

SECURED PROMISSORY NOTE

(City of Morgan Hill Affordable Housing Program – Below Market-Rate Units)

EXCESS SALES PROCEEDS

Morgan Hill, California

[Date]

FOR VALUE RECEIVED, the undersigned [Buyer] (collectively, the “**Maker**”) promise to pay immediately when due to the order of the City of Morgan Hill, a municipal corporation (“**City**”), at 17575 Peak Avenue, Morgan Hill, CA 95037 or at any other place that may be designated in writing by the City, all amounts due to the City as Excess Sales Proceeds pursuant to Section 14 of the Property Restriction Agreement (defined below). All sums hereunder shall be payable in lawful money of the United States of America.

1. **Definitions.** As used herein, the following terms shall have the meanings set forth in this Section.

“City Deed of Trust” means that certain Deed of Trust, Assignment of Rents and Security Agreement dated as of the date hereof, executed by Maker as Trustor for the benefit of the City and recorded against the Property to secure repayment of this City Note and performance under the Property Restriction Agreement, as such instruments may be amended, modified or supplemented from time to time.

“City Documents” means collectively the City Note, the City Deed of Trust, and the Property Restriction Agreement.

“City Note” means this Secured Promissory Note, as it may be amended, modified or supplemented from time to time.

“Excess Sales Proceeds” is defined in Section 14 of the Property Restriction Agreement.

“Prohibited Transfer” is defined in Section 10 of the Property Restriction Agreement.

“Property” means the property located at [Address] in the City of Morgan Hill together with the improvements located thereon, as more particularly described in Exhibit A attached to the City Deed of Trust.

“Property Restriction Agreement” means that certain Property Restriction Agreement and Option to Purchase executed by and between City and Maker, dated as of the date of this City Note and recorded in the Official Records of Santa Clara County.

“Security” is defined in the City Deed of Trust.

“Transfer” is defined in Section 10 of the Property Restriction Agreement.

2. **Excess Proceeds.** This City Note is made and delivered pursuant to, and in implementation of, the City’s Below Market Rate Affordable Housing Program, pursuant to which, the City, in order to assist Maker to purchase the Property, has arranged for the sale of the Property to Maker at a below-market price. Concurrently with the execution of this City Note, Maker shall execute the City Deed of Trust and the Property Restriction Agreement, each of which shall be recorded against the Property. The Property Restriction Agreement imposes restrictions upon the price at which the Property may be sold, and obligates Maker to pay to the City Excess Sales Proceeds upon the occurrence of any Prohibited Transfer.

3. **Security.** This City Note is secured by the City Deed of Trust. The holder of this City Note will be entitled to the benefits of the security provided by the City Deed of Trust and will have the right to enforce the covenants and agreements of Maker contained therein and in the Property Restriction Agreement.

4. **Payments.** In the event any Excess Sales Proceeds become due and payable under the Property Restriction Agreement, including without limitation, upon the occurrence of a Prohibited Transfer of the Property, such amounts shall be immediately due and payable hereunder. Failure to declare such amounts due in any instance shall not constitute a waiver on the part of the City to declare them due in the future. Maker will pay to City all sums owing under this City Note without deduction, offset, or counterclaim of any kind.

5. **Transfer.** Maker shall not Transfer any interest in the Property without complying with all requirements of the Property Restriction Agreement. Maker’s failure to comply with the requirements of this paragraph shall be a Default under this City Note.

6. **Default.** The occurrence of any one or more of the following shall constitute an event of default (“**Default**”) hereunder:

a. The occurrence of a breach of any of Maker’s covenants, warranties, representations, promises, or guaranties under this City Note, the City Deed of Trust or the Property Restriction Agreement, including without limitation, any unauthorized refinancing, sale or other Transfer of the Property, Maker’s failure to occupy the Property as Maker’s principal residence, or Maker’s failure to maintain insurance on the Property as required pursuant to the City Deed of Trust.

b. The entry of an order for relief under federal bankruptcy laws as to Maker or the adjudication of Maker as insolvent or bankrupt pursuant to the provisions of any state or federal insolvency or bankruptcy act, or Maker’s consent to, acquiescence in, or attempt to secure the appointment of, any receiver for all or any substantial part of the Property.

c. The occurrence of an event of default under any other loan secured by the Property and the continuance of such default beyond the expiration of all applicable cure periods such that the holder of such loan has the right to accelerate such loan.

7. **Remedies.** Upon the occurrence of a Default, the giving of any required notice thereof, and the expiration of any applicable cure period, City may, at its option, exercise any one or more of the following remedies:

a. Declare all of the sums payable under this City Note to be immediately due and payable without further demand.

b. Pursue the exercise of the power of sale provided under the City Deed of Trust.

c. Either in person or by agent, with or without bringing any action or proceeding, or by a receiver appointed by a court, and without regard to the adequacy of its security, enter upon the Property and take possession thereof (or any part thereof) and of any of the Security in its own name or in the name of the Trustee, and do any acts which it deems necessary or desirable to preserve the value or marketability of the Property, or part thereof or interest therein, or protect the security thereof. The entering upon and taking possession of the Security shall not cure or waive any breach hereunder or invalidate any act done in response to such breach, and notwithstanding the continuance in possession of the Property, the City shall be entitled to exercise every remedy provided by the City Documents or by law, upon occurrence of any uncured breach.

d. Commence an action to foreclose the City Deed of Trust as a mortgage, appoint a receiver, or specifically enforce any of the covenants set forth in the City Documents.

e. Exercise its option to purchase the Property pursuant to the Property Restriction Agreement.

f. Exercise all other rights and remedies provided herein or in any other City Document, including without limitation, the exercise of the power of sale pursuant to the City Deed of Trust.

g. Exercise any other remedy provided by law or in equity.

The rights and remedies of the City hereunder are cumulative, and the City's exercise or failure to exercise one or more of such rights or remedies shall not preclude City's exercise, at the same time or different times, of any other right or remedy for the same default or any other default.

8. **Maker's Personal Liability.** Maker will be fully and personally liable for all loss, cost, liability, damage or expense (including without limitation attorneys' fees) suffered or incurred by City arising from any of the following:

a. Failure to pay taxes, assessments, and any other charges that could result in liens against any portion of the Property or any other Security.

b. Failure to pay and discharge any mechanics' liens, materialmen's liens, or other unpermitted liens against any portion of the Property or any other Security.

c. Maker's fraud or intentional misrepresentation with respect to any representations, warranties, or certifications made in the City Documents or in connection with Maker's application to participate in the City's affordable housing program.

d. Maker's retention of any rental income or other income arising with respect to any portion of the Property or any other Security subsequent to the date of City's delivery of any notice of a Default, or which, under the terms of the City Documents, should otherwise have been paid to City.

e. Maker's retention or use of insurance proceeds, condemnation awards, or other similar funds or payments attributable to the Property or any other Security that pursuant to the City Documents should have been paid to City or used for another purpose.

f. Waste of the Property, or any other failure to maintain, repair, or restore any portion of the Property or any other Security in accordance with the requirements of the City Documents.

g. The removal, demolition, damage, or destruction of any portion of the Property or any other Security that is neither consented to in writing by City nor fully compensated for by insurance proceeds or condemnation awards.

h. The failure of the City Documents to constitute a lien or security interest, as applicable, on the Property or any other Security, subject only to those exceptions, if any, permitted by the City Documents or otherwise approved in writing by City.

Nothing in this paragraph will affect or limit the rights of City to enforce any of City's rights or remedies with respect to any portion of the Property or any other Security.

9. **Maker's Waivers.** Maker hereby expressly waives diligence, presentment, protest, and demand, and notice of protest, notice of dishonor and notice of nonpayment of this City Note, and expressly waives any rights to be released by reason of any extension of time or change in terms of payment, or change, alteration or release of any security given for the payments hereof, and expressly waives the right to plead any and all statutes of limitation as a defense to any demand on this City Note.

10. **Notices.** All notices, requests, demands, reports or other communications regarding this City Note shall be in writing and delivered: (i) personally; or (ii) by independent, reputable, overnight commercial courier; or (iii) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested; addressed as follows,

or to such other address as specified in written notice delivered to the parties pursuant to this Section:

To Maker: [Buyer]
 [Address]
 Morgan Hill, CA 95037

To City: Community Development Agency - Housing
 City of Morgan Hill
 17575 Peak Avenue
 Morgan Hill, CA 95037

Any notice that is personally delivered (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), shall be deemed received on the documented date of delivery thereof.

11. **Assignment by Lender; Successors and Assigns.** This City Note shall be binding upon Maker and Maker's heirs, successors and assigns; provided however, Maker may not assign this City Note without City's prior written consent except as may be permitted in accordance with the City Deed of Trust and Property Restriction Agreement. City may assign its rights to receive the proceeds under this City Note to any person or entity without the consent of Maker, and upon notice to Maker of such assignment, all payments shall be made to the assignee.

12. **No Joint Venture.** The relationship of Maker and City under this City Note is solely that of a participant and administrator of an affordable housing program, and in no manner are the City and the Maker partners or joint venturers, nor do any of the City Documents establish a principal and agent relationship between City and Maker.

13. **Attorneys' Fees and Costs.** If any legal action is filed to interpret or enforce this City Note, the prevailing party shall be entitled to an award of its reasonable attorneys' fees, costs and expenses incurred therein. Maker agrees to pay all costs and expenses (including reasonable attorneys' fees) that City may incur in connection with enforcement of this City Note and collection of sums payable hereunder whether or not suit is filed.

14. **No Third-Party Beneficiaries.** This City Note shall not benefit or be enforceable by any person or entity except the City and the Maker and their respective successors and assigns.

15. **Entire Agreement; Amendments.** This City Note, together with the Property Restriction Agreement and the City Deed of Trust, sets forth the entire understanding between Maker and the City with respect to the subject matter hereof. Any previous representations, warranties, agreements, and understandings among the parties regarding the subject matter of the Property Restriction Agreement, this City Note and City Deed of Trust whether written or oral, are superseded by the terms of the Property Restriction Agreement, this City Note and the City

Deed of Trust. This City Note may be modified or amended only by a written instrument duly executed by City and Maker.

16. **No Waiver.** Any waiver of any term or provision of this City Note must be in writing. No waiver of any breach, default or failure of condition under this City Note or any other City Document shall be implied from City's failure or delay in declaring a default or exercising any of City's rights or remedies with respect to such breach, default or failure, or from any previous waiver of any similar or unrelated breach, default or failure, nor shall acceptance by City of any payment hereunder constitute a waiver of City's right to require prompt payment of any remaining amounts owed. Without limiting the generality of the foregoing, City's failure or delay in declaring any amount due hereunder shall not constitute a waiver of City's right to declare such sum due for the same or any subsequent event that triggers Maker's payment obligations hereunder.

17. **Severability.** If any provision of this City Note shall be held by a court of competent jurisdiction to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this City Note shall not be affected or impaired thereby.

18. **Controlling Law and Venue.** The terms of this City Note shall be interpreted under the laws of the State of California without regard to principles of conflicts of law. This City Note was entered into and is to be performed in the County of Santa Clara, which is the exclusive venue for any action or dispute arising hereunder.

19. **Captions.** All captions and headings in this City Note are for the purposes of reference and convenience and shall be disregarded for all other purposes, including the construction or enforcement of any of the provisions of this City Note.

20. **Joint and Several.** The obligations of each signatory to this City Note shall be joint and several.

21. **Time of the Essence.** Time is of the essence with regard to all matters contained in this City Note.

SIGNATURES ON FOLLOWING PAGE.

IN WITNESS WHEREOF, Maker has executed and delivered this City Note as of the date first written above.

MAKER

By: _____

Name: [Buyer]

OAK #4835-0646-3770 v1