

ATTACHMENT N 3
PROMISSORY NOTE SECURED BY DEED OF TRUST,

(\$XXXXXX) _____, 2023

FOR VALUE RECEIVED, the undersigned [XXXXXXXXXX] (“**Borrower**”) promises to pay to the [ORANGE COUNTY HOUSING AUTHORITY, acting solely as the Housing Successor Agency to the Orange County Development Agency][COUNTY OF ORANGE, a political subdivision of the state of California], (the "County") (the “**County**”), or order at Santa Ana, California or such other place as the County may designate in writing, the principal sum of [XXXX] (\$XXX) plus interest on the terms specified below.

1. Agreement. This Note is given in accordance with that certain Loan Agreement executed by and between the County and the Borrower of even date herewith (the “**Loan Agreement**”), and in connection with that certain Regulatory Agreement executed by and between the County and the Borrower dated as of the same date as this Note (the “**Regulatory Agreement**”). The obligations of the Borrower under this Note shall be subject to the terms of the Loan Agreement, the Deed of Trust of even date herewith which secures performance under this Note, the Assignment of Leases, the Regulatory Agreement, and the other Loan Documents, all of which are hereby incorporated by reference. Capitalized terms used but not defined herein shall have the meaning as set forth in the Loan Agreement.

2. Interest and Repayment.

(a) Borrower promises to pay simple interest recalculated annually based upon the outstanding principal amount at the rate of three percent (3%) per annum. Such simple interest shall begin to accrue the date escrow closes.

(b) Borrower promises to repay the indebtedness during the Permanent Term (defined in the Loan Agreement) of the Loan as follows:

(1) Commencing on the date six (6) months after closing of the Borrower’s previous year’s books and every one-year anniversary date thereafter during the Permanent Term, Borrower shall make annual payments to County of the then available Residual Receipts (hereinafter defined), but only to the extent said Residual Receipts are available; and

(2) At the expiration of the Permanent Term, as set forth in the Loan Agreement, the then outstanding principal amount of this Note together with all accrued, but unpaid interest thereon shall become all due and payable.

(c) Notwithstanding anything to the contrary set forth in this Paragraph 2, during the Permanent Term for so long as Borrower (i) timely makes the payments required under this Note, (ii) is not in breach of any of the terms, covenants or conditions of this Note, and (iii) there is no uncured Event of Default under the Loan Agreement or any other Loan Document, County agrees that then available Residual Receipts otherwise payable in their entirety to the County shall be divided ----- percent (--%) to the County and -----

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---- percent (--%) to the Borrower. This Paragraph 2(c) shall have no further force or effect immediately (x) upon an occurrence of any failure by Borrower to make timely payments hereunder, (y) a breach of any term, covenant or condition hereunder or (z) an Event of Default under any Loan Document which continues to remain uncured after the expiration of any cure period. In the event the Loan is timely reinstated in full as permitted under California law prior to foreclosure with all outstanding monies, costs, and expenses owed to County paid in full, then in such event the Residual Receipts sharing agreement stated hereinabove in this Paragraph 2 (c) shall also be reinstated

(d) For purposes of this Note, the terms listed below are defined as follows:

(1) **“Residual Receipts”** means the Annual Project Revenue less (A) Annual Operating Expenses (hereinafter defined), (B) obligated debt service on the Senior Construction/Permanent Loan (as defined in the Loan Agreement) and on any other loan(s) for the Project senior to the County’s Loan approved in writing by the County at the closing of the Loan, (C) payment obligations (e.g. partnership management fees, and deferred developer fees) approved in writing by the County at the closing of the Loan, (D) scheduled deposits to reserves approved in writing by the County at the closing of the Loan, and (E) required deposits under the Loan Agreement for Operating Reserves and Replacement Reserves.

(2) **“Annual Project Revenue”** means all annual revenue generated by the Project, including, but not limited to, rent payments, governmental assistance housing payments, laundry and other vending machine and pay telephone income.

(3) **“Annual Operating Expenses”** means all regular and customary annual expenses incurred in relation to the operation of the Project as reflected on the annual budget for the Project that Borrower shall prepare and abide by each year during the Term (as defined in the Loan Agreement) of this Loan. Said Annual Operating Expenses shall include reasonable property management and administrative fee, as approved by the County, utility charges, operating and maintenance expenses, Project property taxes, Project insurance premiums and County annual loan monitoring fees, as set forth in the Loan Agreement. Director reserves the right to at any time review and approve each or any annual budget during the Term hereof and any changes to any said annual budget requested by Director shall be promptly implemented by Borrower. Notwithstanding the foregoing, in no event shall Annual Operating Expenses include any costs, fees, fines, charges, penalties, awards, judgments or expenses (including, but not limited to legal and accounting fees and expenses) which are due to or arising out of the Borrower’s (A) breach or default of this Loan, any Loan Document or any Mortgage Loan Document (B) fraudulent acts or willful misconduct or (C) breach or default under any other contract, lease or agreement pertaining to the Project. Annual Operating Expenses shall also not include other expenses not related to the Project’s operations such as depreciation, amortization, accrued principal and interest expense on deferred payment debt and capital improvement expenditures.

3. Payments.

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(a) All amounts due and payable under the Note are payable at the address provided to the Borrower by the County, or at such other place or places as the County may designate to the Borrower in writing from time to time. Any payment under this Note shall be paid in advance, on the first day of the month in currency of the United States of America, which at the time of payment is lawful for the payment of public and private debts and which on the respective dates on which such payments are due shall be in immediately available funds.

(b) All payments and prepayments received by County pursuant to the terms hereof shall be applied in the following manner: first, to the payment of all expenses, charges, costs and fees incurred by or payable to County by Borrower pursuant to the terms of the Loan Documents (in such order and manner as County, in its sole discretion, may elect, however all Residual Receipts, prepayments and any other loan payments will be applied **[proportionally to [both] the HOME Loan, the MHSA Loan, and the HSA Loan]**, as such terms are defined in the Loan Agreement, based upon the original loan amount.); second to the payment of all interest accrued to the date of such payment; and third, to the payment of the outstanding principal until paid in full. Notwithstanding anything to the contrary contained herein, after the occurrence and during the continuation of an Event of Default (as such term is defined in the Loan Agreement), all amounts received by County from any party shall be applied in such order as County, in its sole discretion, may elect.

4. Prepayments. Borrower may prepay all or part of the principal balance and accrued interest due under this Note without penalty.

5. Security. This Note is secured by, among other things, a Deed of Trust covering real and personal property including, but not limited to, the Property and the Project (as such terms are defined in the Loan Agreement).

6. Waivers.

(a) Borrower expressly agrees that this Note or any payment hereunder may be extended from time to time at the County's sole discretion and that the County may accept security in consideration for any such extension or release any security for this Note at its sole discretion all without in any way affecting the liability of Borrower.

(b) No extension of time for payment of this Note or any installment hereof made by agreement by the County with any person now or hereafter liable for payment of this Note shall operate to release, discharge, modify, change, or affect the original liability of Borrower under this Note, either in whole or in part.

(c) The obligations of Borrower under this Note shall be absolute and Borrower waives any and all rights:

(1) to offset, deduct, or withhold any payments or charges due under this Note for any reasons whatsoever;

(2) of presentment for payment, demand, protest and notices of dishonor and protest; and

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(3) of diligence in taking any action to collect any sums owing under this Note or in proceeding against any of the rights and interests in and to properties securing payment of this Note.

7. Attorney Fees and Costs. Borrower agrees that if any amounts due under this Note are not paid when due, to pay in addition, all costs and expenses of collection and reasonable attorney fees paid or incurred in connection with the collection or enforcement of this Note, whether or not suit is filed.

8. Joint and Several Obligations. This Note is the joint and several obligation of all makers, sureties, guarantors, and endorsers, and shall be binding upon them and their successors and assigns.

9. Acceleration. If any of the payments required by the terms hereof shall not be paid when the same becomes due, or if the payment due on the maturity date of this Note is not paid when due, whether by acceleration or otherwise, or if an Event of Default (as defined in the Loan Agreement) occurs under the Loan Agreement or other default under any other Loan Document occurs, then, or at any time thereafter, the whole of the unpaid principal and interest owing on this Note shall, at the option of County and without notice, become immediately due and payable. This option may be exercised at any time after any such event and the acceptance of one or more installments or other payments from any person thereafter shall not constitute a waiver of County's option. County's failure to exercise said option in connection with any particular event or series of events shall not be construed as a waiver of the provisions hereof as regards that event or any subsequent event. The Loan Agreement and other Loan Documents may also contain provisions, which provide for the automatic acceleration of amounts owing under this Note upon the occurrence of certain specified events. County shall have, and be entitled to exercise, upon the occurrence of any Event of Default or other event described above, all rights and remedies available to County under the Loan Agreement, this Note, the other Loan Documents or at law or in equity. All such rights and remedies shall be cumulative.

10. Prohibition Against Transfer of Interest. The Borrower shall not make any sale, assignment or conveyance, or transfer in any other form, nor any further pledge, encumbrance, or mortgaging of the Property and/or the Project or any part thereof or of any of its interest therein, other than in accordance with the terms of this Note, the Loan Agreement, the Regulatory Agreement, the Deed of Trust and the other Loan Documents.

11. Default Interest; Default Under Other Loan Documents. All covenants, conditions, and agreements contained in this Note, the Loan Agreement, the Regulatory Agreement, the Deed of Trust and the other Loan Documents are hereby made a part of this Note, and the Borrower agrees that the unpaid balance of the then principal amount of this Note, together with all accrued interest thereon and charges owing, shall, at the option of the County hereof, become immediately due and payable, and thereafter until paid bear interest at the rate of twelve percent (12%) per annum (which rate shall in no event exceed the highest interest rate then permitted at law and if it does, it will be reduced to said lower amount) (the "Default Rate"), compounded annually upon the failure of the Borrower to make any payment hereunder as and when due (after expiration of any cure period); upon the failure of the Borrower to perform or

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observe any other term or provision of this Note; or upon the occurrence of any event (whether termed default, event of default, or similar term) which (after the expiration of any cure period) under the terms of this Note, the Loan Agreement, the Regulatory Agreement, the Deed of Trust or other Loan Document shall entitle the County to exercise rights or remedies thereunder.

12. Definitions. Capitalized terms not defined in this Note shall have the same meanings as defined in the Loan Agreement, the terms of which are incorporated into this Note by this reference.

13. Governing Law. This Note shall be construed in accordance with and be governed by the laws of the State of California.

14. Severability. If any provision of this Note shall be judicially determined 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.

15. Captions. The captions and headings in this Note are merely for convenience and substantively are not part of this Note.

16. JURY TRIAL WAIVER; VENUE. UNLESS PROHIBITED BY FEDERAL, STATE OR LOCAL LAWS, IN ANY JUDICIAL ACTION OR PROCEEDING ARISING FROM OR RELATING TO THE LOAN OR THE LOAN DOCUMENTS, INCLUDING ANY ACTION OR PROCEEDING INVOLVING A CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT, BORROWER HEREBY WAIVES ANY RIGHT IT OR THEY MAY HAVE TO REQUEST OR DEMAND A TRIAL BY JURY. VENUE FOR ANY ACTION RELATED TO THE LOAN OR LOAN DOCUMENTS SHALL BE IN AN APPROPRIATE COURT IN ORANGE COUNTY, CALIFORNIA SELECTED BY COUNTY TO WHICH BORROWER HEREBY CONSENTS.

17. Joint and Several Liability. If Borrower consists of more than one person or entity, each shall be jointly and severally liable for the performance of Borrower's obligations under this Note.

18. Notices. All notices to be given pursuant to this Note shall be given as provided in the Loan Agreement.

19. Calculation of Interest. Interest hereunder shall be calculated on the basis of a three hundred sixty (360) day year consisting of twelve (12) months of thirty (30) days each, except that interest due and payable for a period less than a full month shall be calculated by dividing (a) the product of (i) the actual number of days elapsed in such period, (ii) the outstanding principal balance hereunder during that period and (iii) the Note interest rate in effect hereunder during that period by (b) 360.

20. Number and Gender. In this Note the singular shall include the plural and the masculine gender shall include the feminine and neuter genders, and vice versa, if the context so requires.

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21. Time. Time is of the essence in this Note.

22. No Waiver by the County. No waiver of any breach, default, or failure of condition under the terms of this Note, the Loan Agreement, the Regulatory Agreement, the Deed of Trust or any other Loan Document or the obligations secured thereby shall be implied from any failure of the County to take, or any delay by the County in taking, action with respect to such breach, default or failure, or any form of previous waiver of any similar or unrelated breach, default or failure; and waiver of any term of this Note, the Loan Agreement, the Regulatory Agreement, the Deed of Trust or any other 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.

23. Amendments and Modifications. This Note may not be changed orally, but only by an amendment in writing signed by Borrower and the County.

24. Non-Recourse. The County will neither seek nor obtain judgment against the Borrower for payment of principal or interest under the Note or for other obligations under the Loan Documents following a judicial foreclosure (or to the extent permitted by law, a nonjudicial foreclosure of the Deed of Trust), and the County's sole recourse against the Borrower for any default in the payment of principal or interest is limited to the Property and the Project and any other collateral of the Loan; provided, however, nothing in this Paragraph 24 will be deemed to limit or prejudice the rights of County to:

(a) foreclose the Deed of Trust or enforce any of its other rights or remedies under the Loan Documents; or

(b) name the Borrower or the general partners of Borrower as a party defendant in any action, proceeding or arbitration, subject to the limitations of this Section; or

(c) assert any unpaid amounts on the Loan as a defense or offset to or against any claim or cause of action arising out of or pertaining to the Project made or alleged against the County by the Borrower or any of its general partners; or

(d) exercise self-help remedies such as set off or nonjudicial foreclosure against or sale of any real or personal property collateral or security; or

(e) proceed against any entity or person, including Borrower and the general partners of Borrower with respect to the enforcement of any leases, bonds, policies of insurance, or other agreements (other than the Loan Documents); or

(f) recover damages against Borrower or the general partners of Borrower for fraud, breach of warranty, failure to maintain insurance, waste, or material misrepresentation; or

(g) recover any condemnation proceeds or insurance proceeds or other similar funds or payments attributable to the Property and/or the Project that under the terms of the Loan Documents should have been paid to Lender; or

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(h) recover any tenant security deposits, prepaid rents, or other similar sums paid to or held by Borrower or any other entity or person in connection with the Property and the Project; or

(i) recover the value of any personalty or fixtures removed by Borrower from the Project after the occurrence of an Event of Default

(j) recover the rents and profits of the Property and the Project accruing from and after the occurrence of an Event of Default that have not been applied to pay any portion of the Loan, operating, and maintenance expenses of the Property and/or the Project, insurance, premiums, impositions, deposits into a reserve for replacement, or other sums required by the Loan Documents; or

(k) recover any amounts owing to the County under indemnity provisions (including indemnity provisions pertaining to Hazardous Materials as such term is defined in the Loan Agreement) in the Loan Documents; or

(l) recover funds to reimburse County for sums expended by County for the protection or preservation of the Property, the Project or County's interest therein (including, without limitation, payment of any real property taxes, assessments or other charges which would create liens on any portion of the Property or Project

The limitation of liability set forth in this Section 24 shall be deemed void and have no force or effect if Borrower or any general partner of Borrower attempts to materially delay any foreclosure of or on the Deed of Trust or any other collateral for the Loan, or if the Borrower or any of its general partners claim that this Agreement or any related documents are invalid or unenforceable to an extent that would preclude foreclosure. Notwithstanding anything to the contrary set forth in the immediately preceding sentence, in the event Borrower contests any foreclosure proceeding in good faith and Borrower prevails in such action, or in the event Borrower and the County agree to a settlement of any such action which gave rise to the foreclosure proceeding, the Loan shall remain nonrecourse. Any liability of Borrower or any of the general partners of Borrower for any obligations arising in connection with the matters set forth in clauses (a) through (l) inclusive will be personal liability, and may be asserted against and recovered from its or their interest in the Property and/or Project as well as against any of its and their other assets. Nothing contained in this Section impairs the validity of this Note or any related documents or any lien or security interest created or perfected by it.

Signature Page to follow

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IN WITNESS WHEREOF, Borrower has executed this Promissory Note as of the day and year first above written.

BORROWER:

[BORROWER BLOCK]

By:

APPROVED AS TO FORM
COUNTY COUNSEL
ORANGE COUNTY, CALIFORNIA

By _____, Deputy

Dated _____