

RESOLUTION NO. 2013-055

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROHNERT PARK AUTHORIZING AND APPROVING EXECUTION OF AN ASSIGNMENT AND ASSUMPTION AND SECOND LOAN MODIFICATION AGREEMENT AND CERTIFICATION BETWEEN THE CITY, EAST COTATI AVENUE PARTNERS AND TOWER 2 APARTMENTS L.P., TO EFFECTUATE THE TRANSFER AND REHABILITATION OF TOWER APARTMENTS

WHEREAS, on January 10, 2012, the City of Rohnert Park ("City") elected to retain the housing assets and functions previously held and performed by the Community Development Commission of the City of Rohnert Park (formerly known as the "Community Development Agency of the City of Rohnert Park"); and

WHEREAS, pursuant to Resolution 1991-06 adopted on February 26, 1991, the Community Development Agency of the City of Rohnert Park ("CDA") made a loan to Burbank Housing Development Corporation ("BHDC") in the amount of three hundred, ninety thousand dollars (\$390,000), which was assigned to East Cotati Avenue Partners, a California limited partnership ("East Cotati") and was documented in a Deed of Trust and Promissory Note ("Loan Documents"); and

WHEREAS, the loan proceeds were used to purchase the land on which the Tower Apartments low income housing project was constructed; and

WHEREAS, the Tower Apartments were built by Burbank Housing in 1992 using CDA low and moderate housing funds, Sonoma County funds, Low Income Housing Tax Credits ("LIHTC"), and State funds; and

WHEREAS, the project, which has successfully provided 50 units of quality affordable housing since 1992, is now in need of rehabilitation; and

WHEREAS, in July 2012, Burbank Housing successfully applied for and will receive a second allocation of LIHTC of approximately four million, five hundred thousand dollars (\$4,500,000) to fund the rehabilitation; and

WHEREAS, in order to use the tax credits, a new ownership entity (Tower 2 Apartments, L.P.) was formed naming Burbank Housing as general partner and Wells Fargo Bank as limited partner ("Tower 2 Apartments"); and

WHEREAS, Wells Fargo Bank will fund the construction loan and provide equity in exchange for the tax credits; and

WHEREAS, as a result of the change in ownership, the City is requested to consent to the assignment of its loan documents from East Cotati to Tower 2 Apartments; and

WHEREAS, in order to meet California Tax Allocation Credit Committee ("CTCAC") requirements for tax credits, comply with Well Fargo Bank lending requirements, and incorporate the new ownership entity into the existing loan documents, the City is also being requested to modify the Loan Documents, as previously modified in 1993, to, among other things, extend the term from 2012 to 2069; and


WHEREAS, approval of the Assignment and Assumption and Second Loan Modification Agreement and Certification will allow the financing, transfer and rehabilitation of Tower Apartments to move forward.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Rohnert Park that it does hereby approve and authorize the execution of an Assignment and Assumption and Second Loan Modification Agreement and Certification between the City, East Cotati Avenue Partners, a California Limited Partnership and Tower 2 Apartments, L.P., a California Limited Partnership, in the form attached hereto as Exhibit A, with minor modifications that may be approved by the City Manager in consultation with the City Attorney.

BE IT FURTHER RESOLVED that the City Manager is hereby authorized and directed to take all actions to effectuate the transfer from East Cotati to Tower 2 Apartments and the rehabilitation of Tower Apartments by Tower 2 Apartments, including without limitation to execute subordination agreements as required by the senior lenders and any other documents required to close the transaction.

DULY AND REGULARLY ADOPTED this 26th day of March, 2013.

CITY OF ROHNERT PARK


Pam Stafford, Mayor

ATTEST:


JoAnne Buergler, City Clerk

Attachments: Exhibit A Assignment and Assumption and Second Loan Modification Agreement

AHANOTU: AYE BELFORTE: Abstain MACKENZIE: AYE CALLINAN: AYE STAFFORD: AYE
AYES: (4) NOES: (0) ABSENT: (0) ABSTAIN: 10

RECORDING REQUESTED BY:
North American Title Company
Escrow/Order Number 56103-1151986-12

AFTER RECORDING RETURN TO:

Tower 2 Apartments, L.P.,
c/o Burbank Housing Development Corporation
790 Sonoma Avenue
Santa Rosa, CA 95404

SPACE ABOVE RESERVED FOR RECORDER

**ASSIGNMENT AND ASSUMPTION AND
SECOND LOAN MODIFICATION AGREEMENT AND CERTIFICATION
(City of Rohnert Park)
(Tower Apartments)**

**ASSIGNMENT AND ASSUMPTION AND
SECOND LOAN MODIFICATION AGREEMENT AND CERTIFICATION
(City of Rohnert Park)
(Tower Apartments)**

This **ASSIGNMENT AND ASSUMPTION AGREEMENT AND SECOND LOAN MODIFICATION AGREEMENT AND CERTIFICATION** (this "**Agreement**") is entered into as of March 27, 2013, by and among the City of Rohnert Park (the "**City**" or "**Lender**"), a municipal corporation, Tower 2 Apartments, L.P., a California limited partnership (the "**Partnership**") and East Cotati Avenue Partners, a California limited partnership ("**Assignor**").

RECITALS

A. Assignor is the fee owner of the improved real property located at 781 East Cotati Avenue, Rohnert Park, California described on Exhibit A attached hereto (the "**Property**").

B. The Community Development Agency of the City of Rohnert Park ("**Agency**") made a loan to Assignor's predecessor, Burbank Housing Development Corporation ("**BHDC**") in the original principal amount of \$390,000 (the "**Loan**"). The Loan is evidenced by the following documents which, together with all other documents evidencing the Loan, as such documents may subsequently be amended, are referred to collectively as the "**Loan Documents**":

1. A Promissory Note dated August 23, 1991 made by BHDC to the order of Lender ("**Note**");
2. A Deed of Trust dated August 23, 1991, recorded in the Official Records of Sonoma County ("**Official Records**") on September 6, 1991, as Instrument No. 1991-89055;
3. An Assignment Agreement (unrecorded) dated August 25, 1992; and
4. A Modification to Note and Deed of Trust dated December 1, 1993, between Lender and Assignor, recorded in the Official Records on March 16, 1994, as Instrument No. 1994-0035573 ("**1993 Modification Agreement**").

C. In accordance with sections 34171(j) and 34176 of the California Health and Safety Code and City of Rohnert Park Resolution No. 2012-10, the City determined to serve as the Successor Agency to the Agency and elected to retain the housing assets and functions of the Agency. Therefore, the City is the successor-in-interest to the Agency's rights under the Loan.

D. Concurrently herewith, Assignor is selling and transferring the Property to the Partnership. In connection with the sale and transfer of the Property, Assignor desires to assign all of its right, title and interest in and to the Loan Documents to the Partnership, and the Partnership desires to assume all of Assignor's right, title and interest in and to the Loan Documents, subject to Lender's consent below.

E. Tower 2 Apartments LLC ("**General Partner**"), a California limited liability company, as the sole general partner of the Partnership, and Burbank Housing Communities Corporation, a California nonprofit public benefit corporation, as the limited partner ("**BHCC**"), executed that certain Agreement of Limited Partnership of the Partnership, dated as of January 5, 2013. Concurrently herewith, BHCC will withdraw from the Partnership and Wells Fargo Affordable Housing Community Development Corporation (the "**Limited Partner**", and together with the General Partner, the "**Partners**") is being admitted to the Partnership as the limited partner pursuant to the Partnership's First Amended and Restated Agreement of Limited Partnership (the "**Partnership Agreement**").

F. The Partnership and the Partners have requested that the Lender execute and deliver this Agreement. The Lender understands and by entering this Agreement acknowledges that the Partnership and the Partners will be relying upon the information and agreements contained in this Agreement.

NOW THEREFORE, in consideration of the foregoing, of the mutual promises of the parties hereto and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Lender, Assignor, and the Partnership mutually agree as follows:

1. Assignment by Assignor. Assignor hereby assigns to the Partnership all of Assignor's right, title, and interest in and obligations under the Loan and the Loan Documents.

2. Acceptance of Assignment and Assumption by Partnership. The Partnership accepts the above assignment of Assignor's right, title and interest in, and assumes all obligations under, the Loan and the Loan Documents, and agrees to perform all of Assignor's obligations and covenants under the Loan and the Loan Documents as if the Partnership were the original signatory thereto.

3. Representations.

- a. Assignor and the Partnership each represents and warrants that it is a duly formed, validly existing limited partnership in good standing under the laws of the State of California, and has the power and authority to execute this Agreement and perform its respective obligations hereunder.
- b. Assignor represents and warrants that it has not previously assigned, pledged, hypothecated or otherwise transferred any of its rights or obligations under the Loan Documents.

4. Lender Consent. The Lender hereby consents to the assignment to and assumption of Assignor's rights and obligations under the Loan and the Loan Documents by the Partnership. From and after the Effective Date, the Lender releases Assignor from its obligations under the Loan Documents and agrees to look solely to the Partnership for the performance of Assignor's obligations under the Loan Documents.

5. Certifications. The Lender and the Partnership agree and certify that the Loan Documents are in full force and effect and, except to the extent amended or modified by this Agreement, have not been amended or modified. As of June 30, 2012, the outstanding balance of the Loan is \$1,040,000.00, and any amounts currently due and payable to the Lender under the Loan Documents have been paid, and the parties are not aware of any uncured default under the Loan Documents. The Lender represents that the Loan was not funded with the proceeds of any tax exempt bonds.

6. Modifications to Loan. In connection with the sale of the Property to the Partnership, the terms of the Loan are being modified as set forth below, which modification for federal income tax purposes shall be treated as a separate transaction taking place immediately prior to the sale of the Property to the Partnership:

- a. The maturity date of the Loan is extended until July 16, 2069.
- b. The first sentence of Section 7 of the Note is deleted and shall be replaced with the following:

“Notwithstanding anything to the contrary in the Loan Documents, prior to the maturity date of the Loan, the Partnership shall only be required to make payments on the Loan in accordance with the procedures set forth below, unless such repayment requirements are waived by the Lender in its sole and absolute discretion. Consistent herewith, the clause in the introductory paragraph of the Note that reads “... said interest payable concurrently with above principal payment, on or before August 23, 2012” is hereby deleted.

“Surplus Cash” Payments. If there is “Surplus Cash” from the Property as defined below, the Partnership shall be entitled to retain fifty percent (50%) of such Surplus Cash. The remaining fifty percent (50%) of the Surplus Cash shall be used to repay the Loan in accordance with the following paragraphs.

“Surplus Cash” means the excess of the annual operating income of the Property owned and operated by the Partnership on the Property (but not including interest income earned on tenant security deposits and reserve accounts) over the “Annual Expenses” of the Property, all as determined by the annual audit and furnished by a qualified accountant.

“Annual Expenses” shall mean the actual, reasonable and customary costs, fees and expenses directly attributable to the operation, maintenance, and management of the Property, deposits to reserves, deferred developer fee payments, payments of asset management or partnership management fees to the Partners of the Partnership (or the Partnership itself in the absence of a partnership) in the maximum aggregate annual cumulative amount of \$30,000, increasing by 3% each year, repayment of loans made by the Partners of the Partnership, and payments to the Limited Partner of the Partnership required as a result of shortfall in the tax credits, all as determined in accordance with generally accepted accounting principles.

Any allowable Annual Expenses incurred which could not be included due to insufficient annual operating income during a given fiscal year (or calendar year if applicable), shall be accrued, carried over and allowed as deductions in the Surplus Cash calculation for later fiscal years (or calendar year if applicable) in which there is sufficient operating income.

Surplus Cash payments shall be paid once a year one hundred twenty (120) days after the end of the fiscal year (or calendar year if applicable) for the prior fiscal year (or calendar year if applicable). If there are any later revisions or adjustments which increase the amount due hereunder, payments for same shall be due and payable within ten (10) days after the Partnership is notified of the adjustments.

If any other lender requires payment of a portion of “residual receipts” or out of “surplus cash” (hereinafter a “**Surplus Cash Lender**”), the amount payable to the Lender will equal a prorated share of the available 50% portion of the “Surplus Cash” between itself and the other Surplus Cash Lenders. The Lender’s share shall be that amount which is derived by multiplying the available Surplus Cash as defined above, by that amount which is derived by multiplying the available Surplus Cash times a fraction, the denominator of which is the sum of all the original principal amounts of the loans of the Surplus Cash Lenders and the Loan, and the numerator of which is the original principal amount of the Loan.

Notwithstanding anything in the Loan Documents to the contrary, the City agrees that any Surplus Cash generated prior to the repayment of the Wells Fargo Bank construction loan may be used to pay development costs or fund reserves related to the Project.”

- c. Section 1.03 of the 1993 Modification Agreement shall be amended and restated in its entirety as follows:

“The Lender shall give Limited Partner a copy of any written notices provided to the Partnership under any of the Loan Documents. Any cure period provided to the Limited Partner in the Loan Documents shall commence on the date a copy of any notice of default is provided to the Limited Partner. All notices required to be given to the Limited Partner under the Loan Documents shall be in writing and sent to the addresses set forth below (or such other address designated in a manner provided herein) and given in the manner provided in the Loan Documents.

Wells Fargo Affordable Housing
Community Development Corporation
MAC D1053-170
301 South College Street, 17th Floor
Charlotte, NC 28202-6000
Attention: Director of Asset Management

with copies to:

Joel Hjelmaas, Counsel
Wells Fargo Bank, N.A.
MAC X2401-06T
1 Home Campus, 6th Floor
Des Moines, IA 50328-0001

and

Craig A. deRidder, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037”

- d. Section 2.04 of the Modification Agreement shall be amended and restated in its entirety as follows:

“Notwithstanding the above provisions, the Lender hereby pre-approves any transfers made pursuant to that certain Right of First Refusal, Purchase Option and Put Right Agreement by and between the Limited Partner and the General Partner dated as of March 1, 2013. Further, the following changes of ownership in the Partnership shall be permitted without the consent of the Lender: (i) the transfer of the partnership interest in the Partnership by the Limited Partner; and (ii) the transfer of any direct or indirect ownership interests in the Limited Partner.”

7. This Agreement is made for the benefit of Partnership and the Partners and any permitted successors and assigns of the Partners under the Partnership Agreement.

8. Except as modified by this Agreement, the Loan Documents shall remain unmodified and in full force and effect.

9. The terms of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

10. If any provision of this Agreement is determined to be unenforceable for any reason, it shall be adjusted rather than voided, to the greatest extent possible, to achieve the intent of the parties. All of the other provisions shall be deemed valid and enforceable to the greatest extent possible.

11. This Agreement may be executed in counterparts, and each shall constitute an original and all taken together shall constitute one Agreement.

WHEREAS, the parties to this Agreement have executed it as of the date set forth above.

CITY: **CITY OF ROHNERT PARK**, a municipal corporation

By: _____
Gabriel A. Gonzalez
City Manager

ATTEST:

JoAnne Buerger, City Clerk

APPROVED AS TO FORM:

City Attorney

PARTNERSHIP: **TOWER 2 APARTMENTS, L.P.**,
a California limited partnership

By: Tower 2 Apartments LLC,
a California limited liability company,
its general partner

By: Burbank Housing Development Corporation,
a California nonprofit public benefit corporation,
its sole member/manager

By: _____
Charles A. Cornell
Executive Director

ASSIGNOR: **EAST COTATI AVENUE PARTNERS.**,
a California limited partnership

By: Burbank Housing Development Corporation, a California
nonprofit public benefit corporation, its General Partner

By: _____
Charles A. Cornell
Executive Director

EXHIBIT A
LEGAL DESCRIPTION

Real property in the City of Rohnert Park, County of Sonoma, State of California, described as follows:

LOTS 10 AND 11 OF RANCHO COTATI SUBDIVISION NO. 11, AS RECORDED IN BOOK 25 OF MAPS AT PAGE 4 OF THE OFFICIAL RECORDS OF SONOMA COUNTY, CALIFORNIA.

EXCEPTING THE FOLLOWING DESCRIBED PORTION OF LOT 11:
BEGINNING AT THE NORTHWESTERLY CORNER OF SAID LOT 11; THENCE NORTH 62° 07' EAST, 100 FEET; THENCE SOUTH 27° 53' EAST, 50 FEET; THENCE SOUTH 62° 07' WEST, 100 FEET THENCE NORTH 27° 53' WEST, 50 FEET TO THE POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM THAT PORTION CONTAINED IN THE DEED FROM BEN ORETSKY AND PAUL V. WRIGHT TO THE COUNTY OF SONOMA, A POLITICAL SUBDIVISION DATED SEPTEMBER 7, 1965 AND RECORDED OCTOBER 11, 1965 IN LIBER 2151 OF OFFICIAL RECORDS, PAGE 770, RECORDER'S SERIAL NO. J-65860, SONOMA COUNTY RECORDS.

ALSO EXCEPTING THEREFROM THAT PORTION CONTAINED IN THE DEED FROM COTATI AVENUE DORMITORIES, INC., A CORPORATION, TO THE CITY OF ROHNERT PARK, A MUNICIPAL CORPORATION, RECORDED JANUARY 20, 1970 IN BOOK 2440 O.R., Page 746 Serial No. L-49458, SONOMA COUNTY RECORDS.

APN: 143-071-046

State of California

County of _____

On _____ before me _____
Date

personally appeared _____

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public

State of California

County of _____

On _____ before me _____
Date

personally appeared _____

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature of Notary Public