

**RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO**

City Clerk
City of Morgan Hill
17575 Peak Avenue
Morgan Hill, CA 95037

TO BE RECORDED WITHOUT FEE
PER GOVERNMENT CODE 27383 and 6103

(SPACE ABOVE LINE FOR RECORDER'S USE)

SEWER/TRAFFIC FEE SECURED FINANCING AGREEMENT

This Sewer/Traffic Fee Secured Financing Agreement (the "Agreement") is entered into as of _____, 2023, by and between CUTINA MORGAN HILL, LLC, a California Limited Liability Corporation company (the "Borrower") and the City of Morgan Hill, a municipal corporation duly organized and existing under the laws of the State of California, California, ("City") with reference to the following facts and purposes:

RECITALS

The following recitals are a substantive portion of this Agreement:

- A. The City has established a Sewer/Traffic Fee Financing Program (the "Program") to defer sewer and traffic fees for new and expanding industrial and commercial businesses.
- B. Borrower owns certain real property in the City described in the attached Exhibit "1" (the "Subject Property") upon which improvements are to be made for a new hotel, anticipated to be a Holiday Inn Express (the "Project").
- C. The purpose of this Agreement is provide a financing mechanism for the Sewer/Traffic Impact Fees for the Project.
- D. On June 21, 2023, the City granted a request of the Borrower to be a Program participant with respect to CUTINA MORGAN HILL, LLC Sewer and Traffic Fees in the aggregate amount of Five Hundred Eighty-One Thousand, Five Hundred Twenty-Eight Dollars and Zero Cents (\$581,528.00) (the "Fees"), payable by the Borrower in connection with Improvements on the Property.
- E. Borrower and City have determined that the Project is the type of development for which this Agreement is appropriate. This Agreement will assist Borrower in developing the Project by providing a financing mechanism for the Sewer/Traffic Impact Fees for the Project consistent with the planning goals, policies, and other provisions of the City's General Plan and City's Municipal Code, and otherwise achieve the goals and purposes for which the Sewer/Traffic Fee Financing Program was adopted.
- F. When constructed and open the Project will generate Transient Occupancy Tax ("TOT") for the City creating a public benefit which is required in order to enter into this Agreement.

G. As a condition of participation in the Program and in consideration of the City's agreement to defer payment of the Fees as specified herein, the Borrower is required to execute this Agreement and the documents specified setting forth the terms and conditions for payment of the Fees by the Borrower to the City and establishing security for such payment.

NOW, THEREFORE, the City and the Borrower agree as follows:

1. Financing of Fee. Upon satisfaction of the conditions set forth in Section 3 below but not later than the date the Borrower is required to pay a minimum of twenty percent (20%) of the Sewer/Traffic Fees for the Improvements on the Property, before December 31, 2024 or the issuance of the first building permit for the Project, whichever is earlier ("Initial Payment Date"), in accordance with applicable City ordinances and regulations, the Borrower shall be granted the right to pay the Fees pursuant to the Program in accordance with the payment terms set forth in Section 2 below. If the conditions set forth in Section 4 below are not satisfied in full, the Borrower shall pay the Fees in their entirety on the Initial Payment Date or on such other date(s) as provided in the applicable City ordinances and regulations, and this Agreement shall terminate and be of no further force and effect.

2. Payment of Fees. The Fees shall be paid as follows:

(a) Twenty percent (20%) of the Sewer and Traffic Impact Fees, One Hundred Sixteen Three Hundred Six Dollars, and Zero Cents (\$116,306), shall be paid to the City on the Initial Payment Date as the "Down Payment". Additionally, all other impact fees in the amount of One Hundred Fifty-Three, Three Hundred Fifty-One Dollars and Zero Cents (\$153,351.00) shall be paid by the Initial Payment Date, for a total of Two Hundred Sixty-Nine, Six Hundred Fifty-Seven Dollars and Zero Cents (\$269,657.00).

(b) The remaining balance of the Fees (total fees minus the Down Payment) of Four Hundred Sixty-Five Thousand, Two Hundred Twenty-Two Dollars and Zero Cents (\$465,222.00) ("Financed Fees") shall be paid in sixty (60) equal monthly installments and shall bear fixed interest at the PMIA Average Monthly Effective Yield as determined by the most recent PMIA/LAIF Performance Report rate plus 0.5% as determined on the Initial Payment Date of XXX and XXX hundredth percent (X.XX%) per annum compounded monthly. The monthly installment shall be \$XXX per month which shall commence on the date of the issuance of the Certificate of Occupancy, or no later than December 31, 2025 whichever occurs first continuing on the first day of each month thereafter until full principal amount and all interest thereon has been paid. Maturity date is five years after the first payment is made or December 31, 2030, whichever occurs first.. Borrower may prepay the balance without penalty.

3. Promissory Note and Deed of Trust. In order to secure and perfect Borrowers' obligation to repay the Financed fees, Borrower agrees to execute a promissory note in the form provided by City (the "Promissory Note") attached hereto and incorporated herein as Exhibit "2", which shall be secured by a Deed of Trust, attached hereto and incorporated herein as Exhibit "3". This Agreement, the Promissory Note and the Deed of Trust shall be collectively referred to herein as the "Loan Documents." Borrower agrees to apply for and receive building permits for and commence construction of a hotel on the Subject Property on or before December 31, 2024. City and the Borrower agree that the Loan Documents shall create and perfect the City's security interest in the real property set forth in Exhibit A as security) for the payment of the Financed Fees.

4. Conditions to Financing of Fees. As conditions to the Borrower's right to finance payment of the Fees in the manner set forth in Sections 1, 2 and 3 the representations set forth in Section 7 must remain true and correct as of the Initial Payment Date, and the following actions must be completed by not later than the Initial Payment Date (unless waived in writing by the City):

(a) Delivery to the City of the Down Payment;

- (b) Execution by the Borrower and delivery to the City of the appropriate Loan Documents; and
- (c) Recordation of the Deed of Trust.

5. Events of Default. Each of the following shall constitute a "Default" by the Borrower under the Agreement and the other Loan Documents:

- (a) Failure by the Borrower to duly perform, comply with, or observe any of the conditions, terms, or covenants of any of the Loan Documents (including, without limitation, the obligation to repay the Financed Fees as provided in Section 2(b) of this Agreement), if such failure remains uncured fifteen (15) days after written notice of such failure is mailed by the City to the Borrower; provided, however, that if a lesser period or notice requirement is allowed before a Default occurs under any of the following subsections or under any other Loan Document, such lesser requirement shall control in this Agreement.
- (b) Any representation or warranty contained in any Loan Document proves to have been incorrect in any material respect when made or on the Initial Payment Date.
- (c) A court having jurisdiction shall have made or entered any decree or order (1) adjudging the Borrower to be bankrupt or insolvent, (2) approving as properly filed a petition seeking reorganization of the Borrower or seeking any arrangement for the Borrower under the bankruptcy law or any other applicable debtor's relief law or statute of the United States or any state or other jurisdiction, (3) appointing a receiver, trustee, liquidator, or assignee of the Borrower in bankruptcy or insolvency or for any of their properties, or (4) directing the winding up or liquidation of the Borrower, if any such decree or order described in clauses (1) to (4), inclusive, shall have continued unstayed or undischarged for a period of ninety (90) days unless a lesser time period is permitted for cure under any other lien on the Collateral, in which event such lesser time period will apply under this subsection (c) as well; or the Borrower shall have admitted in writing its inability to pay its debts as they fall due or shall have voluntarily submitted to or filed a petition seeking any decree or order of the nature described in clauses (1) to (4), inclusive. The occurrence of any Default in this subsection shall act to accelerate automatically, without the need for any action by the City, the indebtedness evidenced by the Note.
- (d) The Borrower shall have assigned its assets for the benefit of its creditors or suffered a sequestration or attachment of or execution on any substantial part of its property, unless the property so assigned, sequestered, attached or executed upon shall have been returned or released within ninety (90) days after such event (unless a lesser time period is permitted for cure under any other lien on the Collateral, in which event such lesser time period shall apply under this subsection (d) as well) or prior to sooner sale pursuant to such sequestration, attachment, or execution. The occurrence of any Default in this subsection shall act to accelerate automatically, without the need for any action by the Agency, the indebtedness evidenced by the Note.
- (e) The Borrower shall have voluntarily suspended its business or, if the Borrower is a partnership, the partnership shall have been dissolved or terminated.
- (f) The condemnation, seizure, or appropriation of all or, in the opinion of the City, a substantial part of the Collateral, except for a condemnation initiated by the City.
- (g) There shall not take place any default declared by any lender under any loan document related to any other loans secured by a deed of trust or lien on the Collateral. The occurrence of Default under this subsection (g) shall act to accelerate automatically, without the need for any action by the City, the indebtedness evidenced by the Note.
- (h) Failure to obtain permits for and diligently construct the Project and open the Project to paying guests and to collect Transient Occupancy Tax as required by City ordinance.

6. Remedies. The occurrence of any Default will, either at the option of the City or automatically, where so specified, give the City the right to proceed with any and all remedies set forth in this Agreement and the Loan Documents, including but not limited to the following:

- (a) The City shall have the right to cause all indebtedness of the Borrower to the City under this Agreement, together with any accrued interest thereon, to become immediately due and payable. The Borrower waives all right to presentment, demand, protest or notice of protest or dishonor. The City may proceed to enforce payment of the indebtedness and to exercise any or all rights afforded to the City as a creditor and secured party under the law.. The Borrower shall be liable to pay the City on demand all expenses, costs and fees (including, without limitation, attorney's fees and expenses) paid or incurred by the City in connection with the collection of the Financed Fees.
- (b) The City shall have the right to mandamus or other suit, action or proceeding at law or in equity to require the Borrower to perform its obligations and covenants under the Loan Documents or to enjoin acts on things which may be unlawful or in violation of the provisions of the Loan Documents.
- (c) The City shall maintain all rights to foreclose upon the Subject Property for a default under the terms of the Promissory Note or the Deed of Trust.
- (d) No right, power, or remedy given to the City by the terms of this Agreement, or the Loan Documents is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such instrument, or by any statute or otherwise against the Borrower and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

7 Representations and Warranties. The Borrower hereby represents and warrants to the City as follows:

- (a) The Borrower is duly organized, validly existing and in good standing under the laws of the State of California and has the power and authority to own its property and carry on its business as now being conducted.
- (b) The Borrower and the Guarantor, as applicable, have full power and authority to execute and deliver this Agreement and to make and accept the obligations contemplated hereunder, to execute and deliver the Loan Documents and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement, and to perform and observe the terms and provisions of all of the above.
- (c) This Agreement and the Loan Documents and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement have been executed and delivered by persons who are duly authorized to execute and deliver the same for and on behalf of the Borrower and the Guarantor, as applicable, and all actions required under the Borrower's and the Guarantor's organizational documents and applicable governing law for the authorization, execution, delivery and performance of this Agreement and the Loan Documents and all other documents or instruments executed and delivered, or to be executed and delivered, pursuant to this Agreement, have been duly taken.
- (d) This Agreement and the Loan Documents and all other documents or instruments which have been executed and delivered pursuant to or in connection with this Agreement constitute or, if not yet executed or delivered, will when so executed and delivered constitute, legal, valid and binding obligations of the Borrower, as applicable, enforceable against them in accordance with their respective terms.

(e) The Borrower is not in default under any law or regulation or under any order of any court, board, commission or agency whatsoever, and there are no claims, actions, suits or proceedings pending or, to the knowledge of the Borrower, threatened against or affecting the Borrower or the Property, at law or in equity, before or by any court, board, commission or agency whatsoever which might, if determined adversely to the Borrower, materially affect the Borrower's ability to meet its obligation or impair the security to be given to the City pursuant hereto.

(f) To the best knowledge of the Borrower:

(1) The Property is not and has not been a site for the use, generation, treatment, manufacture, storage, disposal or transportation of any hazardous materials and there are no hazardous materials located in, on or under the Property;

(2) The Property is presently in compliance with all hazardous materials laws, including, without limitation, those relating to soil and ground water conditions;

(3) There have been no investigations, inquiries, notices, orders, hearings, actions, or other proceedings by or before any governmental agency are pending or threatened against the Borrower and/or the Property pertaining in any way to (A) the use, generation, treatment, manufacture, storage, presence, disposal or transportation of hazardous materials from, under, into or on the Property or any portion thereof and/or (B) the violation or alleged violation of, or the noncompliance or alleged noncompliance with, any hazardous materials law; and

(4) No underground storage tanks are presently located, or in the past have been located, in, on or under the Property.

8. Indemnification. Borrower shall hold City, its elective and appointive boards, commissions, officers, agents, and employees, harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage which may arise from Borrower's contractors, subcontractors', agents' or employees' operations on the Project, whether such operations be by Borrower or by any Borrower's contractors, subcontractors, or by any one or more persons directly or indirectly employed by, or acting as agent for Borrower or any of Borrower's contractors or subcontractors. Borrower shall indemnify and defend City and its elective and appointive boards, commissions, officers, agents and employees from any suits or actions at law or in equity for damages caused, or alleged to have been caused, by reason of any of the aforesaid operations and Borrower shall pay all reasonable attorney's fees and costs that the City may incur. City does not, and shall not, waive any rights against Borrower which it may have by reason of the aforesaid hold-harmless requirement of Borrower because of the acceptance of improvements by City, or the deposit of security with City by Borrower. The aforesaid hold-harmless requirement of Borrower shall apply to all damages and claims for damages of every kind suffered, or alleged to have been suffered, by reason of any of the aforesaid operations referred to in this subsection, regardless of whether or not City has prepared, supplied or approved of, plans and/or specifications for the Project. Notwithstanding anything herein to the contrary, Borrower's indemnification of City shall not apply to the extent that such action, proceedings, demands, claims, damages, injuries or liability is based upon the active negligence of the City.

9. General Provisions.

(a) Time is of the essence in the performance of all obligations under this Agreement and the Other Loan Documents.

(b) Any notice requirement set forth herein shall be deemed to be satisfied three (3) days after mailing of the notice first-class United States certified mail, postage prepaid, addressed to the appropriate party as follows:

Borrower:

CUTINA MORGAN HILL, LLC
Attn: Michelle Della Penna

2801 Ocean Park #193
Santa Monica, CA 90405

City: City of Morgan Hill 17575 Peak Avenue Morgan Hill, CA 95037 Attention: Finance Director	Copy to: City Clerk City of Morgan Hill 17575 Peak Avenue Morgan Hill, CA 95037
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Such addresses may be changed by notice to the other party given in the same manner as provided above.

(c) If either party brings an action or proceeding to enforce, protect or establish any right or remedy hereunder or under any of the Loan Documents, the prevailing party shall be entitled to recover from the other party its costs of suit and reasonable attorneys' fees which shall be fixed by the court.

(d) If any provision of this Agreement shall be declared invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired.

(e) This Agreement and the Loan Documents and other instruments given pursuant to this Agreement shall be construed in accordance with and be governed by the laws of the State of California. Any action commenced about thus Agreement or any of the Loan Documents shall be filed in the central branch of the Santa Clara County Superior Court.

(f) This Agreement may not be changed orally, but only by agreement in writing signed by the Borrower and the City.

(g) The Loan Documents together embody the agreement between the City and the Borrower for the payment of the Fee. No verbal agreements or conversations with any officer, agent or employee of the City prior to the execution of this Agreement shall affect or modify any of the terms or obligations contained in the Loan Documents. Any such verbal agreement shall be considered unofficial information and in no way binding upon the City.

(h) This Agreement and its terms and conditions shall be binding on the successor in interest to Borrower's Project or the Property.

(i) No official or employee of the City shall be personally liable for any default or liability under this Agreement.

(j) The Borrower covenants there shall be no discrimination based upon race, color, creed, religion, gender, marital status, sexual orientation, age, disability, national origin, or ancestry in any activity pursuant to this Agreement.

(k) The Borrower shall comply with all applicable laws ordinances, codes, and regulations of the federal, state, and local governments.

(l) The Borrower shall at all times avoid conflict of interest or appearance of conflict of interest in performance of this Agreement.

(m) Whenever any approval, notice, direction, consent, request, waiver of condition or other action by the City is required or permitted under this Agreement, such action may be given, made, or taken by the City Manager, or by any person who shall have been designated in writing to the Borrower by the City Manager, without further approval by the City Council, and any such action shall be in writing.

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(n) The following exhibits are attached to and incorporated by reference in this Agreement:

Exhibit A	Real Property
Exhibit B	Promissory Note
Exhibit C	Deed of Trust

If any term or provision of any Loan Document conflicts with any term or provision of this Agreement, the term or provision of this Agreement shall control to the extent of such conflict.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

BORROWER: CUTINA MORGAN HILL, LLC a Limited Liability California Corporation

CITY: CITY OF MORGAN HILL a municipal corporation

Michelle Della Penna, Managing Partner

Date: _____

Christina Turner, City Manager

Date: _____

Approved as to Form:

Cosme Fagundo, Managing Partner

Date: _____

Donald A. Larkin, City Attorney

Date: _____

Attest:

Michelle Bigelow City Clerk

Date: _____

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of **California**)
County of Santa Clara)

On _____, 2023, before me, _____, 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.

SIGNATURE OF NOTARY PUBLIC

(ABOVE AREA FOR NOTARY SEAL)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of **California**)
County of Santa Clara)

On _____, 2023, before me, _____, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person 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.

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County of Santa Clara)

On _____, 2023, before me, _____, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person 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.

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WITNESS my hand and official seal.

SIGNATURE OF NOTARY PUBLIC

(ABOVE AREA FOR NOTARY SEAL)

EXHIBIT 1
LEGAL DESCRIPTION OF REAL PROPERTY

For conveyancing purposes only: APN 726-58-006

PARCEL ONE: PARCEL 6 AS SHOWN ON THAT CERTAIN MAP ENTITLED AS "PARCEL MAP EVERGREEN VILLAGE" RECORDED ON JULY 17, 2019 IN BOOK 924, PAGES 45-47, SANTA CLARA COUNTY RECORDS.

PARCEL TWO: NON-EXCLUSIVE 60 FOOT WIDE ACCESS EASEMENT AS RETAINED IN THAT CERTAIN GRANT OF RECIPROCAL EASEMENTS, RECORDED JUNE 16, 1989, IN BOOK K988 AT PAGE 1623, OFFICIAL RECORDS, AND AS AMENDED BY THAT CERTAIN AMENDMENT TO GRANT OF RECIPROCAL EASEMENTS RECORDED DECEMBER 16, 1998 AS INSTRUMENT NO. 14554697, OFFICIAL RECORDS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA AND AS AMENDED BY THAT CERTAIN SECOND AMENDMENT TO GRANT OF RECIPROCAL EASEMENTS RECORDED FEBRUARY 7, 2008 AS INSTRUMENT NO. 19736430, OFFICIAL RECORDS, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA.

PARCEL THREE: NON-EXCLUSIVE EASEMENTS FOR DRAINAGE, ACCESS, INGRESS AND EGRESS, PARKING, AND UTILITIES, ENCROACHMENTS OF CERTAIN IMPROVEMENTS, LANDSCAPING AND CONSTRUCTION OF IMPROVEMENTS, STORM WATER AND DRAINAGE FACILITIES, AND SIGNAGE CONTAINED IN COMMON OPERATION AND RECIPROCAL EASEMENT AGREEMENT, DATED DECEMBER 5, 2018, RECORDED DECEMBER 5, 2018 AS INSTRUMENT NO. 24076332, AS AFFECTED BY FIRST AMENDMENT TO COMMON OPERATION AND RECIPROCAL EASEMENT AGREEMENT, DATED JULY 17, 2019, RECORDED JULY 18, 2019 AS INSTRUMENT NO. 24228167.

EXHIBIT 2
PROMISSORY NOTE

SECURED PROMISSORY NOTE

Cutina Morgan Hill, LLC
Attn: Michelle Della Penna
2801 Ocean Park #193
Santa Monica, CA 90405

Morgan Hill, CA
_____, 2023

\$ ____ AMOUNT ____ \$465,222.00

1. BORROWER'S PROMISE TO PAY

FOR VALUE RECEIVED, Cutina Morgan Hill, LLC ("BORROWER") hereby promises to timely pay to the CITY OF MORGAN HILL, a municipal corporation ("CITY" or "NOTE HOLDER") in lawful money of the United States of America, the principal sum of

(\$ ____ .____) (the "PRINCIPAL"), together with interest on the outstanding PRINCIPAL amount, all in accordance with the terms and conditions set forth in this Secured Promissory Note ("NOTE").

The loan evidenced by this SECURED PROMISSORY NOTE ("NOTE") is to secure performance by BORROWER for the payment of fees due to the CITY pursuant to the SEWER/TRAFFIC FEE SECURED FINANCING AGREEMENT (the "Agreement") dated on or about the same date herewith by and between BORROWER and CITY, which is incorporated herein by this reference, and evidences the obligation to repay the Loan. The Sewer/Traffic Fees financed under the Agreement constitute a loan CITY to BORROWER ("LOAN"). The obligations under this NOTE are secured by a Deed of Trust and Assignment of Rents executed by BORROWER and CITY, as Trustor, in favor of that certain Lender identified in said Deed of Trust, as beneficiary (the "DEED OF TRUST") dated substantially concurrently herewith encumbering real property more particularly described in the DEED OF TRUST (the "PROPERTY").

2. INTEREST RATE AND PAYMENT COMMENCEMENT

A. Payment and Interest Rate.

Payments shall be due under this Note as follows: Beginning the first of the month following the issuance of the Certificate of Occupancy or December 31, 2025, whichever shall occur first, Maker shall make sixty (60) equal monthly payments of Four Hundred Sixty-Five, Two Hundred Twenty-Two **Dollars and 00/100 Dollars (\$465,222.00)** which shall bear shall bear fixed interest at the PMIA Average Monthly Effective Yield as determined by the most recent PMIA/LAIF Performance Report rate plus 0.5% as determined on the Initial Payment Date of **XXX and XXX hundredth percent (X.XX%)**, per annum compounded monthly. The monthly installment shall be **XXX per month**. The monthly installment payments shall commence on the first of the month following the issuance of the Certificate of Occupancy or December 31, 2025, whichever shall occur first and continuing on the first day of each month thereafter with the remaining balance of

principal due and payable on the first day of the sixty first (61st) month following the date of the issuance of the Certificate of Occupancy or December 31, 2025, whichever shall occur first provided, however, that Maker's obligation to repay this Note may be accelerated in accordance with the Agreement or the terms of this Note. Monthly payments are due on the first day of the month and considered delinquent on the fifth day of the month. BORROWER SHOULD CONSULT WITH BORROWER'S OWN TAX ADVISOR(s) REGARDING ANY TAX EFFECTS ON BORROWER OF THE INTEREST RATE.

B. Acceleration.

Should any sum due hereunder not be paid by the **fifth (5th)** day after written notice of such default is given by the Holder to the Maker, then all sums of unpaid principal and accrued interest may immediately be deemed due and payable and shall thereafter bear interest at the rate of ten percent (10%) per annum, until paid.

3. MATURITY DATE; PAYMENTS

Maturity date is five years after the first payment is made or December 31, 2030, whichever occurs first.

4. BORROWER'S RIGHT TO HAVE THIS NOTE CANCELED UPON PERFORMANCE

BORROWER has an absolute right to have this NOTE cancelled and a Full Reconveyance filed by the CITY immediately following full payment of all principal and all interest due under this NOTE and the Agreement.

5. BORROWER'S FAILURE TO PAY AS REQUIRED

A. Late Charge for Overdue Payments.

Subject to NOTE HOLDER'S compliance with California Civil Code Section 2954.5, as amended or restated from time to time, if NOTE HOLDER has not received the full amount of any payment due under within 5 (five) calendar days after the date it is due, NOTE HOLDER may require BORROWER to pay a late charge to NOTE HOLDER. The amount of the charge will be five percent (5%) of the overdue payment of PRINCIPAL and interest, and the late charge must be paid within ten (10) days after written demand therefor.

B. Default.

If there is a failure to comply with the provisions of this NOTE or the DEED OF TRUST securing this NOTE, and such default is not cured within ten (10) days after written notice from NOTE HOLDER (an "Event of Default"), then NOTE HOLDER may demand that BORROWER pay all outstanding PRINCIPAL and accrued interest. Failure to pay accrued interest and outstanding PRINCIPAL on the Maturity Date shall also be an Event of Default. Upon the occurrence of an Event of Default, NOTE HOLDER may exercise its rights and remedies at law and in equity, including, without limitation, non-judicial foreclosure.

C. No Waiver By NOTE HOLDER.

Even if, at a time when there is an Event of Default, NOTE HOLDER does not require payment immediately in full as described above, NOTE HOLDER will still have the right to require a full payment at a later time.

D. Payment of NOTE HOLDER'S Costs and Expenses.

If NOTE HOLDER has required payment immediately in full as described above, NOTE HOLDER will have the right to be paid by BORROWER for all of its costs and expenses in enforcing this NOTE to the extent not prohibited by applicable law (i.e., BORROWER shall be responsible for collection costs with respect to collection from BORROWER). Those expenses include, for example, attorneys' fees actually incurred by NOTE HOLDER in connection with enforcing this NOTE.

E. Venue.

This Note shall be governed by and construed in accordance with the laws of the State of California. Any action brought to enforce this note shall be brought in the Superior Court of Santa Clara County.

F. Successor and Assigns.

Subject to the foregoing, the terms of this Note shall be binding upon and inure to the benefit of the respective heirs, successors in interest and assigns of BORROWER and NOTE HOLDER.

G. Time is of the Essence.

Time is of the essence with respect to each and every provision hereof. If any provision hereof is found to be invalid or unenforceable by a court of competent jurisdiction, the invalidity thereof shall not affect the enforceability of the remaining provisions of this Note.

6. GIVING OF NOTICES

All notices, requests, demands and other communication given or required to be given hereunder shall be in writing and personally delivered, sent by first class certified mail, postage prepaid, return receipt requested, or sent overnight by a nationally recognized courier service such as Federal Express, addressed to the parties as follows:

CITY:	City Clerk City of Morgan Hill 17575 Peak Avenue Morgan Hill, CA 95037-4128
BORROWER:	Cutina Morgan Hill, LLC Attn: Michelle Della Penna 2801 Ocean Park #193 Santa Monica, CA 90405

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Delivery of any notice or other communication hereunder shall be deemed made on the date of actual delivery thereof to the address of the addressee, if personally delivered, and on the date indicated in the return receipt or courier's records as the date of delivery or as the day after the day of mailing, if sent by first class or certified mail. Any party may change its address for purposes of this Section by giving notice to the other party.

7. SECURED RE COURSE LOAN

Notwithstanding anything to the contrary in this NOTE, the DEED OF TRUST or any other document relating to the LOAN, NOTE HOLDER'S recourse for repayment of the sums owed under this NOTE or under the DEED OF TRUST or any other document relating to the LOAN shall not be limited to the collateral described in the DEED OF TRUST, and BORROWER agrees that NOTE HOLDER may seek or obtain any appropriate relief or remedy, including a deficiency judgment against BORROWER.

8. WAIVERS

BORROWER and any other person who has obligations under this NOTE hereby waive the rights of "presentment" and "notice of dishonor." "Presentment" means the right to require NOTE HOLDER to demand payment of amounts due. "Notice of dishonor" means the right to require NOTE HOLDER to give notice to other persons that amounts due have not been paid.

BORROWER:

Date: _____

[Name and Title]

Date: _____

[Name and Title]

CITY:

By: Mark Turner, Mayor

Date: _____

APPROVED AS TO FORM:

Donald A. Larkin
City Attorney

Date: _____

EXHIBIT 3
Deed of Trust