

**BELOW MARKET RATE  
SECURED PROMISSORY NOTE**

\$ \_\_\_\_\_,  
\_\_\_\_\_, 20\_\_

Morgan Hill, California

FOR VALUE RECEIVED, the undersigned, \_\_\_\_\_ and \_\_\_\_\_ (collectively, the “**Borrower**”) promises to pay to the order of 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, the principal sum of \_\_\_\_\_ Dollars (\$**XXX,XXX.00**) together with interest at the rate specified below. All sums hereunder shall be payable in lawful money of the United States of America.

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

“**City Loan**” means that certain subordinate loan, made by City to Borrower to enable Borrower to purchase the Property.

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

“**Note**” means this Secured Promissory Note, as amended from time to time, evidencing Borrower’s obligation to repay the City Loan.

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

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

“**Property Restriction Agreement**” means that certain Affordable Housing Resale Restriction Agreement and Option to Purchase dated as of the date hereof and executed by and between Borrower and City.

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

“**Transfer**” means any voluntary or involuntary sale, assignment or transfer of any legal, equitable or possessory interest, life estate, land contract, or any lease or rental, of the Property.

2. **City Loan.** This Note is made and delivered pursuant to, and in implementation of, the City's Below Market Rate Housing Program, under which the City, in order to assist Borrower to purchase the Property, is making a loan to Borrower in the principal amount of this Note as set forth above. The City shall have the power and authority to do, in a manner consistent with this Note, and the other City Loan Documents, any and all things that it may deem necessary and appropriate in connection with the servicing of the City Loan.

3. **Interest.** Interest shall accrue on the outstanding principal balance of this Note at the rate of three percent (3%) simple interest per annum. Interest shall be calculated on the basis of a year of 365 days, and charged for the actual number of days elapsed.

4. **Default Rate of Interest.** Upon the occurrence of a Default hereunder and the expiration of any applicable cure period, the interest rate shall automatically be increased without notice to the rate (the "**Default Rate**") equal to the lesser of ten percent (10%) per annum or the maximum rate permitted by law.

5. **Loan Security.** This Note is secured by the City Deed of Trust. The holder of this 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 Borrower contained therein and in the Property Restriction Agreement.

6. **Payments.** No principal or interest payments shall be due or payable on this Note except as stated below. The entire amount of principal and all accrued interest and all accrued Default Interest (if any) shall be due and payable in full upon the occurrence of any of the following events: (i) the Transfer of any interest in the Property; (ii) upon Borrower's Default; or (iii) upon Borrower's death, incapacity or bankruptcy; provided that, if none of these events occurs prior to that date that is the forty-fifth (45<sup>th</sup>) anniversary of the date of this Note ("**Cancellation Date**"), this Note shall be cancelled on the Cancellation Date, and no principal or interest shall be payable, and City will cause the City Deed of Trust and the Property Restriction Agreement to be reconveyed upon cancellation of this Note.

All payments on this Note will be applied first to the payment of any costs, fees, late charges, or other charges incurred in connection with the indebtedness evidenced by this Note; next, to the payment of accrued interest; then to the reduction of the principal balance; or in any other order that City requires.

Borrower will pay to City all sums owing under this Note without deduction, offset, or counterclaim of any kind. The relationship of Borrower and City under this Note is solely that of borrower and lender, and the loan evidenced by this Note and secured by the City Deed of Trust will in no manner make City the partner or joint venturer of Borrower.

7. **Prepayment.** Borrower may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due under this Note, provided that each such prepayment is accompanied by accrued interest on the amount of principal prepaid calculated to the date of such prepayment. Prepayments shall be applied first to any unpaid late charges and other

costs and fees then due, then to accrued but unpaid interest, and then to principal. Notwithstanding any prepayment of the principal balance of this Note, the Property Restriction Agreement shall remain in effect, and the City Deed of Trust shall remain a lien on the Property to secure performance thereunder until such time as the Property Restriction Agreement is reconveyed in accordance with its terms.

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

9. **Default.** An event of default ("**Default**") shall arise hereunder upon the occurrence of any one or more of the following:

a. The breach of any of Borrower's covenants, warranties, representations, promises, under this Note, the City Deed of Trust or the Property Restriction Agreement, including without limitation, any unauthorized refinancing or Transfer of the Property, Borrower's failure to occupy the Property as Borrower's principal residence, and Borrower's failure to pay when due any sum payable hereunder, and Borrower's failure to cure any such breach within thirty (30) days following City's delivery of notice thereof, or such shorter cure period as may be specified in the applicable City Loan Document.

b. The entry of an order for relief under federal bankruptcy laws as to Borrower, or the adjudication of Borrower as insolvent or bankrupt pursuant to the provisions of any state insolvency or bankruptcy act, or Borrower'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.

10. **Remedies.** Upon the occurrence of a Default, the giving of 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 Note to be immediately due and payable without further demand.

b. The exercise of any remedy provided to City under the City Deed of Trust, including without limitation, the exercise of the power of sale, the commencement of an action to foreclose the City Deed of Trust as a mortgage, or the appointment of a receiver.

c. The filing of an action to specifically enforce the covenants hereof.

d. The exercise of City's option to purchase the Property pursuant to the Property Restriction Agreement.

e. The exercise of any other right or remedy provided herein, in any other City Loan Document, or in any other document or agreement now or hereafter evidencing, creating or securing all or any portion of the obligations secured hereby.

f. The exercise of any other remedy provided by law or in equity.

11. **Remedies Cumulative.** The rights and remedies of the City hereunder are cumulative, and 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.

12. **Borrower's Personal Liability.** Borrower will be fully and personally liable for all loss, cost, liability, damage or expense suffered or incurred by City arising from 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 liens against any portion of the Property or any other Security.

c. Borrower's fraud or intentional misrepresentation with respect to any representations, warranties, or certifications made in the City Loan Documents, or otherwise made by Borrower in connection with the loan evidenced by this Note.

d. Retention by Borrower 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 Default to Borrower, or which, under the terms of the City Loan Documents, should otherwise have been paid to City.

e. Retention of insurance proceeds, condemnation awards, or other similar funds or payments attributable to the Property or any other Security that under the terms of the City Documents should have been paid to City, or the use of such funds in a manner contrary to the use permitted by the City Documents.

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 Loan 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. Legal costs and expenses reasonably incurred by City in pursuit of remedies after the giving to Borrower of notice of the occurrence of a Default.

Nothing in this Section shall affect or limit City’s rights to enforce any of its rights or remedies with respect to any portion of the Property or any other Security.

13. **Borrower’s Waivers.** Borrower hereby waives diligence, presentment, protest, and demand, and notice of protest, notice of dishonor and notice of nonpayment of this 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 Note.

14. **Notices.** In every case when, under the provisions of this Note, it shall be necessary or desirable for Borrower or City to serve any notice, request, demand, report or other communication on the other, the same shall be in writing and shall not be effective for any purpose unless served: (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:

To Borrower:   
Morgan Hill, CA 95037

To City: Community Development Agency  
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.

15. **Assignment by Lender; Successors and Assigns.** City may assign its rights to receive the proceeds under this Note to any person or entity, and upon notice to Borrower of such assignment, all payments shall be made to the assignee. The promises and agreements herein contained shall bind and inure to the benefit of, as applicable, the respective heirs, executors, administrators, successors and assigns of City and Borrower; provided however, Borrower may not assign this Note without City’s written consent except as may be permitted in accordance with the City Deed of Trust.

16. **Attorneys’ Fees and Costs.** In any legal action filed in connection with the interpretation or enforcement of this Note, the prevailing party shall be entitled to an award of its reasonable attorneys’ fees, costs and expenses. Borrower agrees to pay all costs and expenses, including

reasonable attorneys' fees, that City may incur in the collection or enforcement of this Note, whether or not suit is filed.

17. **No Waiver.** No waiver of any breach, default or failure of condition under this Note or any other City Loan 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 Borrower's payment obligations hereunder. Any waiver of any term or provision of this Note or any other City Loan Document, or any of the obligations secured thereby must be made in writing and shall be limited to the express written terms of such waiver.

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

19. **Entire Agreement; Amendments.** This Note, together with the Property Restriction Agreement and the City Deed of Trust sets forth the entire understanding between Borrower and the City with respect to the subject matter hereof. Any modification of, or amendment to this Note must be in a written instrument signed by City and Borrower.

20. **Severability.** If any provision in this 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 hereof shall not in any way be affected or impaired thereby.

21. **Controlling Law and Venue.** The terms of this Note shall be interpreted under the laws of the State of California without regard to principles of conflicts of law. This 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.

22. **Captions.** All captions and headings in this 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 provisions thereof.

23. **Joint and Several.** If this Note is executed by more than one person as Borrower, the obligations of each shall be joint and several.

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

This Note is hereby executed as of the date first written above.

**BORROWER:**

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

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