

**SUBORDINATE LOAN AGREEMENT**

**among**

**CITY OF SAN JOSE,  
as Issuer**

**U.S. BANK NATIONAL ASSOCIATION,  
as Subordinate Trustee**

**and**

**MARKHAM PLAZA I, LP, a California limited partnership,  
as Borrower**

**Relating to**

**\$ \_\_\_\_\_  
CITY OF SAN JOSE  
MULTIFAMILY HOUSING REVENUE BONDS  
(MARKHAM PLAZA I)  
SUBORDINATE SERIES 2019B-2**

**Dated as of October 1, 2019**

All of the right, title and interest of the City of San José (except for its Unassigned Rights) in and to this Subordinate Loan Agreement are being assigned to U.S. Bank National Association, as Subordinate Trustee, as security for the above-referenced bonds pursuant to a certain Subordinate Indenture of Trust dated as of October 1, 2019.

## TABLE OF CONTENTS

	Page
ARTICLE I DEFINITIONS .....	2
Section 1.1.    Definitions.....	2
Section 1.2.    Interpretation. ....	2
ARTICLE II REPRESENTATIONS, WARRANTIES AND COVENANTS .....	2
Section 2.1.    Representations, Warranties and Covenants of the Issuer. ....	2
Section 2.2.    Representations, Warranties and Covenants of the Borrower.....	3
Section 2.3.    Representations and Warranties of the Subordinate Trustee.....	7
Section 2.4.    Tax Covenants of the Borrower. ....	8
Section 2.5.    Enforcement of Subordinate Loan Documents.....	9
ARTICLE III THE SUBORDINATE LOAN.....	9
Section 3.1.    Conditions to Funding the Subordinate Loan. ....	9
Section 3.2.    Terms of the Subordinate Loan.....	9
Section 3.3.    Assignment to Subordinate Trustee.....	9
Section 3.4.    Investment of Funds. ....	10
Section 3.5.    Damage; Destruction and Eminent Domain. ....	10
ARTICLE IV LOAN PAYMENTS .....	10
Section 4.1.    Payments Under the Subordinate Note; Independent Obligation of Borrower. ....	10
Section 4.2.    Payment of Certain Fees and Expenses Under the Subordinate Note.....	11
Section 4.3.    Prepayment of Subordinate Loan.. ....	11
Section 4.4.    Borrower's Obligations Upon Redemption. ....	12
ARTICLE V SPECIAL COVENANTS OF BORROWER .....	12
Section 5.1.    Performance of Obligations.....	12
Section 5.2.    Compliance With Applicable Laws. ....	12
Section 5.3.    Subordinate Indenture Provisions. ....	12
Section 5.4.    Participations in Subordinate Bonds. ....	12
Section 5.5.    Borrower to Maintain Its Existence.....	13
Section 5.6.    Borrower to Remain Qualified in State and Appoint Agent. ....	13
Section 5.7.    Sale or Other Transfer of Project. ....	13
Section 5.8.    Right to Perform Borrower's Obligations. ....	13
Section 5.9.    Notice of Certain Events. ....	13
Section 5.10.   Survival of Covenants. ....	13
Section 5.11.   Access to Project; Records.....	13

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
Section 5.12. Reserved. ....	14
Section 5.13. Obligation of the Borrower to Acquire and Construct the Project. ....	14
ARTICLE VI INDEMNIFICATION .....	14
Section 6.1. Indemnification.....	14
ARTICLE VII EVENTS OF DEFAULT AND REMEDIES .....	16
Section 7.1. Events of Default. ....	16
Section 7.2. Remedies on Default. ....	17
Section 7.3. No Remedy Exclusive.....	18
Section 7.4. Agreement to Pay Attorneys' Fees and Expenses. ....	18
Section 7.5. No Additional Waiver Implied by One Waiver.....	18
ARTICLE VIII MISCELLANEOUS .....	18
Section 8.1. Notices.. ....	18
Section 8.2. Concerning Successors and Assigns.....	19
Section 8.3. Governing Law.....	19
Section 8.4. Modifications in Writing.....	19
Section 8.5. Further Assurances and Corrective Instruments. ....	19
Section 8.6. Captions. ....	19
Section 8.7. Severability. ....	19
Section 8.8. Counterparts.....	19
Section 8.9. Amounts Remaining in Subordinate Bond Fund or Other Funds. ....	19
Section 8.10. Effective Date and Term. ....	20
Section 8.11. Cross References.....	20
Section 8.12. Waiver of Personal Liability.....	20
Section 8.13. No Liability of Issuer. ....	20
Section 8.14. No Liability of Officers.....	21
Section 8.15. Capacity of the Subordinate Trustee.....	21
Section 8.16. Reliance.....	21

**EXHIBIT A – FORM OF SUBORDINATE PROMISSORY NOTE**

## SUBORDINATE LOAN AGREEMENT

**THIS SUBORDINATE LOAN AGREEMENT** (this “**Subordinate Loan Agreement**”), made and entered into October 1, 2019, by and among the **CITY OF SAN JOSE** (together with any successor to its rights, duties and obligations, the “**Issuer**”), a municipal corporation and chartered city duly organized and existing pursuant to its charter and the laws and constitution of the State of California (the “**State**”), **U.S. BANK NATIONAL ASSOCIATION**, a national banking association, organized and operating under the laws of the United States of America (together with any successor trustees appointed under the Subordinate Indenture, the “**Subordinate Trustee**”), and **MARKHAM PLAZA I, LP**, a limited partnership duly organized and existing under the laws of the State of California (together with its successors and assigns permitted hereunder, the “**Borrower**”);

### W I T N E S S E T H:

**WHEREAS**, the Issuer is authorized by Chapter 7 of Part 5 of Division 31 of the California Health and Safety Code (the “**Act**”) to issue revenue bonds for the purpose of financing, among other things, the acquisition, construction, rehabilitation and equipping of multifamily rental housing and for the provision of capital improvements in connection therewith and determined necessary thereto; and

**WHEREAS**, the Borrower has requested the assistance of the City in financing the rehabilitation of a 153-unit (including a manager’s unit) multifamily rental housing development to be located within the City of San José, California known as “Markham Plaza I” (the “**Project**”), and as a condition to such financial assistance the Borrower has agreed to enter into a Regulatory Agreement and Declaration of Restrictive Covenants of even date herewith (the “**Regulatory Agreement**”) setting forth certain restrictions with respect to the Project; and

**WHEREAS**, the Issuer has determined to assist in the financing of the Project by issuing its City of San José Multifamily Housing Revenue Bonds (Markham Plaza I), Subordinate Series 2019B-2, in the original aggregate principal amount of \$\_\_\_\_\_ (the “**Subordinate Bonds**”), pursuant to a Subordinate Indenture of Trust, dated as of October 1, 2019 (the “**Subordinate Indenture**”), by and between the Issuer and the Subordinate Trustee, and the Act, and making a subordinate loan to the Borrower in the amount of the sum of such principal amount (the “**Subordinate Loan**”), evidenced by a Subordinate Promissory Note (the “**Subordinate Note**”) upon the terms and conditions set forth herein;

**WHEREAS**, in order to provide a portion of the funds necessary to finance the Project, the Issuer has also entered into an Indenture of Trust, dated as of October 1, 2019 (the “**Senior Indenture**”), with U.S. Bank National Association, as trustee (the “**Senior Trustee**”), pursuant to which the Issuer will issue its City of San José Multifamily Housing Revenue Bonds (Markham Plaza I) Series 2019B-1 in the original aggregate principal amount of \$\_\_\_\_\_ (the “**Senior Bonds**”) and loan the proceeds thereof to the Borrower to finance a portion of the acquisition, rehabilitation and equipping of the Project; and

**WHEREAS**, the Borrower’s obligations under this Subordinate Loan, the Subordinate Note and this Subordinate Loan Agreement are subordinate in all respects to all payment obligations under Senior Loan Documents (as defined in the Senior Indenture);

**NOW, THEREFORE**, for and in consideration of the mutual covenants and representations hereinafter contained, the parties hereto agree as follows:

## ARTICLE I

### DEFINITIONS

**Section 1.1. Definitions.** All words and phrases (except for “Event of Default”) defined in the Subordinate Indenture shall have the same meanings for the purposes of this Subordinate Loan Agreement. In addition to the words and phrases defined in the Subordinate Indenture and elsewhere herein, the following words and phrases shall have the following meanings:

“Event of Default” means any of those events specified in and defined by the applicable provisions of Article VII hereof to constitute an event of default.

“Subordinate Loan Agreement” means this Subordinate Loan Agreement, together with any amendments hereto.

“Taxes” means all taxes, water rents, sewer rents, assessments and other governmental or municipal or public or private dues, fees, charges and levies and any liens (including federal tax liens) which are or may be levied, imposed or assessed upon the Project or any part thereof, or upon any leases pertaining thereto, or upon the rents, issues, income or profits thereof, whether any or all of the aforementioned be levied directly or indirectly or as excise taxes or as income taxes.

**Section 1.2. Interpretation.** Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Words importing the singular number shall include the plural number and vice versa unless the context shall otherwise indicate. Words importing persons include firms, partnerships, limited liability companies, joint ventures, associations and corporations. References to Articles, Sections and other subdivisions of this Subordinate Loan Agreement are the Articles, sections and other subdivisions of this Subordinate Loan Agreement as originally executed.

The terms “herein,” “hereunder,” “hereby,” “hereto,” “hereof” and any similar terms refer to this Subordinate Loan Agreement; the term “heretofore” means before the date of execution of this Subordinate Loan Agreement; and the term “hereafter” means after the date of execution of this Subordinate Loan Agreement.

## ARTICLE II

### REPRESENTATIONS, WARRANTIES AND COVENANTS

**Section 2.1. Representations, Warranties and Covenants of the Issuer.** The Issuer makes the following representations, warranties and covenants:

(a) The Issuer is a municipal corporation and chartered city duly organized and existing pursuant to its charter and the laws and constitution of the State of California.

(b) The Issuer has all necessary power and authority to issue the Subordinate Bonds and to execute and deliver this Subordinate Loan Agreement, the Subordinate Indenture, and

the other Subordinate Loan Documents to which it is a party, and to perform its duties and discharge its obligations hereunder and thereunder.

(c) The Issuer has taken all action on its part for the issuance of the Subordinate Bonds and for the execution and delivery thereof.

(d) Each of the Subordinate Loan Documents to which the Issuer is a party has been duly validly authorized, executed and delivered by the Issuer and, assuming due authorization, execution and delivery by the other parties thereto, constitutes the legal, valid and binding obligation of the Issuer enforceable against the Issuer in accordance with its respective terms, subject to bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors generally and general equitable principles.

(e) To the best knowledge of the Issuer, the Issuer has complied with the provisions of the Act and the laws of the State which are prerequisites to the consummation of the transactions on the part of the Issuer described or contemplated in the Subordinate Loan Documents. To the best knowledge of the Issuer, the execution and delivery of the Subordinate Bonds and the Subordinate Loan Documents to which the Issuer is a party, the consummation of the transactions on the part of the Issuer contemplated thereby and the fulfillment of or compliance with the terms and conditions thereof do not conflict with or result in the breach of any of the terms, conditions or provisions of any agreement or instrument or judgment, order or decree to which the Issuer is now a party or by which it is bound, nor do they constitute a default under any of the foregoing or result in the creation or imposition of any prohibited lien, charge or encumbrance of any nature upon any property or assets of the Issuer under the terms of any instrument or agreement.

(f) To the best knowledge of the Issuer, no authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution and delivery by the Issuer of, and performance by the Issuer of its obligations under, any of the Subordinate Loan Documents, which has not been obtained.

(g) To the best knowledge of the Issuer, there is no action, suit, proceeding, inquiry or investigation pending or threatened against the Issuer by or before any court, governmental agency or public board or body, nor, to the Issuer's knowledge, any basis therefor, that (i) affects or questions the existence or the territorial jurisdiction of the Issuer or the title to office of any member of the governing body of the Issuer; (ii) affects or seeks to prohibit, restrain or enjoin the execution and delivery of any Subordinate Loan Documents or the issuance, execution or delivery of the Subordinate Bonds, as applicable; (iii) affects or questions the validity or enforceability of the Subordinate Bonds; or (iv) questions the power or authority of the Issuer to perform its obligations under the Subordinate Bonds or to carry out the transactions contemplated by the Subordinate Bonds and the Subordinate Loan Documents.

It is expressly acknowledged that the Issuer makes no representation as to the financial position or business condition of the Borrower and does not represent or warrant as to any of the statements, materials (financial or otherwise), representations or certifications furnished or to be made and furnished by the Borrower in connection with the issuance, execution and delivery of the Subordinate Bonds, as applicable, or as to the correctness, completeness or accuracy of such statements.

**Section 2.2. Representations, Warranties and Covenants of the Borrower.** The Borrower makes the following representations, warranties and covenants to Issuer, all of which,

together with the other representations and agreements of the Borrower contained in this Subordinate Loan Agreement, are relied upon by the Issuer and the Subordinate Trustee and serve as a basis for the undertakings of the Issuer and the Subordinate Trustee contained in this Subordinate Loan Agreement:

(a) The Borrower is a limited partnership duly organized, validly existing and in good standing under the laws of the State of California and duly qualified to conduct its business under the laws of the State and in every other state in which the nature of its business requires such qualification, has full legal right, power and authority to enter into this Subordinate Loan Agreement and the other Subordinate Loan Documents, and to carry out and consummate all transactions contemplated hereby and by the other Subordinate Loan Documents, and by proper partnership action has duly authorized the execution, delivery and performance of this Subordinate Loan Agreement and the other Subordinate Loan Documents. All general partners, if any, of the Borrower are duly incorporated, organized and in good standing under the laws of their respective states of organization and are duly qualified to transact business in the State.

(b) The Borrower has the legal right, power and authority to (i) own its properties and assets, including, but not limited to, the Project, (ii) to carry on its business as now being conducted and the Borrower contemplates it to be conducted with respect to the Project and (iii) execute and deliver, carry out its obligations under, and close the transactions provided for in, the Subordinate Loan Documents to which it is a party.

(c) The General Partners of the Borrower executing this Subordinate Loan Agreement and the other Subordinate Loan Documents on behalf of Borrower are duly and properly authorized to execute the same. This Subordinate Loan Agreement and the other Subordinate Loan Documents have been duly authorized, executed and delivered by the Borrower and, assuming due authorization, execution and delivery by the other parties thereto, will constitute the legal, valid and binding agreements of the Borrower enforceable against the Borrower; except in each case as enforcement may be limited by bankruptcy, insolvency or other laws affecting the enforcement of creditors' rights generally, by the application of equitable principles regardless of whether enforcement is sought in a proceeding at law or in equity and by public policy.

(d) No consent or approval of any trustee or holder of any indebtedness of the Borrower, and to the best knowledge of the Borrower and with respect to the Borrower, no consent, permission, authorization, order or license of, or filing or registration with, any governmental authority (except with respect to any state securities or "blue sky" laws) is necessary in connection with the execution and delivery of this Subordinate Loan Agreement or the other Subordinate Loan Documents or the consummation of any transaction herein or therein contemplated, or the fulfillment of or compliance with the terms and conditions hereof or thereof, except as have been obtained or made and as are in full force and effect.

(e) The execution and delivery of this Subordinate Loan Agreement and the other Subordinate Loan Documents, the consummation of the transactions herein and therein contemplated and the fulfillment of or compliance with the terms and conditions hereof and thereof, will not conflict with or constitute a violation or breach of or default (with due notice or the passage of time or both) under (i) the organizational or other governing documents of the Borrower or to the best knowledge of the Borrower and with respect to the Borrower, (ii) any applicable law or administrative rule or regulation, or any applicable court or administrative decree or order, (iii) any mortgage, deed of trust, Subordinate Loan Agreement, lease, contract or other agreement or instrument to which the Borrower is a party or by which it or its properties

or assets are otherwise subject or bound, or (iv), except as provided in the Subordinate Loan Documents, result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of the Borrower, which conflict, violation, breach, default, lien, charge or encumbrance might have consequences that would materially and adversely affect the consummation of the transactions contemplated by this Subordinate Loan Agreement or the Subordinate Loan Documents, or the financial condition, assets, properties or operations of the Borrower.

(f) There is no action, suit, proceeding, inquiry or investigation, before or by any court or federal, state, municipal or other governmental authority, pending, or to the knowledge of the Borrower, after reasonable investigation, threatened, against or affecting the Borrower or the assets, properties or operations of the Borrower which, if determined adversely to the Borrower or its interests, would have a material adverse effect upon the consummation of the transactions contemplated by, or the validity of, this Subordinate Loan Agreement or the other Subordinate Loan Documents or upon the financial condition, assets, properties or operations of the Borrower, and the Borrower is not in default (and no event has occurred and is continuing which with the giving of notice or the passage of time or both could constitute a default) with respect to any order or decree of any court or any order, regulation or demand of any federal, state, municipal or other governmental authority, which default might have consequences that would materially and adversely affect the consummation of the transactions contemplated by this Subordinate Loan Agreement or the other Subordinate Loan Documents or the financial condition, assets, properties or operations of the Borrower. All tax returns (federal, state and local) required to be filed by or on behalf of the Borrower have been filed, and all taxes shown thereon to be due, including interest and penalties, except such, if any, as are being actively contested by the Borrower in good faith, have been paid or adequate reserves have been made for the payment thereof which reserves, if any, are reflected in the audited financial statements described therein. The Borrower enjoys the peaceful and undisturbed possession of all of the Property.

(g) The Project and the operation of the Project (in the manner contemplated by the Subordinate Loan Documents) conform with the requirements of the Act as well as all applicable zoning, planning, building and environmental laws, ordinances and regulations of governmental authorities having jurisdiction over the Project.

(h) The Borrower has filed or caused to be filed all federal, state and local tax returns which are required to be filed or has obtained appropriate extensions therefor, and has paid or caused to be paid all taxes as shown on said returns or on any assessment received by it, to the extent that such taxes have become due.

(i) The Borrower is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which it is a party which default would materially adversely affect the transactions contemplated by the Subordinate Loan Documents or the operations of the Borrower or the enforceability of the Subordinate Loan Documents to which the Borrower is a party or the ability of the Borrower to perform all obligations thereunder.

(j) The Borrower agrees to pay all costs of maintenance and repair, all Taxes and assessments, insurance premiums (including public liability insurance and insurance against damage to or destruction of the Project) concerning or in any way related to the Project, or any part thereof, and any expenses or renewals thereof, and any other governmental charges and



impositions whatsoever, foreseen or unforeseen, and all utility and other charges and assessments concerning or in any way related to the Project.

(k) If the Borrower is a partnership, all of the partnership interests in the Borrower are validly issued and are fully registered, if required, with the applicable governmental authorities and/or agencies, and, except as set forth in the Borrower's Partnership Agreement, there are no outstanding options or rights to purchase or acquire those interests. If the Borrower is a limited liability company, all of the ownership interests in the Borrower are validly issued and are fully registered, if required, with the applicable governmental authorities and/or agencies, and there are no outstanding options or rights to purchase or acquire those interests. Nothing in this Subordinate Loan Agreement shall prevent the Borrower from issuing additional partnership interests or ownership interests if such units are issued in accordance with all applicable securities laws, provided such issuance is in accordance with the Borrower's Partnership Agreement.

(l) The representations and warranties of the Borrower contained in the Regulatory Agreement are true and accurate.

(m) The information, statements or reports furnished in writing to the Issuer by the Borrower in connection with this Subordinate Loan Agreement or the consummation of the transactions contemplated hereby do not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading; and the representations and warranties of the Borrower and the statements, information and descriptions contained in the Borrower's closing certificates, as of the Closing Date, are true and correct in all material respects, do not contain any untrue statement of a material fact, and do not omit to state a material fact necessary to make the representations, warranties, statements, information and descriptions contained therein, in the light of the circumstances under which they were made, not misleading; and any estimates or the assumptions contained in any certificate of the Borrower delivered as of the Closing Date are reasonable.

(n) The Borrower acknowledges that (i) it understands the nature and structure of the transactions relating to the financing of the Project, (ii) it is familiar with the provisions of all of the documents and instruments relating to the financing to which the Borrower is a party or of which it is a beneficiary, including the Subordinate Indenture, (iii) it understands the risks inherent in such transactions, including without limitation the risk of loss of the Project, and (iv) it has not relied on the Issuer or the Subordinate Trustee for any guidance or expertise in analyzing the financial or other consequences of the transactions contemplated by the Subordinate Loan Documents or otherwise relied on the Issuer or the Subordinate Trustee in any manner.

(o) The Borrower covenants to pay all fees of the Issuer and Subordinate Trustee in connection with the financing, including but not limited to the following:

(i) All taxes and assessments of any type or character charged to the Issuer or to the Subordinate Trustee affecting the amount available to the Issuer or the Subordinate Trustee from payments to be received hereunder or in any way arising due to the transactions contemplated hereby (including taxes and assessments assessed or levied by any public agency or governmental authority of whatsoever character having power to levy taxes or assessments) but excluding franchise taxes based upon the capital and/or income of the Subordinate Trustee and taxes based upon or measured by

the net income of the Subordinate Trustee or the Issuer; provided, however, that the Borrower shall have the right to protest any such taxes or assessments and to require the Issuer or the Subordinate Trustee, at the Borrower's expense, to protest and contest any such taxes or assessments levied upon them and that the Borrower shall have the right to withhold payment of any such taxes or assessments pending disposition of any such protest or contest unless such withholding, protest or contest would adversely affect the rights or interests of the Issuer or the Subordinate Trustee;

(ii) All fees, charges and expenses of the Subordinate Trustee for services rendered under the Subordinate Indenture, as and when the same become due and payable;

(iii) The portion of the annual fee of the Issuer attributable to the Subordinate Bonds (in addition to the fee attributable to the Senior Obligations, which shall be payable in accordance with and pursuant to the Senior Loan Documents), payable as set forth in Section 7(a) of the Regulatory Agreement, and the fees and expenses of the Issuer or any agents, attorneys, accountants, consultants selected by the Issuer to act on its behalf in connection with this Subordinate Loan Agreement, the Regulatory Agreement or the Subordinate Loan Documents, including, without limitation, any and all expenses incurred in connection with the authorization, issuance and delivery of the Subordinate Bonds, as applicable, or in connection with any litigation which may at any time be instituted involving this Subordinate Loan Agreement, the Regulatory Agreement, or the Subordinate Loan Documents or any of the other documents contemplated thereby, or in connection with the reasonable supervision or inspection of the Borrower, its properties, assets or operations or otherwise in connection with the administration of the foregoing (except to the extent any such fees or expenses are payable as a result of the gross negligence or willful misconduct of the Issuer); and

(iv) These obligations and those in Section 6.1 shall remain valid and in effect notwithstanding repayment of the loan hereunder or termination of this Subordinate Loan Agreement or the Subordinate Indenture.

**Section 2.3. *Representations and Warranties of the Subordinate Trustee.*** The Subordinate Trustee makes the following representations and warranties:

(a) The Subordinate Trustee is a national banking association, duly organized and existing under the laws of the United States of America. The Subordinate Trustee is duly authorized to act as a fiduciary and to execute the trust created by the Subordinate Indenture, and meets the qualifications to act as Subordinate Trustee under the Subordinate Indenture.

(b) The Subordinate Trustee has complied with the provisions of law which are prerequisite to the consummation of, and has all necessary power (including trust powers) and authority (i) to execute and deliver this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party, (ii) to perform its obligations under this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party, and (iii) to consummate the transactions contemplated by this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party.

(c) The Subordinate Trustee has duly authorized (i) the execution and delivery of this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party, (ii) the performance by the Subordinate Trustee of its obligations under this Subordinate

Loan Agreement and the other Subordinate Loan Documents to which it is a party, and (iii) the actions of the Subordinate Trustee contemplated by this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party.

(d) Each of the Subordinate Loan Documents to which the Subordinate Trustee is a party has been duly executed and delivered by the Subordinate Trustee and, assuming due authorization, execution and delivery by the other parties thereto, constitutes a valid and binding obligation of the Subordinate Trustee, enforceable against the Subordinate Trustee in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors generally and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(e) No approval, permit, consent, authorization or order of any court, governmental agency or public board or body not already obtained is required to be obtained by the Subordinate Trustee as a prerequisite to (i) the execution and delivery of this Subordinate Loan Agreement and the other Subordinate Loan Documents to which the Subordinate Trustee is a party (ii) the authentication or delivery of the Subordinate Bonds, (iii) the performance by the Subordinate Trustee of its obligations under this Subordinate Loan Agreement and the other Subordinate Loan Documents to which it is a party, or (iv) the consummation of the transactions contemplated by this Subordinate Loan Agreement and the other Subordinate Loan Documents to which the Subordinate Trustee is a party. The Subordinate Trustee makes no representation or warranty relating to compliance with any federal or state securities laws.

**Section 2.4. Tax Covenants of the Borrower.** The Borrower covenants and agrees that:

(a) It will at all times comply with the terms of the Tax Certificate and the Regulatory Agreement;

(b) It will not take, or permit to be taken on its behalf, any action which would cause the interest payable on the Subordinate Bonds to be included in gross income, for federal income tax purposes, and will take such action as may be necessary in the opinion of Bond Counsel to continue such exclusion from gross income, including, without limitation, the preparation and filing of all statements required to be filed by it in order to maintain the exclusion (including, but not limited to, the filing of all reports and certifications required by the Regulatory Agreement);

(c) No changes will be made to the Project, no actions will be taken by the Borrower and the Borrower will not omit to take any actions, which will in any way adversely affect the tax-exempt status of the Subordinate Bonds;

(d) It will comply with the requirements of Section 148 of the Code and the Regulations issued thereunder throughout the term of the Subordinate Bonds and will not make any use of the proceeds of the Subordinate Bonds, or of any other funds which may be deemed to be proceeds of the Subordinate Bonds under the Code and the related regulations of the United States Treasury, which would cause the Subordinate Bonds to be "arbitrage bonds" within the meaning of Section 148 of the Code;

(e) If the Borrower becomes aware of any situation, event or condition which would, to the best of its knowledge, result in the interest on the Subordinate Bonds becoming

includable in gross income for purposes of federal income tax purposes, it will promptly give written notice of such circumstance, event or condition to the Issuer and the Subordinate Trustee.

In the event of a conflict between the terms of this Section 2.4 and the Tax Certificate, the terms of the Tax Certificate shall control.

**Section 2.5. *Enforcement of Subordinate Loan Documents.*** The Subordinate Trustee may enforce and take all reasonable steps, actions and the proceedings necessary for the enforcement of all terms, covenants and conditions of the Subordinate Loan Documents as and to the extent set forth therein.

### ARTICLE III

#### THE SUBORDINATE LOAN

**Section 3.1. *Conditions to Funding the Subordinate Loan.*** The Subordinate Loan shall be deemed funded upon delivery of the Subordinate Note (representing the purchase price of the Subordinate Bonds) and satisfaction of the following conditions:

(a) The Borrower shall have executed and delivered to the Issuer the Subordinate Note in the form attached hereto as Exhibit A, with only such changes therein as shall be approved in writing by the Issuer, and the Issuer shall have endorsed the Subordinate Note to the Subordinate Trustee;

(b) The Subordinate Mortgage shall have been executed and delivered by the Borrower and delivered to the title company for recording in the appropriate office for officially recording real estate documents in the jurisdiction in which the Project is located (the "Recorder's Office");

(c) The Regulatory Agreement shall have been executed and delivered by the parties thereto and shall have been delivered to the title company for recording in the Recorder's Office, and the Subordinate Trustee shall have received evidence satisfactory to it of such delivery;

(d) All other Subordinate Loan Documents not listed above shall have been executed and delivered by all parties thereto and delivered to the Subordinate Trustee; and

(e) The Borrower shall have delivered to the Subordinate Trustee and the Issuer an opinion of its counsel or other counsel satisfactory to the Subordinate Trustee and the Issuer.

**Section 3.2. *Terms of the Subordinate Loan.*** The Subordinate Loan shall (i) be evidenced by the Subordinate Note; (ii) be secured by the Subordinate Mortgage; (iii) be in the original aggregate principal amount of \$\_\_\_\_\_; (iv) bear interest as provided in the Subordinate Note; (v) provide for payments on the Subordinate Bonds from available Revenues, if any, in accordance with the Subordinate Note; and (vi) be subject to optional and mandatory prepayment at the times, in the manner and on the terms, and have such other terms and provisions, as provided herein and in the Subordinate Note.

**Section 3.3. *Assignment to Subordinate Trustee.*** The parties hereto acknowledge, and the Borrower consents to, the assignment by the Issuer to the Subordinate Trustee

pursuant to the Subordinate Indenture of all of the Issuer's right, title and interest in this Subordinate Loan Agreement (excluding the Unassigned Rights), the Subordinate Loan, the Subordinate Mortgage and the Revenues as security for the payment of the principal of, and interest on the Subordinate Bonds.

**Section 3.4. *Investment of Funds.*** Except as otherwise provided in the Subordinate Indenture, any money held as a part of any fund or account established under the Subordinate Indenture shall be invested or reinvested by the Subordinate Trustee in Investment Securities in accordance with the Subordinate Indenture.

**Section 3.5. *Damage; Destruction and Eminent Domain.*** If, prior to payment in full of the Subordinate Bonds, the Project or any portion thereof is destroyed or damaged in whole or in part by fire or other casualty, or title to, or the temporary use of, the Project or any portion thereof shall have been taken by the exercise of the power of eminent domain, and the Issuer, the Borrower, or the Subordinate Trustee receives Net Proceeds from insurance or any condemnation award in connection therewith, such Net Proceeds shall be utilized, after satisfaction of all payment requirements of the Senior Loan Documents, as provided in the Subordinate Loan Documents and the Subordinate Indenture.

#### ARTICLE IV

#### LOAN PAYMENTS

**Section 4.1. *Payments Under the Subordinate Note; Independent Obligation of Borrower.***

(a) The Borrower agrees to repay the Subordinate Loan from "Cash Available for Debt Service" (as such term is defined in the Subordinate Note) as provided in the Subordinate Note, and in all instances at the times and in the amounts necessary to enable the Subordinate Trustee, on behalf of the Issuer, to pay all amounts payable with respect to the Subordinate Bonds, when due, whether at maturity or upon redemption, acceleration or otherwise. The obligation of the Borrower to make the payments set forth in this Article IV shall be an independent and separate obligation of the Borrower from its obligation to make payments under the Subordinate Note, provided that in all events payments made by the Borrower under and pursuant to the Subordinate Note shall be credited against the Borrower's obligations hereunder on a dollar-for-dollar basis. If for any reason the Subordinate Note or any provision of the Subordinate Note shall be held invalid or unenforceable against the Borrower by any court of competent jurisdiction, the Subordinate Note or such provision of the Subordinate Note shall be deemed to be the obligation of the Borrower pursuant to this Subordinate Loan Agreement to the full extent permitted by law and such holding shall not invalidate or render unenforceable any of the provisions of this Article IV and shall not serve to discharge any of the Borrower's payment obligations hereunder or eliminate the credit against such obligations to the extent of payments made under the Subordinate Note.

(b) The obligations of the Borrower to repay the Subordinate Loan, to perform all of its obligations under the Subordinate Loan Documents, to provide indemnification pursuant to Section 6.1 hereof, to pay costs, expenses and charges pursuant to Section 4.2 hereof and to make any and all other payments required by this Subordinate Loan Agreement, the Subordinate Indenture or any other documents contemplated by this Subordinate Loan Agreement or by the Subordinate Loan Documents shall, subject to the limitations set forth in

Section 5.1 hereof, be absolute and unconditional and shall not be subject to diminution by setoff, recoupment, counterclaim, abatement or otherwise.

(c) Notwithstanding anything contained in any other provision of this Subordinate Loan Agreement to the contrary (but subject to the provisions of Section 5.1 hereof and the Subordination Agreement), the following obligations of the Borrower shall be and remain the joint and several full recourse obligations of the Borrower and each of the Borrower's general partners, payable from and enforceable against any and all income, assets and properties of the Borrower: (i) the Borrower's obligations to the Issuer and the Subordinate Trustee under Section 4.2 of this Subordinate Loan Agreement; (ii) the Borrower's obligations under Section 6.1 of this Subordinate Loan Agreement; and (iii) the Borrower's obligation to pay legal fees and such expenses under Section 7.4 of this Subordinate Loan Agreement.

**Section 4.2. *Payment of Certain Fees and Expenses Under the Subordinate Note.***

(a) The Borrower shall pay (or cause to be paid by the Subordinate Trustee), in consideration of the funding of the Subordinate Loan, the following fees, expenses and other money payable in connection with the Subordinate Loan:

(i) On or prior to the Closing Date, to the Issuer, an initial financing fee attributable to the Subordinate Bonds (in addition to the fee attributable to the Senior Obligations, which shall be payable in accordance with and pursuant to the Senior Loan Documents) in an amount equal to \$\_\_\_\_\_, together with all third-party and out-of-pocket expenses of the Issuer (including but not limited to the fees and expenses of counsel to the Issuer) in connection with the Subordinate Loan and the issuance of the Subordinate Bonds.

(ii) All other fees and expenses of the Subordinate Trustee and the Issuer described in Sections 2.2(o)(ii) and 2.2(o)(iii) hereof.

**Section 4.3. *Prepayment of Subordinate Loan.*** Subject to the terms and conditions of the Subordination Agreement (defined in the Subordinate Indenture), the Borrower shall have the option to prepay the Subordinate Loan in full or in part prior to the payment and discharge of all the outstanding Subordinate Bonds on any Business Day in accordance with the provisions of the Subordinate Indenture, this Subordinate Loan Agreement and the Subordinate Note, without the payment of any premium or fee. The Borrower shall be required to prepay the Subordinate Loan in each case that Subordinate Bonds are required to be redeemed in accordance with the terms and conditions set forth in the Subordinate Indenture.

The Subordinate Bonds are subject to redemption in accordance with the terms and conditions set forth in the Subordinate Indenture. In connection with any prepayment, whether optional or mandatory, in addition to all other payments required under the Subordinate Note or the Subordinate Indenture, the Borrower shall pay an amount sufficient to pay the redemption price of the Subordinate Bonds to be redeemed, including principal and interest, and further including any interest to accrue with respect to the Subordinate Loan and such Subordinate Bonds between the prepayment date and the redemption date, together with a sum sufficient to pay all fees, costs and expenses in connection with such redemption and, in the case of redemption in whole, to pay all other amounts payable under this Subordinate Loan Agreement and the Subordinate Indenture. The Borrower shall provide notice of the prepayment to the Issuer, and the Subordinate Trustee in writing ten (10) days, or such shorter time as is possible in the case of mandatory prepayments, prior to the date on which the Borrower will make the

prepayment. Each such notice shall state, to the extent such information is available, (a) the amount to be prepaid, and (b) the date on which the prepayment will be made by the Borrower.

**Section 4.4. *Borrower's Obligations Upon Redemption.*** In the event of any redemption, the Borrower will timely pay, to the Subordinate Trustee an amount equal to the principal amount of such Subordinate Bonds or portions thereof called for redemption, together with interest accrued to the redemption date. In addition, the Borrower will timely pay all fees, costs and expenses associated with any redemption of Subordinate Bonds.

## ARTICLE V

### SPECIAL COVENANTS OF BORROWER

**Section 5.1. *Performance of Obligations.*** The Borrower shall keep and faithfully perform all of its covenants and undertakings contained herein and in the Subordinate Loan Documents, including, without limitation, its obligations to make all payments set forth herein and therein in the amounts, at the times and in the manner set forth herein and therein.

Except as otherwise provided herein or in the Subordinate Loan Documents, the obligations of the Borrower under this Subordinate Loan Agreement are non-recourse liabilities of the Borrower and its partners and neither Borrower nor its partners shall have any personal liability hereunder. The Bond Purchaser's sole remedy against Borrower after an Event of Default shall be to exercise its rights under the Subordinate Mortgage and no deficiency judgment shall be obtained against the Borrower. However, nothing in this Section 5.1 shall limit the right of the Issuer or the Subordinate Trustee to proceed against the Borrower to recover any fees owing to any of them or any actual out-of-pocket expenses (including but not limited to actual out-of-pocket attorneys' fees incurred by any of them) incurred by any of them in connection with the enforcement of any rights under this Subordinate Loan Agreement or the other Subordinate Loan Documents. In any action or proceeding brought with respect to the Subordinate Loan or the Subordinate Bonds, no deficiency or other money judgment shall be enforced against the Borrower or any partner of the Borrower or any successor or assign of the Borrower, and any judgment obtained shall be enforced only against the Project and other property of the Borrower encumbered by the Subordinate Loan Documents and not against the Borrower or any partner of the Borrower or any successor or assign of the Borrower.

**Section 5.2. *Compliance With Applicable Laws.*** All work performed in connection with the Project shall be performed in strict compliance with all applicable federal, state, county and municipal laws, ordinances, rules and regulations now in force or that may be enacted hereafter.

**Section 5.3. *Subordinate Indenture Provisions.*** The execution of this Subordinate Loan Agreement shall constitute conclusive evidence of approval of the Subordinate Indenture by the Borrower. Whenever the Subordinate Indenture by its terms imposes a duty or obligation upon the Borrower, such duty or obligation shall be binding upon the Borrower to the same extent as if the Borrower were an express party to the Subordinate Indenture, and the Borrower shall carry out and perform all of its obligations under the Subordinate Indenture as fully as if the Borrower were a party to the Subordinate Indenture.

**Section 5.4. *Participations in Subordinate Bonds.*** The Borrower agrees that no "related party" of the Borrower, as such term is used in section 1.148-1(b) of the regulations

issued under section 148 of the Code, may own or participate in the ownership of the Subordinate Bonds.

**Section 5.5. *Borrower to Maintain Its Existence.*** The Borrower agrees to maintain its existence and maintain its current legal status with authority to own and operate the Project.

**Section 5.6. *Borrower to Remain Qualified in State and Appoint Agent.*** The Borrower will remain duly qualified to transact business in the State and will maintain an agent in the State on whom service of process may be made in connection with any actions against the Borrower.

**Section 5.7. *Sale or Other Transfer of Project.*** The Borrower may convey and transfer the Project only upon strict compliance with the provisions of the Senior Loan Documents, the Regulatory Agreement and the Subordinate Loan Documents.

**Section 5.8. *Right to Perform Borrower's Obligations.*** In the event the Borrower fails to perform any of its obligations under this Subordinate Loan Agreement, and during the continuance of any Event of Default the Issuer or the Subordinate Trustee, after giving requisite notice, if any, may, but shall be under no obligation to, perform such obligation and pay all costs related thereto, and all such costs so advanced by the Issuer or the Subordinate Trustee shall become an additional obligation of the Borrower hereunder, payable on demand and if not paid on demand with interest thereon at the default rate of interest payable under the Subordinate Loan Documents.

**Section 5.9. *Notice of Certain Events.*** The Borrower shall promptly advise the Issuer and the Subordinate Trustee in writing of the occurrence of any Event of Default hereunder or any event which, with the passage of time or service of notice or both, would constitute an Event of Default, specifying the nature and period of existence of such event and the actions being taken or proposed to be taken with respect thereto.

**Section 5.10. *Survival of Covenants.*** The provisions of Sections 2.4, 4.2, 6.1 and 7.4 of this Subordinate Loan Agreement shall survive the expiration or earlier termination of this Subordinate Loan Agreement and, with regard to the Subordinate Trustee, the resignation or removal of the Subordinate Trustee.

**Section 5.11. *Access to Project; Records.*** Subject to reasonable notice, the Issuer and the Subordinate Trustee, and the respective duly authorized agents of each, shall have the right (but not any duty or obligation) at all reasonable times and during normal business hours: (a) to enter the Project and any other location containing the records relating to the Borrower, the Project, the Subordinate Loan and the Borrower's compliance with the terms and conditions of the Subordinate Loan Documents; (b) to inspect and audit any and all of the Borrower's records or accounts pertaining to the Borrower, the Project, the Subordinate Loan and the Borrower's compliance with the terms and conditions of the Subordinate Loan Documents; and (c) to require the Borrower, at the Borrower's sole expense, (i) to furnish such documents to the Issuer and the Subordinate Trustee, as the Issuer or the Subordinate Trustee, as the case may be, from time to time, deems reasonably necessary in order to determine that the provisions of the Subordinate Loan Documents have been complied with and (ii) to make copies of any records that the Issuer or the Subordinate Trustee or the respective duly authorized agents of each, may reasonably require. The Borrower shall make available to the Issuer and the Subordinate Trustee, such information concerning the Project, the Subordinate Mortgage and the Subordinate Loan Documents as any of them may reasonably request.



## **Section 5.12. Reserved.**

### **Section 5.13. *Obligation of the Borrower to Acquire and Construct the Project.***

The Borrower shall proceed with reasonable dispatch to complete the rehabilitation and equipping of the Project. If amounts on deposit in the Subordinate Loan Fund designated for the Project and available to be disbursed to the Borrower are not sufficient to pay the costs of such rehabilitation and equipping, the Borrower shall pay such additional costs from its own funds. The Borrower shall not be entitled to any reimbursement from the Issuer, the Subordinate Trustee, or the Subordinate Bondholders in respect of any such costs or to any diminution or abatement in the repayment of the Subordinate Loan. Neither of the Subordinate Trustee nor the Issuer makes any representation or warranty, either express or implied, that money, if any, which will be paid into the Subordinate Loan Fund or otherwise made available to the Borrower will be sufficient to complete the rehabilitation of the Project, and neither of the Subordinate Trustee nor the Issuer shall be liable to the Borrower, the Subordinate Bondholders or any other person if for any reason the Project is not completed.

## ARTICLE VI

### INDEMNIFICATION

**Section 6.1. *Indemnification.*** (a) To the fullest extent permitted by law, the Borrower agrees to indemnify, hold harmless and defend the Issuer, the Subordinate Trustee, and each of their respective officers, governing members, directors, officials, employees, attorneys and agents (collectively, the "Indemnified Parties"), against any and all losses, damages, claims, actions, liabilities, costs and expenses of any conceivable nature, kind or character (including, without limitation, reasonable attorneys' fees, litigation and court costs, amounts paid in settlement (to the extent that the Borrower has consented to such settlement) and amounts paid to discharge judgments) and amounts paid to discharge judgments) to which the Indemnified Parties, or any of them, may become subject under or any statutory law (including federal or state securities laws) or at common law or otherwise, arising out of or based upon or in any way relating to:

(i) the Subordinate Bonds, the Subordinate Loan Documents, or the execution or amendment hereof or thereof or in connection with transactions contemplated hereby or thereby, including, as applicable, the issuance, sale or resale of the Subordinate Bonds;

(ii) any act or omission of the Borrower or any of its agents, contractors, servants, employees or licensees in connection with the Project, the operation of the Project, or the condition, environmental or otherwise, occupancy, use, possession, conduct or management of work done in or about, or from the planning, design, installation or rehabilitation of, the Project or any part thereof;

(iii) any lien (other than a permitted encumbrance) or charge upon payments by the Borrower to the Issuer and the Subordinate Trustee hereunder, or any taxes (including, without limitation, all ad valorem taxes and sales taxes), assessments, impositions and other charges imposed on the Issuer or the Subordinate Trustee in respect of any portion of the Project (other than income and similar taxes on fees received or earned in connection therewith);

(iv) any violation of any environmental regulations with respect to, or the release of any hazardous substances from, the Project or any part thereof during the period in which the Borrower is in possession or control of the Project;

(v) the enforcement of, or any action taken by, the Issuer or the Subordinate Trustee related to remedies under, this Subordinate Loan Agreement or the Subordinate Indenture;

(vi) any untrue statement or misleading statement or alleged untrue statement or alleged misleading statement of a material fact contained in any offering statement or disclosure or continuing disclosure document for the Subordinate Bonds or any of the documents relating to the Subordinate Bonds, or any omission or alleged omission from any offering statement or disclosure or continuing disclosure document for the Subordinate Bonds of any material fact necessary to be stated therein in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading;

(vii) any Determination of Taxability;

(viii) any breach (or alleged breach) by Borrower of any representation, warranty or covenant made in or pursuant to this Subordinate Loan Agreement;

(ix) the Project, or the condition, occupancy, use, possession, conduct or management of, or work done in or about, or from the planning, design, installation, or rehabilitation of, the Project or any part thereof; or

(x) the Subordinate Trustee's acceptance or administration of the trust of the Subordinate Indenture, or the exercise or performance of any of its powers or duties thereunder or under any of the documents relating to the Subordinate Bonds to which it is a party;

except (a) in the case of the foregoing indemnification of (1) the Subordinate Bondholder Representative or any related Indemnified Party, to the extent such damages are caused by the gross negligence or willful misconduct of such Indemnified Party, or (2) in the case of the Subordinate Trustee or any related Indemnified Party, the negligence or willful misconduct of the Subordinate Trustee, or any breach by such party of its obligations under any of the Subordinate Loan Documents or any untrue statement or misleading statement of a material fact by such Indemnified Party contained in any offering statement or document for the Subordinate Bonds or any of the Subordinate Loan Documents or any omission or alleged omission from any such offering statement or document of any material fact necessary to be stated therein in order to make the statements made therein by such Indemnified Party not misleading; or (b) in the case of the foregoing indemnification of the Issuer or any related Indemnified Party, they shall not be indemnified by the Borrower with respect to liabilities arising from their own bad faith, fraud or willful misconduct. In the event that any action or proceeding is brought against any Indemnified Party with respect to which indemnity may be sought hereunder, the Borrower, upon written notice from the Indemnified Party (which notice shall be timely given so as not to materially impair the Borrower's right to defend), shall assume the investigation and defense thereof, including the employment of counsel reasonably approved by the Indemnified Party, and shall assume the payment of all expenses related thereto, with full power to litigate, compromise or settle the same in its sole discretion so long as the Indemnified Party is fully released (otherwise the Indemnified Party shall have the right to review and

approve or disapprove any such compromise or settlement, which approval shall not be unreasonably withheld). Each Indemnified Party shall have the right to employ separate counsel in any such action or proceeding and to participate in the investigation and defense thereof. The Borrower shall pay the reasonable fees and expenses of such separate counsel; provided, however, that such Indemnified Party may only employ separate counsel at the expense of the Borrower if and only if in such Indemnified Party's good faith judgment (based on the advice of counsel) an actual conflict of interest exists by reason of common representation.

In addition thereto, the Borrower will pay upon demand all of the fees and expenses paid or incurred by the Subordinate Trustee and/or the Issuer in enforcing the provisions hereof, as more fully set forth in this Subordinate Loan Agreement.

(b) The rights of any persons to indemnity hereunder and rights to payment of fees and reimbursement of expenses pursuant this Subordinate Loan Agreement shall survive the final payment or defeasance of the Subordinate Bonds and in the case of the Subordinate Trustee any resignation or removal. The provisions of this Section shall survive the termination of this Subordinate Loan Agreement.

Nothing contained in this Section 6.1 shall in any way be construed to limit the indemnification rights of the Issuer contained in Section 9 of the Regulatory Agreement. With respect to the Issuer, the Regulatory Agreement shall control in any conflicts between this Section 6.1 and Section 9 of the Regulatory Agreement.

## ARTICLE VII

### EVENTS OF DEFAULT AND REMEDIES

**Section 7.1. *Events of Default.*** Subject to applicable notice and cure rights, the following shall be "Events of Default" under this Subordinate Loan Agreement and the term "Event of Default" shall mean, whenever it is used in this Subordinate Loan Agreement, one or all of the following events after the expiration of any applicable cure periods:

(a) Any representation or warranty made by the Borrower in the Subordinate Loan Documents or any certificate, statement, data or information furnished by the Borrower in connection therewith or included by the Borrower in its application to the Issuer for assistance proves at any time to have been incorrect when made in any material respect;

(b) Failure by the Borrower to pay from Revenues any amounts due under this Subordinate Loan Agreement, the Subordinate Note or the Subordinate Mortgage at the times and in the amounts required by this Subordinate Loan Agreement, the Subordinate Note and the Subordinate Mortgage, as applicable (provided that if no such notice or cure period is provided, such failure shall not be an Event of Default unless it continues for a period of 10 days written after notice to Borrower thereof); or

(c) The Borrower's failure to observe and perform any of its other covenants, conditions or agreements contained herein, other than as referred to in clause (a) above, for a period of thirty (30) days after written notice specifying such failure and requesting that it be remedied is given by the Issuer or the Subordinate Trustee to the Borrower; provided, however, that if the failure shall be such that it can be corrected but not within such period, the Borrower shall commence the cure within such 30-day period and diligently pursue the cure until the failure is corrected;

Notwithstanding anything herein to the contrary, the Investor Limited Partner shall have the right, but not the obligation, to cure defaults hereunder in the same manner as the Borrower. Any cure of any default made or tendered by Investor Limited Partner shall be deemed to be a cure by Borrower and shall be accepted or rejected on the same basis as if made or tendered by Borrower.

**Section 7.2. Remedies on Default.** Whenever any Event of Default hereunder shall have occurred and be continuing, the Subordinate Trustee or the Issuer, with the prior written consent of the Subordinate Bondholder Representative (as such term is defined in the Indenture), where so provided may take any one or more of the following remedial steps:

(a) The Issuer shall cooperate with the Subordinate Trustee as the Subordinate Trustee acts pursuant to Section 6.02 of the Subordinate Indenture.

(b) In the event any of the Subordinate Bonds shall at the time be Outstanding and not paid and discharged in accordance with the provisions of the Subordinate Indenture, the Issuer or the Subordinate Trustee may have access to and inspect, examine and make copies of the books and records and any and all accounts, data and income tax and other tax returns of the Borrower.

(c) The Issuer or the Subordinate Trustee may, without being required to give any notice (other than to the Issuer or the Subordinate Trustee, as applicable), except as provided herein, pursue all remedies of a creditor under the laws of the State, as supplemented and amended, or any other applicable laws.

(d) The Issuer or Subordinate Trustee may take whatever action at law or in equity may appear necessary or desirable to collect the payments due under this Subordinate Loan Agreement then due and thereafter to become due, or to enforce performance and observance of any obligation, agreement or covenant of the Borrower under this Subordinate Loan Agreement.

Any amounts collected pursuant to Article IV and any other amounts which would be applicable to payment of principal of and interest on the Subordinate Bonds collected pursuant to action taken under this Section shall be applied in accordance with the provisions of the Subordinate Indenture.

The provisions of this Section are subject to the further limitation that if, after any Event of Default hereunder all amounts which would then be payable hereunder by the Borrower if such Event of Default had not occurred and was not continuing shall have been paid by or on behalf of the Borrower, and the Borrower shall have also performed all other obligations in respect of which it is then in default hereunder, and shall have paid the reasonable charges and expenses of the Issuer and the Subordinate Trustee, including reasonable attorneys' fees paid or incurred in connection with such default, and if there shall then be no default existing under the Subordinate Indenture, then and in every such case such Event of Default hereunder shall be waived and annulled, but no such waiver or annulment shall affect any subsequent or other Event of Default or impair any right consequent thereon.

The Issuer hereby agrees that any cure of any Event of Default hereunder made or tendered by the Investor Limited Partner or its designee shall be deemed to be cured by the Borrower, and shall be accepted or rejected by the Issuer on the same basis as if made or tendered by the Borrower. Subordinate Trustee, as assignee of Issuer, hereby agrees that

copies of all notices that are sent to Borrower hereunder shall also be sent to the Investor Limited Partner.

**Section 7.3. *No Remedy Exclusive.*** No remedy conferred upon or reserved to the Issuer or the Subordinate Trustee by this Subordinate Loan Agreement is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Subordinate Loan Agreement or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the Issuer or the Subordinate Trustee to exercise any remedy reserved to it in this Article VII, it shall not be necessary to give any notice, other than such notice as may be expressly required by this Subordinate Loan Agreement.

**Section 7.4. *Agreement to Pay Attorneys' Fees and Expenses.*** In the event the Borrower should default under any of the provisions of this Subordinate Loan Agreement and the Issuer or the Subordinate Trustee should employ attorneys or incur other expenses for the collection of loan payments or the enforcement of performance or observance of any obligation or agreement on the part of the Borrower contained in this Subordinate Loan Agreement or in the Subordinate Note, the Borrower shall on demand therefor reimburse the reasonable fees of such attorneys and such other expenses so incurred.

**Section 7.5. *No Additional Waiver Implied by One Waiver.*** In the event any agreement contained in this Subordinate Loan Agreement should be breached by any party and thereafter waived by the other parties, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

## ARTICLE VIII

### MISCELLANEOUS

**Section 8.1. *Notices.*** Whenever in this Subordinate Loan Agreement the giving of notice by mail or otherwise is required, the giving of such notice may be waived in writing by the person entitled to receive such notice and in any such case the giving or receipt of such notice shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

Any notice, request, complaint, demand, communication or other paper required or permitted to be delivered to the Issuer, the Subordinate Trustee, or the Borrower shall be sufficiently given and shall be deemed given (unless another form of notice shall be specifically set forth herein) on the Business Day following the date on which such notice or other communication shall have been delivered to a national overnight delivery service (receipt of which to be evidenced by a signed receipt from such overnight delivery service) addressed to the appropriate party at the addresses set forth in Section 10.04 of the Subordinate Indenture or upon receipt such notice or other communication delivered by facsimile transmission as required or permitted by this Subordinate Loan Agreement (receipt of which shall be evidenced by confirmation of transmission). The Issuer, the Subordinate Trustee, or the Borrower may, by notice given as provided in this paragraph, designate any further or different address to which subsequent notices or other communication shall be sent.

The Subordinate Trustee agrees to accept and act upon facsimile transmission of written instructions and/or directions pursuant to this Subordinate Loan Agreement, provided, however, that subsequent to such facsimile transmission of written instructions shall provide the originally executed instructions and/or directions shall be provided to the Subordinate Trustee in a timely manner.

**Section 8.2. *Concerning Successors and Assigns.*** All covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant hereto shall survive the financing herein contemplated and shall continue in full force and effect so long as the obligations hereunder are outstanding. Whenever in this Subordinate Loan Agreement any of the parties hereto is referred to, such reference shall be deemed to include the successors and assigns of such party; and all covenants, promises and agreements by or on behalf of the Borrower which are contained in this Subordinate Loan Agreement shall bind its successors and assigns and inure to the benefit of the successors and assigns of the Issuer and the Subordinate Trustee.

**Section 8.3. *Governing Law.*** This Subordinate Loan Agreement and the Exhibits attached hereto shall be construed in accordance with and governed by the laws of the State and, where applicable, the laws of the United States of America.

**Section 8.4. *Modifications in Writing.*** Modification or the waiver of any provisions of this Subordinate Loan Agreement or consent to any departure by the parties therefrom, shall in no event be effective unless the same shall be in writing approved by the parties hereto and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given and so long as the interests of any Subordinate Bondholders are not adversely affected and the Subordinate Trustee consents in writing thereto. No notice to or demand on the Borrower in any case shall entitle it to any other or further notice or demand in the same circumstances.

**Section 8.5. *Further Assurances and Corrective Instruments.*** The Issuer, the Subordinate Trustee and the Borrower agree that they will, from time to time, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such supplements hereto and such further instruments as may reasonably be required for correcting any inadequate or incorrect description of the performance of this Subordinate Loan Agreement.

**Section 8.6. *Captions.*** The section headings contained herein are for reference purposes only and shall not in any way affect the meaning or interpretation of this Subordinate Loan Agreement.

**Section 8.7. *Severability.*** The invalidity or unenforceability of any provision of this Subordinate Loan Agreement shall not affect the validity of any other provision, and all other provisions shall remain in full force and effect.

**Section 8.8. *Counterparts.*** This Subordinate Loan Agreement may be signed in any number of counterparts with the same effect as if the signatures thereto and hereto were upon the same instrument.

**Section 8.9. *Amounts Remaining in Subordinate Bond Fund or Other Funds.*** It is agreed by the parties hereto that any amounts remaining in the Subordinate Bond Fund or other funds and accounts established under the Subordinate Indenture upon expiration or sooner termination of the term hereof, shall be paid in accordance with the Subordinate Indenture.

**Section 8.10. Effective Date and Term.** This Subordinate Loan Agreement shall become effective upon its execution and delivery by the parties hereto, shall be effective and remain in full force from the date hereof, and, subject to the provisions hereof, shall expire on such date as the Subordinate Indenture shall terminate.

**Section 8.11. Cross References.** Any reference in this Subordinate Loan Agreement to an "Exhibit," an "Article," a "Section," a "Subsection" or a "Paragraph" shall, unless otherwise explicitly provided, be construed as referring, respectively, to an exhibit attached to this Subordinate Loan Agreement, an article of this Subordinate Loan Agreement, a section of this Subordinate Loan Agreement, a subsection of the section of this Subordinate Loan Agreement in which the reference appears and a paragraph of the subsection within this Subordinate Loan Agreement in which the reference appears. All exhibits attached to or referred to in this Subordinate Loan Agreement are incorporated by reference into this Subordinate Loan Agreement.

**Section 8.12. Waiver of Personal Liability.** No city councilmember, officer, agent or employee of the Issuer or any director, officer, agent or employee of the Borrower shall be individually or personally liable for the payment of any principal (or redemption price) or interest on the Subordinate Bonds or any other sum hereunder or be subject to any personal liability or accountability by reason of the execution and delivery of this Subordinate Loan Agreement; but nothing herein contained shall relieve any such city councilmember, director, officer, agent or employee from the performance of any official duty provided by law or by this Subordinate Loan Agreement.

**Section 8.13. No Liability of Issuer.** The Issuer shall not be obligated to pay the principal (or redemption price) of or interest on the Subordinate Bonds, except from Revenues and other money and assets received by the Subordinate Trustee on behalf of the Issuer pursuant to this Subordinate Loan Agreement. Neither the faith and credit nor the taxing power of the State or any political subdivision thereof, nor the faith and credit of the Issuer is pledged to the payment of the principal (or redemption price) or interest on the Subordinate Bonds. The Issuer shall not be liable for any costs, expenses, losses, damages, claims or actions, of any conceivable kind on any conceivable theory, under or by reason of or in connection with this Subordinate Loan Agreement, the Subordinate Bonds or the Subordinate Indenture, except only to the extent amounts are received for the payment thereof from the Borrower under this Subordinate Loan Agreement.

The Borrower hereby acknowledges that the Issuer's sole source of money to repay the Subordinate Bonds will be provided by the payments made by the Borrower pursuant to this Subordinate Loan Agreement, together with investment income on certain funds and accounts held by the Subordinate Trustee under the Subordinate Indenture, and hereby agrees that if the payments to be made hereunder shall ever prove insufficient to pay all principal (or redemption price) and interest on the Subordinate Bonds as the same shall become due (whether by maturity, redemption, acceleration or otherwise), then upon notice from the Subordinate Trustee, the Borrower shall pay such amounts as are required from time to time to prevent any deficiency or default in the payment of such principal (or redemption price) or interest, including, but not limited to, any deficiency caused by acts, omissions, nonfeasance or malfeasance on the part of the Subordinate Trustee, the Borrower, the Issuer or any third party, subject to any right of reimbursement from the Subordinate Trustee, the Issuer or any such third party, as the case may be, therefor.

**Section 8.14. No Liability of Officers.** No recourse under or upon any obligation, covenant, or agreement or in any Subordinate Bonds, or under any judgment obtained against the Issuer, or by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any constitution or statute or otherwise or under any circumstances, shall be had against any incorporator, city councilmember, director, commissioner, employee, agent or officer, as such, past, present, or future, of the Issuer, either directly or through the Issuer, or otherwise, for the payment for or to the Issuer or any receiver thereof, or for or to the Owner of any Subordinate Bonds, of any sum that may be due and unpaid by the Issuer upon any of the Subordinate Bonds. Any and all personal liability of every nature, whether at common law or in equity, or by statute or by constitution or otherwise, of any such incorporator, city councilmember, director, commissioner, employee, agent or officer, as such, to respond by reason of any act or omission on his or her part or otherwise, for the payment for or to the Issuer or any receiver thereof, or for or to the Owner of any Subordinate Bonds, of any sum that may remain due and unpaid upon the Subordinate Bonds or any of them, is hereby expressly waived and released as a condition of and consideration for the execution of this Subordinate Loan Agreement and the issuance of the Subordinate Bonds.

**Section 8.15. Capacity of the Subordinate Trustee.** The Subordinate Trustee is entering into this Subordinate Loan Agreement solely in its capacity as Subordinate Trustee and shall be entitled to the rights, protections, limitations from liability and immunities afforded it as Subordinate Trustee under the Subordinate Indenture. The Subordinate Trustee shall be responsible only for the duties of the Subordinate Trustee expressly set forth herein and in the Subordinate Indenture.

**Section 8.16. Reliance.** The representations, covenants, agreements and warranties set forth in this Subordinate Loan Agreement may be relied upon by the Issuer and the Subordinate Trustee. In performing their duties and obligations under this Subordinate Loan Agreement and under the Subordinate Indenture, the Issuer and the Subordinate Trustee may rely upon statements and certificates of the Borrower, upon certificates of tenants believed to be genuine and to have been executed by the proper person or persons, and upon audits of the books and records of the Borrower pertaining to occupancy of the Project. In addition, the Issuer and the Subordinate Trustee may consult with counsel, and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or suffered by the Issuer or the Subordinate Trustee under this Subordinate Loan Agreement and under the Subordinate Indenture in good faith and in conformity with the opinion of such counsel. It is expressly understood and agreed by the parties to this Subordinate Loan Agreement (other than the Issuer) that:

(a) the Issuer may rely conclusively on the truth and accuracy of any certificate, opinion, notice or other instrument furnished to the Issuer by the Subordinate Trustee, any Subordinate Bondholder or the Borrower as to the existence of a fact or state of affairs required under this Subordinate Loan Agreement to be noticed by the Issuer;

(b) the Issuer shall not be under any obligation to perform any record keeping or to provide any legal service, it being understood that such services shall be performed or caused to be performed by the Subordinate Trustee or the Borrower, as applicable; and

(c) none of the provisions of this Subordinate Loan Agreement shall require the Issuer or the Subordinate Trustee to expend or risk its own funds (apart from the proceeds of Subordinate Bonds issued under the Subordinate Indenture) or otherwise endure financial liability in the performance of any of its duties or in the exercise of any of its rights under this



Subordinate Loan Agreement, unless it shall first have been adequately indemnified to its satisfaction against the costs, expenses and liabilities which may be incurred by taking any such action.

[Signature Pages Follow]

IN WITNESS WHEREOF, the parties hereto have executed this Subordinate Loan Agreement, all as of the date first set forth above.

**CITY OF SAN JOSE**

By: \_\_\_\_\_  
Julia H. Cooper,  
Director of Finance

ATTEST:

By: \_\_\_\_\_  
Toni J. Taber CMC,  
City Clerk

Approved as to form:

By: \_\_\_\_\_  
Shasta Greene,  
Senior Deputy City Attorney

[Signature page – Subordinate Loan Agreement – Markham Plaza I]

**U.S. BANK NATIONAL ASSOCIATION**, as  
Subordinate Trustee

By: \_\_\_\_\_  
Authorized Officer

[Signature page – Subordinate Loan Agreement – Markham Plaza I]

**MARKHAM PLAZA I, LP,**  
a California limited partnership

By: EAH Markham I, LLC,  
a California limited liability company,  
its Managing General Partner

By: EAH Inc.,  
a California non-profit public  
benefit corporation,  
its Member

By: \_\_\_\_\_  
Laura Hall, President

By: CORE Markham I, LLC,  
a California limited liability company,  
its Co-General Partner

By: \_\_\_\_\_  
Christopher Neale, Manager

[Signature page – Subordinate Loan Agreement – Markham Plaza I]

**EXHIBIT A**

**FORM OF SUBORDINATE PROMISSORY NOTE**

**[Attached]**

## **SUBORDINATE PROMISSORY NOTE (TAX-EXEMPT BONDS)**

\$[\_\_\_\_\_] \_\_\_\_\_, 2019

FOR VALUE RECEIVED, MARKHAM PLAZA I, LP, a California limited partnership (“Borrower”), promises to pay to the order of the CITY OF SAN JOSE (“Issuer”) at such place as Lender shall designate in writing, the principal sum of [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_] together with interest at the Interest Rate. Issuer and its successors in interest in and to this Subordinate Promissory Note (“Note”), are referred to as the “Lender”.

1. Defined Terms. As used in this Note, the following terms shall have the following definitions. Capitalized terms not defined herein shall have the meanings given to such terms in the Deed of Trust, the Indenture or the Loan Agreement, as applicable (each as defined herein).

(a) “Capital Transaction” means any transaction out of the ordinary course of the business of Borrower resulting in the receipt of any economic consideration by Borrower or its Partners in connection with the Project (but excluding capital contributions required by the Partnership Agreement) including, without limitation, (i) the sale, transfer or other disposition of all or any substantial portion of the assets of Borrower, including the sale, directly or indirectly, of any interest in the Project, (ii) any refinancing of any loan that is senior in right of repayment to repayment of the Loan, or the making of any additional secured loans to Borrower, or (iii) receipt of insurance or condemnation proceeds with respect to the Project (other than business interruption or similar type of insurance or condemnation proceeds which cover a temporary taking of all or any portion of the Project) after such proceeds are applied to the rebuilding, repair or replacement of the Project.

(b) “Cash Available for Debt Service” means an amount equal to forty-four and five-tenths percent (44.5%) of Cash Flow.

(c) “Cash Expenditures” means all costs and expenses of any type incurred and then due on an accrual basis incident to the equipping, financing, ownership and operation of the Project, including, without limitation, amounts required to be funded into the replacement reserve, taxes, required payments of principal and interest on any loans or obligations that are not contingent on the amount of Cash Flow or Capital Proceeds, and costs of capital improvements to the and not funded or to be funded from Capital Proceeds or the replacement reserves. For purposes of the foregoing calculation, debt service and other amounts payable in connection with any loan shall be equal to the regularly scheduled payments under the respective loan documents, real estate taxes and assessments, and on an annualized basis, all projected expenditures, including those of a seasonal nature, which might be expected to be incurred on an unequal basis during a full annual period of operation.

(d) “Cash Flow” with respect to any fiscal year, means Cash Receipts less (i) Cash Expenditures, less (ii) to the Limited Partner, an amount equal to the Credit Deficiency, if any; (iii) an amount sufficient to pay federal income taxes on taxable income allocated to the Limited Partner for such a fiscal year by the Partnership, assuming the Limited Partner is subject to the maximum corporate federal income tax rate then in effect, if any (iii) the Investor Services Fee; (iv) after the initial deposit into the Operating Reserve, payments to the Operating Reserve

up to the Operating Reserve Amount; (vi) the Supplemental Property Management Fee; (vii) the Deferred Developer Fee; (viii) the Tenant Services Fee, and (ix) the Partnership Administration Fee. Cash Flow shall be determined separately for each fiscal year.

(e) “Cash Receipts” means all cash receipts of Borrower from whatever source derived other than Capital Transaction or any capital contribution, including, without limitation, from operations.

(f) “Construction Loan” means that certain loan being made to Borrower by U.S. Bank National Association from the proceeds of those certain City of San Jose Multifamily Housing Revenue Bonds (Markham Plaza I) Series 2019B-1, in the aggregate face amount of \$[ ] secured by that certain Construction Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing executed by Borrower for the benefit of the City of San Jose dated as of even date herewith.

(g) “Credit Deficiency” means the amount by which the low income housing tax credits allocated to the Limited Partner is less than the Projected Credits (as defined in the Partnership Agreement) as adjusted by any reductions in capital contributions pursuant to the provisions of the Partnership Agreement. For this purpose, the Limited Partner shall be considered to have received low income housing tax credits in the amount allocated to the Limited Partner on the Partnership's federal income tax returns reduced by: (i) any adjustment of the low income housing tax credits reported on the Partnership's tax return that is made by the Partnership or by the IRS or a court in a Final Determination; and (ii) the amount of any recapture of such Credits other than recapture due to a Tax Credit Recapture (as defined in the Partnership Agreement).

(h) “Deed of Trust” means the “Subordinate Mortgage” as defined in the Indenture.

(i) “Deferred Developer Fee” means a deferred developer fee payable to Developer by Borrower pursuant to that certain Development Services Agreement dated \_\_\_\_\_, 2019 between Borrower and Developer, in an amount not to exceed \$\_\_\_\_\_.

(j) “Developer” means [CORE AFFILIATE TBD].

(k) “Final Determination” means with respect to any issue, the earliest to occur of: (i) a decision, judgment, decree, or other order affecting the Borrower being issued by any court of competent jurisdiction, which decision, judgment, decree, or other order has become final (i.e., all allowable appeals requested by the parties to the action have been exhausted or the time for such appeals has expired); (ii) the Internal Revenue Service having entered into a binding agreement with the Borrower or having reached a final administrative or judicial determination affecting the Borrower which, whether by law or agreement, is not subject to appeal; or (iii) the expiration of the applicable statute of limitations.

(l) “First Payment Date” means the first June 1 following repayment in full of the Construction Loan on which there is Cash Available for Debt Service.

(m) “Indebtedness” means collectively, the principal of, interest on, and any other amounts due at any time under, this Note or the Deed of Trust.

(n) “Indenture” means that certain Subordinate Indenture of Trust, dated as of \_\_\_\_\_ 1, 2019, by and between the Issuer and the Trustee.

(o) “Interest Rate” means [2.5]% per annum, compounded annually.

(p) “Investor Services Fee” means a fee payable to the Limited Partner in the amount of Five Thousand Dollars (\$5,000) per year commencing in 2019, and prorated for the number of months the Borrower has rental income. The Investor Services Fee shall increase by three (3%) per year, commencing in 2020.

(q) “Limited Partner” means Wincopin Circle LLLP, a Maryland limited liability limited partnership, and its successors and assigns, as a limited partner of Borrower.

(r) “Lender” means initially, the Issuer, and any subsequent holder of this Note.

(s) “Loan” means the “Subordinate Loan” as defined in the Indenture.

(t) “Loan Agreement” means that certain Subordinate Loan Agreement dated as of \_\_\_\_\_, 2019 by and among the Issuer, the Borrower and the Trustee.

(u) “Loan Payment Date” means June 1 of every year commencing on the First Payment Date.

(v) “Maturity Date” means the earlier to occur of (i) September 1, 2064 or (ii) any earlier date on which the unpaid principal balance of this Note becomes due and payable, by acceleration or otherwise.

(w) “Note” means this Subordinate Promissory Note.

(x) “Operating Reserve” means an operating reserve to be created by the Borrower no later than the date the Limited Partner makes its third capital contribution, and funded in the initial amount of the Operating Reserve Amount.

(y) “Operating Reserve Amount” means \$ \_\_\_\_\_

(z) “Partners” means collectively and singularly, any partner of Borrower.

(aa) “Partnership Administrative Fee” means a fee payable to \_\_\_\_\_ in the amount of \_\_\_\_\_ per year commencing in 2019, and prorated for the number of months the Borrower has rental income. The Partnership Administrative Fee shall increase by three (3%) per year, commencing in 2020.

(bb) “Project” means the Markham Plaza I Apartments project located in San Jose, California



(cc) “Supplemental Property Management Fee” means \_\_\_\_\_.

(dd) “Tenant Services Fee” means a fee payable to \_\_\_\_\_ in the amount of \_\_\_\_\_ per year commencing in 2019, and prorated for the number of months the Borrower has rental income. The Tenant Services Fee shall increase by three (3%) per year, commencing in 2020.

2. Method of Payment. All payments due under this Note shall be payable to Lender, or its successor. Each such payment shall be made by check or wire transfer of immediately available funds in accordance with wire transfer instructions that Lender shall supply by written notice to Borrower from time to time.

3. Repayment of Loan.

(a) Subject to the further provisions of this Note, the principal amount outstanding hereunder from time to time shall bear interest at a rate per annum equal to the Interest Rate. Interest on this Note shall be computed on the basis of a 360-day year consisting of twelve 30-day months.

(b) Commencing on the First Payment Date and continuing on each Loan Payment Date until and including the Maturity Date (or the date the unpaid principal balance otherwise becomes due, whether by acceleration or otherwise), Borrower shall make annual payments in arrears to Lender of principal and interest on the outstanding amount of the Loan payable from Cash Available for Debt Service. The following shall be deferred: (i) all interest accruing under the Note prior to the First Payment Date and (ii) the difference between the amount of interest accruing under the Note for each payment period commencing on the First Payment Date at the Interest Rate and the amount of interest actually paid under the Note from Cash Available for Debt Service for each such period commencing on the First Payment Date shall, to the extent not actually paid from Cash Available for Debt Service (all such interest which is deferred in accordance with this subsection is referred to herein as “Deferred Interest”). All Deferred Interest shall immediately be added to the principal balance outstanding (and interest shall accrue thereon at the Interest Rate, subject to the further provisions of this Note) and be payable (i) as set forth above or (ii) in full on the Maturity Date or such earlier date as the Loan is prepaid. Loan payments shall be first applied to interest at the Interest Rate due for the current period, and then Deferred Interest which has accrued but not been paid and then to the outstanding principal of the Loan. Any payments received by Lender by for the account of Borrower by any party shall be treated as a payment by Borrower hereunder.

(c) Commencing on the First Payment Date and continuing on each Loan Payment Date until the Maturity Date, whether or not a payment is made under Section 3(b) above, Borrower shall submit to Lender its audited financial statement for the prior fiscal year, which shall include a report of the accountants calculating the Cash Flow and Cash Available for Debt Service which such report is subject to the approval of the Lender in its sole and absolute discretion.

(d) Borrower shall pay all unpaid principal of and interest on this Note on the earlier to occur of (i) a Capital Transaction or (ii) the Maturity Date. Any regularly scheduled

annual installment of principal and interest that is received by Lender before the date it is due shall be deemed to have been received on the due date solely for the purpose of calculating interest due.

4. Application of Payments. If at any time Lender receives from Borrower or otherwise, any amount applicable to the Indebtedness which is less than all amounts due and payable at such time, Lender may apply that payment to amounts then due and payable under this Note in any manner and in any order determined by Lender, in Lender's discretion. Borrower agrees that neither Lender's acceptance of a payment from Borrower in an amount that is less than all amounts then due and payable nor Lender's application of such payment shall constitute or be deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction.

5. Security. The Indebtedness is secured by the Deed of Trust.

6. Acceleration. If an Event of Default has occurred and is continuing, subject to the provisions and requirements of the Loan Agreement and Indenture, the entire unpaid principal balance, any accrued interest, and all other amounts payable under this Note shall at once become due and payable, at the option of Lender subject to applicable notice and cure rights as described in the Loan Agreement. Lender may exercise this option to accelerate regardless of any prior forbearance. Borrower's failure to make any payment required hereunder within thirty (30) days of written notice thereof shall be an Event of Default hereunder.

7. Limitation of Liability. Subject to Section 5.1 of the Loan Agreement, this Note is a nonrecourse obligation and neither Borrower nor any of its partners, nor any of the members, managers, partners, directors, officers, or employees of Borrower's partners, shall have any personal liability under this Note or the Deed of Trust for the repayment of the Indebtedness or for the performance of any other obligations of Borrower under this Note and Deed of Trust, and Lender's only recourse for the satisfaction of the Indebtedness and the performance of such obligations shall be Lender's exercise of its rights and remedies with respect to the Property and any other collateral held by Lender as security for the Indebtedness.

8. Prepayments. Borrower may voluntarily prepay all or any portion of this Note, at any time without penalty or premium.

9. Costs and Expenses. To the fullest extent allowed by applicable law, Borrower shall pay all reasonable expenses and costs, including, without limitation, out-of-pocket expenses and reasonable attorneys' fees and costs and expert witnesses and costs of investigation, incurred by Lender as a result of any default under this Note or in connection with efforts to collect any amount due under this Note, including those incurred in post-judgment collection efforts and in any bankruptcy proceeding (including any action for relief from the automatic stay of any bankruptcy proceeding) or judicial or non-judicial foreclosure proceeding.

10. Forbearance. Any forbearance by Lender in exercising any right or remedy under this Note or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of that or any other right or remedy. The acceptance by Lender of any payment after the due date of such payment, or in an amount which is less than the required payment, shall not be a

waiver of Lender's right to require prompt payment when due of all other payments or to exercise any right or remedy with respect to any failure to make prompt payment.

11. Waivers. Presentment, demand, notice of dishonor, protest, notice of acceleration, notice of intent to demand or accelerate payment or maturity, presentment for payment, notice of nonpayment, grace, and diligence in collecting the Indebtedness are waived by Borrower and all endorsers of this Note and all other third party obligors.

12. Loan Charges. This Note shall not be construed to create a contract for the use, forbearance or detention of money requiring payment of interest at a rate greater than the maximum interest permitted to be charged under applicable law. Amounts payable hereunder representing late payments, penalty payments or the like shall be payable to the extent allowed by applicable law. If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower in connection with the Loan is interpreted so that any interest or other charge provided for in this Note, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of this Note. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, shall be deemed to be allocated and spread ratably over the stated term of this Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of this Note.

13. Commercial Purpose. Borrower represents that the Indebtedness is being incurred by Borrower solely for the purpose of carrying on a business or commercial enterprise, and not for personal, family, household or agricultural purposes.

14. Notices. All notices, demands and other communications required or permitted to be given by Lender to Borrower pursuant to this Note shall be made in accordance with the provisions of the Deed of Trust. In addition, notices under this Note and the Deed of Trust shall also be simultaneously delivered to Limited Partner at the following address: c/o Enterprise Community Asset Management, Inc., 70 Corporate Center, 11000 Broken Land Parkway, Suite 700, Columbia, Maryland 21044, Attention: Asset Management.

15. Payments on Non-Business Day. If the date for the making of any payment under this Note is not a business day, such payment shall be due and payable on the next succeeding business day.

16. Governing Law. The laws of the State of California, other than those laws denominated choice of law rules which would require the application of the laws of another forum, shall govern the validity, construction and effect of this Note.

17. Severability. The invalidity, illegality or unenforceability of any provision of this Note shall not affect the validity, legality or enforceability of any other provision, and all other provisions shall remain in full force and effect.

18. Remedies Cumulative; Standstill. In the event of and during the continuance of an Event of Default, Lender may exercise all or any one or more of its rights and remedies available under this Note, at law or in equity. Such rights and remedies shall be cumulative and concurrent, and may be enforced separately, successively or together, and the exercise of any particular right or remedy shall not in any way prevent Lender from exercising any other right or remedy available to Lender. Lender may exercise any such remedies from time to time as often as may be deemed necessary by Lender. Lender agrees that, until the end of the Compliance Period (as defined in the Partnership Agreement), Lender may not exercise any rights or remedies under or in connection with this Note except with the prior written consent of the Limited Partner, which consent may be withheld in the Limited Partner's sole and absolute discretion. Notwithstanding the foregoing, such standstill provisions shall not apply to the Issuer.

19. No Agency or Partnership. The relationship between Borrower and Lender is, and at all times shall remain, solely that of debtor and creditor. No covenant or provision of this Note is intended, nor shall it be deemed or construed, to create a partnership, joint venture, agency or common interest in profits or income between Borrower and Lender, or render Lender liable for any debts, obligations, acts, omissions, representations or contracts of Borrower.

20. Entire Agreement; Amendment and Waiver. This Note contains the complete and entire understanding of the parties with respect to the matters covered. This Note may not be amended, modified or changed, nor shall any waiver of any provision hereof be effective, except by a written instrument signed by the party against whom enforcement of the waiver, amendment, change, or modification is sought, and then only to the extent set forth in that instrument and subject in all events to the provisions of the Indenture and the Loan Agreement. No specific waiver of any of the terms of this Note shall be considered as a general waiver.

21. Further Assurances. Borrower shall, at any time and from time to time, promptly execute and deliver all further instruments and documents, and take all further action that may be reasonably necessary or desirable, or that Lender may reasonably request, in order to protect any right or interest granted by this Note or to enable Lender to exercise and enforce its rights and remedies under this Note provided that any such further actions shall not increase Borrower's liability or obligations hereunder.

22. Captions. The captions of the sections of this Note are for convenience only and shall be disregarded in construing this Note.

23. Waiver of Trial by Jury. TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW, BORROWER AND LENDER (A) COVENANT AND AGREE NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS NOTE OR THE RELATIONSHIP BETWEEN THE PARTIES THAT IS TRIABLE OF RIGHT BY A JURY AND (B) WAIVE ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE

FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL. NOTWITHSTANDIGN THE FOREGOING, SUCH WAIVER OF TRIAL BY JURY SHALL NOT APPLY TO THE ISSUER.

24. Time of the Essence. Time is of the essence with respect to this Note.

*[Signature Page Follows Immediately.]*

IN WITNESS WHEREOF, the undersigned has duly executed and delivered this Subordinate Promissory Note as of the date first set forth above.

**BORROWER:**

MARKHAM PLAZA I, LP,  
a California limited partnership

By: EAH Markham I, LLC,  
a California limited liability company,  
its Managing General Partner

By: EAH Inc.,  
a California non-profit public benefit corporation,  
its Member

By: \_\_\_\_\_  
Laura Hall, President

By: CORE Markham I, LLC,  
a California limited liability company,  
its Co-General Partner

By: \_\_\_\_\_  
Christopher Neale, Manager

## ASSIGNMENT

Pay to the order of U.S. Bank National Association, without recourse or warranty, as Trustee under the Indenture referred to in the attached Note.

CITY OF SAN JOSE

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_