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**AGENDA ITEM  
ST. JOHNS COUNTY BOARD OF COUNTY COMMISSIONERS**

*Deadline for Submission - Wednesday 9 a.m. – Thirteen Days Prior to BCC Meeting*

**10/17/2023**

**BCC MEETING DATE**

**TO:** Joy Andrews, Interim County Administrator **DATE:** September 22, 2023

**FROM:** Shawna Novak, Director, Health and Human Services **PHONE:** 904 209-6089

**SUBJECT OR TITLE:** A Resolution extending the Impact Fee Deferral Agreement between the County and Ability VNA, LLC for the New Augustine Affordable Housing Development and approving a subordination agreement.

**AGENDA TYPE:** Consent Agenda, Contract, Resolution

**BACKGROUND INFORMATION:**

Pursuant to section 37.07 C.3.a. of the Land Development Code, deferred impact fees shall be due and payable no later than sixteen (16) years after the execution of the Deferral Agreement with the County, unless otherwise extended by the Board of County Commissioners. Ability VNA, LLC has requested and received a deferral of the impact fees for its New Augustine Affordable Housing Development. However, Ability is requesting the Board extend the Impact Fee Deferral Agreement from 16 years to 18 years. Additionally, the lender for the project has requested the County subordinate its interest in the Impact Fee Deferral Agreement as part of the financing for the project.

1. IS FUNDING REQUIRED?     No     2. IF YES, INDICATE IF BUDGETED.     No      
IF FUNDING IS REQUIRED, MANDATORY OMB REVIEW IS REQUIRED:  
INDICATE FUNDING SOURCE:

**SUGGESTED MOTION/RECOMMENDATION/ACTION:**

Motion to adopt Resolution 2023-\_\_\_\_\_, extending the Impact Fee Deferral Agreement between the County and Ability VNA, LLC from 16 to 18 years and authorizing the County Administrator, or designee, to execute a Subordination Agreement to subordinate the County's' interest in the Impact Fee Deferral Agreement to the senior lender for the project.

**For Administration Use Only:**  
Legal: Kealey West 10/2/2023 OMB: JN 10/4/2023 Admin: Sarah Taylor 10/5/2023

**RESOLUTION NO. 2023-\_\_\_\_**

**A RESOLUTION BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, EXTENDING THE DUE DATE OF THE IMPACT FEE DEFERRAL AGREEMENT BETWEEN THE COUNTY AND ABILITY VNA, LLC RELATED TO THE VILLAGES OF NEW AUGUSTINE AFFORDABLE HOUSING DEVELOPMENT; APPROVING AND AUTHORIZING THE COUNTY ADMINISTRATOR, OR DESIGNEE, TO EXECUTE A SUBORDINATION AGREEMENT SUBORDINATING THE IMPACT FEE DEFERRAL AGREEMENT TO THE SENIOR MORTGAGE LENDER.**

**RECITALS**

**WHEREAS**, Ability VNA, LLC, (“Ability”) is developing a 92-unit new construction affordable housing development known as Villages of New Augustine located on three separate parcels consisting of 6.41 acres in West Augustine to provide affordable housing for low- and moderate-income person and families in St. Johns County; and

**WHEREAS**, Ability requested and received a deferral of the impact fees for its affordable housing development; and

**WHEREAS**, pursuant to the Land Development Code, deferred impact fees shall be due and payable no later than sixteen (16) years after the execution of the Deferral Agreement with the County, unless otherwise extended by the Board of County Commissioners; and

**WHEREAS**, Ability is requesting the Board extend the Impact Fee Deferral Agreement from 16 years to 18 years to coincide with its private lender financing for the project; and

**WHEREAS**, the senior lender for the project has requested the County subordinate its interest in the Impact Fee Deferral Agreement as part of the financing for the project; and

**NOW THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of St. Johns County, Florida, as follows:

**Section 1.** The above Recitals are incorporated by reference into the body of this Resolution, and such Recitals are adopted as findings of fact.

**Section 2.** The Board of County Commissioners hereby extends the Impact Fee Deferral Agreement between the County and Ability VNA, LLC from 16 years to 18 years, and authorizes the County Administrator to execute the subordination agreement, in substantially the same form

and format as attached, on behalf of the County.

**Section 3.** To the extent there are typographical or administrative errors or omissions that do not change the tone, tenor, or context of this Resolution, then this Resolution may be revised without subsequent approval by the Board of County Commissioners.

**PASSED AND ADOPTED** by the Board of County Commissioners of St. Johns County, Florida this \_\_\_\_\_ day of October 2023.

**BOARD OF COUNTY COMMISSIONERS  
OF ST. JOHNS COUNTY, FLORIDA**

By: \_\_\_\_\_  
Christian Whitehurst, Chair

ATTEST: Brandon J. Patty,  
Clerk of the Circuit Court and Comptroller

By: \_\_\_\_\_  
Deputy Clerk

**RECORDING REQUESTED BY  
AND WHEN RECORDED RETURN TO:**

Buchalter, A Professional Corporation  
1000 Wilshire Blvd., Suite 1500  
Los Angeles, CA 90017  
Attention: Mercedes O. Martin, Esq.

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(SPACE ABOVE THIS LINE FOR RECORDER'S USE)

**SUBORDINATION AGREEMENT**

This SUBORDINATION AGREEMENT (this “**Agreement**”), dated as of [\_\_\_\_\_] , 2023, is executed by and among (i) BANK OF AMERICA, N.A., a national banking association (together with its successors and assigns, “**Senior Lender**”), (ii) ST. JOHNS COUNTY, FLORIDA, a political subdivision existing under the laws of the State of Florida (“**Subordinate Lender**”), and (iii) ABILITY VNA, LLC, a Florida limited liability company (“**Borrower**”).

**RECITALS:**

A. Senior Lender has determined to make a taxable construction loan to the Borrower in the maximum principal amount of \$[\_\_\_\_\_] (the “**Senior Loan**”) to provide for the financing of a 92-unit multifamily rental housing development project located on scattered sites near the intersection of Chapin Street and North Volusia Street in St. Johns County, Florida commonly known as “Villages of New Augustine” (the “**Project**”). The Senior Loan will be made pursuant to that certain Construction Loan Agreement, dated as of [\_\_\_\_\_] , 2023 (as amended from time to time, the “**Senior Loan Agreement**”), among Senior Lender, as lender, and Borrower, as borrower. The Senior Loan will be evidenced by, among other things, that certain Promissory Note dated as of [\_\_\_\_\_] , 2023, in the maximum principal amount of \$[\_\_\_\_\_] , made by Borrower to the order of Senior Lender (as amended from time to time, the “**Senior Note**”). To secure, among other obligations, Borrower’s obligations under the Senior Loan Agreement and the Senior Note, the Borrower is executing and delivering that certain Mortgage, Assignment of Rents, Security Agreement and Fixture Filing for the benefit of Senior Lender dated as of [\_\_\_\_\_] , 2023 (as amended from time to time, the “**Senior Mortgage**”), encumbering the property described on Exhibit A attached hereto and described in the Senior Mortgage as the “**Mortgaged Property**”. The Senior Mortgage shall be recorded substantially concurrently herewith in the Official Records of St. Johns County, Florida (“**Official Records**”). The Senior Loan Agreement, the Senior Note, the Senior Mortgage and all of the other documents evidencing the Senior Loan are referred to herein collectively as the “**Senior Loan Documents**”.

C. The Borrower requested and the Subordinate Lender made separate subordinate loans to Borrower in the aggregate original principal amount of \$954,180 (individually and

collectively, the “**Subordinate Loan**”), related to the deferral in impact fees for the Project and evidenced by (i) that certain Agreement For Deferral of Impact Fees dated February 2, 2023 between Ability Housing, Inc. and Subordinate Lender, as amended by that certain [\_\_\_\_\_] dated [\_\_\_\_\_] , 2023 (the “**Impact Fee Deferral Agreement**”), and (ii) that certain Mortgage Note, in connection with a deferral of impact fees for the Project dated [\_\_\_\_\_] , 2023 in the amount of \$954,180, and secured by, among other things, that certain Impact Fee Deferred Payment Mortgage, dated as of [\_\_\_\_\_] , 2023, placing a mortgage lien against the Mortgaged Property (the “**Subordinate Mortgage**”).

D. The Senior Lender and the Subordinate Lender have agreed that the Subordinate Mortgage placed against the Mortgaged Property by the Subordinate Lender will be subordinate to that of the Senior Loan and subject to all of the conditions contained in this Agreement.

**AGREEMENTS:**

NOW, THEREFORE, in order to induce Senior Lender to acknowledge and permit the Subordinate Loan to Borrower and to allow a subordinate mortgage lien against the Mortgaged Property, and in consideration thereof, Senior Lender, Subordinate Lender and Borrower agree as follows:

**1. Recitals.**

The recitals set forth above are incorporated herein by reference.

**2. Definitions.**

In addition to the terms defined in the Recitals to this Agreement, for purposes of this Agreement the following terms have the respective meanings set forth below:

“**Affiliate**” means, when used with respect to a Person, any corporation, partnership, joint venture, limited liability company, limited liability partnership, trust or individual Controlled by, under common Control with, or which Controls such Person, and in all cases any other Person that holds fifty percent (50%) or more of the ownership interests in such Person.

“**Borrower**” means the Person named as such in the first paragraph on page 1 of this Agreement, any successor or assign of Borrower, including without limitation, a receiver, trustee or debtor-in-possession and any other Person (other than Senior Lender) who acquires title to the Mortgaged Property after the date of this Agreement.

“**Business Day**” means any day other than (a) a Saturday, (b) a Sunday, (c) a day on which Senior Lender is not open for business, or (d) a day on which the Federal Reserve Bank of New York is not open for business.

“**Condemnation Action**” means any action or proceeding, however characterized or named, relating to any condemnation or other taking, or conveyance in lieu thereof, of all or any part of the Mortgaged Property, whether direct or indirect.

“**Control**” (including with correlative meanings, the terms “Controlling,” “Controlled by” and

“under common Control with”), as applied to any entity, means the possession, directly or indirectly, of the power to direct or cause the direction of the management or operations of such entity, whether through the ownership of voting securities, ownership interests or by contract or otherwise.

“**Default Notice**” means: (a) a copy of any written notice from Senior Lender to Borrower and Subordinate Lender stating that a Senior Loan Default has occurred under the Senior Loan Documents; or (b) a copy of the written notice from Subordinate Lender to Borrower and Senior Lender stating that a Subordinate Loan Default has occurred under the Subordinate Loan Documents. Each Default Notice shall specify the default upon which such Default Notice is based.

“**Person**” means an individual, an estate, a trust, a corporation, a partnership, a limited liability company or any other organization or entity (whether governmental or private).

“**Senior Lender**” means the Person or Persons named as such in the first paragraph on Page 1 of this Agreement, its successors and assigns and any other Person who becomes the legal holder of the Senior Loan after the date of this Agreement.

“**Senior Loan Default**” means the occurrence of an “Event of Default” as that term is defined in the Senior Loan Documents.

“**Senior Loan Documents**” means the Senior Mortgage, the Senior Note, the Senior Loan Agreement, and all other “Loan Documents” as that term is defined in the Senior Loan Agreement.

“**Subordinate Lender**” means the Person or Persons named as such in the first paragraph on page 1 of this Agreement, any successor or assign of Subordinate Lender, including without limitation, a receiver, trustee or debtor-in-possession and any other Person who becomes the legal holder of the Subordinate Note after the date of this Agreement.

“**Subordinate Loan Default**” means a default by Borrower in performing or observing any of the terms, covenants or conditions in the Subordinate Loan Documents to be performed or observed by it, which continues beyond any applicable period provided in the Subordinate Loan Documents for curing the default.

“**Subordinate Loan Documents**” means the Impact Fee Deferral Agreement, Subordinate Note, the Subordinate Mortgage, and all other documents evidencing, securing or otherwise executed and delivered in connection with the Subordinate Loan.

“**Subordinate Mortgage**” means the mortgage, deed of trust or deed to secure debt encumbering the Mortgaged Property as security for the Subordinate Loan, which Subordinate Lender will cause to be recorded among the applicable land records immediately before this Agreement, as further described in the Recitals to this Agreement.

“**Subordinate Note**” means the promissory notes issued by Borrower to Subordinate Lender, or order, to evidence the Subordinate Loan, as further described in this Agreement.

**3. Permission to Place Mortgage Lien Against Mortgaged Property.**

Senior Lender agrees, notwithstanding the prohibition against inferior liens on the Mortgaged Property contained in the Senior Loan Documents and subject to the provisions of this Agreement, to permit Subordinate Lender to record the Subordinate Mortgage and other recordable Subordinate Loan Documents against the Mortgaged Property to secure Borrower's obligation to repay the Subordinate Note and all other obligations, indebtedness and liabilities of Borrower to Subordinate Lender under and in connection with the Subordinate Loan.

**4. Borrower's and Subordinate Lender's Representations and Warranties.**

Borrower and Subordinate Lender each makes the following representations and warranties to Senior Lender:

**(a) Subordinate Loan Documents.**

The Subordinate Loan is evidenced by the Subordinate Note and is secured by the Subordinate Mortgage and the other Subordinate Loan Documents.

**(b) [Reserved].**

**(c) Relationship of Borrower to Subordinate Lender and Senior Lender.**

Subordinate Lender is not an Affiliate of Borrower and is not in possession of any facts which would lead it to believe that Senior Lender is an Affiliate of Borrower.

**(d) Term.**

The term of the Subordinate Note does not end before the stated term of the Senior Note.

**(e) Subordinate Loan Documents.**

The executed Subordinate Loan Documents are substantially in the same forms as those submitted to, and approved by, Senior Lender prior to the date of this Agreement.

**5. Deliveries.**

Subordinate Lender shall submit the following items to Senior Lender the later of (a) ten (10) Business Days after the date on which the proceeds of the Subordinate Loan are disbursed to Borrower, and (b) the effective date of the Senior Loan Documents:

**(1) Title Policy Endorsement.**

An endorsement to the policy of title insurance insuring the lien of the Senior Mortgage which insures that (A) there are no liens or other encumbrances affecting the Mortgaged Property, other than "Permitted Encumbrances" (as defined in the Senior Mortgage), the Subordinate Mortgage, and other Subordinate Loan Documents filed or recorded against the Mortgaged Property, (B) the lien of the Subordinate Mortgage is

subordinate to the lien of the Senior Mortgage, and (C) this Agreement has been recorded among the applicable land records.

**(2) Certification.**

A certification from Borrower and Subordinate Lender to Senior Lender that the Subordinate Loan Documents do not contain any changes from the Subordinate Loan Documents submitted to, and approved by, Senior Lender prior to the date of this Agreement.

**(3) Subordinate Loan Documents.**

A complete set of the fully executed Subordinate Loan Documents, certified by Borrower to be true, correct and complete.

**(4) Senior Loan Documents.**

An executed copy of each of the Senior Loan Documents, certified by Borrower to be true, correct and complete.

**6. Terms of Subordination.**

**(a) Agreement to Subordinate.**

Senior Lender and Subordinate Lender agree that (1) the indebtedness evidenced by the Subordinate Loan Documents is and shall be subordinated in right of payment, to the extent and in the manner provided in this Agreement, to the prior payment in full of the Indebtedness evidenced by the Senior Loan Documents, and (2) the liens, terms, covenants and conditions of the Subordinate Mortgage and the other Subordinate Loan Documents are and shall be subject and subordinate in all respects to the liens, terms, covenants and conditions of the Senior Mortgage and the other Senior Loan Documents and to all advances heretofore made or which may hereafter be made pursuant to the Senior Mortgage and the other Senior Loan Documents (including but not limited to, all sums advanced for the purposes of (A) protecting or further securing the lien of the Senior Mortgage, curing defaults by Borrower under the Senior Loan Documents or for any other purpose expressly permitted by the Senior Loan Documents, or (B) constructing, renovating, repairing, furnishing, fixturing or equipping the Mortgaged Property).

**(b) Subordination of Subrogation Rights.**

Subordinate Lender agrees that if, by reason of its payment of real estate taxes or other monetary obligations of Borrower, or by reason of its exercise of any other right or remedy under the Subordinate Loan Documents, it acquires by right of subrogation or otherwise a lien on the Mortgaged Property which (but for this subsection) would be senior to the lien of the Senior Mortgage, then, in that event, such lien shall be subject and subordinate to the lien of the Senior Mortgage.



**(c) Payments Before Senior Loan Default.**

Until Subordinate Lender receives a Default Notice (or otherwise acquires actual knowledge) of a Senior Loan Default, Subordinate Lender shall be entitled to retain for its own account all payments made under or pursuant to the Subordinate Loan Documents.

**(d) Payments After Senior Loan Default.**

Borrower agrees that, after it receives a Default Notice (or otherwise acquires knowledge) of a Senior Loan Default, it will not make any payments under or pursuant to the Subordinate Loan Documents (including but not limited to principal, interest, additional interest, late payment charges, default interest, attorneys' fees, or any other sums secured by the Subordinate Loan Documents) without Senior Lender's prior written consent. Subordinate Lender agrees that, after it receives a Default Notice from Senior Lender with written instructions directing Subordinate Lender not to accept payments from Borrower on account of the Subordinate Loan, it will not accept any payments under or pursuant to the Subordinate Loan Documents (including but not limited to principal, interest, additional interest, late payment charges, default interest, attorneys' fees, or any other sums secured by the Subordinate Loan Documents) without Senior Lender's prior written consent. If Subordinate Lender receives written notice from Senior Lender that the Senior Loan Default which gave rise to Subordinate Lender's obligation not to accept payments has been cured, waived, or otherwise suspended by Senior Lender, the restrictions on payment to Subordinate Lender in this Section 6 shall terminate, and Senior Lender shall have no right to any subsequent payments made to Subordinate Lender by Borrower prior to Subordinate Lender's receipt of a new Default Notice from Senior Lender in accordance with the provisions of this Section 6(d).

**(e) Remitting Subordinate Loan Payments to Senior Lender.**

If, after Subordinate Lender receives a Default Notice from Senior Lender in accordance with Section 6(d), Subordinate Lender receives any payments under the Subordinate Loan Documents, Subordinate Lender agrees that such payment or other distribution will be received and held in trust for Senior Lender and unless Senior Lender otherwise notifies Subordinate Lender in writing, will be promptly remitted, in kind to Senior Lender, properly endorsed to Senior Lender, to be applied to the principal of, interest on and other amounts due under the Senior Loan Documents in accordance with the provisions of the Senior Loan Documents. By executing this Agreement, Borrower specifically authorizes Subordinate Lender to endorse and remit any such payments to Senior Lender, and specifically waives any and all rights to have such payments returned to Borrower or credited against the Subordinate Loan. Borrower and Senior Lender acknowledge and agree that payments received by Subordinate Lender, and remitted to Senior Lender under this Section 6, shall not be applied or otherwise credited against the Subordinate Loan, nor shall the tender of such payment to Senior Lender waive any Subordinate Loan Default which may arise from the inability of Subordinate Lender to retain such payment or apply such payment to the Subordinate Loan.

**(f) Notice of Payment from Other Persons.**

Subordinate Lender agrees to notify (telephonically or via email, followed by written notice) Senior Lender of Subordinate Lender's receipt from any Person other than Borrower of a payment with respect to Borrower's obligations under the Subordinate Loan Documents, promptly after Subordinate Lender obtains knowledge of such payment.

**(g) Agreement Not to Commence Bankruptcy Proceeding.**

Subordinate Lender agrees that during the term of this Agreement it will not commence, or join with any other creditor in commencing any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings against or with respect to Borrower, without Senior Lender's prior written consent.

**7. Default Under Subordinate Loan Documents.**

**(a) Notice of Subordinate Loan Default and Cure Rights.**

Subordinate Lender shall deliver to Senior Lender a Default Notice within five (5) Business Days in each case where Subordinate Lender has given a Default Notice to Borrower. Failure of Subordinate Lender to send a Default Notice to Senior Lender shall not prevent the exercise of Subordinate Lender's rights and remedies under the Subordinate Loan Documents, subject to the provisions of this Agreement. Senior Lender shall have the right, but not the obligation, to cure any Subordinate Loan Default within ninety (90) days following the date of such notice; provided, however that Subordinate Lender shall be entitled, during such ninety (90) day period, to continue to pursue its rights and remedies under the Subordinate Loan Documents. All amounts paid by Senior Lender in accordance with the Senior Loan Documents to cure a Subordinate Loan Default shall be deemed to have been advanced by Senior Lender pursuant to, and shall be secured by, the Senior Loan Agreement and the Senior Mortgage.

**(b) Subordinate Lender's Exercise of Remedies After Notice to Senior Lender.**

If a Subordinate Loan Default occurs and is continuing, Subordinate Lender agrees that, without Senior Lender's prior written consent, it will not commence foreclosure proceedings with respect to the Mortgaged Property under the Subordinate Loan Documents or exercise any other rights or remedies it may have under the Subordinate Loan Documents, including, but not limited to accelerating the Subordinate Loan (and enforcing any "due on sale" provision included in the Subordinate Loan Documents), collecting rents, appointing (or seeking the appointment of) a receiver or exercising any other rights or remedies thereunder unless and until it has given Senior Lender at least ninety (90) days prior written notice; during such ninety (90) day period, however, Subordinate Lender shall be entitled to exercise and enforce all other rights and remedies available to Subordinate Lender under the Subordinate Loan Documents and/or under applicable laws, including without limitation, rights to enforce covenants and agreements of Borrower relating to income, rent, or affordability restrictions contained in any land use restriction agreement.

**(c) Cross Default.**

Borrower and Subordinate Lender agree that a Subordinate Loan Default shall constitute a Senior Loan Default under the Senior Loan Documents and Senior Lender shall have the right to exercise all rights or remedies under the Senior Loan Documents in the same manner as in the case of any other Senior Loan Default. If Subordinate Lender notifies Senior Lender in writing that any Subordinate Loan Default of which Senior Lender has received a Default Notice has been cured or waived, as determined by Subordinate Lender in its sole discretion, then provided that Senior Lender has not conducted a sale of the Mortgaged Property pursuant to its rights under the Senior Loan Documents, any Senior Loan Default under the Senior Loan Documents arising solely from such Subordinate Loan Default shall be deemed cured, and the Senior Loan shall be reinstated, provided, however, that Senior Lender shall not be required to return or otherwise credit for the benefit of Borrower any default rate interest or other default related charges or payments received by Senior Lender during such Senior Loan Default.

**8. Default Under Senior Loan Documents.**

**(a) Notice of Senior Loan Default and Cure Rights.**

Senior Lender shall deliver to Subordinate Lender a Default Notice within five (5) Business Days in each case where Senior Lender has given a Default Notice to Borrower. Failure of Senior Lender to send a Default Notice to Subordinate Lender shall not prevent the exercise of Senior Lender's rights and remedies under the Senior Loan Documents, subject to the provisions of this Section 8(a), nor shall such failure constitute a default by Senior Lender under this Agreement. Subordinate Lender shall have the right, but not the obligation, to cure any such Senior Loan Default within sixty (60) days following the date of such Default Notice or the date on which Subordinate Lender otherwise acquires actual knowledge of Senior Loan Default; provided, however, that Senior Lender shall be entitled during such sixty (60) day period to continue to pursue its remedies under the Senior Loan Documents. Subordinate Lender may have up to ninety (90) days from the date of the Default Notice to cure a non-monetary default if during such ninety (90) day period Subordinate Lender keeps current all payments required by the Senior Loan Documents. In the event that such a non-monetary default creates an unacceptable level of risk relative to the Mortgaged Property, or Senior Lender's secured position relative to the Mortgaged Property, as determined by Senior Lender in its sole discretion, then Senior Lender may exercise during such ninety (90) day period all available rights and remedies to protect and preserve the Mortgaged Property and the rents, revenues and other proceeds from the Mortgaged Property. All amounts paid by Subordinate Lender to Senior Lender to cure a Senior Loan Default shall be deemed to have been advanced by Subordinate Lender pursuant to, and shall be secured by the Subordinate Mortgage.

**(b) Cross Default.**

Subordinate Lender agrees that, notwithstanding any contrary provision contained in the Subordinate Loan Documents, a Senior Loan Default shall not constitute a default under the Subordinate Loan Documents (if no other default has occurred under the Subordinate Loan Documents) until either (1) Senior Lender has accelerated the maturity of the Senior Loan, or (2) Senior Lender has taken affirmative action to exercise its rights under the Senior Loan

Documents to collect rent, to appoint (or seek the appointment of) a receiver or to foreclose on (or to exercise a power of sale contained in) the Senior Loan Documents. At any time after a Senior Loan Default is determined to constitute a default under the Subordinate Loan Documents, Subordinate Lender shall be permitted to pursue its remedies for default under the Subordinate Loan Documents, subject to the restrictions and limitations of this Agreement. If at any time Borrower cures any Senior Loan Default to the satisfaction of Senior Lender, as evidenced by written notice from Senior Lender to Subordinate Lender, any default under the Subordinate Loan Documents arising from such Senior Loan Default shall be deemed cured and the Subordinate Loan shall be retroactively reinstated as if such Senior Loan Default had never occurred.

## **9. Conflict.**

Borrower, Senior Lender and Subordinate Lender each agrees that, in the event of any conflict or inconsistency between the terms of the Senior Loan Documents, the Subordinate Loan Documents and the terms of this Agreement, the terms of this Agreement shall govern and control solely as to the following: (a) the relative priority of the security interests of Senior Lender and Subordinate Lender in the Mortgaged Property; (b) the timing of the exercise of remedies by Senior Lender and Subordinate Lender under the Senior Loan Documents and the Subordinate Loan Documents, respectively; and (c) solely as between Senior Lender and Subordinate Lender, the notice requirements, cure rights, and the other rights and obligations which Senior Lender and Subordinate Lender have agreed to as expressly provided in this Agreement. Borrower acknowledges that the terms and provisions of this Agreement shall not, and shall not be deemed to: extend Borrower's time to cure any Senior Loan Default or Subordinate Loan Default, as the case may be; give Borrower the right to notice of any Senior Loan Default or Subordinate Loan Default, as the case may be other than that, if any, provided, respectively under the Senior Loan Documents or the Subordinate Loan Documents; or create any other right or benefit for Borrower as against Senior Lender or Subordinate Lender.

## **10. Rights and Obligations of Subordinate Lender Under the Subordinate Loan Documents and of Senior Lender under the Senior Loan Documents.**

Subject to each of the other terms of this Agreement, all of the following provisions shall supersede any provisions of the Subordinate Loan Documents covering the same subject matter:

### **(a) Protection of Security Interest.**

Subordinate Lender shall not, without the prior written consent of Senior Lender in each instance, take any action which has the effect of increasing the indebtedness outstanding under, or secured by, the Subordinate Loan Documents, except that Subordinate Lender shall have the right to advance funds to cure Senior Loan Defaults pursuant to Section 8(a) and advance funds pursuant to the Subordinate Loan Documents for the purpose of paying real estate taxes and insurance premiums, making necessary repairs to the Mortgaged Property and curing other defaults by Borrower under the Subordinate Loan Documents.

**(b) Condemnation or Casualty.**

Following the occurrence of (1) a Condemnation Action, or (2) a fire or other casualty resulting in damage to all or a portion of the Mortgaged Property (collectively, a “**Casualty**”), at any time or times when the Senior Mortgage remains a lien on the Mortgaged Property the following provisions shall apply:

(A) Subordinate Lender hereby agrees that its rights (under the Subordinate Loan Documents or otherwise) to participate in any proceeding or action relating to a Condemnation Action or a Casualty, or to participate or join in any settlement of, or to adjust, any claims resulting from a Condemnation Action or a Casualty shall be and remain subject and subordinate in all respects to Senior Lender’s rights under the Senior Loan Documents with respect thereto, and Subordinate Lender shall be bound by any settlement or adjustment of a claim resulting from a Condemnation Action or a Casualty made by Senior Lender; provided, however, this subsection or anything contained in this Agreement shall not limit the rights of Subordinate Lender to file any pleadings, documents, claims or notices with the appropriate court with jurisdiction over the proposed Condemnation Action or Casualty; and

(B) all proceeds received or to be received on account of a Condemnation Action or a Casualty, or both, shall be applied (either to payment of the costs and expenses of repair and restoration or to payment of the Senior Loan) in the manner determined by Senior Lender in its sole discretion; provided, however, that if Senior Lender elects to apply such proceeds to payment of the principal of, interest on and other amounts payable under the Senior Loan, any proceeds remaining after the satisfaction in full of the principal of, interest on and other amounts payable under the Senior Loan shall be paid to, and may be applied by, Subordinate Lender in accordance with the applicable provisions of the Subordinate Loan Documents, provided however, Senior Lender agrees to consult with Subordinate Lender in determining the application of Casualty proceeds, provided further however that in the event of any disagreement between Senior Lender and Subordinate Lender over the application of Casualty proceeds, the decision of Senior Lender, in its sole discretion, shall prevail.

**(c) Insurance.**

Subordinate Lender agrees that all original policies of insurance required pursuant to the Senior Mortgage shall be held by Senior Lender. The preceding sentence shall not preclude Subordinate Lender from requiring that it be named as a loss payee, as its interest may appear, under all policies of property damage insurance maintained by Borrower with respect to the Mortgaged Property, provided such action does not affect the priority of payment of the proceeds of property damage insurance under the Senior Mortgage, or that it be named as an additional insured under all policies of liability insurance maintained by Borrower with respect to the Mortgaged Property.

**(d) No Modification of Subordinate Loan Documents.**

Borrower and Subordinate Lender each agree that, until the principal of, interest on and all other amounts payable under the Senior Loan Documents have been paid in full, it will not, without the prior written consent of Senior Lender in each instance, increase the amount of the Subordinate Loan, increase the required payments due under the Subordinate Loan, decrease the term of the Subordinate Loan, increase the interest rate on the Subordinate Loan, or otherwise amend the Subordinate Loan terms in a manner that creates an adverse effect upon Senior Lender under the Senior Loan Documents. Any unauthorized amendment of the Subordinate Loan Documents or assignment of Subordinate Lender's interest in the Subordinate Loan without Senior Lender's consent shall be void ab initio and of no effect whatsoever; provided, however, Subordinate Lender shall not be prohibited from assigning its interest in the Subordinate Loan as required by the laws of the State of Florida and/or the regulations of the Subordinate Lender.

**11. Modification or Refinancing of Senior Loan.**

Subordinate Lender consents to any agreement or arrangement in which Senior Lender waives, postpones, extends, reduces or modifies any provisions of the Senior Loan Documents, including any provision requiring the payment of money. Notwithstanding the foregoing, Senior Lender may not modify any provision of the Senior Loan Documents which increases the interest rate, extends the term or increases the principal amount of the Senior Loan, except as permitted in connection with a default under the Senior Loan as set forth in Section 8(a) hereof, and except for increases in the interest rate, extensions of the term or increases in the principal amount of the Senior Loan that results from advances made by Senior Lender to protect the security or lien priority of Senior Lender under the Senior Loan Documents, or to cure defaults under the Subordinate Loan Documents. Subordinate Lender further agrees that its agreement to subordinate hereunder shall extend to any new mortgage debt which is for the purpose of refinancing all or any part of the Senior Loan (including reasonable and necessary costs associated with the closing and/or the refinancing); and that all the terms and covenants of this Agreement shall inure to the benefit of any holder of any such refinanced debt; and that all references to the Senior Loan, the Senior Note, the Senior Loan Agreement, the Senior Mortgage, the Senior Loan Documents and Senior Lender shall mean, respectively, the refinance loan, the refinance note loan agreement, the mortgage securing the refinance note, all documents evidencing, securing or otherwise pertaining to the refinance note and the holder of the refinance note. Subordinate Lender further agrees that Borrower will have the right to refinance the Senior Loan prior to maturity of the Senior Loan.

**12. Default by Subordinate Lender or Senior Lender.**

If Subordinate Lender or Senior Lender defaults in performing or observing any of the terms, covenants or conditions to be performed or observed by it under this Agreement, the other, non-defaulting lender shall have the right to all available legal and equitable relief.

**13. Reinstatement.**

To the extent that Borrower makes a payment to Senior Lender or Senior Lender receives any payment or proceeds of the collateral securing the Senior Loan for Borrower's benefit, which

payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable doctrine, then to the extent of such payment or proceeds received and not retained by Senior Lender, this Agreement shall be reinstated and continue in full force and effect until full and final payment shall have been made to Senior Lender. Subordinate Lender agrees to hold in trust for Senior Lender and promptly remit to Senior Lender any payments received by Subordinate Lender after such invalidated, rescinded or returned payment was originally made.

#### **14. Notices.**

Each notice, request, demand, consent, approval or other communication (hereinafter in this Section referred to collectively as “notices” and referred to singly as a “notice”) which the any party is required or permitted to give to another party pursuant to this Agreement shall be in writing and shall be deemed to have been duly and sufficiently given if (a) personally delivered with proof of delivery thereof (any notice so delivered shall be deemed to have been received at the time so delivered), or (b) sent by Federal Express (or other similar national overnight courier) designating early morning delivery (any notice so delivered shall be deemed to have been received on the next Business Day following receipt by the courier), or (c) sent by United States registered or certified mail, return receipt requested, postage prepaid at a post office regularly maintained by the United States Postal Service (any notice so sent shall be deemed to have been received two days after mailing in the United States), addressed to the respective parties as follows:

**SENIOR LENDER:**

Bank of America, N.A.  
101 East Kennedy Blvd., 6<sup>th</sup> Floor  
P.O. Box 31590  
Tampa, FL 33602  
Mail Stop: FL1-400-06-13  
Attention: CREB Loan Administration

**BORROWER:**

Ability VNA, LLC  
c/o Ability Housing, Inc.  
3740 Beach Blvd., Suite 304  
Jacksonville, FL 32207

With copy to:  
Stearns Weaver Miller  
150 West Flagler St., Suite 2200  
Miami, FL 33130  
Attn: Brian McDonough

**SUBORDINATE LENDER:**

St. Johns County  
Growth Management Department  
4040 Lewis Speedway  
St. Augustine, FL 32084

Any party may, by notice given pursuant to this Section, change the person or persons and/or addresses or addresses, or designate an additional person or persons or an additional

address or addresses, for its notices, but notice of a change of address shall only be effective upon receipt. Each party hereto agrees that it will not refuse or reject delivery of any notice given hereunder, that it will acknowledge, in writing, receipt of the same upon request by another party and that any notice rejected or refused by it shall be deemed for all purposes of this Agreement to have been received by the rejecting party on the date so refused or rejected, as conclusively established by the records of the U.S. Postal Service or the courier service.

## **15. General.**

### **(a) Assignment/Successors.**

This Agreement shall be binding upon Borrower, Senior Lender and Subordinate Lender and shall inure to the benefit of the respective legal successors, transferees and assigns of Borrower, Senior Lender and Subordinate Lender. Borrower shall not assign any of its rights and obligations under this Agreement without the prior written consent of Senior Lender.

### **(b) No Partnership or Joint Venture.**

Senior Lender's permission for the placement of the Subordinate Loan does not constitute Senior Lender as a joint venturer or partner of Subordinate Lender. Neither party hereto shall hold itself out as a partner, agent or Affiliate of the other party hereto.

### **(c) Senior Lender's and Subordinate Lender's Consent.**

Wherever Senior Lender's consent or approval is required by any provision of this Agreement, such consent or approval may be granted or denied by Senior Lender in its sole and absolute discretion, unless otherwise expressly provided in this Agreement. Wherever Subordinate Lender's consent or approval is required by any provision of this Agreement, such consent or approval may be granted or denied by Subordinate Lender in its sole and absolute discretion, unless otherwise expressly provided in this Agreement.

### **(d) Further Assurances.**

Subordinate Lender, Senior Lender and Borrower each agrees, at Borrower's expense, to execute and deliver all additional instruments and/or documents reasonably required by any other party to this Agreement in order to evidence that the Subordinate Mortgage is subordinate to the lien, covenants and conditions of the Senior Loan Documents, or to further evidence the intent of this Agreement.

### **(e) Amendment.**

This Agreement shall not be amended except by written instrument signed by all parties hereto.

### **(f) Governing Law.**

This Agreement shall be governed by the laws of the jurisdiction in which the Mortgaged Property is located without giving effect to any choice of law provisions thereof that would result



in the application of the laws of another jurisdiction. Senior Lender, Subordinate Lender and Borrower agree that any controversy arising under or in relation to this Security Instrument shall be litigated exclusively in the jurisdiction in which the Mortgaged Property is located. The state and federal courts and authorities with jurisdiction in such locale shall have exclusive jurisdiction over all controversies that arise under or in relation to this Agreement. The parties hereto irrevocably consent to service, jurisdiction, and venue of such courts for any such litigation and waive any other venue to which any might be entitled by virtue of domicile, habitual residence or otherwise.

**(g) Severable Provisions.**

If any provision of this Agreement shall be invalid or unenforceable to any extent, then the other provisions of this Agreement, shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

**(h) Term.**

The term of this Agreement shall commence on the date hereof and shall continue until the earliest to occur of the following events: (1) the payment in full of the principal of, interest on and other amounts payable under the Senior Loan Documents; (2) the payment in full of the principal of, interest on and other amounts payable under the Subordinate Loan Documents, other than by reason of payments which Subordinate Lender is obligated to remit to Senior Lender pursuant to Section 6 hereof; (3) the acquisition by Senior Lender of title to the Mortgaged Property pursuant to a foreclosure or a deed in lieu of foreclosure of, or the exercise of a power of sale contained in, the Senior Loan Documents; or (4) the acquisition by Subordinate Lender of title to the Mortgaged Property pursuant to a foreclosure or a deed in lieu of foreclosure of, or the exercise of a power of sale contained in, the Subordinate Loan Documents, but only if such acquisition of title does not violate any of the terms of this Agreement.

**(i) Counterparts.**

This Agreement may be executed in any number of counterparts, each of which shall be considered an original for all purposes; provided, however, that all such counterparts shall together constitute one (1) and the same instrument.

**(j) Sale of Senior Loan.**

Nothing in this Agreement shall limit Senior Lender's (including any assignee or transferee of Senior Lender) right to sell or transfer the Senior Loan, or any interest in the Senior Loan. The Senior Loan or a partial interest in the Senior Loan (together with this Agreement and the other Loan Documents) may be sold one or more times without prior notice to Borrower.

**[Remainder of Page Intentionally Blank]**

**IN WITNESS WHEREOF**, Borrower, Senior Lender and Subordinate Lender have signed and delivered this Agreement under seal (where applicable) or have caused this Agreement to be signed and delivered under seal (where applicable) by a duly authorized representative. Where applicable law so provides, Borrower, Senior Lender and Subordinate Lender intend that this Agreement shall be deemed to be signed and delivered as a sealed instrument.

**SENIOR LENDER:**

**BANK OF AMERICA, N.A.**,  
a national banking association

By: \_\_\_\_\_  
Name: Dylan Jones  
Its: Senior Vice President

STATE OF FLORIDA )  
  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this \_\_\_\_ day of \_\_\_\_\_, 2023, by Dylan Jones, the Senior Vice President, of **BANK OF AMERICA, N.A.**, a national banking association. Such individual is  personally known to me or has  produced identification.

\_\_\_\_\_

Printed Name: \_\_\_\_\_  
Notary Public

Serial Number (if any): \_\_\_\_\_

My Commission Expires:

(NOTARY SEAL)

**IN WITNESS WHEREOF**, Borrower, Senior Lender and Subordinate Lender have signed and delivered this Agreement under seal (where applicable) or have caused this Agreement to be signed and delivered under seal (where applicable) by a duly authorized representative. Where applicable law so provides, Borrower, Senior Lender and Subordinate Lender intend that this Agreement shall be deemed to be signed and delivered as a sealed instrument.

**SUBORDINATE LENDER:**

**ST. JOHNS COUNTY, FLORIDA,**

a political subdivision existing under the laws of the State of Florida

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

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

Its: \_\_\_\_\_

ATTEST:     Brandon J. Patty,  
                  Clerk of the Circuit Court & Comptroller

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

Deputy Clerk

STATE OF FLORIDA                     )

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this \_\_\_ day \_\_\_\_\_ by \_\_\_\_\_ as the \_\_\_\_\_ of St. Johns County, Florida, a political subdivision existing under the laws of the State of Florida, Said person is personally known to me or has produced \_\_\_\_\_ as identification.

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

Notary Public

Serial Number (if any): \_\_\_\_\_

My Commission Expires:

(NOTARY SEAL)

**IN WITNESS WHEREOF**, Borrower, Senior Lender and Subordinate Lender have signed and delivered this Agreement under seal (where applicable) or have caused this Agreement to be signed and delivered under seal (where applicable) by a duly authorized representative. Where applicable law so provides, Borrower, Senior Lender and Subordinate Lender intend that this Agreement shall be deemed to be signed and delivered as a sealed instrument.

**BORROWER:**

**ABILITY VNA, LLC,**  
a Florida limited liability company

By: Ability VNA MM, LLC,  
a Florida limited liability company,  
its Manager

By: Ability Housing, Inc.,  
a Florida not-for-profit corporation,  
its Manager

By: \_\_\_\_\_  
Name: Shannon L. Nazworth  
Title: President

STATE OF FLORIDA )

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me by means of  physical presence or  online notarization, this \_\_\_\_ day of \_\_\_\_\_, 2023 by Shannon L. Nazworth, as President of Ability Housing, Inc., the Manager of the Manager of Ability VNA, LLC. She is personally known to me or has produced \_\_\_\_\_ as identification.

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Notary Public  
Serial Number (if any): \_\_\_\_\_

My Commission Expires:

(NOTARY SEAL)

**Exhibit A**  
**Legal Description**

[To be attached]