

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE (A) AUTHORIZING THE DIRECTOR OF HOUSING TO NEGOTIATE AND EXECUTE LEASE RIDERS TO THE GROUND LEASE IN FAVOR OF THE CALIFORNIA TAX CREDIT ALLOCATION COMMITTEE, THE CALIFORNIA HOUSING FINANCE AGENCY, AND THE CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT AND TO EXECUTE LENDER'S CONSENTS TO THESE LEASE RIDERS; (B) AUTHORIZING A CHANGE IN THE CITY LOAN TERMS TO ALLOW AN INCREASE IN THE KELSEY AYER STATION APARTMENTS ("DEVELOPMENT") RENTS AND INCOME RESTRICTIONS THAT ARE BELOW 60% OF AREA MEDIAN INCOME ("AMI") UP TO 60% OF AMI ~~FOR ALL NEW TENANTS IN UNITS WITH 811 PROJECT BASED VOUCHERS IN THE EVENT OF EXPIRATION OR TERMINATION OF CONTRACT FOR 811 PROJECT BASED VOUCHERS, AND FOR ALL NEW TENANTS IN THE EVENT OF FORECLOSURE, TO THE EXTENT THE CITY HAS DETERMINED SUCH INCREASE IS NEEDED FOR THE FEASIBILITY OF THE DEVELOPMENT AND ALLOWED BY OTHER FUNDS; AND~~ (C) APPROVING A LOAN INCREASE OF \$1,500,000 TO THE ORIGINAL \$12,825,000 FOR A TOTAL LOAN COMMITMENT OF \$14,325,000 ~~AND~~; (D) AUTHORIZE THE DIRECTOR OF HOUSING OR THE DIRECTOR OF HOUSING'S DESIGNEE TO NEGOTIATE AND EXECUTE WITH THE COUNTY DEPARTMENT OF ENVIRONMENTAL HEALTH A COVENANT REGARDING CONTAMINATED SOIL AND RELATED ENVIRONMENTAL ISSUES AND TO NEGOTIATE AND EXECUTE AMENDMENTS TO THE CITY'S GROUND LEASE OR AN ENVIRONMENTAL AGREEMENT, AS MAY NECESSARY FOR ENFORCING AND SECURING THE OBLIGATIONS OF THE LESSEE, THE KELSEY AYER STATION LP OR AFFILIATE, TO COMPLY WITH MONITORING AND REMEDIATION OBLIGATIONS UNDER THE COVENANT

**WHEREAS**, on May 4, 2021, City of San José (“City”) Council approved a total commitment of up to \$15,925,000 with \$10,825,000 in low- and moderate-income Housing Asset Funds and \$5,100,000 in inclusionary fee funds for a construction-permanent loan to The Kelsey Ayer Station LP (“Developer”), or an affiliated entity for the Kelsey Ayer Station Apartments (“Development”); and

**WHEREAS**, the Director of Housing was authorized to acquire the property not to exceed the acquisition loan balance at the time of transfer, negotiate and execute loan documents, the documents related to acquisition, and ground leasing of the property and all other documents, including amendments thereto, related to the City financing of the Development; and

**WHEREAS**, prior to the initial Council financing loan commitment, the project was delayed due to difficulties securing all additional non-City funding and a need to accommodate lower rents for the tenants and Developer requested an additional \$1,700,000 from the City to cover this gap, resulting in an initial City commitment of up to \$10,825,000 in low- and moderate-income Housing Asset Funds and up to \$2,000,000 in Inclusionary Fee Funds for a total commitment of up to \$12,825,000 in construction and permanent financing; and

**WHEREAS**, additionally, consistent with the Ground Lease Policy in the City Housing Department Underwriting Guidelines, the City provided additional funding of up to \$3,100,000 to acquire the land prior to the close of construction funding and was authorized to acquire the property, negotiate, and execute a ground lease or option to the Developer for a total term not to exceed 99 years; and

**WHEREAS**, the cost for purchasing the property does not require an additional commitment of City funds and due to timing constraints, the purchase of the property will

be implemented through a purchase and sale agreement rather than through an acquisition loan and City exercise of option to purchase; and

**WHEREAS**, the City and Developer will enter into a Ground Lease for a term of 70 years plus an option for a 15-year extension to provide an option period if required by the California Housing Finance Agency (“CalHFA”); and

**WHEREAS**, certain state agencies have additional requirements associated with their funding that apply when the City owns the land and ground leases it for the Development; and

**WHEREAS**, the California Tax Credit Allocation Committee (“TCAC”) requires the City as the owner of the land to record a lease rider after conversion to permanent financing and prior to TCAC’s final approval of the Development’s tax credits; and

**WHEREAS**, 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; and

**WHEREAS**, CalHFA and the California Department of Housing and Community Development will each require the recording of a rider with similar terms to the TCAC rider as part of the conversion to permanent financing; and

**WHEREAS**, Developer will be required to provide an updated title report and to execute an estoppel agreement prior to the execution of any of these rides to provide the City with sufficient basis for executing these riders; and

**WHEREAS**, Developer originally applied for tax credits in mid-2021 but did not receive an allocation until late 2021, and during that period the project experienced a 16% increase in construction costs specifically raw material costs taking away much of the cushion from the project's proforma for other unexpected increases; and

**WHEREAS**, since March 2022 interest rates have increased by 75 basis points, which reduced the permanent loan resulting in a financing gap and Developer requested an additional \$1,500,000 to be used to fill the gap from the reduced permanent mortgage, resulting in total City loan commitment in construction and permanent financing up to \$14,325,000 at a cost of approximately \$126,769 per unit, of up to \$8,925,000 in Low- and Moderate Income Housing Asset Funds and up to \$8,500,000 in Affordable Housing Impact Fee funds, including \$3,100,000 for purchase of land; and

**WHEREAS**, the U.S. Department of Housing and Urban Development's ("HUD") Section 811 Supportive Housing for Persons with Disabilities program provides funds to stage agencies for project rental assistance, and funding sources for the Development include a rental subsidy provided through CalHFA for twenty two (22) of the units restricted to 20% of Area Median Income ("AMI") pursuant to the HUD 811 Project Rental Assistance Demonstration program contract ("811 Project Based Vouchers"), which is consistent with the approach authorized for project-based Section 8 vouchers, under 25 CCR 6922 (d), only the tenant contribution paid under the contract will be considered as rent for the purposes of compliance with the City affordability restriction; and

**WHEREAS**, staff is also requesting a change to the City loan terms to allow Development rents and income restrictions that are below 60% of AMI to increase up to 60% AMI ~~for all new tenants in units with 811 Project Based Vouchers in the event of expiration or termination of the contract for 811 Project Based Vouchers, and for all~~

~~new~~ tenants in the event of foreclosure to the extent the City has determined an increase is needed to ensure the Development's continued financial feasibility, as set forth in the Memorandum from the Housing and Budget Departments dated as of June 9, 2022 and the Supplemental Memorandum from the Housing Department dated as of June 17, 2022; and

**WHEREAS**, as for benzene environmental issue, further testing will be performed to determine if a vapor barrier, or other protective measures will need to be installed beneath the future building to prevent the soil gas vapors from migrating into the building; and

**WHEREAS**, on December 11, 2020, The Kelsey Ayer Station LLC, current owner of the property, entered into an agreement with the Santa County of Santa Clara ("County") Department of Environmental Health ("DEH") to approve a Site Management Plan ("SMP") to address environmental concerns at the property; and

**WHEREAS**, an addendum to the SMP was approved by the County in May 2022 and includes procedures for managing the contaminated soil during construction; and

**WHEREAS**, after the building is construed, an operation and maintenance plan will be completed that will include controls and inspections; and

**WHEREAS**, in addition, in the addendum to the SMP, DEH required a deed restriction on the property in perpetuity that would provide notice that any disturbance or redevelopment of the property must adhere to DEH's environmental requirements and monitoring obligations; and

WHEREAS, the DEH deed restriction requirement was only recently disclosed to the City during the final negotiations to acquire property from the Developer; and

WHEREAS, DEH's staff confirmed that regardless of the property ownership structure, its deed restriction requirement is non-negotiable and must be recorded against the property; and

WHEREAS, staff is seeking additional authority to negotiate and execute this agreement;

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:**

- a. The Director of Housing, is hereby authorized, to negotiate and execute lease riders to the ground lease in favor of the California Tax Credit Allocation Committee, the California Housing Finance Agency, and the California Department of Housing and Community Development and to execute lender's consents to these riders.
- b. A change in the City loan terms, is hereby authorized, to allow an increase in The Kelsey Ayer Station Apartments ("Development") rents and income restrictions that are below 60% of Area Median Income ("AMI") up to 60% AMI for ~~all new tenants in units with 811 Project Based Vouchers ("811 Project Based Vouchers") the event of expiration or termination of the contract for 811 Project Based Vouchers, and for all new~~ tenants in the event of foreclosure, to the extent the City has determined such increase is needed for feasibility of the Development and allowed by other funds.

c. A loan increase of \$1,500,000 to the original \$12,825,000 loan commitment for a total commitment of \$14,325,000, is hereby authorized.

e.d. The Director of Housing or the Director of Housing's designee, is hereby authorized, to negotiate and execute with the County Department of Environmental Health a covenant regarding contaminated soil and related environmental issues and to negotiate and execute amendments to the City's ground lease or an environmental agreement, as may be necessary for enforcing and securing the obligations of the lessee, The Kelsey Ayer Station LP or affiliate, to comply with monitoring and remediation obligations under the covenant.

ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2022, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

\_\_\_\_\_  
SAM LICCARDO  
Mayor

ATTEST:

\_\_\_\_\_  
TONI J. TABER, CMC  
City Clerk