

**ASSIGNMENT, ASSUMPTION AND MODIFICATION OF GROUND LEASE AND  
AMENDED AND RESTATED GROUND LEASE  
FOR  
ONE WESTHELP DRIVE (FORMER WESTHELP PROPERTY)**

**THIS ASSIGNMENT, ASSUMPTION AND MODIFICATION OF GROUND LEASE AND AMENDED AND RESTATED GROUND LEASE FOR ONE WESTHELP DRIVE (FORMER WESTHELP PROPERTY)** (the "Agreement") is made as of April \_\_, 2015 by and among the TOWN OF GREENBURGH, a municipal corporation of the State of New York, constituting a political subdivision thereof, having its office at 177 Hillside Avenue, White Plains 10607 (the "Town"), the COUNTY OF WESTCHESTER, a municipal corporation of the State of New York, constituting a political subdivision thereof, having its office at 148 Martine Avenue, White Plains, New York 10601 (the "County", and together with the Town being sometimes hereinafter referred to as the "Existing Interest Holders") and Marathon Development Group, Ltd., a New York business corporation having an address at 901 Main Street, Suite 300 Peekskill, New York 10566 (together with its successors and assigns, the "Lessee").

**WITNESSETH:**

**WHEREAS**, the County is the owner of certain lands located adjacent to the Westchester Community College campus in the Town of Greenburgh, consisting of approximately six (6) acres of land and being more particularly described in Schedule A annexed hereto; and

**WHEREAS**, on or about April 24, 1990, the County entered into a Ground Lease Agreement with WestHELP, a New York not-for-profit corporation, to construct a housing facility for the provision of emergency homeless and transitional housing and services to homeless persons for a ten (10) year term which expired on September 17, 2001. ("the WestHELP Lease"). The aforesaid land, together with the administration and classroom building and eight (8) residential buildings presently located thereon are hereinafter described herein as the "Premises"; and

**WHEREAS**, on or about April 26, 1990, the County entered into a Ground and Facilities Lease Agreement with the Town (the "Town Ground Lease"), pursuant to which it leased the Premises to the Town for a thirty (30) year term, commencing upon the expiration of the WestHELP Lease, for the purpose of providing housing to low and moderate income persons and families; and

**WHEREAS**, the WestHELP Lease with the County expired on September 17, 2001 and the term of the Town Ground Lease was deemed to have commenced on September 18, 2001; and

**WHEREAS**, on or about on September 18, 2001, pursuant to a request from the County, and to assist the County in fulfilling its obligation to provide shelter, food and other services to homeless families in conjunction with the New York State Social Services Law and applicable regulations issued pursuant thereto, the Town agreed to modify the Town Ground Lease to permit use of the Premises by WestHELP as an emergency homeless housing facility for an additional ten (10) year term pursuant to that certain Sublease and Homeless Housing Facilities Agreement (the

“WestHELP Sublease”) dated September 18, 2001 by and between the Town, WestHELP and the County; and

**WHEREAS**, the Town was only willing to forego occupancy under the Town Ground Lease and to permit the County and WestHELP to continue to use the Premises for the provision of housing and services to homeless families pursuant to the WestHELP Sublease if the Town was able to continue to use the Premises for low and moderate income persons and families, commencing upon the expiration of the WestHELP Sublease; and

**WHEREAS**, the WestHELP Sublease expired on September 30, 2011; and

**WHEREAS**, the Town, the County and the Lessee desire that: (i) the Town assign all of its rights, obligations and interests in and to the Town Ground Lease to the Lessee, and that Lessee assume all of the Town’s rights, obligations and interests in the Town Ground Lease; and (ii) the Town Ground Lease be amended and restated in its entirety, in order to facilitate Lessee’s development, rehabilitation and operation on the Premises of an affordable housing project consisting of approximately seventy-four (74) residential rental units exclusively for low-income senior citizens aged 62 and older (the “Project”), all on the terms and conditions set forth herein; and

**WHEREAS**, on January 7, 2015, in recognition of the demand for rental housing for seniors of limited financial need, the New York State Division of Human Rights granted a public policy exemption from the prohibition on consideration of age with respect to the housing and is allowing the Project to developed for, marketed to and leased exclusively to persons 62 years of age or older, with prospective tenants under the age of 62 being prohibited from occupancy, subject to applicable laws (a copy of which exemption is attached hereto as Exhibit A); and

**WHEREAS**, occupancy by tenants under the age of 62, shall be deemed a material breach of the use restrictions under this Agreement, provided however, that any such breach shall not result in an action against the Premises or the Project for either money damages or foreclosure of this Agreement, provided Lessee shall diligently undertake eviction proceedings against such tenant, the sole remedy being court action to confirm or deny discrimination.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained, and for other good and valuable consideration receipt of which is hereby acknowledged, the parties hereto agree as follows:

**SECTION 1. Assignment and Assumption of Town Ground Lease.**

(a) Effective and conditioned upon the closing of Lessee’s construction financing for the Project (the “Construction Closing”) and the Town’s receipt of the Assignment Fee (as defined in Section 1(c) below), and subject to the terms and conditions of this Agreement, the Town hereby assigns the Town Ground Lease, together with all of the Town’s right, title and interest thereunder, to the Lessee, and the Lessee hereby assumes the Town Ground Lease, and the rights and obligations of the Town under same.

(b) Notwithstanding anything to the contrary contained in this Agreement, but subject to any agreements that the Lessee and the Existing Interest Holders may hereafter enter into regarding liabilities and responsibilities to cure existing conditions at the Premises revealed during the Lessee's Due Diligence Period outlined in Section 4 below, the Town shall remain responsible for all liabilities and obligations of the Town relating to the Town Ground Lease which accrued prior to the date that the assignment set forth in subsection (a) above becomes effective (the "Effective Date").

(c) In consideration of the Town's assignment of the Town Ground Lease to the Lessee pursuant to this Section 1, the Lessee agrees to pay an assignment fee to the Town in the total amount of Two Million Two Hundred Thousand and 00/100 Dollars (\$2,200,000.00), which assignment fee ("Assignment Fee") shall be payable to the Town as follows: (1) Two Hundred Thousand and 00/100 Dollars (\$200,000.00) upon the execution of this Agreement (the "Initial Assignment Fee" or "Deposit"), said Deposit to be held in escrow by an agreed upon third party (the "Escrow Agent"). The Deposit shall become refundable if at any time prior to Construction Closing, the Lessee, in its sole discretion, timely and properly elects to terminate this Agreement, provided however that the Escrow Agent shall retain the Deposit until Construction Closing pending performance by the Existing Interest Holders hereunder or Lessee's election to terminate this Agreement. In the event Existing Interest Holders fail to materially perform hereunder, Lessee shall have all remedies available to it at law or in equity, including without limitation, the right to specifically enforce this Agreement.

(2) The Deposit shall be credited against the Assignment Fee. The Deposit shall be returned to Lessee if the Existing Interest Holders fail to deliver title as set forth herein, or the Lessee timely and properly elects to terminate this Agreement in accordance with the terms and conditions of this Agreement. In all other circumstances, the Escrow Agent shall deliver the Deposit to Town as its sole remedy in the event there is no Closing for any reason not the fault of the Existing Interest Holders, the Deposit representing liquidated damages for the breach, whereupon this Agreement shall be null and void and neither party shall have any further obligation to the other.

(c) If the Existing Interest Holders are unable to deliver insurable title, or to make conveyance, or to deliver possession of the Premises, all as herein stipulated, or if at the time of the Construction Closing, the Premises does not conform with the provisions hereof or if the Lessee timely and properly elects to terminate this Agreement in accordance with the terms and conditions of this Agreement, then the Lessee may, in addition to its remedies hereunder, accept such title, possession or condition as the Existing Interest Holders may deliver or Lessee may terminate this Agreement and obtain the return of the Deposit. It is understood and agreed that, except as otherwise provided herein, the Existing Interest Holders shall not be under any obligation to attempt to cure by litigation or otherwise any defect which may be found to exist in the title to the Premises or to remove any encumbrances upon the title to the Premises not voluntarily placed thereon by the Existing Interest Holders.

(d) In accordance with the provisions of Sections 14 and 15 of the Town Ground Lease, the County hereby expressly consents to the Town's assignment of the Town Ground Lease to the Lessee as set forth in subsection (a) above.

(e) Commencing on the Effective Date: (i) Lessee hereby warrants, covenants and agrees to diligently perform and discharge each and all of the Town's obligations, duties, responsibilities and covenants under the Town Ground Lease and to indemnify and hold the Town harmless from and against any and all liabilities, claims, demands, obligations, assessments, losses, costs, damages and expenses of any nature whatsoever (including without limitation, court costs and reasonable attorneys' fees) which the Town may incur, sustain or suffer or which may be asserted or charged against the Town which are caused by Lessee's performance or non-performance of such obligations, duties, responsibilities, covenants and liabilities under the Town Ground Lease, as amended and restated hereby, on or after the Effective Date; and (ii) the Town hereby indemnifies and agrees to hold harmless the Lessee from and against any and all liabilities, claims, demands, obligations, assessments, losses, costs, damages and expenses of any nature whatsoever (including, without limitation, court costs and reasonable attorney's fees) which Lessee may incur, sustain or suffer or which may be asserted or charged against Lessee, which are caused by the Town's performance or non-performance of such obligations, duties, responsibilities, covenants and liabilities under the Town Ground Lease prior to the Effective Date.

## **SECTION 2. Demise of Leased Premises and Term.**

(a) Effective and conditioned upon the Construction Closing, the County hereby leases to Lessee, and Lessee hereby takes and hires from the County, upon and subject to the terms, conditions, covenants and provisions hereof, the Premises for a term commencing on the date of the Construction Closing and continuing until December 31, 20\_\_ (the "Lease Term"), unless sooner terminated as herein provided.

(b) The said Premises are leased to Lessee and Lessee accepts same in its present physical condition, and except as otherwise set forth in this Agreement, without any representation or warranty by the Existing Interest Holders as to the condition thereof or as to the use or occupancy which may be made thereof under any existing or future law, rule, regulation or ordinance. The Existing Interest Holders shall not be responsible for any latent defect in the Premises.

(c) The Existing Interest Holders shall have no obligation whatsoever to maintain, repair or replace the land, buildings or infrastructure of the Premises during the term of this Agreement.

(e) Lessee is hereby granted access to the Premises by way of the current access road, known as "WestHELP Drive", which connects the Premises to Westchester Community College Entrance Road connecting to Knollwood Road. Lessee shall have the responsibility of maintaining (including snow removal), repairing and cleaning any access roads to the Premises during the term of the Agreement

## **SECTION 3. Rent.**

For use of the Premises during the Lease Term pursuant to this Lease, the Lessee agrees to pay rent to the County in the total amount of Ten and 00/100 Dollars (\$10.00) per annum commencing on the first anniversary date of the execution of this Agreement and continuing until

the expiration of this Agreement (the “Rent”, and together with the Assignment Fee being sometimes hereinafter collectively referred to as the “Consideration”).

#### **SECTION 4. Due Diligence.**

(a) As used herein, the term “Due Diligence Period” shall mean the period beginning on the date of the execution of this Agreement and continuing until 5:00 p.m. on the ninetieth (90<sup>th</sup>) day thereafter.

(b) The Existing Interest Holders shall make available to Lessee, and shall use their best efforts to do so within seventy-two (72) hours after the execution of this Agreement, all documents, records and other information relating to the Premises requested by, and not previously delivered to, Lessee. The parties agree that as of the date of the execution of this Agreement, the Lessee has requested the following documents pursuant to this Section 4(b):

- (1) environmental, asbestos and physical reports, if any;
- (2) copies of all service contracts pertaining to the Premises, if any;
- (3) as-built plans and specifications, if in the possession of or reasonably available to the Existing Interest Holders, as well as any certificates of occupancy issued in connection with the Premises;
- (4) a list of all personal property associated with the Premises, if applicable;
- (5) copies of each title insurance policy or abstract of title for the Premises and any survey thereof in possession of the Existing Interest Holders; and
- (6) copies of all contracts and agreements with governmental authorities pertaining to the Premises, other than the Town Ground Lease, if any;

Lessee reserves the right to request such additional documentation as it may deem necessary or appropriate in the course of its due diligence investigation of the Premises, and the Existing Interest Holders will use their best efforts to comply with any such additional requests in a timely manner, but no such additional requests by Lessee shall result in any extension or delay of the Due Diligence Period.

(c) The Existing Interest Holders hereby grant to Lessee and its representatives, agents, architect and/or engineer, prospective lenders and investors, and other specialists and contractors access to all portions of the Premises during normal business hours, subject to one (1) business day’s prior notice from Lessee, and the Existing Interest Holders’ consent thereto, which shall not be unreasonably withheld. The Existing Interest Holders shall ensure that Lessee and its authorized agents have full access to the Premises to make an examination and inspection of the physical condition of all portions of the Premises, including without limitation, the roof, elevators, plumbing, electrical, heating and air conditioning, structural systems and environmental matters, as well as access to the books and all records for the Premises. Lessee and its designated representatives may perform, at Lessee’s sole cost and expense, any environmental tests including, without limitation, testing for the presence of lead based paint, radon, mold and asbestos, structural, engineering, title, zoning and governmental compliance studies, tests, inspections, searches or any other research that it deems appropriate with respect to the Premises. Lessee shall be liable to the Existing Interest Holders for any damages or costs caused by it or its agents to the Premises.

Lessee agrees to indemnify and hold the Existing Interest Holders harmless from and against any cost, claim, charge or liability including reasonable attorneys' fees asserted or occasioned by the activity on or about the Premises by Lessee or any of its agents or representatives, (i) except as to any claim arising out of the Existing Interest Holders' negligence or willful misconduct, and (ii) except as to the discovery of any "Hazardous Materials" (as defined in subsection (d) below).

(d) In the event that any Phase I or other environmental inspection, audit or test conducted or report generated by the Lessee and/or its representatives during the Due Diligence Period reveals (i) any "Hazardous Materials" (as defined below), (ii) any other environmental condition in, on, under or affecting the Premises that the Lessee determines to be objectionable, or (iii) any other conditions or information that the Lessee determines requires further study and testing to determine whether such conditions involve Hazardous Materials or other objectionable environmental conditions (collectively, "Hazardous Conditions"), the Lessee shall deliver written notice thereof to the Existing Interest Holders prior to the end of the Due Diligence Period (an "Environmental Objection Notice"). In such event, the Lessee shall have the option, and the Environmental Objection Notice shall specify whether the Lessee elects to exercise such option, to extend the Due Diligence Period for an additional forty-five (45) days to undertake a Phase II environmental audit to study such Hazardous Conditions (the "Extended Due Diligence Period"), provided that the right given to Lessee to extend the Due Diligence Period pursuant to this Section 4(d) shall be limited to the grounds set forth in clauses (i), (ii), and (iii) above, and shall not apply to any other situation. If the Lessee elects not to invoke its termination rights during the Due Diligence Period, or the Extended Due Diligence Period, to the extent applicable, it will have been deemed to have waived any objections to environmental conditions at the Premises, provided, however, that if remediation of any type is required due to Hazardous Conditions at the Premises, such remediation cost shall be deducted from the Consideration subject to mutual agreement between Lessee, the Existing Interest Holders and their respective legislative bodies. "Hazardous Materials" shall have the collective meanings given to the terms "hazardous material," "hazardous substances" and "hazardous wastes" in the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 et seq., as amended, and also any meanings given to such terms in any similar state or local statutes, ordinances, regulations or by-laws. Without limiting the generality of the foregoing, the term "Hazardous Materials" shall include oil and any other substance known to be hazardous, such as hazardous waste, lead-based paint, asbestos, methane gas, urea formaldehyde insulation, underground storage tanks, polychlorinated biphenyls (PCBs), toxic substances or other pollutants.

(e) Lessee shall have the right to cancel this Agreement for any reason at any time during the Due Diligence Period, such right to be exercised by giving written notice to the Existing Interest Holders pursuant to Section 23 below. In the event Lessee exercises its right to cancel this Agreement pursuant to this Section 4(e), the Escrow Agent shall return to Lessee the Deposit.

## **SECTION 5. Title Commitments; and Objections to Title.**

(a) Upon the execution of this Agreement, Lessee shall proceed promptly at its expense to have the title examined by a title company licensed and authorized to issue title insurance by the New York State Insurance Department, or any agent for such title company, and shall direct the title company to have a copy of its report forwarded to the Existing Interest Holders' counsel. Within sixty (60) days after the date of this Agreement, Lessee shall deliver to the Existing Interest

Holders' counsel notice of any liens, encumbrances or other defects of title subject to which Lessee is unwilling to accept the leasehold interests contemplated under this Agreement. At least thirty (30) days prior to the Construction Closing, Lessee shall have the title re-examined by the title company and shall deliver to the Existing Interest Holders' counsel a copy of said company's updated report together with a notice of any liens, encumbrances or other defects of title subject to which Lessee is unwilling to accept the leasehold interests contemplated under this Agreement.

(b) The amount of any unpaid taxes, assessments, water chargers and sewer rents which the Existing Interest Holders are obligated to pay and discharge, with the interest and penalties thereon to a date not less than two (2) business days after the Construction Closing, and any other liens or encumbrances which the Existing Interest Holders are obligated to pay or discharge in order to convey to Lessee such leasehold title as is herein provided to be conveyed, may at the option of the Existing Interest Holders (and only to the extent that the sum of such items does not exceed the Consideration) be credited against the Consideration at Construction Closing. Any liens and encumbrances referred to in this Section 5(b) shall be deemed Permitted Exceptions, provided:

(i) the Existing Interest Holders shall deliver to Lessee at the Construction Closing, instruments in recordable form and legally sufficient to satisfy such liens and encumbrances of record together with monies sufficient for the cost of recording or filing said instruments; or

(ii) the Existing Interest Holders, having made arrangements with the title company, shall deposit with said company legally sufficient monies acceptable to the title company to insure the obtaining and the recording of such satisfactions.

(c) In the event that on the date of Construction Closing the Existing Interest Holders' title to the Premises shall be subject to mortgages, liens, encumbrances or objections other than those subject to which Lessee is obligated to accept leasehold title hereunder, and if Lessee shall be unwilling to waive the same and to close this transaction without abatement of the Consideration or mutually-agreeable allowance, Lessee shall have all rights and remedies at law or in equity, including without limitation specific performance, and the Consideration may be applied against any such unpermitted mortgages, liens, encumbrances or objections in the event Lessee proceeds to Construction Closing. In no event shall the Existing Interest Holders be required to, and nothing herein contained shall obligate the Existing Interest Holders to, expend any money or bring any action or proceeding or otherwise incur any costs or expenses in order to cure any purported defect or objection or to fulfill any condition or to render or deliver title to the Premises to Lessee as herein provided, except the Existing Interest Holders are required to remove and satisfy at Construction Closing all mortgage liens, security interests and liens securing the payment of indebtedness with respect to the Premises.

(d) From and after the date of this Agreement, the Existing Interest Holders shall not create nor voluntarily suffer or permit any lien, encumbrance, restriction or agreement to be placed against the Premises.

## **SECTION 6. Violations.**

(a) All violations of building, fire, sanitary, zoning, environmental, housing and other Laws and Regulations (as hereinafter defined) noted or issued by the date hereof or by the Construction Closing (collectively, “Violations”) as to conditions affecting the Premises shall be the sole responsibility of the Existing Interest Holders. At or before Construction Closing, the Existing Interest Holders shall pay all fines and penalties for any Violations that are assessed against the Premises prior to the Construction Closing, with reasonable evidence presented to Lessee at Construction Closing of the satisfaction thereof. The term “Laws and Regulations” shall mean, collectively, all present and future building, fire, sanitary, zoning, environmental, housing and other statutes, laws, ordinances, codes, orders, restrictions, resolutions, requirements, rules and regulations of all governmental authorities having jurisdiction with respect to the Premises or any part thereof, including, without limitation, landmark designations and all zoning variances and special exceptions, if any.

(b) If required, the Existing Interest Holders upon notice from Lessee shall promptly furnish to Lessee authorization to make any necessary searches for the purposes of determining whether notes or notices of Violations have been noted or issued with respect to the Premises.

## **SECTION 7. Representations and Warranties.**

(a) The Existing Interest Holders each hereby represent and warrant to Lessee, as to themselves only, that:

(i) The Existing Interest Holders are municipal corporations and/or body politics organized and existing under and pursuant to the laws of the State of New York, and have the requisite power and authority to enter into and to perform the terms of this Agreement, and this Agreement and the consummation of the transactions provided for herein have been duly authorized on behalf of the Existing Interest Holders.

(ii) Subject to receipt of the consents set forth in Section 9(b)(1) below, this Agreement has been executed and constitutes, and each document and instrument contemplated hereby to be executed and delivered by the Existing Interest Holders, when executed and delivered, shall constitute the legal, valid and binding obligation of the Existing Interest Holders, enforceable against the Existing Interest Holders in accordance with its respective terms.

(iii) There are no judgments, orders, writs, injunctions or decrees of any kind issued against the Existing Interest Holders unpaid or unsatisfied of record, nor any actions, suits or other legal or administrative proceedings pending or, to the best of the Existing Interest Holders’ knowledge, threatened against the Existing Interest Holders, which would have any material adverse effect on the Premises, or the ability of the Existing Interest Holders to consummate the transactions contemplated by this Agreement. The Existing Interest Holders shall promptly notify Lessee of the occurrence of any of the foregoing events between the date of the execution of this Agreement and the date of the Construction Closing.

(iv) The County owns legal and record title to the Premises, and the Town owns the leasehold interest in the Premises under the Town Ground Lease, free and clear of all liens and



encumbrances except for any exceptions shown on the title report to be ordered by Lessee pursuant to Section 4 above.

(v) annexed hereto as Schedule 7(a)(v) is a true, correct and complete list as of the date of this Agreement of all management, service, operations, maintenance, supply and other service contracts or agreements with respect to the Premises (together with such new or modified agreements entered into by either or both of the Existing Interest Holders, each a “Service Contract”, and collectively, the “Service Contracts”), true, correct and complete copies of which have been made available for review by Lessee. Except as otherwise disclosed on Schedule 7(a)(v), all of the Service Contracts may be terminated without penalty upon not more than thirty (30) days notice. If there are any Service Contracts presently affecting the Premises, the Existing Interest Holders shall not (i) amend, renew or extend any Service Contract, or (ii) enter into any new service contract with respect to the Premises, without the prior consent of Lessee. Prior to the Construction Closing, the Existing Interest Holders will terminate all Service Contracts except those which cannot be legally terminated and any that Lessee has specifically agreed to assume. Notwithstanding anything to the contrary contained in this Agreement, the Existing Interest Holders do not represent or warrant that any particular Service Contract will be in force or effect at the Construction Closing or that the service providers will have performed their obligations thereunder. Notwithstanding anything to the contrary contained herein, Lessee shall not be required to assume the Existing Interest Holders’ management contract(s), if any, and all such management contracts or agreements shall be terminated by the Existing Interest Holders at or prior to the Construction Closing.

(vi) There are not currently pending any condemnation or eminent domain proceedings that would affect the Premises, and the Existing Interest Holders do not have any knowledge of, and/or have not received written notice of, any threatened condemnation or eminent domain proceedings that would affect the Premises. The Existing Interest Holders shall promptly notify Lessee of the occurrence of any of the foregoing events between the date of the execution of this Agreement and the Construction Closing.

(vii) There are not currently pending any liens or special assessments with respect to all or any portion of the Premises by any governmental authorities, and the Existing Interest Holders have not received written notice of, any pending liens or special assessments with respect to all or any portion of the Premises by any governmental authorities. The Existing Interest Holders shall promptly notify Lessee of the occurrence of any of the foregoing events between the date of the execution of this Agreement and the Construction Closing.

(viii) The Existing Interest Holders have not entered into any contracts for the sale of the Premises or any portion thereof, any leases of the Premises other than this Agreement and the Town Ground Lease, or except as otherwise set forth in the title report referenced in Section 5(a), any deeds, declarations, preferences, conditions, zoning performance covenants, easements, or rights of way affecting the Premises. No person or entity has any rights of first refusal, options or other preferential rights to purchase or lease the Premises or any portion thereof. While this Agreement is in effect, the Existing Interest Holders shall not convey or encumber, or permit any lien or encumbrance upon, the Premises or any interest therein without the prior written consent of Lessee.

(ix) None of the execution, delivery or performance of this Agreement by the Existing Interest Holders does or will, with or without the giving of notice, lapse of time or both, violate, conflict with, constitute a default or result in a loss of rights under or require the approval or waiver of any entity under (1) any material agreement, instrument or other document to which either or both of the Existing Interest Holders are a party or by which they are bound, or (2) any judgment, decree, order, statute, law, injunction, rule, regulation or the like of a governmental unit applicable to either or both of the Existing Interest Holders.

(x) To the best of the Existing Interest Holders' knowledge after reasonable inquiry, and except as disclosed in Exhibit B: (a) the Existing Interest Holders have not received any notices, demand letters or requests for information from any governmental authority or third party indicating that the Existing Interest Holders may be in violation of, or liable under, any Environmental Law in connection with the ownership or operation of the Premises; (b) there are no civil, criminal or administrative actions, suits, demands, claims, hearings, investigations or proceedings pending or threatened against either or both of the Existing Interest Holders relating to any violation, or alleged violation, of any applicable Environmental Law which pertains to the Premises; (c) no reports pertaining to the Premises have been filed, or are required to be filed, by the Existing Interest Holders concerning the release of any Hazardous Material or the threatened or actual violation of any Environmental Law; (d) no Hazardous Material has been disposed of, released or transported in violation of any applicable Environmental Law on or from the Premises; (e) there have been no environmental investigations, studies, audits, tests, reviews or other analyses regarding compliance or noncompliance of the Premises with any applicable Environmental Law conducted by or which are in the possession of the Existing Interest Holders; and (f) neither of the Existing Interest Holders, nor the Premises, is subject to any material liabilities or expenditures (fixed or contingent) relating to any suit, settlement, law or claim asserted or arising under any Environmental Law. For purposes hereof, (i) "Environmental Law" means any Applicable Law relating to the regulation or protection of human health, safety or the environment or to emissions, discharges, releases or threatened releases of any Hazardous Material.

(xi) To the best of the Existing Interest Holders' knowledge, all building(s) comprising the Premises is/are structurally sound, is/are presently equipped with operational heating systems, which heating systems were both operational and in use, as necessary during the annual heating season (i.e. October 1<sup>st</sup> – May 31<sup>st</sup>) throughout the term of the Town Ground Lease.

(xii) The Existing Interest Holders shall maintain the Premises in the same condition and repair as it is currently being maintained, ordinary wear and tear and damage by casualty or condemnation excepted, and shall operate, maintain and use the Premises in the ordinary course of business and use reasonable efforts to preserve for Lessee the relationships of the Existing Interest Holders and tenants, suppliers, managers, employees and others having an ongoing relationship with the Premises. The Existing Interest Holders will not defer taking actions, or otherwise manage the Premises differently due to the pending sale of the Premises.

(xiii) The Existing Interest Holders have not received any written notice from any governmental authorities or agency, mortgagee, insurance company, board of fire underwriters, or any other association having authority or power over all or any portion of the Premises, requesting the performance of any work or alterations with respect to the Premises that has not been performed.

(xiv) Neither of the Existing Interest Holders has received written notice from the supplier of water, sewage, electricity, gas or telephone services to the Premises stating that such service is being or will be terminated or curtailed.

(xv) Neither of the Existing Interest Holders are in bankruptcy, receivership or dissolution, neither have made an assignment for the benefit of creditors or admitted in writing their inability to pay their debts as they mature, neither have been adjudicated as bankrupt or filed a voluntary bankruptcy petition or petition or answer seeking reorganization or an arrangement with creditors under the Federal bankruptcy law or any similar law or state of the United States or any jurisdiction and no such petition has been filed against either of the Existing Interest Holders and, to the best of each Existing Interest Holders' knowledge, none is threatened.

(xvi) Neither of the Existing Interest Holders are insolvent (within the meaning of any applicable Federal or state law relating to bankruptcy or fraudulent transfers) nor will they be rendered insolvent by the transactions contemplated by this Agreement.

(b) Lessee hereby represents and warrants to the Existing Interest Holders that:

(i) Lessee is a business corporation duly formed and in good standing under the laws and regulations of the State of New York, and has the requisite power and authority to enter into and perform the terms of this Agreement, and this Agreement and the consummation of the transactions provided for herein have been duly authorized.

(ii) This Agreement has been executed and constitutes, and each document and instrument contemplated hereby to be executed and delivered by Lessee, when executed and delivered, shall constitute, the legal, valid and binding obligation of Lessee enforceable against Lessee in accordance with its respective terms (subject to bankruptcy, insolvency, reorganization, moratorium or similar laws and regulations affecting creditors' rights generally).

(iii) There are no judgments, orders, writs, injunctions or decrees of any kind issued against Lessee unpaid or unsatisfied of record, nor any actions, suits or other legal or administrative proceedings pending or, to the best of Lessee's knowledge, threatened against Lessee, which would have any material adverse effect on the ability of the Lessee to consummate the transactions contemplated by this Agreement.

#### **SECTION 8. Risk of Loss; Casualty; Eminent Domain.**

(a) If prior to the Construction Closing, there shall occur a fire or other casualty affecting the Premises which causes damage or injury to the Premises and results in Restoration Costs in excess of an amount equal to [10%] of the Consideration or a Material Part of the Premises is taken by eminent domain, Lessee may, by providing written notice to the Existing Interest Holders at any time prior to the Construction Closing, elect to cancel this Agreement. In the event that Lessee shall so elect, both parties shall be relieved and released of and from any further liability hereunder (except as otherwise provided herein), and the Town shall return the Deposit to Lessee. Unless this Agreement is so cancelled, this Agreement shall remain in full force and effect, and at the Construction Closing the Existing Interest Holders shall pay to Lessee any sums of money collected by the Existing Interest Holders under policies of insurance, and in addition, the

Existing Interest Holders shall assign, transfer and set over to Lessee all of the Existing Interest Holders' right, title and interest in and to such policies and any further sums payable thereunder and all of the Existing Interest Holders' right, title and interest in and to any awards by reason of such taking by eminent domain. In such circumstances the Existing Interest Holders shall file their proofs of loss promptly (or authorize and empower Lessee to do so) and cooperate with Lessee in the processing and adjustment of such claim. As used in this Section 7, "*Restoration Costs*" means, as of any date with respect to any fire or other casualty affecting the Premises, the cost to be incurred (as reasonably determined by the Existing Interest Holders' architect or engineer) from and after such date, to repair, restore, replace or rebuild the Premises following and as a result of such fire or other casualty as nearly as practicable to their value and condition immediately prior to such damage or injury; and "*Material Part*" means that the sum of the reduction in fair market value of the Premises including the buildings thereon plus the cost to restore, repair, replace or rebuild the remaining portion of the Premises including the buildings thereon following and as a result of the relevant such taking by eminent domain, as the case may be, shall be [10%] or more of the Consideration, or that the portion of the Premises taken by eminent domain renders the Premises unusable for the Project.

(b) During the Lease Term, Lessee shall give prompt written notice to the County after the occurrence of any fire, earthquake, flood, act of God, damage from an unrelated third party, or other casualty to or in connection with the Premises, the Project or any portion thereof (hereinafter sometimes referred to as a "Casualty"). If, during the Lease Term, the Premises shall be damaged or destroyed by Casualty, Lessee shall promptly and diligently repair or restore the Premises as soon as reasonably possible, so long as any applicable leasehold mortgagee with the right to control the disbursement of such proceeds has released such proceeds to Lessee for such restoration or repair. In the event the insurance proceeds are not sufficient to repair or restore the Premises, Lessee shall use commercially reasonable efforts to provide, to the extent available to Lessee from non-Lessee sources, sufficient additional funds which, when added to such insurance proceeds, will fully effect such repair or restoration. Upon the occurrence of any such Casualty, Lessee, promptly and with all due diligence, shall apply for and collect all applicable insurance proceeds recoverable with respect to such Casualty, and Lessee shall have the right in its discretion to settle any claim for insurance proceeds. In the event that Lessee shall reasonably determine, by notice to the County, given within thirty (30) days after receipt by Lessee of any such insurance proceeds, that it is not economically practical to restore the Premises and/or the Project to substantially the same condition in which they existed prior to the occurrence of such Casualty, then Lessee may terminate this Agreement as of a date that is not less than thirty (30) days after the date of such notice. If Lessee terminates this Lease pursuant to this Section 8(b), Lessee shall surrender possession of the Premises to the County as of the effective date of such termination and shall assign to the County, (or, if same has already been received by Lessee, pay to the County) all of its right, title and interest in and to the proceeds from Lessee's insurance upon the Premises, subject to the prior rights of any leasehold mortgagee therein, as referenced in subsection (c) below.

(c) In the event of a Casualty and subsequent termination of this Agreement pursuant to Section 8(b) hereof, the insurance proceeds received as the result of such Casualty shall be distributed as follows: (a) first, if a leasehold mortgage is in place and requires distribution of proceeds to the leasehold mortgagee, to the leasehold mortgagee to the extent of any indebtedness then owed to such leasehold mortgagee (or, if more than one leasehold mortgage is in place, then to

the respective leasehold mortgagees in their order of priority or as may be required by any intercreditor agreement or other written agreement entered into by and among such leasehold mortgagees); (b) second, to the County and the Lessee on a proportionate basis. If the County and the Lessee are unable to agree as to the exact amount of such allocation, then each shall select an independent M.A.I. real estate appraiser (an "Appraiser"). Each Appraiser shall separately determine the amount of the balance of the insurance proceeds that is to be allocated to the interests of the County and the Lessee, the allocations shall be averaged, and such average shall be the final allocation of the net insurance proceeds.

(d) The County and Lessee agree that, in the event of a taking by eminent domain during the Lease Term such that Lessee reasonably determines that the Premises cannot continue to be operated, at reasonable cost, for its then current use, then this Agreement shall terminate as of the date of such taking. The County and Lessee agree that, in the event of a taking by eminent domain during the term that does not result in the termination of this Lease pursuant to this Section 8(d), this Agreement shall continue in effect as to the remainder of the Premises, and the net amounts owed or paid to the parties or to which any of the parties may be or become entitled by reason of any such Taking pursuant to any agreement with any condemning governmental or quasi-governmental entity which has been made in settlement of any proceeding relating to a taking, less any costs and expenses incurred by the parties in collecting such award or payment (the "Net Condemnation Award") shall be paid to Lessee and/or any leasehold mortgagee, if the terms of the applicable leasehold mortgage so require, and shall be used to restore the Premises and/or the Project to the same status and condition, as nearly as reasonably possible, that existed prior to the taking, subject to any applicable requirements of the leasehold mortgagee(s).

(e) The Existing Interest Holders agree that from the date of the execution of this Agreement through the expiration of the Lease Term, they will not seek to exercise any power of eminent domain or condemnation with respect to the Premises.

## **SECTION 9. Contingencies.**

(a) Lessee shall be entitled to terminate this Agreement, and to have the Initial Assignment Fee returned to it, if the following contingencies haven't been satisfied on or before the date of the Construction Closing (collectively, "Lessee's Contingencies"):

(i) Lessee shall have obtained all necessary municipal and/or governmental approvals, including required zoning changes or variances, consistent with the terms and conditions hereof, site plan approval and building permits, sufficient to develop, rehabilitate and operate the Project on the Premises. Lessee shall commence work on all approvals for the Project, as chronologically appropriate, and shall diligently pursue the same. The Existing Interest Holders agree to cooperate and support Lessee, to the maximum extent possible, in obtaining all permits and approvals (including without limitation site plan approval, variances, zoning changes and all required SEQRA actions, provided that the Existing Interest Holders shall not be required to incur any expense in connection with same.)

(ii) Lessee shall have obtained construction and permanent financing including without limitation, equity financing through the sale of low-income housing tax credits, tax-exempt

bonds, grants and below-market loans, as available and appropriate, sufficient to develop, rehabilitate and operate the Project in accordance with development and operating budgets prepared by the Lessee (in its sole discretion).

(iii) Lessee shall have obtained from the Existing Interest Holders (and/or third parties) all easements necessary or appropriate to ensure that the Lessee, at the commencement of the Lease Term, has ingress to and egress from the Premises, and such other such rights over the land of the Existing Interest Holders or others which are reasonably required or appropriate for the development, rehabilitation and operation of the Project at the Premises.

(b) The Existing Interest Holders shall be entitled to terminate this Agreement if, on or before the date of the Construction Closing, the County Board of Legislators and/or the Town Council fail to enact legislation authorizing the execution of this Agreement, which the County and the Town shall pursue expeditiously and in good faith.

#### **SECTION 10. Taxes and Assessments.**

(a) On or before Construction Closing, the Lessee and the Town shall enter into a Payment In Lieu of Taxes Agreement to provide for the payment of taxes and assessments on the Premises (the "PILOT Agreement"), which PILOT Agreement shall commence as of Construction Closing and have a term of thirty (30) years from conversion of the Project financing to its permanent phase, and shall provide for annual PILOT payments, commencing as of the date the Project is place in service, in an amount equal to three percent (3%) of the shelter rent (defined as the aggregate annual rental income of the Project, including any governmental rental assistance subsidies less the expense of all utilities, including gas, electricity, oil, management fees, insurance, trash removal, water and sewer, as well as any amounts paid by the Lessee for assessments for local improvements and special districts and those taxes from which the Premises are not exempt under the New York State Real Property Tax Law). The Lessee and the Existing Interest Holders acknowledge that pursuant to New York Real Property Tax Law Section 406(1), the Existing Interest Holders are exempt from the payment of taxes and assessments imposed upon real property owned by it, and the Lessee and the Existing Interest Holders agree that it is the intention of the parties that the Premises shall not be exempted from the payment of taxes and assessment by New York Real Property Tax Law Section 406(1) during the term of the PILOT Agreement.

(b) The Existing Interest Holders recognize, understand and agree that the PILOT Agreement is an integral component of the Project's financing and shall, in good faith, undertake all actions and approvals required to ensure that the PILOT Agreement is effective and enforceable in accordance with the terms set forth in Section 10(a). In the event that the PILOT Agreement has not been executed on or before the date of Construction Closing, the Existing Interest Holders shall be deemed to be in default hereunder.

#### **SECTION 11. Use.**

(a) Lessee shall have the right to use the Premises for any and all purposes related to, in furtherance of and in connection with the Project. Lessee acknowledges that the Existing Interest Holders have entered into this Agreement in reliance upon Lessee's covenant to own, develop, construct, operate and maintain the Premises and the Project for low and moderate income rental

housing, as described in Section 15 of the Town Ground Lease, for the purpose of providing affordable housing restricted exclusively to seniors age sixty-two (62) years and older with prospective tenants under the age of 62 being prohibited from occupancy (“Affordability and Occupancy Restrictions”). The use of the premises for such purposes is a material obligation of the tenancy and the Affordability and Occupancy Restrictions shall be set forth in all applicable Regulatory Agreements.

(b) The Lessee expressly agrees that any change in the Affordability and Occupancy Restrictions without the express written consent of the County shall be a default hereunder. The County shall have all rights available at law and in equity, including, without limitation, the right to specifically enforce the Affordability and Occupancy Restrictions and/or seek injunctive relief; provided however, if a violation of the Affordability and Occupancy Restrictions results solely from the occupancy of any dwelling unit by a family which includes a person less than sixty-two (62) years or age or by a person less than sixty-two (62) years of age, then the remedies set forth above shall not be available to the Existing Interest Holders, it being agreed that the Lessee shall immediately prosecute eviction proceedings against the occupants of that dwelling unit, the Existing Interest Holders sole remedy being to demand prompt and vigorous legal action regarding the eviction. Failure by Lessee to promptly and vigorously pursue eviction shall be a material default hereunder and the County shall have all rights available to it at law and in equity. A determination by a Court of competent jurisdiction that eviction on the grounds of age alone is not an acceptable Lessee action (notwithstanding the status of the Project as being limited to tenants age sixty-two (62) and older) shall be promptly appealed by the Lessee, if so requested by the County, at the Lessee’s cost. A final determination by a court of competent jurisdiction which is either non-appealable or reasonably determined by the Existing Interest Holders not to warrant further appeal, shall not be an actionable default hereunder (regardless of that Court’s holding), provided the Lessee promptly complies with the Court’s determination.

(c) Notwithstanding the foregoing, this paragraph shall not be construed as limiting Lessee’s rights to provide additional services or facilities to residents of the Project provided that such services are consistent with the development, construction, operation and maintenance of the Project. Lessee shall utilize the existing administration and residential buildings subject to remodeling and renovation as described below, and except as otherwise set forth in the plans and specifications for the Project, shall not demolish the existing administrative or residential buildings pursuant to this Agreement.

## **SECTION 12. Improvements, Repairs and Maintenance.**

(a) Lessee shall at all times during the Lease Term, at its own cost and expense, keep and maintain or cause to be kept and maintained the land and buildings constituting the Premises in good order, repair and condition. Lessee shall be responsible for all maintenance of the facility and for all repairs to the facility or to the grounds thereof, structural or otherwise. Notwithstanding anything to the contrary, Lessee’s obligations with respect to all such repairs and replacements occasioned by casualty or condemnation shall be subject to receipt of adequate insurance proceeds, and/or condemnation award proceeds. Lessee agrees to make no less than \$3,000,000 in repairs and capital improvements to the Premises. The County shall not be required to make any improvements, repairs or alterations to the Premises during the term of this Agreement. Upon, and

subject to, the Construction Closing and the commencement of the Lease Term, Lessee will begin renovations and restructuring of the 108 apartments/rooms in the complex, including renovations to apartment kitchens, new floorings and bathroom tiles; renovations to the administration building (which shall be used solely for non-residential purposes, including, without limitation, the provision of services to residents of the Project) to accommodate spaces for sitting and office areas, a residents lounge and computer learning center; installation of a new Washer – Dryer room with Machines; renovations to various rooms in the basement of the Administration building; and installation of cable TV wiring throughout the property, including common areas and outdoor spaces.

(b) Lessee shall, at Lessee's sole expense, prepare plans and specifications the Project. Such plans and specifications shall conform to the requirements of the New York State Building Code. Lessee shall file such plans and specifications with the Town Building Department and diligently prosecute an application for issuance of any necessary Building Permits. Lessee shall comply with all applicable laws, rules, regulations and ordinances in carrying out all such alterations, improvements and changes, unless otherwise exempted, and diligently prosecute obtaining all such necessary approvals.

(c) Upon the commencement of the Lease Term, the County will deliver possession of the Premises to Lessee in "as is" condition. Lessee agrees to begin the Project within thirty (30) days after Construction Closing has occurred and will proceed with renovation work diligently and in good faith in order to complete such work at the earliest practicable time. The Existing Interest Holders shall deliver the Premises vacant and in broom clean condition.

(d) Lessee shall be responsible for obtaining any permits and approvals required in connection with the Project, including without limitation, SEQR approval (to the extent necessary). The County agrees to reasonably cooperate with Lessee's efforts to obtain any required permits and approvals that are within its control. Notwithstanding anything to the contrary set forth in this Agreement, the parties agree that the Town shall be the lead agency for the SEQR review process required under Article 8 of New York State's Environmental Conservation Law and the regulations promulgated in connection with same.

(e) Unless otherwise exempted, Lessee shall provide a minimum of one (1) parking spot for each residential dwelling unit located within the Project, and to the extent same is not in compliance with all Town regulations as they pertain to required parking on the Premises, Lessee shall use commercially reasonable efforts to obtain any variance or other exemption permitting the number of parking spaces contemplated in this Section 12(d).

(f) During the Lease Term, in the event that Lessee fails to perform any required repairs or maintenance to the Premises, and such failure continues for a period of thirty (30) days after notice from the County, or if such maintenance or repairs cannot be completed within said period, Lessee fails to commence such maintenance and repairs within such period and to continue same diligently until completed, or if any repairs, maintenance or installation is required by any governmental directive from a governmental entity other than the County and same is not completed within the time required by such directive, the County may enter the Premises to perform such maintenance or repair. In such event Lessee shall reimburse the County for the costs or expenses thereof, within thirty (30) days after receipt of an invoice therefor.



**SECTION 13. Access to Premises.**

Upon at least forty-eight (48) hours prior written and telephonic notice, and in accordance with the State Social Services Law and applicable regulations issued pursuant thereto, except upon immediate telephonic notice in the event of an emergency, the County shall have the right to enter upon the Premises for purposes of reasonable inspections performed during reasonable business hours in order to assure compliance by Lessee with its obligations under this Agreement.

**SECTION 14. Requirements of Public Authorities.**

During the term of this Agreement Lessee, at its sole cost and expense, shall promptly observe and comply with all present and future laws, ordinances, requirements, orders, directives, rules and regulations affecting Lessee's use and occupation of the Premises or appurtenances thereto or any part thereof issued by any governmental authority having jurisdiction, and Lessee shall pay all costs, expenses, liabilities, losses, damages, fines, penalties, claims and demands that may in any manner arise out of or be imposed because of the failure of the Lessee to comply therewith.

**SECTION 15. Assignment and Subletting.**

Lessee shall have the right to assign, transfer, sublease, or otherwise dispose of its interests, rights or obligations under this Agreement, without the Existing Interest Holders' consent, to any entity of which the Lessee, or the managing member of the Lessee is a member, or any entity in which Lessee has a controlling interest or with which Lessee is affiliated. Lessee shall not sell, convey, assign, transfer, sublease, or otherwise dispose of its interests, rights or obligations under this Agreement to any non-affiliate of Lessee without the prior written consent of the Existing Interest Holders (unless such assignment occurs after the Construction Closing, in which case only the County's consent shall be required). Lessee shall exercise the right of assignment pursuant to this Section 15 by giving written notice thereof to the Existing Interest Holders (or the County only, as applicable) in accordance with Section 22 below. In the event the Lessee exercises its right of assignment pursuant to this Section 15, the assignee shall assume all of Lessee's rights and obligations set forth in this Agreement.

**SECTION 16. Covenant against Liens; Right to Encumber.**

(a) Lessee shall not have any right, authority or power to bind the County, the County's estate or any other interest of the County in the Premises, for any claim for labor or material or for any other charge or expense, lien or security interest incurred in connection with the development, rehabilitation or operation of the Project. Notice is hereby given that the County will not be liable for any labor, services, or materials furnished or to be furnished to the Lessee, or to anyone holding the Project or any part thereof through or under the Lessee, and that no mechanic's or other liens for any such labor, services or materials ("Mechanic's Liens") shall attach to or affect the interests of the County in and to the Premises. Lessee shall, at its sole cost and expense, cause any such Mechanics Liens affecting the interests of the County in and to the Premises to be discharged of

record or bonded within fifteen (15) days after written notice from the County, as applicable, to Lessee of the filing thereof and Lessee shall defend, indemnify and save the County harmless from and against all costs, liabilities, suits, penalties, claims and demands, including reasonable attorneys' fees, resulting therefrom.

(b) Lessee shall have the right during the Lease Term to encumber, through one or more leasehold mortgages, all of Lessee's right, title and interest in the Premises and the Project, subject to the provisions of this Lease; provided, however, that the same shall be in all respects subordinate and inferior to the County's right, title and interest as provided in this Agreement, and that any such leasehold mortgagee shall be subject to all of the rights and obligations of the County herein contained in this Agreement.

(c) During the Lease Term, the County shall give any such leasehold mortgagee of which the County has received written notice from Lessee pursuant to subsection (h) below, as well as Lessee's tax credit investor, a duplicate copy of all notices of default or Event of Default or other notices that the County may give to or serve in writing upon Lessee pursuant to the terms of this Lease. No notice by the County to Lessee under this Agreement shall be effective unless and until a copy of such notice has been provided to each leasehold mortgagee identified to the County pursuant to subsection (h) below as well as Lessee's tax credit investor. The address of the leasehold mortgagee originally designated in the leasehold mortgage, or other documentation related thereto, and/or the address of Lessee's tax credit investor may be changed upon written notice delivered to the County in the manner specified in Section 23 below. Lessee shall be required to provide the County, upon Lessee's receipt, of any notice of default given to Lessee by any leasehold mortgagee or Lessee's tax credit investor.

(d) Any leasehold mortgagee or Lessee's tax credit investor, at its option, at any time within thirty (30) days following expiration of the right of Lessee to cure any default or Event of Default under this Agreement, may pay any amount or do any act or thing required of Lessee by the terms of this Agreement. All payments made and all acts performed by such leasehold mortgagee or tax credit investor within such thirty (30) day period shall be effective to prevent a termination of the rights of Lessee hereunder to the same extent as if they had been performed by Lessee.

(e) Upon foreclosure or assignment or deed in lieu of foreclosure of all or any part of Lessee's leasehold interest in the Premises granted under this Agreement, any leasehold mortgagee (or its designee or nominee) or any purchaser at foreclosure shall have the right to acquire all or any part of the leasehold interest in the Premises granted to Lessee under this Agreement without consent or approval of the County and shall also have the right to further sell, transfer, assign or sublet all or any part of the leasehold interest in the Premises granted to Lessee under this Agreement to a third party without the consent or approval of the County. In the event of any such transfer by foreclosure, or by assignment or deed in lieu of foreclosure, the transferee and its successors and assigns shall have no liability for the payment of any sums or the performance of any obligation required by this Agreement to be paid or performed by the Lessee prior to such transfer. Such transferee and each of its successors and assigns shall become the lessee under this Agreement, as applicable, shall be the owner of all or any part of the leasehold interest so transferred for all purposes under this Agreement, shall be responsible for the payment of all sums and the performance of all obligations as lessee hereunder, as applicable, which thereafter become

due or arise under this Agreement, and shall be entitled to all of the rights, benefits and privileges of Lessee, as applicable, under this Agreement.

(f) The County and Lessee agree that at any time and from time to time upon not less than ten (10) days prior written notice by the other party, or upon request from any leasehold mortgagee or a permitted assignee or other interested person, the County or Lessee will execute, acknowledge and deliver to the other party or to such leasehold mortgagee a statement in writing certifying (i) that this Agreement is unmodified and in full force and effect; (ii) the date through which the Rent has been paid; (iii) that, to the knowledge of the certifier (if such be the case), there is no default, set-off, defense or other claim against the County or Lessee, as applicable, other than those, if any, so specified under the provisions of this Lease; and (iv) as to such other matters as the requesting party may reasonably specify. It is intended that any such statement may be relied upon by any persons proposing to acquire the interest of the County, the Lessee or any leasehold mortgagee, as the case may be, in this Agreement or by any prospective leasehold mortgagee or assignee of any leasehold mortgage, or by the Lessee's tax credit investor or any assignee of such tax credit investor.

(g) The County agrees not to encumber or convey any of its interest in the Premises with any deed to secure debt, mortgage, deed of trust or other instrument in the nature thereof as security for any debt which is not expressly subordinate to Lessee's interest under this Agreement and to any leasehold mortgage, without the prior written consent of Lessee, which consent shall not be unreasonably withheld. If required by Lessee or any of Lessee's leasehold mortgagees, it shall be a condition precedent to any such encumbrance of the County's interest in the Premises that the County provide Lessee and such leasehold mortgagees with a subordination, non-disturbance and attornment agreement, in form and substance reasonably acceptable to Lessee and such leasehold mortgagees.

(h) Lessee shall provide written notice to the County of the name and address of each leasehold mortgagee under this Agreement as well as the name and address of Lessee's tax credit investor. In addition, Lessee shall provide the County, upon its request, with full and complete copies of all mortgage and related documents in connection with any leasehold mortgage entered into by Lessee, as well all material documentation in connection with the equity investment by Lessee's tax credit investor.

## **SECTION 17. Indemnity.**

(a) Lessee shall indemnify and save the Existing Interest Holders harmless from and against any and all liability, damages, penalties or judgments arising from death or injury to person or property sustained by anyone in or about the Premises resulting from the gross negligence or willful misconduct of the Lessee, its agents, servants, employees or contractors, except to the extent that same is due to the gross negligence or willful misconduct of the Existing Interest Holders, or their agents, servants, employees or contractors. Lessee shall at its own cost and expense, defend any and all suits or actions which may be brought against the Existing Interest Holders or in which the Existing Interest Holders may be impleaded with others upon any of the above-mentioned matters or claims.

(b) The Existing Interest Holders shall each, as to themselves only, indemnify and save Lessee harmless from and against any and all liability, damages, penalties or judgments arising from death or injury to person or property sustained by anyone in or about the Premises resulting from the gross negligence or willful misconduct of the County and/or the Town, as applicable, and their agents, servants, employees or contractors, except to the extent same is due to the gross negligence or willful misconduct of Lessee, or its agents, servants, employees or contractors. The Existing Interest Holders shall each, as to themselves only, and at their own cost and expense defend any and all suits or actions which may be brought against Lessee or in which Lessee may be impleaded with others upon any such above mentioned matter or claim due to the gross negligence or willful act of the Existing Interest Holders.

#### **SECTION 18. Insurance.**

Lessee shall provide or cause to be provided, and keep in force or cause to be kept in force during the term of this Agreement, commercial general liability insurance of \$1,000,000 per occurrence and \$2,000,000 aggregate; and excess umbrella liability in the amount of \$3,000,000, or such greater amounts as may be required by Lessee's tax credit investor and/or any leasehold mortgagee, naming the County as additional insureds. During the Lease Term, Lessee shall keep all buildings and improvements on the Premises insured for the benefit of Lessee and the County as their interests may appear, against loss or damage by fire and customary extended coverage in a minimum amount equal to the full replacement value thereof. To the extent available, all policies of insurance required hereunder shall contain an endorsement that same may not be cancelled without thirty (30) days prior written notice to the County.

#### **SECTION 19. Default.**

(a) Events of Default. Each of the following shall be an "Event of Default" by Lessee hereunder, unless cured to the reasonable satisfaction of the County by Lessee, the leasehold mortgagee(s) or the tax credit investor:

(i) failure by Lessee to pay any Consideration when due or to pay or cause to be paid any other liquidated sums of money herein stipulated to be paid by Lessee, if such failure shall continue for a period of thirty (30) days after written notice thereof has been given by either of the Existing Interest Holders to Lessee;

(ii) failure by Lessee to perform or observe any of the provisions of this Agreement (other than the provisions requiring the payment of Consideration or other liquidated sums of money) stipulated in this Agreement to be observed and performed by Lessee which in the County's reasonable judgment has a material adverse impact on the Premises, Project, County or Lessee, if such failure shall continue for a period of forty-five (45) days after notice thereof has been given by the County to Lessee; provided, however, that if any such failure cannot reasonably be cured within such forty-five (45) day period, then the County shall not have the right to terminate this Agreement or Lessee's right to possession hereunder so long as Lessee promptly commences the curing of any such failure and thereafter proceeds in good faith and with due diligence to remedy and correct such failure within a reasonable period of time;

(iii) the subjection of any right or interest of Lessee in this Agreement to attachment, execution or other levy, or to seizure under legal process, if not released within one hundred twenty (120) days; provided that the foreclosure of any leasehold mortgage shall not be construed as an Event of Default within the meaning of this Subsection 19(a)(iii);

(iv) the appointment of a receiver to take possession of Lessee's interest in the Premises or of Lessee's operations on the Premises for any reason, if such receivership is not terminated, stayed, dismissed or vacated within ninety (90) days after the appointment of the receiver;

(v) Lessee shall file a petition for voluntary bankruptcy under the Bankruptcy Code of the United States or any similar law, state or federal, now or hereafter in effect, provided, however, in such event Lessee's tax credit investor shall have the right to cure such default for a period of ninety (90) days after such filing;

(vi) within ninety (90) days after the filing against Lessee of any involuntary proceedings under such Bankruptcy Code or similar law, such proceedings shall not have been vacated or stayed or dismissed; or

(viii) a trustee or receiver shall be appointed for Lessee or for all or the major part of Lessee's property or the Premises, in any involuntary proceeding, or any court shall have taken jurisdiction of all or the major part of Lessee's property or the Premises in any involuntary proceeding for the reorganization, dissolution, liquidation or winding up of Lessee, and such trustee or receiver shall not be discharged or such jurisdiction relinquished or vacated or stayed on appeal or otherwise stayed within ninety (90) days; or

(ix) the failure by Lessee or an affiliate of Lessee to develop the Project.

(b) At any time after the occurrence of an Event of Default by Lessee hereunder, the Existing Interest Holders (if such Event of Default occurs prior to the Construction Closing), or the County (if such Event of Default occurs after the Construction Closing), as applicable, and subject in all respects to the provisions of this Agreement with respect to the Existing Interest Holders' rights to cure defaults by Lessee and with respect to the rights of any leasehold mortgagee or Lessee's tax credit investor, and subject further to the provisions of Sections 19(d)-(g) of this Agreement, may terminate this Agreement by giving Lessee written notice thereof (with a copy of such notice to each leasehold mortgagee and Lessee's tax credit investor), setting forth in such notice an effective date for termination which is not less than thirty (30) days after the date of such notice, in which event this Agreement and Lessee's interest in the Premises created hereby and all interest of Lessee and all parties claiming by, through or under Lessee shall automatically terminate upon the effective date for termination as set forth in such notice. In such event, the Existing Interest Holders (if such Event of Default occurs prior to the Construction Closing), or the County (if such Event of Default occurs after the Construction Closing), as applicable, or their agents or representatives, shall have the right, without further demand or notice, to re-enter and take possession of the Premises (including all buildings and other improvements comprising any part thereof) at any time from and after the effective termination date without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or existing breaches of covenants; provided that the Existing Interest Holders (if such Event of Default occurs

prior to the Construction Closing), or the County (if such Event of Default occurs after the Construction Closing), as applicable shall not be entitled to disturb possession of any tenants or others in possession pursuant to residential subleases so long as such tenants or others are not in default thereunder and attorn to the Existing Interest Holders (if such Event of Default occurs prior to the Construction Closing), or the County (if such Event of Default occurs after the Construction Closing), as applicable, as their lessor.

(c) Upon the exercise by the Existing Interest Holders, or the County, as applicable, of the right to terminate this Agreement pursuant to Section 19(b) above, Lessee shall execute such releases, deeds and other instruments in recordable form as the Existing Interest Holders, or the County, as applicable, shall reasonably request in order to accurately set forth of record the then current status of the Lessee's interest in the Premises and Lessee's rights hereunder.

(d) So long as Lessee's tax credit investor, or an affiliate of such tax credit investor, is a member of the Lessee, the Existing Interest Holders agree, simultaneously with the giving of each notice hereunder, to give a duplicate copy thereof to the Lessee's tax credit investor. Lessee's tax credit investor shall have the same cure period after the giving of a notice as provided to Lessee plus an additional thirty (30) days to cure any default under this Agreement. The Existing Interest Holders agree to accept such performance on the part of Lessee's tax credit investor as though the same had been done or performed by Lessee.

(e) Lessee's rights hereunder shall not be terminated and Lessee shall not be in default under this Agreement if a delay in Lessee's performance of its obligations hereunder arises from unforeseeable causes beyond the reasonable control or without the fault or negligence of Lessee. Examples of such causes include (i) acts of God, public enemy or terroristic acts, (ii) acts or failure to act of the Existing Interest Holders or other governmental entity in either its sovereign or contractual capacity, (iii) fires, (iv) floods, (v) epidemics, (vi) quarantine restrictions, (vii) freight embargoes, (viii) unusually severe weather, and (ix) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of Lessee or the subcontractors or suppliers.

(f) Default by Existing Interest Holders.

(i) The Town shall be in default of this Agreement if it: (A) fails to perform any provision of this Agreement that it is obligated to perform, or (B) if any of the Town's representations or warranties under this Agreement is untrue or becomes untrue in any material respect, or (C) upon the occurrence of a default by the Town under the Town Ground Lease (each of items (A) – (C) being a "Town Default") and if the Town Default is not cured within the earlier of: (x) thirty (30) days after written notice of the Town Default has been given to the Town by Lessee and/or the County, as applicable, or (y) the cure period provided for such default under the Town Ground Lease, with respect to a default emanating thereunder. If the default cannot reasonably be cured within thirty (30) days, and subject to the terms of the Town Ground Lease for defaults emanating thereunder, the Town shall not be in default of this Agreement if the Town commences to cure the default within such thirty-day period and diligently and in good faith continues to cure the default until completion, provided the same is capable of being cured by the Town.

(ii) The County shall be in default of this Agreement if it: (A) fails to perform any provision of this Agreement that it is obligated to perform, or (B) if any of the County's representations or warranties under this Agreement is untrue or becomes untrue in any material respect, or (C) upon the occurrence of a default by the County under the Town Ground Lease (each of items (A) – (C) being a "County Default") and if the County Default is not cured within the earlier of: (x) thirty (30) days after written notice of the County Default has been given to the County by Lessee and/or the Town, as applicable, or (y) the cure period provided for such default under the Town Ground Lease, with respect to a default emanating thereunder. If the default cannot reasonably be cured within thirty (30) days, and subject to the terms of the Town Ground Lease for defaults emanating thereunder, the County shall not be in default of this Agreement if the County commences to cure the default within such thirty-day period and diligently and in good faith continues to cure the default until completion, provided the same is capable of being cured by the County.

(iii) If the Town and/or the County shall have failed to cure a Town Default, or a County Default, as applicable, under this Section 19(f) after expiration of the applicable time for cure of a particular default, Lessee, at its election, but without obligation therefor (A) may seek specific performance of any obligation of the Town and/or the County, as applicable, after which Lessee shall retain, and may exercise and enforce, any and all rights that Lessee may have against the Town and/or the County as a result of such default, (B) from time to time without releasing the Town and/or the County in whole or in part from the obligations to be performed by them hereunder, may cure the subject Town Default, or County Default, as applicable, including any such Town Default or County Default arising under the Town Ground Lease, at the Town and/or County's cost, as applicable (and may offset any costs so incurred against any indebtedness owed by Lessee to the Town, with respect to costs incurred remedying a Town Default, or to the County, with respect to costs incurred remedying a County Default), (C) may terminate this Agreement, and/or (D) may exercise any other remedy given hereunder or now or hereafter existing at law or in equity. Any reasonable costs incurred by Lessee in order to cure such a default by the Existing Interest Holders shall be due immediately from the Town and/or the County, as applicable.

(iv) In order to allow the Lessee to exercise its rights to cure a Town Default and/or County Default arising under the Town Ground Lease provided in Section 19(f)(iii)(B) above, the Existing Interest Holders agree that commencing upon the execution of this Agreement and continuing until the Construction Closing, they will copy the Lessee on any notices of default sent under the Town Ground Lease.

(g) Notices of default given by either or both of the Existing Interest Holders or by Lessee hereunder shall specify the alleged default and the applicable Agreement provisions, and shall demand that Lessee, Town and/or County, as applicable, perform the appropriate provisions of this Agreement within the applicable period of time for cure. No such notice shall be deemed a forfeiture or termination of this Agreement unless expressly set forth in such notice. No notice of default by either or both of the Existing Interest Holders to Lessee under this Lease shall be effective unless or until a copy of such notice has been provided to Lessee's tax credit investor.

## **SECTION 20. Restrictions on Disposition.**

(a) Except as otherwise expressly provided in this Agreement (including, without limitation, the provisions of Sections 15 and 20(b) hereof), Lessee shall have no right to transfer any legal or beneficial interest in the Premises or the Project without both Existing Interest Holders' prior written consent, if such transfer occurs prior to the Construction Closing, or the County's prior written consent, if such transfer occurs after the Construction Closing. Any attempted transfer without the consent(s) required under this Section 20(a) shall be null and void.

(b) Notwithstanding the provisions of Section 20(a) above, by its execution of this Agreement, the Existing Interest Holders are deemed to have consented to (i) a transfer by Lessee to any leasehold mortgagee in compliance with Section 15 hereof, and to an assignment or other transfer by any leasehold mortgagee to a third party purchaser following a foreclosure sale or acceptance by the leasehold mortgagee of a deed-in-lieu of foreclosure provided, however, such third party purchaser shall be subject to the County's approval which approval shall not be unreasonably withheld; (ii) any residential lease entered into by Lessee and residents of the Project in the ordinary course of Lessee's business; (iii) any transfer of a non-managing member interest in Lessee, or an interest in any non-managing member of Lessee; and (iv) the withdrawal, removal and/or replacement of Lessee's managing member for cause in accordance with the operating agreement of Lessee (as amended, restated, modified and supplemented from time to time).

(c) During the Lease Term, the County shall not transfer all or any portion of its interest in the Premises and/or the Project without the prior written consent of any leasehold mortgagee then in existence and, in any event, the County shall not transfer all or any portion of its interest in the Premises and/or the Project if the same would cause a violation or breach of (i) any legal requirement, (ii) the provisions of Section 20(d) below, or (iii) any agreement or contract to which the Lessee and/or the County is a party or by which Lessee and/or the County is bound.

(d) At any time after the tax credit compliance period set forth in Section 42 of the United States Internal Revenue Code of 1986, as same may subsequently be amended, Lessee shall have the option to acquire the County's interest in the Premises from the County for the then fair market value of the Premises (the "Option Price"), which shall be established by an Appraiser selected by the Lessee and reasonably acceptable to the County. In the event Lessee wishes to exercise its option to acquire the County's interest in the Premises it shall provide written notice to that effect to the County. Lessee shall acquire the County's interest in the Premises within one hundred-twenty (120) days after receipt by the County of the Lessee's written notice of intent to exercise the option granted herein, and at the closing with respect to such purchase Lessee shall pay the Option Price in cash or other currently available funds and at the same time Lessee and the County shall enter into an amendment to this Agreement terminating this Agreement effective upon the receipt of payment by the County. To the extent that the County transfers its interest in the Premises to another party pursuant to the terms of this Agreement, such party or parties shall succeed to the interests of the County subject to the purchase option described in this Section 20(d).

## **SECTION 21. No Waiver of Rights.**

No waiver of any condition or agreement in this Agreement by any of the parties will imply or constitute a further waiver by such party of the same or any other condition or agreement.



**SECTION 22. Choice of Law.**

This Agreement shall be deemed to be executed in the County of Westchester and shall be governed by and construed in accordance with the laws of the State of New York. The parties agree that the forum for any action under this Agreement shall be in any court with jurisdiction that is located in the County of Westchester, State of New York.

**SECTION 23. Notices.**

All notices given pursuant to this Agreement shall be in writing. The Parties hereby designate the business addresses hereinabove specified as the places where all notices, directions or communications from one such party to the other shall be delivered, or to which they shall be mailed. All notices to the County shall be mailed or delivered to the address of the County with a copy to the address of its Department of Social Services (i.e. 112 East Post Road, 5<sup>th</sup> Floor, White Plains, New York 10601). Actual delivery of any such written notice, direction or communication to a party to the aforesaid place, or delivery by certified mail shall be conclusive and deemed to be sufficient service thereof upon such party as of the date such notice, direction or communication is received by the party. Such address may be changed at any time by an instrument in writing executed and acknowledged by the party making such change and delivered to the other parties in the manner specified above. Nothing in this Section shall be deemed to serve as a waiver of any requirements for the service of notice or process in the institution of an action or proceeding as provided by law.

**SECTION 24. Severability.**

If any term, covenant, condition or provision of the Agreement shall at any time or to any extent be invalid or unenforceable, the remainder of the Agreement shall not be affected thereby and each term, covenant, condition and provision of the Agreement shall be valid and be enforceable to the fullest extent permitted by law.

**SECTION 25. Entire Agreement; Modifications.**

This Agreement supersedes all prior discussions and agreements between the parties with respect to the leasing of the Premises. This Agreement contains the sole and entire understanding between the parties with respect to the transactions contemplated by this Lease, and all promises, inducements, offers, solicitations, agreements, representations and warranties heretofore made between the parties, if any, are merged into this Agreement. Any modification to this Agreement prior to the Construction Closing must be in writing and signed by the Existing Interest Holders and the Lessee, and be approved by the Town Board of the Town of Greenburgh and the Westchester County Board of Legislators. Any modification to this Agreement after the Construction Closing must be in writing and signed by the County and the Lessee, and be approved by the Westchester County Board of Legislators.

**SECTION 26. Successors and Assigns.**

All of the terms, covenants, warranties and conditions contained herein shall be for and shall inure to the benefit of and shall bind the Parties and their respective successors and assigns, to the extent such successors and assigns are permitted.

**SECTION 27. Counterparts.**

This Agreement may be simultaneously executed in several counterparts, each of which shall be an original, and all of which shall constitute but one and the same instrument.

**SECTION 28. Section Headings.**

Section headings are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Agreement and in no way affect this Agreement.

**SECTION 29. Memorandum of Lease.**

At or promptly after the Construction Closing, the County and Lessee shall execute and record (at Lessee's expense) a Memorandum of Lease against the Premises evidencing the terms of this Agreement. Upon expiration or earlier termination of this Agreement, Lessee shall execute a Termination of Memorandum of Lease in the form prepared by the County.

**SECTION 30. Limitation of Liability.**

Notwithstanding any provision hereof to the contrary, or any other express or implied agreement between the parties, or any act or course of conduct hereunder, the obligations and indemnifications of the Lessee set forth herein shall solely be those of the Lessee entity named in the first paragraph of this Agreement, and no officer, director, shareholder, partner, member, employee or agent of the Lessee shall have any personal liability whatsoever under this Agreement, it being understood and agreed that the Existing Interest Holders shall look solely to the interest of Lessee in the Premises and the Project for recourse hereunder. No member, official, employee, agent, or consultant of either of the Existing Interest Holders or any affiliate thereof shall be personally liable to the Lessee, or any successor in interest or person claiming by, through or under the Lessee, in the event of any default or breach, or for or on account of any amount which may be or become due, or in any claim, cause or obligation whatsoever under the terms of this Agreement.

**SECTION 31. Title to Project.**

(a) NOTWITHSTANDING ANY PROVISION IN THIS AGREEMENT TO THE CONTRARY, THE PROJECT AND ALL ALTERATIONS, ADDITIONS, EQUIPMENT AND FIXTURES BUILT, MADE OR INSTALLED BY THE LESSEE IN, ON, UNDER OR TO THE PREMISES AND TO THE PROJECT SHALL BE THE SOLE PROPERTY OF THE LESSEE AND THE LESSEE SHALL HOLD TITLE TO THE PROJECT AND ALL SUCH IMPROVEMENTS UNTIL THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT.

(b) The County agrees that Lessee, at any time prior to the forty- fifth (45th) day after the expiration or other termination of this Agreement, may remove from the Premises any and all office, maintenance, construction or similar equipment (but not appliances and fixtures installed in the respective residential units) which Lessee has furnished or installed together with all personal and other property in which the Lessee has an interest, provided that Lessee shall repair any physical damage to the Premises caused by the removal of such equipment and property. Thereafter, and provided the Lessee has not exercised its option to purchase the County's interest in the Project set forth in Section 20(d) above, the Project and all alterations, additions, equipment and fixtures thereto shall be deemed to be and shall automatically become the property of the County, without cost or charge to the County.

(c) The County expressly acknowledges and agrees that any and all depreciation, amortization, profits, losses, income, and tax credits for Federal or state tax purposes relating to the Project located on the Premises and any and all additions thereto, substitutions therefor, fixtures therein and other property relating thereto shall be deducted by or credited exclusively to Lessee during the Lease Term.

**SECTION 32. Interpretation of Rights and Obligations of the Existing Interest Holders.**

Except as otherwise expressly provided herein, after the Construction Closing, or the earlier termination of the Town Ground Lease, any and all rights and obligations of the Existing Interest Holders hereunder shall be deemed to be rights and obligations of the County only for the remainder of the term of this Agreement.

This Lease supersedes all prior discussions and agreements between the Parties with respect to the leasing of the Leased Premises. This Lease contains the sole and entire understanding between the Parties with respect to the transactions contemplated by this Lease, and all promises, inducements, offers, solicitations, agreements, representations and warranties heretofore made between the Parties, if any, are merged into this Lease.

**IN WITNESS WHEREOF**, the parties have duly executed this Agreement as of the date first above written.

[SEAL]

COUNTY OF WESTCHESTER

Attest:

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

[SEAL]

TOWN OF GREENBURGH

\_\_\_\_\_

Attest:

By:

[SEAL]

MARATHON DEVELOPMENT GROUP, LTD.

Attest:

By: Mark Soja, Sole Director and Shareholder

Approved as to form and  
manner of execution

COUNTY ATTORNEY

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

TOWN ATTORNEY

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