Lease, a description of the nature of such default; (iii) any other relating to the condition of the Property reasonably requested by TCAC; and iv) that Lessor understands the recipient will rely on the certificate and that the Lessor will describe in reasonable detail any exceptions to the foregoing statements.

(b) Certificate by Lessee. Within fifteen (15) [OPTION: for public Lessor, this may be "thirty (30)" ] calendar days after written request made by TCAC, Lessee shall execute and deliver to TCAC, or to any proposed purchaser, transferee, or encumbrancer of Lessee's Leasehold interest, a certificate declaring to the best of Lessor's knowledge (i) the existence and validity of the Lease, or New Lease as the case may be, and amendments thereto, if any, and that such Lease or New Lease remains in full force and effect; (ii) that all conditions under the Lease, or New Lease, have been satisfied, and that there are no defaults under the Lease or New Lease, or if there has been a default under the Lease or New Lease, a description of the nature of such default; (iii) any other information relating to the condition of the Property, Leasehold or the Development reasonably requested by TCAC; (iv) that Lessee understands the recipient will rely on the certificate and that the Lessee will describe in reasonable detail any exceptions to the foregoing statements.

10. Notices. Notices and other communications required by this Lease Rider Agreement shall be delivered by messenger to the addresses provided below or sent by U.S Postal Service certified mail, return receipt requested, postage prepaid, addressed as follows:

To TCAC: California Tax Credit Allocation Committee  
915 Capitol Mall, Room 485  
Sacramento, CA 95814  
Attn. Executive Director

To Lessor:

To Lessee:

These addresses may be changed by a written notice given by any party hereto to the other parties in the same manner provided in this Section. Notices shall be effective on receipt.

11. TCAC's Rights Against Lessee. Nothing in this Lease Rider Agreement shall limit or restrict TCAC's rights and remedies under the Regulatory Agreement, or any other agreement between TCAC and Lessee.

12. Successors and Assigns. This Lease Rider Agreement shall inure to the benefit of and bind the successors and assigns of TCAC, Lessor and Lessee.

13. Uninsured Hazard. Lessor agrees that neither TCAC nor any person acquiring the Development, or a portion of the Leasehold pursuant to a court order or other agreement enforcing the Regulatory Agreement, nor the lessee under a New Lease pursuant to Section 6 hereof, nor any successive owner of a portion of the Development after such transfer or New Lease shall have any obligation hereunder or under the Lease or New Lease to repair or reconstruct any damage or loss to the Development which occurred prior to such transfer or New Lease and which is due to a hazard not required to be covered by insurance under the Lease or New Lease. However, if the damage or loss is not corrected and constitutes a breach of the Lease or New Lease, Lessor may exercise its rights under Section 5.

14. Duty to Repair. Lessor agrees that if TCAC, its nominee, or its successor-in-interest succeeds to Lessee's Leasehold interest in the Property and if the Development shall have been or becomes materially damaged before or after the date of such acquisition, TCAC's, its nominee's, or its successor-in-interest's obligation, if any, to repair, replace or reconstruct the Development shall in any such event be limited to the greater of: i) the amount of the net insurance proceeds received by TCAC, its nominee, or its successor-in-interest by reason of that damage or ii) the amount TCAC, its nominee, or its successor-in-interest would be entitled to if in compliance with the minimum insurance requirements of Lessee under the Lease. However, if the damage or loss is not corrected and constitutes a breach of the Lease or New Lease, Lessor may exercise its rights under Section 5.

15. Options. Lessor and Lessee agree that TCAC or its successor-in-interest or other Transferee, after its acquisition of the Leasehold, may exercise any option to extend the term of the Lease or New Lease or to purchase any interest in the Property which is granted to Lessee under or in connection with the Lease or the New Lease.

16. Limitation on Liability. If TCAC agrees to be bound by the terms of the Lease, or in the event of any Transfer to a Transferee, then unless so ordered by a court or as agreed to by TCAC, any Transferee, and any secured creditors, neither TCAC nor Transferee shall have any obligation under the Lease or the New Lease with respect to any liabilities, obligations, losses, damages, fines,

penalties, claims, demands, suits, actions, causes of actions, charges, judgments, costs, and expenses (including architects' and attorneys' fees and court costs) arising out of or resulting from acts, omissions, circumstances or events occurring before or existing at the time of such Transfer or TCAC's agreement to be bound by the Lease or the New Lease except for matters of record identified in the Report at the time of execution of this Lease Rider Agreement or any breach in existence at the time of acquisition of the Leasehold. Nothing in this Lease Rider Agreement or in the Lease or New Lease shall impose on TCAC any liability to perform the obligations of Lessee under the Lease or New Lease or require TCAC to assume the Lease or New Lease unless and until TCAC acquires the Development pursuant to a court order or other agreement enforcing the Regulatory Agreement. After acquiring the Development in such a manner, TCAC shall be liable to perform Lessee's obligations only until TCAC assigns or transfers the Leasehold. TCAC shall not, however, be required to cure Lessee's defaults occurring before TCAC's acquisition of the Development in such a manner except that TCAC or the Transferee must cure any defaults in existence at the time of transfer within a reasonable period of time.

17. Conflict With Lease. The provisions herein are intended to be supplementary to, and not in derogation of, the parties' rights and obligations contained in the Lease (including all of TCAC's rights under the Lease as a party with a recorded encumbrance). In the event of any express conflict or inconsistency between the terms of the Lease and the terms of this Lease Rider Agreement, except for any term expressly excluded or modified by Section 19, the terms of this Lease Rider Agreement shall govern and control, and the Lease shall be deemed to be modified hereby. Notwithstanding the foregoing, nothing contained herein shall affect the rights of Senior Lenders or the Tax Credit Partner, nor shall anything contained herein subordinate the lien of any Senior Lender to any rights of TCAC hereunder.

18. Regulatory Agreement Remedies. Nothing in this Lease Rider Agreement is intended to create enforcement rights under the Regulatory Agreement that do not otherwise exist in the Regulatory Agreement.

19. Additional Provisions. Nothing in this Lease Rider Agreement is intended, nor shall it be construed, to in any way limit the exercise by the City of San José of its nonproprietary governmental powers (such as police, taxing and regulatory powers) with respect to the Lessee, the Property, or the Senior Lender. In no event shall the City of San José incur any liability under this Agreement by reason of the legal exercise of those powers, nor shall any representation required of the Lessor by this Lease Rider Agreement be a representation of the City of San José regarding the exercise of its government powers.

20. Acknowledgment. Lessor and Lessee acknowledge that TCAC is relying on the foregoing representations, warranties, covenants and agreements of the undersigned in allocating the allocation of low income housing tax credits to Lessee, and warrants and affirms to and for the benefit of TCAC that each of their respective representations set forth herein is true, correct and complete as of this date.

**TCAC:**

CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE, a public agency of the State of California

BY: \_\_\_\_\_

Mark Stivers  
Executive Director

**LESSOR:**

**LESSEE:**

**EXHIBIT A**  
Legal Description



## **ATTACHMENT D**

### **33433 Summary Report**

**SUMMARY REPORT PURSUANT TO  
SECTION 33433  
OF THE  
CALIFORNIA HEALTH AND SAFETY CODE  
ON A  
GROUND LEASE BY AND BETWEEN  
THE CITY OF SAN JOSE  
AND  
VILLAS ON THE PARK SAN JOSE LP**

#### **I. INTRODUCTION**

The California Health and Safety Code, Section 33433, requires that if a Housing Successor of a former redevelopment agency wishes to sell or lease property to which it holds title and if that property was acquired in whole or in part with property tax increment funds, the Housing Successor must first secure approval of the proposed sale or lease agreement from its local legislative body after a public hearing. A copy of the proposed sale or lease agreement and a summary report that describes and contains specific financing elements of the proposed transaction shall be available for public inspection prior to the public hearing. As contained in the Code, the following information shall be included in the summary report:

1. The cost of the agreement to the Housing Successor that is to be funded from property tax increment, including land acquisition costs, clearance costs, relocation costs, the costs of any improvements to be provided by the agency, plus the expected interest on any loans or bonds to finance the agreement;
2. The estimated value of the interest to be conveyed or leased, determined at the highest and best use permitted under the redevelopment plan;
3. The estimated value of the interest to be conveyed in accordance with the uses, covenants, and development costs required under the proposed agreement with the Housing Successor, i.e., the reuse value of the site;
4. An explanation of how the sale or lease of the property will assist in the elimination of blight; and
5. The purchase price or sum of the lease payments that the lessor will be required to make during the term of the lease. If the sale price or total rental amount is less than the fair market value of the interest to be conveyed or leased, determined at the highest and best use consistent with the redevelopment plan, then the Housing Successor shall provide as part of the summary an explanation of the reasons for the difference.

This report outlines the salient parts of the Ground Lease anticipated to be entered into by and between the City of San José ("City") and Villas on the Park San Jose LP ("Developer"). This report is being prepared due to the fact that property tax increment funds from the former Redevelopment Agency of the City of San José will be used to acquire the subject Site. The City of San José has elected to become the Housing Successor and retain the housing functions and the encumbered assets of the former redevelopment agency, including completing the transfer of the subject property for the development of 83 permanent affordable housing units, one resident manager's unit, and supportive services space.

This report is based upon the terms of the Ground Lease and the Construction & Permanent Loan Agreement, as specified in the Term Sheets for each agreement, and is organized into the following five sections. The Lease and the terms for the City Loans are referred to as “the Agreement” for the purposes of this summary.

1. **Summary of the Proposed Agreement** – This section includes a description of the property, the proposed development and the major responsibilities of the City and the Developer.
2. **Cost of the Agreement to the City** – This section outlines the cost of the Agreement to the City for costs that have been funded with tax increment funds. It presents the terms of the property conveyance, and sets forth the net cost of the Agreement to the City.
3. **Estimated Value of the Interest to be Conveyed** – This section summarizes the value of the property to be conveyed to the Developer.
4. **Consideration Received and Reasons Therefore** – This section describes the value of the payments to be made by the Developer to the City as well as the fair market value at the highest and best use consistent with the redevelopment plan for the interests conveyed.
5. **Provision of Very Low, Low, or Moderate Income Housing** – This section demonstrates how the conveyance of the property will provide housing for Very Low-, Low-, or Moderate-Income persons.
6. **Elimination of Blight** – This section demonstrates how the Project satisfies the blight elimination criteria imposed by Section 33433 through the provisions of housing for Very Low- to Moderate-Income persons.

## II. SUMMARY OF THE PROPOSED AGREEMENT

### A. *Description of the Property and the Proposed Project*

#### **Property**

The development site (“Site”) consists of a total land area of 0.35 acres. The Site is rectangular in shape, level at street grade, and improved with curb, gutter, and sidewalk. The prior use of the property was an approximately 3,400 square foot single story office building and an asphalt parking lot. The address of the Site is 278 and 286 N. 2<sup>nd</sup> Street just south of E. Julian Street. On the next block to the south is historic St. James Park. The immediate neighborhood is characterized by a mix of multi-family residential developments, single family homes, and commercial businesses and services such as the St. James Health Center on E. Julian.

The property is properly zoned for the proposed project, having recently received approval of a Rezoning and Conditional Use Permit by both the Planning Commission and City Council.

## **Developer**

The Developer is Villas on the Park San Jose LP, a limited partnership with sponsors Affirmed Housing, Inc. and People Assisting the Homeless (PATH)/PATH Ventures. The Developer was selected by the City to develop the Project through a competitive RFQ process in November 2014.

## **Project Description**

The proposed development (“Project”) will consist of a total of 84 apartment units of which 83 are studio units intended for residents who have been chronically homeless and one two-bedroom resident manager’s unit. The building will also include supportive services space.

The building structure will be 6-stories in total including a 5-story Type III wood frame structure above a Type I concrete ground floor level. The ground floor will include a 24-hour security desk, lounge area, a large space for enhanced services, a small parking garage (12 spaces) and a bike storage area. The project will be designed to Build it Green sustainability standards including photovoltaics and a green roof. On-site amenities include a large community room on the second floor, a secure resident courtyard, other common areas such as a rooftop lounge, and laundry facilities. Nearby neighborhood amenities include St. James Park, a health clinic, bus and light rail stations, a pharmacy, and several grocery stores.

The Project is intended to serve the chronically homeless population subject to the availability of project-based rental assistance or its equivalent and support services. Affordability covenants will be recorded against the Leasehold requiring that 42 of the units be affordable to households earning up to 30% of Area Median Income (“AMI”) and 41 units at up to 50% of AMI.

### **B. City Responsibilities**

The City’s responsibilities under the Agreement are to ground lease the Site to the Developer at a nominal annual lease rate and provide additional cash assistance to help fund the cost of constructing the Project.

1. Site Acquisition / Ground Lease – In March 2017 the Developer purchased the Site from a private party for \$4.5 million which is consistent with the Site’s appraised value. The Developer purchased the Site with funds from an Acquisition Loan provided by the City of San José using Community Development Block Grant (“CDBG”) and Low and Moderate Income Housing Asset Fund (“LMIHAF”) funds. Under the contemplated transaction, the City will exercise its option to acquire the Site before the start of construction by a grant deed in repayment for part or all of the outstanding Acquisition Loan balance. The City will then enter into a long-term Ground Lease with the Developer for construction and operation of the Project. The Ground Lease is expected to have a term of 75-99 years. Ground Lease rent will be \$1 per year paid in advance of the Ground Lease date.

Prior to the time the City exercises its option to acquire the Site, the City will replace the acquisition CDBG funds with funds from the LMIHAF. Therefore, at the time of acquisition by the City all funding will have come from the LMIHAF.

2. Construction/Permanent Loan – The City has obtained approval from the City Council to provide a Construction/Permanent Loan to the Project of up to \$12.1 million (including a \$1 million advance for predevelopment expenses) to fund a portion of the Project’s \$38.7 million of total development costs. The Construction/Permanent Loan, which is entirely being funded by the LMIHAF, will be used by the City as final gap financing, meaning the amount of the loan will be determined after all other potential subsidy sources have been applied for and secured and all development cost estimates have been finalized. Since all subsidy sources for the Project and all development cost estimates have not been finalized at this stage, this report reflects the City’s maximum \$12.1 million Construction/Permanent Loan.

The City's Construction/Permanent Loan will be repaid from a share of the Project's annual Net Cash Flow. Net Cash Flow is defined as Net Operating Income ("NOI") less debt service on the first mortgage, City monitoring fees, and permitted expenses including partnership management and asset management fees. The City's Construction/Permanent loan will bear 3% simple interest annually.

### **C. *Developer Responsibilities***

Under the terms of the Agreement, the Developer will be responsible for the following:

- Enter into the Ground Lease with the City for the Site;
- Secure financing for construction of the Project prior to construction;
- Provide on-going property management services;
- Comply with the affordability covenants described in Section IIA;
- Share a portion of the Project's annual Net Cash Flow as repayment on the City's Construction/Permanent Loan;
- At the end of the Ground Lease term, transfer ownership of the Developer's interest in the Leasehold property, including the improvements, to the City or alternatively, at the City's election, demolish the improvements; and
- Meet all conditions for the lease and project financing.

### III. COST OF THE AGREEMENT TO THE CITY

This section presents the total cost of the Agreement to the City that will be funded with Low and Moderate Income Housing Funds (which were distributed to the City prior to the dissolution of the redevelopment agency) or funds from the Low and Moderate Income Housing Asset Fund. These funds are collectively referred to as "Low/Mod Fund".

The "net cost" of the Project after consideration of the revenues that will accrue to the Low/Mod Fund, if any, is also evaluated. The net cost can be either an actual cost, when expenditures exceed receipts, or a net gain, when revenues created by implementation of the Agreement exceed expenditures.

#### A. *Estimated Cost to the City (Low/Mod Fund)*

The costs to the City's Low/Mod Fund resulting from this transaction relate to the acquisition of the Site and the provision of the Construction/Permanent Loan. The maximum costs to the City are \$16.6 million although as previously noted the City's Construction/Permanent Loan could be reduced depending upon the amounts of other funding sources ultimately secured and the final costs to develop the Project. None of the City's costs under the Agreement are being funded with bond proceeds or other debt. Therefore debt interest costs are not applicable.

<b>Gross City Costs</b>	
Acquisition Loan	\$4,500,000
Construction/Permanent Loan (maximum amount) <b>Total</b>	<b>\$12,100,000</b>
<b>Gross City Cost</b>	<b>\$16,600,000</b>

#### B. *Revenues to the City*

Under the terms of the Agreement, revenues to the City will be generated by a combination of: (1) ground rent, (2) a portion of the Project's annual Net Cash Flow as repayment on the City's Construction/Permanent Loan, and (3) the reversion value of the property upon the termination of the Ground Lease.

*Ground Lease Revenues* – As noted previously, the City will receive ground rent of \$1 per year for the full term of the Ground Lease.

*Construction/Permanent Loan* – The City will receive one-third of the Net Cash Flow generated by the Project as repayment on the City's Construction/Permanent Loan. However given that the Project will entirely serve chronically homeless individuals it is anticipated that the Project's Net Cash Flow will be minimal. Based on current underwriting it is estimated that the City will receive a total of \$2.4 million in payments on the Construction/Permanent Loan, or approximately \$830,000 expressed on a net present value basis assuming a 5% annual discount rate.

*Reversion Value of the Property* – Upon the expiration of the Ground Lease, the affordability restrictions will terminate and the City will hold title to the entire property, including the improvements. While it is expected that after the 75-99 year term of the Agreement has expired the building will be of nominal value, the land will have significant value. It is estimated that the land will escalate in value commensurate with the discount rate of 5% per year. Under this assumption, it is estimated that the net present value of the Site will be equivalent to its current fair market value of \$4.5 million.

Based on an evaluation of the Project's operating projections, it is estimated that revenues to the City from the Project will total approximately \$4.5 million in current dollars:

<b>City Revenues</b> (net present value)	
Ground Lease Rent	Nominal
Repayment of Construction/Permanent Loan	\$830,000
Reversion Value of Land <b>Total</b>	\$4,500,000
<b>City Revenues</b>	<b>\$5,330,000</b>

**C. Net Cost to the City (Low/Mod Fund)**

The net cost to the City resulting from this transaction is the difference between the City's costs funded with Low/Mod Funds and any revenues. The net cost to the City resulting from the transaction is estimated to be \$11.27 million. Again, this cost could be reduced if the Project is successful in securing other funding sources not assumed in the current underwriting.

<b>Net City Cost</b>	
Gross City Cost (maximum amount)	\$16,600,000
(Less) City Revenues	(\$5,330,000)
<b>Total Net City Cost</b>	<b>\$11,270,000</b>

**IV. VALUE OF THE INTEREST TO BE CONVEYED**

**A. Reuse Value**

The reuse value of the Site is directly a function of the development economics of the specific Project required in the Agreement. The Developer has committed to build a 6-story residential project with 83 affordable studio units serving homeless individuals, one resident manager's unit, associated supportive services space, and other project amenities. Affordability covenants will be recorded against the property that restricts the units as follows:

- 42 units restricted to households earning up to 30% of AMI
- 41 units restricted to households earning up to 50% of AMI

The affordability covenants significantly constrain the rental income the Project can generate, even with the availability of project-based vouchers. The current economic projections estimate Year 1 operating income at approximately \$1.44 million and operating expenses at \$1.0 million. The Project's net income is estimated to support a permanent loan of \$3.8 million. Therefore, like most 100% affordable housing projects of this nature, the Project requires significant public subsidies for financial feasibility. The anticipated financing plan is as follows (all figures rounded):

<b>Permanent Sources</b>	
Low Income Housing Tax Credits	\$20,700,000
Permanent Loan	3,800,000
City Acquisition Loan	4,500,000
City Construction/Permanent Loan (\$12.1M maximum) *	<u>9,700,000</u>
<b>Total Sources</b>	<b>38,700,000</b>
<b>Uses (Development Costs)</b>	
Land Acquisition	\$ 4,500,000
Direct Construction Costs	24,300,000
Soft Costs	8,900,000
Financing	<u>1,000,000</u>
<b>Total Uses</b>	<b>38,700,000</b>

\*As noted in Section IIB, the maximum Construction/Permanent Loan is \$12.1 million. The current project budget estimates a lower amount is required.

Given the deep affordability restrictions and the anticipated development costs, the Project's economics do not support a purchase price for the Site or significant annual ground rent. Therefore, the Site's fair reuse value is nominal. Upon the expiration of the affordability covenants and ground lease in 75-99 years, the City will hold title to the Site and will be able to sell it at fair market value.

## **B. Estimated Value at Highest and Best Use**

The Site was appraised in March 2017 by Valbridge Property Advisors. Based on the appraiser's analysis of comparable high density residential land sales in the market, the appraiser concluded the Site's value at highest and best use is \$4.5 million.

## **V. CONSIDERATION RECEIVED AND REASONS THEREFORE**

Under the terms of the anticipated Agreement, the Developer will ground lease the Site from the City for a nominal payment of \$1 per year. The City will receive full consideration for the land upon the termination of the affordability covenants and Ground Lease in 75-99 years. These terms are consistent with the Reuse Value of the Site. The Site has a nominal Reuse Value primarily due to the requirement that the Site be developed with 83 permanent affordable housing units intended to serve chronically homeless individuals. As discussed in Section IV, with the restricted rents and need to provide supportive services to formerly homeless residents, the Project lacks the ability to generate cash flow sufficient to fund the Project's construction costs. Therefore, the Project cannot support more than a nominal ground rent payment.

The Site's Ground Lease terms are less than market-rate terms if the Site were to be developed at its highest and best use due to the long term affordability restrictions recorded against the property that limit occupancy to Extremely Low and Very Low Income households, which in turn severely limits the property's income potential and resulting supportable Ground Lease payments.

## **VI. PROVISION OF VERY LOW, LOW, AND MODERATE INCOME HOUSING**

The Project will provide 83 permanent supportive housing units of which 42 units will be affordable to households earning up to 30% of AMI (Extremely Low Income) and 41 units to households earning up to 50% of AMI (Very Low Income). The affordability covenants will run concurrently with the Ground Lease.

## **VII. BLIGHT ELIMINATION**

The Project consists of the development of 83 permanent affordable housing units for Extremely Low- and Very Low-Income households. The units will be subject to affordability restrictions for 75-99 years. In accordance with California Redevelopment Law, California Health and Safety Code Section 33433, the conveyance of property that results in the provision of housing for Low- or Moderate-Income persons satisfies the blight elimination criteria imposed by Section 33433. Thus, the Project fulfills the blight elimination requirement.