



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Jacky Morales-Ferrand

SUBJECT: SEE BELOW

DATE: September 17, 2017

Approved

D. DSYL

Date

9/22/17

COUNCIL DISTRICT: 2 & 3

SUBJECT: AUTHORIZATION FOR THE DIRECTOR OF HOUSING TO NEGOTIATE AND EXECUTE CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE LEASE RIDERS AMENDING THE GROUND-LEASES FOR THE JAPANTOWN SENIORS, DONNER LOFTS AND FORD ROAD FAMILY AFFORDABLE HOUSING PROJECTS

RECOMMENDATION

Adopt a Resolution authorizing the Director of Housing to negotiate and execute lease riders amending the ground-leases for three existing affordable housing projects (Japantown Senior Apartments at 685 North 6th Street, Ford Road Family at 215 Ford Road and Donner Lofts at 156 E. St. John Street) in favor of the California Tax Credit Allocation Committee ("TCAC") subject to satisfaction of certain conditions, and authorizing Director of Housing to execute a lender's consent to the TCAC lease rider.

OUTCOME

Approval of the recommended action will allow the developers of the Japantown Senior, Ford Road Family and Donner Lofts affordable housing projects to fulfill this new requirement added to TCAC's low income housing tax credit compliance process.

BACKGROUND

Nearly all permanent affordable housing projects built in the City are financed in part by low income housing tax credits issued by TCAC. TCAC allocates federal and state low income housing tax credits to developers of the affordable housing projects, verifies that the developers

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have met all the program requirements, and ensures affordability/habitability of the developments for the succeeding 55-years. It has historically enforced its requirements through a regulatory agreement executed by the affordable housing developer.

On March 15, 2017, TCAC adopted a new regulation, which requires the execution and recording of a lease rider ("TCAC Rider") for affordable housing projects constructed on leased land if those projects received their allocation of tax credits on or after January 1, 2017. TCAC has interpreted this requirement to apply to projects regardless of reservation date if those projects have not yet completed TCAC's "placed in service" requirements.

This new requirement retroactively affects three City ground-leased affordable housing projects: Ford Road Family, Donner Lofts, and Japantown Senior Apartments. Construction for these projects was completed in or prior to 2016 and they are now fully occupied. The developers of each project are now working to complete the post construction requirements to ensure the projects meet the terms and conditions of the low income housing tax credit program.

ANALYSIS

Council Authorization

The City Council approvals of its loan and ground-lease related actions for the three projects were all completed prior to TCAC's adoption of the regulation requiring a lease rider. The approvals did not contemplate a post construction request for a TCAC Rider, the potential terms of that rider, and its impact on the City's approved terms of the ground-leases.

The City Council approvals for the three projects permitted the Director of Housing to negotiate and execute documents related to the disposition of the property pursuant to the City's ground-lease. In the case of Donner Lofts, the City Council approval also accommodated later requests for transfer and cure provisions. However, the City Council approvals did not authorize the Director to amend the ground-lease after construction closing 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-leases. Therefore, City Council authorization is required for the Director's execution of the TCAC Riders because the riders materially amend the terms of the existing City ground-leases and impose new obligations on the City.

The Housing Department and the City Attorney's Office have been working actively with TCAC to negotiate an acceptable version of the TCAC Rider. The preferred practice for such lease riders would be to wait until lease rider negotiations for each project are complete prior to seeking City Council approval. Unfortunately, the negotiations have taken more time than was originally anticipated. This request for negotiate and execute authority is intended to help the

projects obtain their placed-in-service approvals from TCAC in a timely manner. The approvals are required to allow the tax credit investors to begin using the tax credits for which they paid.

Summary of Material Changes to Lease Terms

The TCAC Rider amends the City's ground-lease to add or modify lease obligations. The negotiated limitations to those changes are described below.

The TCAC Rider requires the City to waive any provision in the ground-lease in favor of the rider. TCAC has agreed to limit that waiver to the terms that are expressly in conflict with or would frustrate the developer's compliance 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 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 rider's transfer provisions.

Conditions Required for Execution of the Rider

Staff is seeking authorization for the Director to negotiate and execute TCAC riders substantially in the form of the draft rider attached as **Attachment A**, after approval to form by the Attorney's Office and fulfillment of the conditions listed below.

Staff has informed the developers that prior to the execution of the TCAC rider the developer must: A) obtain the written consent of all lenders as is required for all amendments to the ground-lease; B) provide an updated Lessor's title policy as required for the TCAC rider's representation regarding title; and (C) execute an agreement requiring the developer to provide an estoppel certificate to the City during the term of the TCAC rider.

EVALUATION AND FOLLOW-UP

It is anticipated that the Housing Department will return to Council to request a more general authorization for the Director's execution of TCAC lease riders in the future, as this TCAC Rider requirement likely will apply to all future ground-leased affordable housing projects.

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PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda Website for the October 3, 2017, Council Meeting.

COORDINATION

The preparation of this memorandum was coordinated with the City Manager's Budget Office and the City Attorney's Office.

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 delineated in Section 2.08.2840 of the San José Municipal Code.

CEQA

Japantown Senior Apartments:	Resolution No. 74384, GP 07-03-04, PDC08-010
Donner Lofts:	Resolution No. 68839
Ford Road Family Apartments:	Mitigated Negative Declaration, PDC09-022

/s/

JACKY MORALES-FERRAND
Director, Housing Department

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

Attachment A

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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

CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE

**LEASE RIDER
AGREEMENT (TAX CREDITS)
Ground Lease**

TCAC NUMBER CA- [REDACTED]
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,

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operate and manage a rental housing development on the Property consisting of not less than [REDACTED] 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 [REDACTED] (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 [REDACTED] 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:

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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 # _____, Policy No. _____ (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 _____ ("the _____ Agreement") dated _____ for a loan of \$ _____ to further assist the Development which will be secured by _____, all as more fully described under the _____ Agreement. Lessee warrants and

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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.]

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(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

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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

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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.

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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 or 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,

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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:

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(1)

(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.

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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.

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(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.

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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

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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 Jose 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 Jose 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 Jose 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:

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LESSEE:

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EXHIBIT A
Legal Description