

**AMENDED AND RESTATED SECURED PROMISSORY NOTE**

\$ \_\_\_\_\_

San Leandro, California

[\$700,000 + interest accrued since 5-6-02]

January \_\_, 2012

**FOR VALUE RECEIVED**, Eden Surf Associates L.P., a California limited partnership (“**Borrower**”), promises to pay to the City of San Leandro, a municipal corporation (“**City**”), in lawful money of the United States of America, the principal sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) [\$700,000 + interest accrued since 5-6-02], together with interest on the outstanding principal balance in accordance with the terms and conditions described herein. Interest shall accrue on the outstanding principal balance of this Note at a rate equal to three percent (3%) simple interest per annum, commencing upon the date of disbursement thereof. Interest shall be calculated on the basis of a year of 365 days, and charged for the actual number of days elapsed.

The original principal amount of this Amended and Restated Secured Promissory Note (this “**Note**”) is equal to the sum of (i) Seven Hundred Thousand Dollars (\$700,000) which is the principal balance of the Original Note (defined below), and (ii) the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) in interest accrued on the Original Note as of the date hereof.

This Note has been executed and delivered pursuant to and in accordance with that certain Loan Agreement executed by and between Borrower and City, dated as of the date hereof (the “**Loan Agreement**”), and is subject to the terms and conditions of the Loan Agreement, which is by this reference incorporated herein and made a part hereof. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Loan Agreement.

This Note is secured by an Amended and Restated Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (“**Deed of Trust**”) dated as of the date hereof, executed by Borrower for the benefit of City and encumbering the property described therein. City shall be entitled to the benefits of the security provided by the Deed of Trust and shall have the right to enforce the covenants and agreements contained herein, in the Deed of Trust, the Loan Agreement, the Regulatory Agreement and the other City Documents. The Regulatory Agreement shall remain effective for the full term thereof and shall survive the repayment of this Note.

This Note amends and restates the terms of the Secured Promissory Note dated as of May 6, 2002 (“**Original Note**”) which was executed and delivered to City by Citizens’ Housing Corporation, a California nonprofit public benefit corporation, and which was subsequently assigned to and assumed by Borrower. This Note is not in payment, novation, satisfaction or cancellation of the indebtedness evidenced by the Original Note, such indebtedness evidenced thereby hereby ratified and confirmed.

## 1. PAYMENTS

1.1 PAYMENT DATES; MATURITY DATE. Annual payments on this Note shall be payable on a residual receipts basis with Sixty Percent (60%) of all Surplus Cash (defined below) payable to City toward principal and accrued interest. Payments shall be credited first to any unpaid late charges and other costs and fees then due, then to accrued interest, and then to principal. In no event shall any amount due under this Note become subject to any rights, offset, deduction or counterclaim on the part of Borrower. The entire outstanding principal balance of this Note, together with interest accrued thereon and any other sums accrued hereunder shall be payable in full on the date (the "**Maturity Date**") which is the fifty-fifth (55<sup>th</sup>) anniversary of the date hereof.

1.2 ANNUAL PAYMENTS FROM SURPLUS CASH. By no later than June 1 of each year following the origination date of this Note, Borrower shall pay to City the percentage share of Surplus Cash determined pursuant to Section 1.1 above generated by the Project during the previous calendar year. No later than May 1 of each year following the origination date of this Note, Borrower shall provide to City Borrower's calculation of Surplus Cash for the previous calendar year, accompanied by such supporting documentation as City may reasonably request, including without limitation, an independent audit prepared for the Project by a certified public accountant in accordance with generally accepted accounting principles including a statement showing the balance of all outstanding residual receipts loans together with their respective maturity dates. No later than November 1 of each year following the origination date of this Note, Borrower shall provide to City a projected budget for the following calendar year which shall include an estimate of Surplus Cash.

1.2.1 "**Surplus Cash**" shall mean for each calendar year during the term hereof, the amount by which Gross Revenue (defined below) exceeds Annual Operating Expenses (defined below) for the Project. Surplus Cash shall also include net cash proceeds realized from any refinancing of the Project, less fees and closing costs reasonably incurred in connection with such refinancing, and any City-approved uses of the net cash proceeds of the refinancing.

1.2.2 "**Gross Revenue**" shall mean for each calendar year during the term hereof, all revenue, income, receipts and other consideration actually received by Borrower from the operation and leasing of the Project. Gross Revenue shall include, but not be limited to: all rents, fees and charges paid by tenants; Section 8 payments or other rental subsidy payments received for the dwelling units; deposits forfeited by tenants; all cancellation fees, price index adjustments and any other rental adjustments to leases or rental agreements; proceeds from vending and laundry room machines; the proceeds of business interruption or similar insurance; the proceeds of casualty insurance not required to be paid to the holders of Approved Senior Loans (defined below) (provided however, expenditure of such proceeds (or projected expenditures approved by City) for repair or restoration of the Project shall be included within Annual Operating Expenses in the year of the expenditure); condemnation awards for a taking of part or all of the Property or the Improvements for a temporary period; and the fair market value of any goods or services provided to Borrower in consideration for the leasing or other use of any part of the Project. Gross Revenue shall include any release of funds from replacement or other reserve accounts to Borrower other than for costs associated with the Project. Gross Revenue shall not include tenant security deposits, loan proceeds, capital contributions or similar

advances.

1.2.3 "**Annual Operating Expenses**" shall mean for each calendar year during term hereof, the following costs reasonably and actually incurred for the operation and maintenance of the Project to the extent that they are consistent with an annual independent audit performed by a certified public accountant using generally accepted accounting principles: property taxes and assessments; debt service currently due and payable on a non-optional basis (excluding debt service due from residual receipts or surplus cash of the Project) on loans which have been approved by the City and which are secured by deeds of trust senior in priority to the Deed of Trust ("**Approved Senior Loans**") including without limitation that certain loan in the original principal amount of \$2,825,000 secured by a Deed of Trust recorded in the Official Records of Alameda County on March 4, 2005 as Instrument No. 2005086706, which has been assumed by Borrower and which is payable to the California Housing Finance Agency; property management fees and reimbursements in amounts in accordance with industry standards for similar residential projects; premiums for property damage and liability insurance related to the Project; utility service costs not paid for directly or indirectly by tenants; maintenance and repair costs; fees for licenses and permits required for the operation of the Project; organizational costs (e.g., annual franchise tax payments) and costs associated with accounting, tax preparation and legal fees of Borrower incurred in the ordinary course of business; expenses for security services; advertising and marketing costs; payment of deductibles in connection with casualty insurance claims not paid from reserves; tenant services; the amount of uninsured losses actually replaced, repaired or restored and not paid from reserves; cash deposits into reserves for capital replacements in an amount no more than \$500 per unit per year, increasing by 3.5% per year, or such greater amount as reasonably required by the holder of an Approved Senior Loan or as required by a physical needs assessment prepared by a third-party selected or approved by City and prepared at Borrower's expense; cash deposits into operating reserves in an amount reasonably approved by City or required by the holder of an Approved Senior Loan, but only if the accumulated operating reserve does not exceed four (4) months' projected Project operating expenses; and other ordinary and reasonable operating expenses. Payments to Borrower, its partners or affiliates in excess of the limitations set forth in this Section shall not be counted toward Annual Operating Expenses for the purpose of calculating Surplus Cash.

1.2.4 EXCLUSIONS FROM ANNUAL OPERATING EXPENSES. Annual Operating Expenses shall exclude the following: developer fees and interest on any deferred developer fees; contributions to Project operating reserves (except as permitted pursuant to Section 1.2.3); except as expressly provided herein, debt service payments on any loan which is not an Approved Senior Loan, including without limitation, unsecured loans or loans secured by deeds of trust which are subordinate to the Deed of Trust; depreciation, amortization, depletion and other non-cash expenses; expenses paid for with disbursements from any reserve account; distributions to partners (except as permitted pursuant to Section 1.2.3); any amount paid to Borrower, any general partner of Borrower, or any entity controlled by the persons or entities in control of Borrower or any general partner of Borrower (except as permitted pursuant to Section 1.2.3). Notwithstanding the foregoing limitation regarding payments to Borrower and related parties, the following fees shall be included in Annual Operating Expenses in accordance with and subject to the limitations set forth in Section 1.2.3 above even if paid to an affiliate of Borrower or a partner of Borrower: fees paid to a property management agent, resident services agent or social services agent, and subject to Section 1.2.5, repayment of cash advances by

Borrower's general or limited partners to cover operating expense deficits.

1.2.5 ADJUSTMENT TO OPERATING EXPENSES. Notwithstanding anything to the contrary set forth herein, for the purpose of calculating Surplus Cash, Annual Operating Expenses shall include: (a) the repayment of operating deficit loans provided by Borrower's limited partner(s) provided however, interest payable on such loans may be included in Annual Operating Expenses only in an amount equivalent to the lesser of (i) interest accrued at the actual interest rate charged for the loan, or (ii) interest accrued at a rate equal to three percent (3%) in excess of the rate of interest most recently announced by Bank of America, NT & SA (or its successor bank) at its San Francisco office as its "prime rate", and (b) the amount of any tax credit adjustor that is required to be paid from Project cash flow.

1.3 Intentionally omitted.

1.4 DUE ON TRANSFER. The entire unpaid principal balance and all interest and other sums accrued hereunder shall be due and payable upon the Transfer (as defined in Section 5.2 of the Loan Agreement) absent City consent, of all or any part of the Project or the Property or any interest therein other than a Transfer permitted without City consent pursuant to the Loan Agreement. Without limiting the generality of the foregoing, this Note shall not be assumable without City's prior written consent, which consent may be granted or denied in City's sole discretion.

1.5 PREPAYMENT. Borrower may, without premium or penalty, at any time and from time to time, prepay all or any portion of the outstanding principal balance due under this Note, provided that each such prepayment is accompanied by accrued interest on the amount of principal prepaid calculated to the date of such prepayment. Prepayments shall be applied first to any unpaid late charges and other costs and fees then due, then to accrued but unpaid interest, and then to principal. The Regulatory Agreement shall remain in full force for the entire term thereof regardless of any prepayment of this Note.

1.6 MANNER OF PAYMENT. All payments of principal and interest on this Note shall be made to City at 835 East 14<sup>th</sup> Street, San Leandro, CA 94577 or such other place as City shall designate to Borrower in writing, or by wire transfer of immediately available funds to an account designated by City in writing.

## 2. DEFAULTS AND REMEDIES.

2.1 EVENTS OF DEFAULT. The occurrence of any one or more of the following events shall constitute an event of default hereunder ("**Event of Default**"):

(A) Borrower fails to pay when due the principal and interest payable hereunder and such failure continues for ten (10) days after City notifies Borrower thereof in writing.

(B) Pursuant to or within the meaning of the United States Bankruptcy Code or any other federal or state law relating to insolvency or relief of debtors ("**Bankruptcy Law**"), Borrower or any general partner thereof (i) commences a voluntary case or proceeding; (ii) consents to the entry of an order for relief against Borrower or any general partner thereof in an involuntary case; (iii) consents to the appointment of a trustee, receiver, assignee, liquidator or

similar official for Borrower or any general partner thereof; (iv) makes an assignment for the benefit of its creditors; or (v) admits in writing its inability to pay its debts as they become due.

(C) A court of competent jurisdiction enters an order or decree under any Bankruptcy Law that (i) is for relief against Borrower or any general partner thereof in an involuntary case, (ii) appoints a trustee, receiver, assignee, liquidator or similar official for Borrower or any general partner thereof or substantially all of such entity's assets, (iii) orders the liquidation of Borrower or any general partner thereof, or (iv) issues or levies a judgment, writ, warrant of attachment or similar process against the Property or the Project, and in each case the order or decree is not released, vacated, dismissed or fully bonded within ninety (90) days after its issuance.

(D) The occurrence of a Transfer in violation of Article VI of the Loan Agreement.

(E) A default arises under any debt instrument secured by a mortgage or deed of trust on the Project or the Property and remains uncured beyond any applicable cure period such that the holder of such instrument has the right to accelerate payment thereunder.

(F) Borrower fails to maintain insurance on the Property and the Project as required pursuant to the City Documents and Borrower fails to cure such default within ten (10) days.

(G) Subject to Borrower's right to contest the following charges pursuant to the City Documents, if Borrower fails to pay taxes or assessments due on the Property or the Project or fails to pay any other charge that may result in a lien on the Property or the Project, and Borrower fails to cure such default within sixty (60) days of delinquency but in all events prior to the date that the holder of any such lien has the right to pursue foreclosure thereof;

(H) If any representation or warranty contained in any City Document, or any certificate furnished in connection therewith, or in connection with any request for disbursement of the proceeds of the Loan proves to have been false or misleading in any material adverse respect when made and continues to be materially adverse to the City.

(I) A default arises under the Loan Agreement, the Regulatory Agreement or any other City Document and remains uncured beyond the expiration of the applicable cure period.

2.2 REMEDIES. Upon the occurrence of an Event of Default hereunder, City may, at its option (i) by written notice to Borrower, declare the entire unpaid principal balance of this Note, together with all accrued interest thereon and all sums due hereunder, immediately due and payable regardless of any prior forbearance, (ii) exercise any and all rights and remedies available to it under applicable law, and (iii) exercise any and all rights and remedies available to City under this Note and the other City Documents, including without limitation the right to pursue foreclosure under the Deed of Trust. Borrower shall pay all reasonable costs and expenses incurred by or on behalf of City including, without limitation, reasonable attorneys' fees, incurred in connection with City's enforcement of this Note and the exercise of any or all of its rights and remedies hereunder and all such sums shall be a part of the indebtedness secured by the Deed of Trust. The rights and remedies of City under this Note shall be cumulative and not alternative.

2.3 DEFAULT RATE. Upon the occurrence of an Event of Default, interest shall automatically be increased without notice to the lesser of ten percent (10%) per annum or the maximum rate permitted by law (the “**Default Rate**”); provided however, if any payment due hereunder is not paid when due, the Default Rate shall apply commencing upon the due date for such payment. When Borrower is no longer in default, the Default Rate shall no longer apply, and the interest rate shall once again be the rate specified in the first paragraph of this Note. Notwithstanding the foregoing provisions, if the interest rate charged exceeds the maximum legal rate of interest, the rate shall be the maximum rate permitted by law. The imposition or acceptance of the Default Rate shall in no event constitute a waiver of a default under this Note or prevent City from exercising any of its other rights or remedies.

2.4 LIMITED PARTNERS RIGHT TO CURE. Borrower’s limited partners shall have the right to cure any default of Borrower hereunder pursuant to the terms of the Loan Agreement. Any cure tendered by a limited partner of Borrower shall be deemed to be a cure by Borrower and shall be accepted or rejected on the same basis as if tendered by Borrower.

### 3. MISCELLANEOUS

3.1 WAIVERS; BORROWER’S WAIVERS. No waiver by City of any right or remedy under this Note shall be effective unless in a writing signed by City. Neither the failure nor any delay in exercising any right, power or privilege under this Note will operate as a waiver of such right, power or privilege, and no single or partial exercise of any such right, power or privilege by City will preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. No waiver that may be given by City will be applicable except in the specific instance for which it is given. No notice to or demand on Borrower will be deemed to be a waiver of any obligation of Borrower or of the right of City to take further action without notice or demand as provided in this Note.

To the maximum extent permitted by applicable law Borrower hereby waives presentment, demand, protest, notices of dishonor and of protest and all defenses and pleas on the grounds of any extension or extensions of the time of payment or of any due date under this Note, in whole or in part, whether before or after maturity and with or without notice.

3.2 NOTICES. Any notice required or permitted to be given hereunder shall be given in accordance with Section 9.3 of the Loan Agreement.

3.3 SEVERABILITY. If any provision in this Note is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Note will remain in full force and effect. Any provision of this Note held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

3.4 GOVERNING LAW; VENUE. This Note shall be governed by the laws of the State of California without regard to principles of conflicts of laws. Any legal action filed in connection with this Note shall be filed in the Superior Court of Alameda County, California, or in the Federal District Court for the Northern District of California.

3.5 PARTIES IN INTEREST. This Note shall bind Borrower and its successors and assigns and shall accrue to the benefit of City and its successors and assigns.

3.6 SECTION HEADINGS, CONSTRUCTION; AMENDMENTS. The headings of Sections in this Note are provided for convenience only and will not affect its construction or interpretation. There shall be no amendment to or modification of this Note except by written instrument executed by Borrower and City.

3.7 RELATIONSHIP OF THE PARTIES. The relationship of Borrower and City under this Note is solely that of borrower and lender, and the loan evidenced by this Note and secured by the Deed of Trust will in no manner make City the partner or joint venturer of Borrower.

3.8 TIME IS OF THE ESSENCE. Time is of the essence with respect to every provision of this Note.

3.9 NONRECOURSE. Except as expressly provided in this Section 3.9, neither Borrower nor its partners shall have personal liability for payment of the principal of, or interest on, this Note, and the sole recourse of City with respect to the payment of the principal of, and interest on, this Note shall be to the Project, the Property and any other collateral held by City as security for this Note; provided however, nothing contained in the foregoing limitation of liability shall:

(A) impair the enforcement against all such security for the Loan of all the rights and remedies of the City under the Deed of Trust and any financing statements City files in connection with the Loan as each of the foregoing may be amended, modified, or restated from time to time;

(B) impair the right of City to bring a foreclosure action, action for specific performance or other appropriate action or proceeding to enable City to enforce and realize upon the Deed of Trust, the interest in the Project and the Property created thereby and any other collateral given to City in connection with the indebtedness evidenced hereby and to name the Borrower as party defendant in any such action;

(C) be deemed in any way to impair the right of the City to assert the unpaid principal amount of the Loan as a demand for money within the meaning of Section 431.70 of the California Code of Civil Procedure or any successor provision thereto;

(D) constitute a waiver of any right which City may have under any bankruptcy law to file a claim for the full amount of the indebtedness owed to City hereunder or to require that the Project and the Property shall continue to secure all of the indebtedness owed to City hereunder in accordance with this Note and the Deed of Trust; or

(E) limit or restrict the ability of City to seek or obtain a judgment against Borrower to enforce against Borrower and its general partners to:

(1) recover under Sections 3.13, 3.15, 3.16, 5.3, 8.2, 10.1 and 11.1 of the Loan Agreement (pertaining to Borrower's indemnification obligations), or

(2) recover from Borrower and its general partners compensatory damages as well as other costs and expenses incurred by City (including without limitation attorney's fees and expenses) arising as a result of the occurrence of any of the following:

(a) any fraud or material misrepresentation on the part of the Borrower, any general partner thereof, or any officer, director or authorized representative of Borrower or any general partner thereof in connection with the request for or creation of the Loan, or in any City Document, or in connection with any request for any action or consent by City in connection with the Loan;

(b) any failure to maintain insurance on the Property and the Project as required pursuant to the City Documents;

(c) failure to pay taxes, assessments or other charges which may become liens on the Property or the Project;

(d) the presence of Hazardous Materials (defined in Section 8.3 of the Loan Agreement) on the Property or other violation of the Borrower's obligations under Article VIII of the Loan Agreement or Section 7.11 of the Deed of Trust (pertaining to environmental matters);

(e) the occurrence of any act or omission of Borrower that results in waste to or of the Project or the Property and which has a material adverse effect on the value of the Project or the Property;

(f) the material misapplication of the Loan proceeds;

(g) the removal or disposal of any personal property or fixtures or the retention of rents, insurance proceeds, or condemnation awards in violation of the Deed of Trust or the Loan Agreement;

(h) the material misapplication of the proceeds of any insurance policy or award resulting from condemnation or the exercise of the power of eminent domain or by reason of damage, loss or destruction to any portion of the Project or the Property; and

(i) the failure of Borrower to pay all amounts payable under this Note in full if Borrower Transfers the Property or the Project in violation of the Loan Agreement.

**SIGNATURE(S) ON FOLLOWING PAGE.**



IN WITNESS WHEREOF, Borrower has executed and delivered this Note as of the date first written above.

**BORROWER**

EDEN SURF ASSOCIATES L.P., a California limited partnership

By: Eden Surf LLC, a California limited liability company  
Its: General Partner

By: Eden Investments, Inc., a California nonprofit public benefit corporation  
Its: Managing Member

By: \_\_\_\_\_  
Linda Mandolini, Executive Director