

**RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:**

Katten Muchin Rosenman LLP
2900 K Street, NW, Suite 200
Washington, DC 20007
Attention: Michael P. Murphy, Esquire

Freddie Mac Loan No. [_____]

**CITY OF SAN JOSE, CALIFORNIA
as Issuer**

**WELLS FARGO BANK, NATIONAL ASSOCIATION,
as Trustee**

and

**FEDERAL HOME LOAN MORTGAGE CORPORATION,
as Freddie Mac**

and

**JPMORGAN CHASE BANK, N.A.
as Construction Phase Credit Facility Provider**

INTERCREDITOR AGREEMENT

**\$13,600,000
City of San Jose, California
Variable Rate Demand Multifamily Housing Revenue Bonds
(Brookwood Terrace Family Apartments),
Series 2009B**

Dated as of November 1, 2009

20091110_02a3_con4
Council Agenda: 11-10-09
Item No.: 2.a.3con4

**DRAFT--Contact the Office of the City Clerk at (408)535-1260 or
CityClerk@sanjoseca.gov for final document.**

INTERCREDITOR AGREEMENT

THIS INTERCREDITOR AGREEMENT (this “Agreement”) is dated as of November 1, 2009, and is made among the **CITY OF SAN JOSE, CALIFORNIA** (the “Issuer”), **WELLS FARGO BANK, NATIONAL ASSOCIATION**, in its capacity as trustee (the “Trustee”), and the **FEDERAL HOME LOAN MORTGAGE CORPORATION** (“Freddie Mac”) and **JPMORGAN CHASE BANK, N.A.**, in its capacity as provider of the Construction Phase Credit Facility referenced below (“Construction Phase Credit Facility Provider”).

RECITALS

Pursuant to, and in accordance with, the laws of the State of California (the “State”), and in accordance with Section 103 of the Internal Revenue Code of 1986, as amended (the “Code”), the Issuer has issued its Variable Rate Demand Multifamily Housing Revenue Bonds (Brookwood Terrace Family Apartments), Series 2009B, in the aggregate principal amount of \$13,600,000 under a Trust Indenture, dated as of November 1, 2009, between the Issuer and the Trustee (the “Indenture”). The proceeds of the Bonds were used by the Issuer to fund a mortgage loan (the “Bond Mortgage Loan”) to Brookwood Terrace Family Apartments, L.P., a limited partnership duly organized and existing under the laws of the State of California (the “Borrower”) under a Financing Agreement dated as of November 1, 2009, among the Issuer, the Trustee and the Borrower (the “Financing Agreement”), and used by the Borrower for the sole and exclusive purpose of financing the acquisition, construction and equipping of a 84-unit multifamily housing project located in the City of San Jose, California, to be known as Brookwood Terrace Family Apartments, which property is more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the “Project”).

The Bond Mortgage Loan is evidenced by the Bond Mortgage Note dated as of November, __ 2009, executed by the Borrower in the amount of \$13,600,000 and payable to the order of the Trustee (the “Bond Mortgage Note”) and the Borrower’s obligations under the Bond Mortgage Note are secured by a First Multifamily Fee Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (California), and by a First Multifamily Leasehold Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (California), each dated as of November 1, 2009 (collectively, the “Bond Mortgage”) encumbering the Project, which Bond Mortgage has been recorded in the official records of the City of San Jose, California (the “Official Records”) prior to the recordation of this Agreement. The Issuer assigned certain of its rights under the Financing Agreement and the Bond Mortgage to the Trustee pursuant to the Indenture and the Financing Agreement.

Contemporaneously with the execution hereof, Freddie Mac, the Construction Phase Credit Facility Provider and the Servicer (as defined below) are entering into a Construction Phase Financing Agreement dated as of November 1, 2009 (the “Construction Phase Financing Agreement”) pursuant to which the Construction Phase Credit Facility Provider has agreed to execute and deliver to the Trustee its letter of credit (the “Construction Phase Credit Facility”) to secure payment of the principal or purchase price of and interest on the Bonds during the Construction Phase.

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In connection with the Construction Phase Credit Facility Provider's delivery of the Construction Phase Credit Facility, the Borrower and the Construction Phase Credit Facility Provider are entering into a Construction Phase Credit Reimbursement Agreement dated as of November 1, 2009 (the "Credit Agreement") to evidence the Borrower's obligation to reimburse the Construction Phase Credit Facility Provider for draws under the Construction Phase Credit Facility.

The Borrower's obligations to the Construction Phase Credit Facility Provider under the Credit Agreement will be secured under a Construction Leasehold Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (Credit Bank) and a Construction Fee Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (Credit Bank), each dated as of November 1, 2009 (collectively, the "Construction Mortgage") encumbering the Project, which Construction Mortgage will be recorded in the Official Records immediately after the recordation of the Bond Mortgage.

Upon satisfaction of the conditions set forth in the Construction Phase Financing Agreement and that Forward Commitment executed by Freddie Mac in favor of Citibank, N.A. (the "Servicer") Freddie Mac will, on the Conversion Date, execute and deliver to the Trustee a Credit Enhancement Agreement (the "Credit Enhancement Agreement") in substitution for the Construction Phase Credit Facility, to provide payment for and secure the payment of amounts owing under the Financing Agreement sufficient to pay the principal and interest on the Bonds, and the purchase price of the Bonds.

To evidence the Borrower's repayment obligations to Freddie Mac as a result of payments made by Freddie Mac under the Credit Enhancement Agreement, the Borrower and Freddie Mac will, on the Conversion Date, enter into a Reimbursement and Security Agreement (the "Reimbursement Agreement").

On the Conversion Date, the Construction Phase Credit Facility Provider shall assign to Freddie Mac (i) all of its rights under the Construction Mortgage whereupon the Construction Mortgage as amended, restated or supplemented shall be known as the "Reimbursement Mortgage" and (ii) all of its rights hereunder.

It is a condition to the delivery of the Credit Enhancement Agreement by Freddie Mac and the delivery of the Construction Phase Credit Facility by the Construction Phase Credit Facility Provider that the rights of the Issuer, the Trustee and Freddie Mac and the Construction Phase Credit Facility Provider to enforce remedies under the Bond Mortgage and the Reimbursement Mortgage, and the Construction Mortgage, respectively, be established between and among the parties hereto.

AGREEMENTS

NOW, THEREFORE, in consideration of the mutual promises contained herein and in order to induce Freddie Mac to covenant under the Construction Phase Credit Facility Agreement to execute and deliver the Credit Enhancement Agreement on the Conversion Date

and to induce the Construction Phase Credit Facility Provider to execute and deliver to the Trustee the Construction Phase Credit Facility and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

SECTION 1. *Defined Terms.* Unless otherwise defined herein, or unless the context clearly indicates otherwise, each term used in this Agreement including in the Recitals set forth above, and which is defined in the Indenture, the Credit Agreement or the Reimbursement Agreement, as applicable, shall have the meaning given to such term by the Indenture, the Credit Agreement or the Reimbursement Agreement.

As used herein, the following terms shall have the meanings set forth below:

“*Affiliate*” as applied to any Person, means any other Person directly or indirectly controlling, controlled by, or under common control with, that Person. For purposes of this definition, “control” (including, with correlative meanings, the terms “controlling,” “controlled by” and “under common control with”), as applied to any Person, means (a) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities or by contract or otherwise, or (b) the ownership of a managing member’s interest in a limited liability company.

“*Bond Documents*” means, collectively, the Indenture, the Bonds, the Financing Agreement, the Bond Mortgage Note, the Tax Regulatory Agreement, the Bond Mortgage, the Remarketing Agreement, this Agreement and any other document evidencing or securing the Bonds as such documents shall be amended, modified or supplemented from time to time.

“*Construction Mortgage*” means the Construction Mortgage as described in the Recitals hereto.

“*Construction Mortgage Documents*” means, collectively, the Construction Phase Credit Facility, the Credit Agreement, the Construction Mortgage and any other document evidencing or securing the obligations of the Borrower pursuant to the Credit Agreement.

“*Construction Phase*” means the period commencing on the Closing Date and ending on the Conversion Date as defined in the Reimbursement Agreement.

“*Construction Phase Credit Facility*” means the irrevocable direct pay letter of credit issued by the Construction Phase Credit Facility Provider on the Delivery Date for the benefit of the Trustee in the amount of the initial principal amount of the Bonds plus interest thereon for a period of 35 days at an interest rate of 12% per annum, and any replacements or renewals thereof.

“*Construction Wrongful Dishonor*” means the failure of the Construction Phase Credit Facility Provider to honor a draw made in accordance with the terms of the Construction Phase Credit Facility (which draw strictly complies with, and conforms to, the terms and conditions of the Construction Phase Credit Facility) or the insolvency of the Construction Phase Credit Facility Provider.

“*Conversion*” means conversion of the Bond Mortgage Loan from the Construction Phase to the Permanent Phase pursuant to the Forward Commitment and the Construction Phase Financing Agreement.

“*Conversion Date*” means the date upon which the Conversion takes place.

“*Credit Agreement*” means the Credit Agreement as described in the Recitals hereto.

“*Credit Enhancement Documents*” means, collectively, the Reimbursement Agreement, the Reimbursement Mortgage, the Pledge Agreement, the Hedge Agreement, if any, and any other document evidencing or securing the obligations of the Borrower pursuant to the Reimbursement Agreement.

“*Permanent Phase*” means the period of the Bond Mortgage Loan commencing on the Conversion Date and continuing through the maturity of the Bond Mortgage Loan.

“*Tax Regulatory Agreement*” means the Regulatory Agreement and Declaration of Restrictive Covenants dated as of November 1, 2009 by and among the Borrower, the Issuer and the Trustee, to be recorded immediately prior to the Bond Mortgage in the Official Records, together with all supplements thereto.

“*Wrongful Dishonor*” means the failure of Freddie Mac to honor a draw made in accordance with the terms of the Credit Enhancement Agreement (which draw strictly complies with, and conforms to, the terms and conditions of the Credit Enhancement Agreement).

SECTION 2. *Rules of Construction.* The words “hereof,” “herein,” “hereunder,” “hereto,” and other words of similar import refer to this Agreement in its entirety.

The terms “agree” and “agreements” contained herein are intended to include and mean “covenant” and “covenants.”

References to Articles, Sections, and other subdivisions of this Agreement are to the designated Articles, Sections, and other subdivisions of this Agreement as originally executed. Reference herein to any document or instrument shall be deemed to include any amendments or supplements to, or restatements of, such documents or instrument.

The headings of this Agreement are for convenience only and shall not define or limit the provisions hereof.

All references made (a) in the neuter, masculine or feminine gender shall be deemed to have been made in all such genders, and (b) in the singular or plural number shall be deemed to have been made, respectively, in the plural or singular number as well.

SECTION 3. *Exercise of Rights and Remedies by the Construction Phase Credit Facility Provider and Freddie Mac.*

(A) During (i) the Construction Phase, until either a Construction Wrongful Dishonor has occurred and is continuing or the Construction Phase Credit Facility terminates in accordance with its terms and all of the Borrower's obligations to Construction Phase Credit Facility Provider under the Credit Agreement shall have been paid in full; and (ii) the Permanent Phase, until either a Wrongful Dishonor has occurred and is continuing, or the Credit Enhancement Agreement terminates in accordance with its terms and all of the Borrower's obligations to Freddie Mac under the Reimbursement Agreement shall have been paid in full:

(i) Except as provided in Sections 3(C) and 3(D), without the prior written consent of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), neither the Trustee nor the Issuer may exercise any of its rights and remedies as beneficiary under the Bond Mortgage or as a secured party with respect to the liens and security interests created by the Financing Agreement or take any action to cause a redemption or mandatory tender of the Bonds or to declare the outstanding balance of the Bonds or the Bond Mortgage Note to be due pursuant to the Indenture or the Financing Agreement or to foreclose the lien of the Bond Mortgage, to seek the appointment of a receiver or to collect rents or realize upon any other collateral held as security for the Bonds, declare a default or event of default, or file or join in the filing of any judicial proceeding to collect the indebtedness secured by the Bond Mortgage.

(ii) Any and all consents and approvals of the Trustee as beneficiary required under the Bond Mortgage shall be given only with the prior written consent of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), each in its sole discretion.

(iii) Freddie Mac and the Trustee and, prior to the Conversion Date and so long as there is no Construction Wrongful Dishonor, the Construction Phase Credit Facility Provider, shall each be named as a mortgagee on all fire, extended coverage and other hazard insurance policies required under the Bond Mortgage and all proceeds shall be held and applied by Trustee in accordance with this paragraph. Prior to the Conversion Date and provided there has not been a Construction Wrongful Dishonor, the application of the proceeds of insurance or condemnation ("Insurance/Condemnation Proceeds") shall be solely as directed by the Construction Phase Credit Facility Provider in

accordance with the terms of the Construction Mortgage Documents (provided that the Construction Phase Credit Facility Provider shall consult with Freddie Mac regarding the use and application of such proceeds) and subject to the requirement that excess proceeds remaining after the use of such Insurance/Condemnation Proceeds for the repair, restoration, rebuilding or alteration of the Project and for payment of costs incurred by the Construction Phase Credit Facility Provider in connection with such casualty or condemnation shall be deposited with the Trustee and applied in accordance with the Indenture to reimburse the Construction Phase Credit Facility Provider for a drawing against the Construction Phase Credit Facility for the purpose of redeeming the Bonds in accordance with the Indenture. During any Construction Wrongful Dishonor, the application of Insurance/Condemnation Proceeds shall be solely as directed by the Trustee. From and after the Conversion Date, the application of Insurance/Condemnation Proceeds shall be solely as directed in writing by Freddie Mac, in accordance with the terms of the Reimbursement Mortgage and subject to the requirement that excess proceeds remaining after the use of such Insurance/Condemnation Proceeds for the repair, restoration, rebuilding or alteration of the Project and for payment of any costs incurred by Freddie Mac in connection with such casualty or condemnation shall be deposited with the Trustee and applied in accordance with the Indenture to reimburse Freddie Mac for a drawing upon the Credit Enhancement Agreement for the purpose of redeeming the Bonds in accordance with the Indenture.

(iv) Except as provided in Sections 3(C) and 3(D), any and all demands permitted to be made by the beneficiary under the terms of the Bond Mortgage shall be made only by or at the written direction of: the Construction Phase Credit Facility Provider (during the Construction Phase); or Freddie Mac (during the Permanent Phase) each in its sole discretion (the beneficiary may request, however, that the Construction Phase Credit Facility Provider or Freddie Mac (as applicable), in its discretion, provide such direction).

(v) Except as provided in Sections 3(C) and 3(D), the Construction Phase Credit Facility Provider (during the Construction Phase) and Freddie Mac (during the Permanent Phase), each in its sole discretion, shall have the sole right to direct the Trustee to waive or forbear any term, condition, covenant or agreement of the Bond Mortgage applicable to the Borrower or the City of San Jose Financing Authority, as applicable, as Trustor, or any breach thereof, other than a covenant that might adversely impact the tax-exempt status of the Bonds.

(vi) Except as provided in Sections 3(C) and 3(D), the Construction Phase Credit Facility Provider (during the Construction Phase) and Freddie Mac (during the Permanent Phase) shall control all of the Bond Mortgage Rights (as such term is defined below) and the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) shall have the right, power and authority to direct the Trustee with respect to all decisions in connection with the Bond Mortgage, which pursuant to its terms may be made by the beneficiary, except neither the Construction Phase Credit Facility Provider

nor Freddie Mac shall have the right to direct the Trustee to take or refrain from taking action that would adversely impact the tax-exempt status of the Bonds. The parties hereto agree that although all Bond Mortgage Loan payments are required to be made monthly under the Financing Agreement during a period while the Bonds bear interest at a Variable Rate and semiannually during a Reset Period or the Fixed Rate Period, the Borrower has agreed during the Permanent Phase to make monthly Bond Mortgage Loan payments under the Reimbursement Agreement to the Servicer in the manner and at the times set forth in the Reimbursement Agreement. "Bond Mortgage Rights" collectively means, with respect to the Bond Mortgage Loan, all rights of the Issuer, the Trustee and/or the beneficiary under the Bond Mortgage (other than those rights specifically excluded below) including without limitation, the right to receive any and all Bond Mortgage Loan payments thereunder and all of the rights and interests under the Bond Mortgage, and to vest in its independent contractor, including the Servicer, such rights, powers and authority as may be necessary to implement any of the foregoing; "Bond Mortgage Rights" does not mean, and expressly excludes (a) the Issuer's rights under Sections 2.4, 2.5, 4.2, 4.3, 6.1 and 7.4 of the Financing Agreement; (b) the right to receive payments relating to the redemption premium of a redeemed Bond; (c) the Issuer's and the Trustee's right to require the Borrower to pay rebate, meet continuing disclosure requirements and the right to specifically enforce the Tax Regulatory Agreement; and (d) the Trustee's rights to specifically enforce the Borrower's obligations to make payments owing to the Trustee pursuant to Sections 2.4, 2.5, 4.2, 4.3, 6.1 and 7.4 of the Financing Agreement; *provided, however*, that the enforcement of such rights of the Trustee or the Issuer is limited as provided in Sections 3(C) and 3(D) (such rights are referred to herein as the "Mortgage Retained Rights").

(vii) The Trustee and the Issuer covenant and agree neither to file nor join in the filing of any involuntary petition involving the Borrower under the federal bankruptcy laws or other federal or state reorganization, receivership, insolvency or similar proceeding without the prior written consent of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase).

(viii) None of the Trustee, the Issuer, Freddie Mac or the Construction Phase Credit Facility Provider shall acquire by subrogation, contract or otherwise any lien upon or other estate, right or interest in the Project or any rents or revenues therefrom that are not subject to the terms of this Agreement.

(ix) Upon the initiation of any liquidation or reorganization of the Borrower or any of the entities comprising Borrower or any of the partners of any such entity (Borrower and all such entities and partners hereinafter collectively referred to as the "Borrower Parties") in or by the filing of any bankruptcy, insolvency or receivership proceeding or upon the initiation of any involuntary liquidation, dissolution or reorganization proceeding involving a Borrower Party, then, in any such case, any payment or distribution, whether in cash, property or securities, to which Trustee or Issuer would be entitled pursuant to the Indenture, Bond Mortgage Note, Financing

Agreement or Bond Mortgage, shall instead be paid over to the Construction Phase Credit Facility Provider (during the Construction Phase); and Freddie Mac (during the Permanent Phase) for application as provided in the: Credit Agreement (during the Construction Phase); and the Reimbursement Agreement (during the Permanent Phase) until all amounts due to the Construction Phase Credit Facility Provider or Freddie Mac under the Credit Agreement or Reimbursement Agreement (as applicable) have been paid in full.

(x) The Trustee and the Issuer irrevocably authorize the Construction Phase Credit Facility Provider (during the Construction Phase); and Freddie Mac (during the Permanent Phase) to take any action (but neither the Construction Phase Credit Facility Provider nor Freddie Mac has any obligation to take any such action, in which case the Trustee or the Issuer may proceed) with respect to any payment or distribution, whether in cash or securities, as described in Section (ix) above (in the name of the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) or in the name of the Trustee or Issuer, as the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) may deem necessary or advisable for the enforcement of the provisions of this Agreement):

- (1) demand, sue for, collect and receive every such payment or distribution described in Section (ix),
- (2) file claims and proofs of claims in any statutory or non-statutory proceeding,
- (3) vote the full amount of the Bond Mortgage Loan in its sole discretion in connection with any resolution, arrangement, plan of reorganization, compromise, settlement or extension, and
- (4) take all such other action (including, without limitation, the right to participate in any composition of creditors and the right to vote the amount of the Bond Mortgage Loan at creditors' meetings for the election of trustees, acceptances of plans and otherwise), as the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) may deem necessary or advisable for the enforcement of the provisions of this Agreement.

The Trustee and the Issuer agree, upon the initiation of any liquidation or reorganization of any Borrower Party by the filing of any bankruptcy, insolvency or receivership proceeding or upon the initiation of any involuntary liquidation, dissolution or reorganization proceeding involving a Borrower Party, and at the sole expense of the

Borrower or if the Borrower fails to pay, at the expense of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), promptly

(1) to take such action as may be requested at any time by the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) to deliver any instruments required to collect the amount of the Bond Mortgage Loan, on written demand therefor, and

(2) to execute and deliver such powers of attorney (only with respect to the Trustee), assignments or other instruments as may be requested in writing by the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) in order to enable the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) to enforce any and all claims upon or in respect of the Bond Mortgage Loan and to collect and receive any and all payments or distributions which may be payable or deliverable at any time upon or in respect of the Bond Mortgage Loan.

Nothing herein contained shall be deemed to preclude the Trustee and the Issuer from appearing or being heard in any bankruptcy, insolvency, or other similar proceedings affecting a Borrower Party, nor from collecting from a Borrower Party the full Bond Mortgage Loan amount due to the Trustee and the Issuer (through subrogation to the rights of the Construction Phase Credit Facility Provider, during the Construction Phase, or Freddie Mac during the Permanent Phase, or otherwise) after all amounts due to (during the Construction Phase) the Construction Phase Credit Facility Provider under the Credit Agreement; or (during the Permanent Phase) Freddie Mac under the Reimbursement Agreement and the Construction Mortgage or Reimbursement Mortgage (as applicable) shall have been paid in full nor from enforcing, in accordance with this Agreement, the Mortgagee Retained Rights.

For purposes of this Agreement, the Construction Phase Credit Facility Provider's or Freddie Mac's (as applicable) claim or entitlement in any bankruptcy proceeding for post-petition interest shall be senior to the Bond Mortgage Loan and the Bonds and subject to the rights, benefits, terms and provisions of this Agreement as if it were part of the Credit Agreement obligations or the Reimbursement Agreement obligations, as applicable. The Trustee and the Issuer hereby agree not to seek adequate protection payments in any Borrower or Borrower Party bankruptcy proceeding without the prior written consent of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), which may be granted or withheld by the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) in its sole discretion. Further, at the sole expense of the Borrower or if the Borrower fails to pay, at the expense of the Construction Phase Credit Facility Provider (during the Construction Phase), or Freddie Mac (during the Permanent Phase), the Trustee and the Issuer agree to join, and not object to, or otherwise contest any request

for relief from the automatic stay of 11 U.S.C. § 362 requested in writing by the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) in any bankruptcy proceeding of the Borrower, in order to enable the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) to foreclose or exercise any of its rights or remedies under the Construction Mortgage or Reimbursement Mortgage (as applicable) to the Project.

The authorization of the Construction Phase Credit Facility Provider and Freddie Mac set forth above in this subsection (x) shall not obligate either the Construction Phase Credit Facility Provider or Freddie Mac to take any such action.

(xi) Upon the occurrence and during the continuation of a default by the Borrower under the Construction Mortgage (during the Construction Phase) or Reimbursement Mortgage (during the Permanent Phase), all amounts payable (including, but not limited to, any payment pursuant to an assignment of rents) under the Construction Mortgage or Reimbursement Mortgage (as applicable) shall be paid to the Construction Phase Credit Facility Provider (during the Construction Phase) (or the then owner of the Construction Mortgage) or Freddie Mac (during the Permanent Phase) (or the then owner of the Reimbursement Mortgage) before any payment or distribution, whether in cash or in other property, shall be made to Trustee or Issuer for the purpose of making Bond Mortgage Loan payments in full under the Financing Agreement. During the continuation of any default under the Construction Mortgage or Reimbursement Mortgage (as applicable), any payment or distribution, whether in cash or other property, which would otherwise (but for the provisions contained in this Agreement) be payable or deliverable under the Bond Mortgage, shall be paid or delivered directly to the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) in satisfaction of any amounts payable (including, but not limited to, any payment pursuant to an assignment of rents) under the Construction Mortgage or Reimbursement Mortgage, as applicable (including any interest thereon accruing after the occurrence of any such default) until all such amounts shall have been paid in full or the default shall have been cured or waived by the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase).

(xii) If any payment of the rents or other revenues arising from an assignment of rents contained in the Bond Mortgage or distribution of security or the proceeds of any of the foregoing is collected or received by Issuer or Trustee in contravention of any term, condition or provision of this Agreement, Issuer or Trustee, as applicable, immediately will deliver the same to the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), in precisely the form received (except for the endorsement or the assignment by Issuer or Trustee, as applicable, where necessary), and, until so delivered, the same shall be held in trust by Issuer or Trustee, as applicable. The Issuer or Trustee shall not be required to deliver money paid by the Borrower pursuant to Sections 2.4, 2.5, 4.2, 4.3, 6.1 or 7.4 of the Financing Agreement (other than money required to be paid to Freddie Mac or the

Construction Phase Credit Facility Provider pursuant to the provisions of such sections) or any rebate payments due under the Indenture.

(xiii) Trustee or Issuer shall not have any right to contest any of the procedures or actions taken by the Construction Phase Credit Facility Provider to exercise its remedies under the Credit Agreement or the Construction Mortgage so long as the Construction Phase Credit Facility Provider is in compliance with its agreements hereunder; or Freddie Mac to exercise its remedies under the Reimbursement Agreement or the Reimbursement Mortgage so long as Freddie Mac is in compliance with its agreements hereunder.

(B) Freddie Mac shall have the right to delegate to the Servicer any of the Bond Mortgage Rights. Neither Freddie Mac nor the Servicer nor the Construction Phase Credit Facility Provider nor their respective officers, directors, employees or agents shall be liable to the Issuer or the Trustee for any action taken or omitted to be taken in good faith by such party in connection with the Bond Mortgage Loan by reason of such party's control of the Bond Mortgage Rights.

(C) If the Borrower defaults in the performance or observance of any covenant, agreement or obligation of the Borrower set forth in the Tax Regulatory Agreement, and if such default remains uncured for a period of 60 days after Borrower and Freddie Mac and, prior to the Conversion Date, the Construction Phase Credit Facility Provider, receive written notice from the Trustee or Issuer stating that a default has occurred pursuant to the Tax Regulatory Agreement, and specifying the nature of the default, the Issuer and the Trustee each shall have the right to seek specific performance of the provisions of the Tax Regulatory Agreement, or to exercise their other rights or remedies thereunder; *provided, however*, that the Trustee shall not have the right to accelerate the Bond Mortgage Note or the Bonds, to cause the mandatory tender or redemption of the Bonds, to foreclose under the Bond Mortgage or take any other remedial action under any of the other Bond Documents. The Trustee and the Issuer agree to refrain from the exercise of such permitted remedies if Freddie Mac or the Construction Phase Credit Facility Provider cures any such default by the Borrower within sixty (60) days after notice to Freddie Mac and the Construction Phase Credit Facility Provider, if such default is capable of being cured by the payment of money or, in the event of any other default, Freddie Mac or the Construction Phase Credit Facility Provider commences to cure such default and thereafter diligently proceeds with such cure, provided that such longer cure period may be agreed to by the Issuer and the Trustee upon receipt of an opinion of Bond Counsel that such period will not adversely affect the exemption of interest on the Bonds from gross income for federal income tax purposes.

(D) If the Borrower defaults in the performance of its obligations to the Issuer pursuant to Sections 2.4, 2.5, 4.2, 4.3, 6.1 or 7.4 of the Financing Agreement or the Borrower's obligation to comply with continuing disclosure requirements or to make payments to the Trustee owed pursuant to Sections 2.4, 2.5, 4.2, 4.3, 6.1 or 7.4 of the Financing Agreement for fees, expenses, rebate or indemnification, the Issuer or the Trustee shall have the right to exercise

all its rights and remedies thereunder; *provided, however*, that neither the Issuer nor the Trustee shall have the right to accelerate the Bond Mortgage Note or the Bonds, to cause mandatory tender or redemption of the Bonds, to foreclose under the Bond Mortgage or take any other remedial action under any of the other Bond Documents. The Trustee and the Issuer agree to refrain from the exercise of such permitted remedies if Freddie Mac or the Construction Phase Credit Facility Provider cures any such default by the Borrower within sixty (60) days after receipt by Freddie Mac and the Construction Phase Credit Facility Provider of written notice of such default, if such default is capable of being cured by the payment of money or, in the event of any other default, Freddie Mac or the Construction Phase Credit Facility Provider commences to cure such default and thereafter diligently proceeds with such cure, provided that such longer cure period may be agreed to by the Issuer and the Trustee upon receipt of an opinion of Bond Counsel that such period will not adversely affect the exemption of interest on the Bonds from gross income for federal income tax purposes.

(E) The Trustee and the Issuer each acknowledges that Freddie Mac or the Servicer (from and after Conversion) may hold cash or other collateral and reserves to secure the Reimbursement Agreement and that the Construction Phase Credit Facility Provider (prior to Conversion) may hold cash or other collateral and reserves to secure the Credit Agreement, which collateral and reserves are not available as security for the Bonds. All cash collateral that is held by the Construction Phase Credit Facility Provider (prior to Conversion) or by the Servicer (from and after Conversion) that is primarily held as security for the payment of principal and interest on the Bonds or to reimburse the Construction Phase Credit Facility Provider for payments under the Credit Agreement or Freddie Mac for payments made under the Credit Enhancement Agreement, as applicable, shall be invested in obligations the interest on which is excludable from gross income for federal income tax purposes. Freddie Mac agrees that it will instruct the Servicer (based upon the Tax Certificate) which funds and accounts held by the Servicer are subject to investment yield limitation as described in the Tax Certificate.

(F) The Trustee and the Issuer each acknowledges that Freddie Mac and the Construction Phase Credit Facility Provider may make advances to the Borrower pursuant to the terms of the Reimbursement Agreement and the Reimbursement Mortgage and the Credit Agreement and the Construction Mortgage, respectively, or any extension, modification, amendment, renewal, consolidation, increase, reinstatement or supplement thereto. The Trustee and the Issuer each acknowledges that the obligations evidenced by the Reimbursement Agreement and secured by the Reimbursement Mortgage and the obligations evidenced by the Credit Agreement and secured by the Construction Mortgage, together with accrued interest thereon, plus fees, advances and expenses due and owing by the Borrower thereunder, as applicable, may increase in the future and the agreements of the Trustee and the Issuer set forth in this Agreement shall extend to such amounts that are currently, and that may become, due and owing under the Reimbursement Mortgage and the Construction Mortgage.

SECTION 4. *Exercise of Rights and Remedies by Trustee; Transfer of Bond Mortgage Loan.*

(A) During the Construction Phase, upon (a) the occurrence and during the continuation of a Construction Wrongful Dishonor, or (b) upon the termination or replacement of the Construction Phase Credit Facility in accordance with its terms, and no further indebtedness of the Borrower remains outstanding under the Construction Phase Credit Documents (the “Construction Debt”), the Construction Phase Credit Facility Provider shall not exercise the rights and remedies referred to in Section 3 hereof without the prior written consent of the Trustee, and the actions set forth in Section 3 shall be taken by the Trustee in its sole discretion.

(B) During the Permanent Phase, upon (a) the occurrence and during the continuation of a Wrongful Dishonor, or (b) upon the termination or replacement of the Credit Enhancement Agreement in accordance with its terms, and no further obligations of the Borrower to Freddie Mac under the Reimbursement Agreement remain outstanding, Freddie Mac shall not exercise the rights and remedies referred to in Section 3 hereof without the prior written consent of the Trustee, and the actions set forth in Section 3 shall be taken by the Trustee in its sole discretion.

(C) During the Construction Phase, unless a Construction Wrongful Dishonor shall have occurred and be continuing, neither the Trustee nor the Issuer shall, without the prior written consent of the Construction Phase Credit Facility Provider, dispose of the Bond Mortgage Loan or transfer the Financing Agreement, the Bond Mortgage Note, the Bond Mortgage or any other related document or any right or interest in the Financing Agreement, the Bond Mortgage Note, the Bond Mortgage or any other related document other than, in the case of the Trustee, to a successor Trustee pursuant to the terms of the Indenture. As a condition to the effectiveness of any such transfer to a successor trustee, the successor trustee must execute an assumption agreement with respect to this Agreement and the Indenture in form and substance acceptable to Freddie Mac and the Construction Phase Credit Facility Provider.

(D) During the Permanent Phase, unless a Wrongful Dishonor shall have occurred and be continuing, neither the Trustee nor the Issuer shall, without the prior written consent of Freddie Mac, dispose of the Bond Mortgage Loan or transfer the Financing Agreement, the Bond Mortgage Note, the Bond Mortgage or any other related document or any right or interest in the Financing Agreement, the Bond Mortgage Note, the Bond Mortgage or any other related document other than, in the case of the Trustee, to a successor Trustee pursuant to the terms of the Indenture. As a condition to the effectiveness of any such transfer to a successor trustee, the successor trustee must execute an assumption agreement with respect to this Agreement and the Indenture in form and substance acceptable to Freddie Mac.

SECTION 5. *Application of Money Received Upon Exercise of Remedies under the Bond Mortgage.* Any and all amounts received or collected by the Trustee, the Construction Phase Credit Facility Provider or Freddie Mac in payment of the Bond Mortgage Loan as a result of the exercise of set-off rights, the liquidation of any security interest created by the Bond Documents, the Construction Mortgage Documents (during the Construction Phase) or the Credit Enhancement Documents (during the Permanent Phase), the sale (by foreclosure, power of sale or otherwise) of the Project under the Bond Mortgage or the

exercise of any remedies under any of the Bond Documents, the Construction Mortgage Documents (during the Construction Phase) or the Credit Enhancement Documents (during the Permanent Phase) against the Borrower or the Project (including rents received from the appointment of a receiver) shall be held by the Trustee or the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), as the case may be, for the benefit of the Trustee and the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase) and will be applied as follows:

(A) Until either (i) a Construction Wrongful Dishonor or Wrongful Dishonor (as applicable) has occurred and is continuing, or (ii) the Construction Phase Credit Facility or Credit Enhancement Agreement (as applicable) expires, terminates or is replaced, and the Borrower has no further Construction Debt or obligations to Freddie Mac under the Reimbursement Agreement (as applicable), such money held by the Trustee and the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) shall be applied in such manner and in such order as the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), in its respective sole discretion, determines, subject, however, to the terms of during the Construction Phase, the Construction Mortgage and Credit Agreement; and during the Permanent Phase, the Reimbursement Mortgage and Reimbursement Agreement;

(B) Upon and following the occurrence and continuance of an event described in clause (A)(i) or clause (A)(ii) of this Section 5, such money held by the Trustee and the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) shall be applied in such manner and in such order (to the extent permitted by the Bond Documents, the Construction Mortgage Documents or the Credit Enhancement Documents (as applicable) and applicable law) as the Trustee, in its sole discretion, determines as required under the terms of the Indenture.

SECTION 6. *Assignment of Rights.* The Issuer and the Trustee each hereby agree that, following a total defeasance of the Bonds, an acceleration of the principal amount of the Bonds or the calling of all Bonds for redemption or the cancellation of the Bonds, when Trustee holds Eligible Funds under the Indenture or in accordance with written instructions provided by the Construction Phase Credit Facility Provider (during the Construction Phase) (whether as a result of a payment by the Construction Phase Credit Facility Provider under the Construction Phase Credit Facility or otherwise); or Freddie Mac (during the Permanent Phase) (whether as a result of the payment by Freddie Mac under the Credit Enhancement Agreement or otherwise) in an amount which shall be sufficient to pay

(A) the principal of all Bonds then Outstanding and any redemption premium owed (provided neither Freddie Mac nor the Construction Phase Credit Facility Provider is liable for any premium) and

(B) all accrued and unpaid interest on the Bonds then Outstanding to the date of redemption, acceleration or defeasance, such that the obligation of the Construction Phase Credit Facility Provider under the Construction Phase Credit Facility or Freddie Mac under the Credit Enhancement Agreement (as applicable) is deemed to be retired in full in accordance with its terms, then, in such event, the Issuer or the Trustee, as applicable, shall promptly do all of the following (but at the sole cost and expense of the Borrower):

(i) Use all funds drawn under the Construction Phase Credit Facility or Credit Enhancement Agreement (as applicable) as may be necessary to promptly redeem, retire or defease all Outstanding Bonds at their face amount plus any accrued interest, and, in the event any excess funds were paid to the Trustee pursuant to a drawing under the Construction Phase Credit Facility, return said excess funds to the Construction Phase Credit Facility Provider promptly; or in the event any excess funds were paid to the Trustee pursuant to a drawing under the Credit Enhancement Agreement, return said excess funds to Freddie Mac promptly;

(ii) At the option of the Construction Phase Credit Facility Provider (during the Construction Phase) or Freddie Mac (during the Permanent Phase), either reconvey, release and cancel, or assign to the Construction Phase Credit Facility Provider or Freddie Mac (as applicable), all of their right, title and interest (other than their rights to be paid for services rendered and to be rendered and for fees and expenses incurred thereunder and to be indemnified pursuant thereto) under the Bond Documents, other than the Tax Regulatory Agreement, and execute, acknowledge and deliver to the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) such instruments and documents as may be reasonably necessary in connection with such reconveyance, release, cancellation or assignment;

(iii) Deliver to the Construction Phase Credit Facility Provider or Freddie Mac (as applicable), in such form and to such place, as the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) shall designate, all property due the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) pursuant to the provisions of the Indenture; and

(iv) Return the Construction Phase Credit Facility to the Construction Phase Credit Facility Provider or the Credit Enhancement Agreement to Freddie Mac, as applicable.

SECTION 7. *Substitution of Obligor.*

7.1 The Issuer and the Trustee agree that, should the Construction Phase Credit Facility Provider or its Affiliate or Freddie Mac succeed to the interest of the Borrower in the Project pursuant to a foreclosure sale or otherwise without having implemented the provisions of Section 6, then the Construction Phase Credit Facility Provider, its Affiliate or Freddie

Mac (as applicable) shall have the right, but not the obligation, to be the successor to the Borrower for all purposes of the Bond Documents and the Construction Phase Credit Facility Provider, its Affiliate and Freddie Mac each acknowledges and agrees that upon its election to succeed the Borrower, it shall be so treated as successor to the Borrower and the Freddie Mac Forward Commitment shall remain in full force and effect in accordance with its terms and subject to the terms of the Construction Phase Financing Agreement, *provided, however*, that any and all liability of Freddie Mac or the Construction Phase Credit Facility Provider or its Affiliate as successor in interest to the Borrower's interest under the Bond Documents shall be limited to the period it owns the Project. The Issuer and the Trustee agree that any such transfer of ownership of the Project shall not be deemed to violate any terms or conditions of the Bond Documents.

- 7.2 Following any succession by Freddie Mac or the Construction Phase Credit Facility Provider or its Affiliate, as applicable (the "Successor Borrower"), to the right, title and interest of the Borrower in the Project pursuant to Section 7.1, the Successor Borrower or its designee shall have the right to sell, transfer and/or assign its interest in the Project to any person or entity, provided that the party purchasing the Project from the Successor Borrower or its designee delivers or causes to be delivered to the Issuer and the Trustee concurrently with such transfer: (i) if the Bonds remain Outstanding, a letter of credit or other credit enhancement facility that complies with all applicable requirements under the Indenture and the Financing Agreement; (ii) a written instrument assuming and agreeing to perform all obligations of the Borrower under the Bond Documents to which the Borrower is a party accruing from and after the date of such transfer; (iii) an opinion of counsel to the transferee that such transferee has duly assumed the obligations of the Borrower under the Bond Documents to which the Borrower is a party, that such transferee is qualified to do so pursuant to the Bond Documents and applicable law, and that each of the Bond Documents to which the Borrower is a party is a binding obligation of the transferee; and (iv) an opinion of Bond Counsel that such transfer or substitution will not cause interest on the Bonds to be included in the gross income of any registered owner thereof for federal income tax purposes (except for interest on any Bond held by a "substantial user" of the Project or a "related person," within the meaning of Section 147(a)(2) of the Internal Revenue Code of 1986, as amended). Upon completion of any transfer to the Successor Borrower or its designee, in accordance with this Section 7, the liability of the Successor Borrower or its designee, as applicable, or any purchaser from the Successor Borrower or its designee shall be limited to the period it owned the Project and the Successor Borrower or its designee, as applicable, shall

thereafter be relieved of any further liability for obligations of the “Borrower” under the Bond Documents accruing from and after the date of such transfer. Any environmental liability that Freddie Mac or the Construction Phase Credit Facility Provider or its Affiliate may incur as a result of its ownership of the Project following a foreclosure or a deed in lieu of foreclosure shall be expressly limited by the provisions of any federal, state or local environmental statutes, rules, regulations or administrative procedures pertaining to “lender liability.”

- 7.3 The Issuer and the Trustee agree that any purchaser may succeed to the interest of the Borrower in the Project pursuant to a foreclosure sale or otherwise, provided that such purchaser delivers or causes the delivery of the documents described in Section 7.2.

SECTION 8. *Acknowledgement and Consent.* The Issuer and the Trustee acknowledge and consent to the granting by the Borrower to the Construction Phase Credit Facility Provider of the Construction Mortgage and subsequently on the Conversion Date to Freddie Mac of the Reimbursement Mortgage each of which shall be a second priority mortgage lien on the Project (as defined in the Indenture). The Issuer and the Trustee acknowledge and agree that, after the Conversion Date, Freddie Mac and, prior to the Conversion Date, the Construction Phase Credit Facility Provider, are each a third-party beneficiary of the Financing Agreement with the right to enforce the provisions of such Financing Agreement subject to the terms of this Agreement. The Issuer and the Trustee agree and acknowledge that to the extent the Bond Mortgage grants or reserves to the Borrower any rights that are not granted or reserved to the Borrower under the Construction Mortgage or Reimbursement Mortgage (as applicable), the Borrower must comply with the terms of the Construction Mortgage or Reimbursement Mortgage (as applicable) and a failure to do so shall be an Event of Default under the Credit Agreement or Reimbursement Agreement (as applicable).

SECTION 9. *Bond Mortgage Loan Servicing.* The parties hereto agree that during the Construction Phase, the Bond Mortgage Loan will be serviced by the Construction Phase Credit Facility Provider. The Construction Phase Credit Facility Provider accepts the terms of this Agreement upon the basis, and with the understanding, that during the Construction Phase, the Construction Phase Credit Facility Provider shall have the power to determine the servicer of the Bond Mortgage Loan. During the Permanent Phase, The identity of the Servicer being of material importance to Freddie Mac, this Agreement is accepted by Freddie Mac on the basis, and with the understanding, that during such time, the Servicer will be determined solely by Freddie Mac. The term “Servicer” as used in this Agreement shall , during the Permanent Phase, mean a multifamily seller and servicer approved by Freddie Mac, which initially shall be Citibank, N.A., and

any permitted successor or assign under the Freddie Mac Multifamily Seller/Servicer Guide (the “Guide”) or any other person designated by Freddie Mac to service the Bond Mortgage Loan.

Accordingly, so long as the Credit Enhancement Agreement is in effect or obligations of the Borrower to Freddie Mac under the Reimbursement Agreement remain outstanding, and no Wrongful Dishonor has occurred and is continuing, the Issuer and the Trustee agree that Freddie Mac shall, in its discretion, have the sole and exclusive right to (a) appoint the Servicer and arrange for the servicing of the Bond Mortgage Loan and the Bond Mortgage or Financing Agreement, provided such servicing shall be performed by a Freddie Mac approved seller-servicer in accordance with the terms and conditions of the Guide, and (b) remove the Servicer (for any reason), terminate its right to service the Bond Mortgage Loan, and appoint a new Servicer.

The Issuer and the Trustee further acknowledge and agree that the Guide is subject to amendment or termination without the consent of the Issuer, the Trustee or the Borrower (provided that no such amendment shall adversely affect the rights of Issuer or Trustee or in any way operate to modify the provisions of the Financing Agreement, the Forward Commitment or affect the tax status of the Bonds) and that none of the Issuer, the Trustee or the Borrower shall have any rights under or be a third-party beneficiary of the Guide. The Trustee and the Issuer acknowledge and agree that the Servicer shall have no duties or obligations to the Trustee, the Issuer or the Developer under the Guide or otherwise, except as expressly set forth in the Bond Documents. The Trustee and the Issuer acknowledge and agree that any Servicer designated by Freddie Mac shall be paid a fee by the Borrower for its services. None of the Issuer, the Trustee, the Construction Phase Credit Facility Provider or Freddie Mac shall have the obligation to pay such fees from their own funds. In the event the Borrower fails to make any payment relating to fees, expenses or indemnification obligations to the Issuer or Trustee as required under the Financing Agreement, the party which has not received such payment shall promptly notify the Construction Phase Credit Facility Provider (prior to the Conversion) and the Servicer (from and after the Conversion Date) of such failure.

SECTION 10. Representations, Warranties and Covenants.

(A) The Issuer represents, warrants and covenants to the other parties hereto that:

(i) The Issuer has not received a notice in writing from the Internal Revenue Service alleging that any event or act has occurred in the operation and management of the Project that would adversely affect the exclusion of the interest on the Bonds from gross income for federal income tax purposes or a notice in writing from the Trustee concerning any event of default under any Bond Document.

(ii) The Issuer has all necessary power and authority to execute, deliver and perform its obligations under and has duly authorized the execution, delivery and performance of this Agreement. This Agreement is a legal, valid and binding obligation

of the Issuer enforceable against the Issuer in accordance with its terms, subject to (a) applicable limitations of bankruptcy or equitable principles affecting the enforcement of creditors' rights, the effect of general principles of equity, including without limitation, concepts of materiality, reasonableness, good faith or fair dealing, and the possibility of the unavailability of specific performance or injunctive relief, (b) the exercise of judicial discretion and (c) any limitation of the legal remedies against public entities in the State.

(iii) The Issuer will not knowingly take or permit, or knowingly omit to take or cause to be taken any action within its control that would adversely affect the exclusion of the interest on the Bonds from gross income for federal income tax purposes.

(B) The Trustee represents, warrants and covenants to the other parties hereto that:

(i) The Trustee has no knowledge of and has no reason to believe that any event or act has occurred that would adversely affect the exclusion of interest on the Bonds from gross income for federal income tax purposes or of any event of default under any Bond Document.

(ii) The Trustee has all necessary power and authority to execute, deliver and perform its obligations under and has duly authorized the execution, delivery and performance of this Agreement. This Agreement is a legal, valid and binding obligation of the Trustee enforceable against the Trustee in accordance with its terms except as enforceability may be limited by bankruptcy, moratorium, insolvency and similar laws affecting creditors' rights generally and general principles of equity.

(iii) The Trustee will not knowingly take or permit, or knowingly omit to take or cause to be taken, any action within its control that would adversely affect the exclusion of the interest on the Bonds from gross income for federal income tax purposes.

(C) Freddie Mac represents, warrants and covenants to the other parties hereto that:

(i) Freddie Mac has all necessary power and authority to execute, deliver and perform its obligations under and has duly authorized the execution, delivery and performance of this Agreement. This Agreement is a legal, valid and binding obligation of Freddie Mac enforceable against Freddie Mac in accordance with its terms except as enforceability may be limited by bankruptcy, moratorium, insolvency and similar laws affecting creditors' rights generally and general principles of equity.

(ii) Freddie Mac will not knowingly take or permit, or knowingly omit to take or cause to be taken any action within its control that would adversely affect the exclusion of the interest on the Bonds from gross income for federal income tax purposes.

(D) The Construction Phase Credit Facility Provider represents, warrants and covenants to the other parties hereto that:

(i) The Construction Phase Credit Facility Provider has all necessary power and authority to execute, deliver and perform its obligations under and has duly authorized the execution, delivery and performance of this Agreement. This Agreement is a legal, valid and binding obligation of the Construction Phase Credit Facility Provider enforceable against the Construction Phase Credit Facility Provider in accordance with its terms except as enforceability may be limited by bankruptcy, moratorium, insolvency and similar laws affecting creditors' rights generally and general principles of equity.

(ii) The Construction Phase Credit Facility Provider will not knowingly take or permit, or knowingly omit to take or cause to be taken any action within its control that would adversely affect the exclusion of the interest on the Bonds from gross income for federal income tax purposes.

SECTION 11. *Subrogation.*

The Issuer and the Trustee agree that during Construction Phase, the Construction Phase Credit Facility Provider, and during the Permanent Phase, Freddie Mac shall be subrogated to their rights and remedies under the Bond Documents (except with respect to any Mortgagee Retained Rights) upon and to the extent of the Construction Phase Credit Facility Provider's payment (whether pursuant to the Construction Phase Credit Facility or otherwise) or Freddie Mac's payment (whether pursuant to the Credit Enhancement Agreement or otherwise) of the principal of or interest on the Bonds or the payment or performance of any obligation under the Bond Documents. The Issuer and the Trustee agree to cooperate with the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) at the sole expense and liability of the Construction Phase Credit Facility Provider or Freddie Mac (as applicable) in connection with the Construction Phase Credit Facility Provider or Freddie Mac's enforcement of any of such rights and remedies and, except as permitted under the terms of this Agreement, agree not to take any actions that would prejudice the exercise of such rights of subrogation unless in the opinion of Bond Counsel delivered to Issuer, Trustee, the Construction Phase Credit Facility Provider and Freddie Mac such action is necessary to preserve the exemption of interest on the Bonds from gross income for federal income tax purposes.

SECTION 12. *Amendment and Waiver.* This Agreement and each provision hereof may be amended to the extent and upon the conditions that the Indenture may be amended by an instrument in writing signed by the parties hereto.

SECTION 13. *Governing Law.* This Agreement and the rights and obligations of the parties hereunder shall be construed in accordance with and be governed by the law of the State of California.

SECTION 14. Notices. All notices, demands, requests, consents, approvals, certificates or other communications (“Communications”) required under this Agreement shall be in writing, mailed (registered or certified mail, return receipt requested and postage pre-paid), hand-delivered, with signed receipt, or sent by nationally recognized overnight courier (receipt of which to be evidenced by a signed receipt for overnight delivery service) and shall be sufficiently given and shall be deemed to have been properly given if given in the manner in which notices are to be given and to the addresses as provided in the Indenture. All communications which the Trustee or Issuer is required to send to any other person pursuant to any Bond Document or any Borrower Documents shall also be sent to the Servicer. All communications required to be sent to Freddie Mac or the Servicer pursuant to the terms of any Bond Document and any other Borrower Document shall be sent to the following addresses:

The Issuer: City of San Jose, California
Department of Finance
200 East Santa Clara Street, 13th Floor Tower
Attention: Debt Management
Telephone: 408-535-7000
Facsimile: 408-292-6482

with a copy to: Office of the City Attorney
City of San Jose, California
200 East Santa Clara Street, 16th Floor
San Jose, California 95113-1905
Attention: City Attorney
Telephone: 408-535-1201
Facsimile: 408-998-3131

The Trustee: Wells Fargo Bank, National Association
707 Wilshire Boulevard, 17th Floor
MAC: E2818-176
Los Angeles, California 90017
Attention: Corporate Trust Services
Telephone: 213-614-3328
Facsimile: 213-614-3335

Construction Phase
Credit Facility Provider: JPMorgan Chase Bank, N.A.
Chase Community Development Banking
17875 Von Karman, Floor 02
Irvine, California 92614
Attention: Dave Munoz, Sr. Service Specialist
Telephone: _____
Facsimile: _____

with a copy to: JPMorgan Chase Bank, N.A.
300 South Riverside Plaza, Mail Code IL1-0236
Chicago, Illinois 60606-0236
Attention: Standby Service Unit
Telephone: _____
Facsimile: _____

and a copy to: JPMorgan Chase Bank, N.A.
Legal Department
245 Park Avenue, Mail Code NY1-Q657
New York, New York 10167
Attention: Michael Zients, Vice President and
Assistant General Counsel
Telephone: _____
Facsimile: _____

Freddie Mac: Federal Home Loan Mortgage Corporation
8100 Jones Branch Drive
Mail Stop B4F
McLean, Virginia 22102
Attention: Director of Multifamily Loan Servicing
Telephone: (703) 903-2000
Facsimile: (703) 714-3003

with a copy to: Federal Home Loan Mortgage Corporation
8200 Jones Branch Drive
McLean, Virginia 22102
Attention: Associate General Counsel – Multifamily,
Legal Division
Telephone: (703) 903-2000
Facsimile: (703) 903-2885

with a copy to: Federal Home Loan Mortgage Corporation
8100 Jones Branch Drive
Mail Stop B4Q
McLean, Virginia 22102
Attention: Director of Multifamily Loan Accounting
Telephone: (703) 714-4177
Facsimile: (571) 382-4798

The Servicer: Citibank, N.A.
c/o Capmark Finance Inc.
116 Welsh Road

P.O. Box 809
Horsham, PA 19044
Attention: Servicing-Account Manager
Telephone: (215) 328-3866
Facsimile: (215) 328-3478

A duplicate copy of each notice or other communication given hereunder by any party to the Servicer shall also be given to Freddie Mac.

The Trustee agrees to accept and act upon facsimile transmissions of written instructions and/or directions pursuant to this Agreement.

SECTION 15. *Benefit of Agreement.* This Agreement shall be binding upon and inure to the benefit of the Issuer, the Trustee, the Construction Phase Credit Facility Provider, the Servicer and Freddie Mac and their respective successors and assigns. No other party shall be entitled to any benefits hereunder, whether as a third-party beneficiary or otherwise. This Agreement shall be deemed terminated with respect to the Construction Phase Credit Facility Provider without the necessity for further or confirmatory instruments upon the earlier of (i) the date, if any, upon which an alternate construction phase credit facility is delivered to replace the Construction Phase Credit Facility unless the alternate construction phase credit facility provider replaces the Construction Phase Credit Facility Provider hereunder, (ii) the Conversion Date, or (iii) the date that the Indenture is released and terminated and, in the case of (i) and (ii) immediately above, all of the Borrower's obligations to Construction Phase Credit Facility Provider under the Credit Agreement shall have been paid in full. This Agreement shall be deemed terminated with respect to Freddie Mac without the necessity for further or confirmatory instruments upon the failure of Conversion to occur by the Forward Commitment Maturity Date or, following Conversion, the earlier of (i) the date, if any, upon which an Alternate Credit Facility is delivered to replace the Credit Enhancement Agreement unless the Alternate Credit Facility Provider replaces Freddie Mac hereunder, (ii) the date that the Indenture is released and terminated or (iii) the date that the Indenture is released and terminated and, in the case of (i) and (ii) immediately above, all of the Borrower's obligations to Freddie Mac under the Reimbursement Agreement shall have been paid in full.

SECTION 16. *Assignment of Construction Phase Credit Facility Provider's Rights.* The Issuer, Trustee, Construction Phase Credit Facility Provider and Freddie Mac each hereby acknowledge and agree that upon the Conversion Date, all rights of the Construction Phase Credit Facility Provider hereunder shall be assigned to Freddie Mac.

SECTION 17. *Counterparts.* This Agreement may be executed in any number of counterparts and all of such counterparts shall together constitute one and the same instrument.

SECTION 18. *Acknowledgment and Consent Regarding Reimbursement Mortgage.* The Issuer and the Trustee agree and acknowledge that to the extent the Bond Mortgage grants or reserves to the Borrower any rights that are not granted or reserved to the Borrower under the Reimbursement Mortgage, Borrower must comply with the terms of the Reimbursement Mortgage and a failure to do so shall be an Event of Default under the Reimbursement Agreement.

SECTION 19. *Trustee.* The Trustee accepts the duties imposed upon it by this Agreement and agrees to perform those duties but only upon and subject to the following express terms and conditions:

(A) the Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Agreement and no implied covenants or obligations shall be read into this Agreement against the Trustee;

(B) as to the existence or nonexistence of any fact or as to the sufficiency or validity of any instrument, paper or proceedings, the Trustee shall be entitled to rely in good faith upon a certificate purportedly signed by an authorized signatory of Freddie Mac as sufficient evidence of the facts contained in such certificate;

(C) the permissive right of the Trustee to do things enumerated in this Agreement shall not be construed as a duty and the Trustee shall not be answerable for other than its negligence or willful misconduct;

(D) none of the provisions contained in this Agreement shall require the Trustee to expend or risk its own funds or otherwise incur financial liability in the performance of any of its duties or in the exercise of any of its rights or powers under this Agreement except for any liability of the Trustee arising from its own negligence or willful misconduct;

(E) the Trustee is entering into this Agreement solely in its capacity as Trustee under the Indenture and not in its individual or corporate capacity; and

(F) all of the provisions of the Indenture related to the duties, obligations, standard of care, protections and immunities from liability afforded the Trustee under the Indenture shall apply to the Trustee under this Agreement.

SECTION 20. *Invalidity.* The invalidity or unenforceability of any provision of this Agreement shall not affect the validity of any other provision and all other provisions shall remain in full force and effect.

SECTION 21. *Time is of the Essence.* Time is of the essence of this Agreement.

SECTION 22. *Controlling Instrument.* This Intercreditor Agreement controls over any contrary provisions of the Bond Documents.

[Remainder of Page Left Intentionally Blank]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered by their respective duly authorized officers as of the date first above written.

CITY OF SAN JOSE, CALIFORNIA

By: _____
Julia H. Cooper,
Assistant Director of Finance

State of California)¹
COUNTY OF [_____])

I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that [_____] , whose name as [_____] of the [_____] , a [_____] organized and existing under the laws of the State of California, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this date that, being informed of the contents of said instrument, he, as such officer and with full authority, executed voluntarily for and as the act of said corporation.

Given under my hand and official seal, this ____ day of [_____].

Notary Public

AFFIX SEAL

My commission expires: _____

¹ Confirm proper form of notary block with Servicer’s counsel.

[ISSUER'S SIGNATURE PAGE TO **BROOKWOOD TERRACE FAMILY APARTMENTS INTERCREDITOR AGREEMENT**]

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee

By: _____
Name:
Title:

State of California)²
COUNTY OF [_____])

I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that [_____] , whose name as [_____] of the [_____] , a [_____] organized and existing under the laws of the State of California, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this date that, being informed of the contents of said instrument, he, as such officer and with full authority, executed voluntarily for and as the act of said corporation.

Given under my hand and official seal, this _____ day of [_____].

Notary Public

AFFIX SEAL

My commission expires: _____

² Confirm proper form of notary block with Servicer's counsel.

[TRUSTEE'S SIGNATURE PAGE TO **BROOKWOOD TERRACE FAMILY APARTMENTS**
INTERCREDITOR AGREEMENT]

JPMORGAN CHASE BANK, N.A., as
Construction Phase Credit Facility Provider

By: _____
Name:
Title:

State of California)³
COUNTY OF [_____])

I, the undersigned authority, a Notary Public in and for said County in said State, hereby certify that [_____] , whose name as [_____] of the [_____] , a [_____] organized and existing under the laws of the State of California, is signed to the foregoing instrument, and who is known to me, acknowledged before me on this date that, being informed of the contents of said instrument, he, as such officer and with full authority, executed voluntarily for and as the act of said corporation.

Given under my hand and official seal, this ____ day of [_____].

Notary Public

AFFIX SEAL

My commission expires: _____

[CONSTRUCTION PHASE CREDIT FACILITY PROVIDER’S SIGNATURE PAGE TO
BROOKWOOD TERRACE FAMILY APARTMENTS INTERCREDITOR AGREEMENT]

³ Confirm proper form of notary block with Servicer’s counsel.

EXHIBIT A

LEGAL DESCRIPTION

[OBTAIN LEGAL DESCRIPTION FROM SERVICER'S COUNSEL]

A-2

20091110_02a3_con4
Council Agenda: 11-10-09
Item No.: 2.a.3con4

**DRAFT--Contact the Office of the City Clerk at (408)535-1260 or
CityClerk@sanjoseca.gov for final document.**