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MEMORANDUM

TO: Jo Sesodia, Director
Planning and Development Management Division

FROM: Alexis Marrero Koratich, Assistant County Attorney /s/ Alexis Marrero Koratich

DATE: March 10, 2022

RE: **Proposed Subordination Agreement for Regulatory Agreement; Sailboat Bend II, Ltd.**

Sailboat Bend II, Ltd., a Florida limited partnership ("Owner") has requested the Board of County Commissioners ("Board") to consider entering into a Subordination Agreement for Regulatory Agreement ("Subordination") to subordinate two existing Declarations of Restrictive Covenants related to (i) the waiver of impact fees for the construction of affordable housing and (ii) the waiver of educational impact fees prohibiting the residence of school aged children in a manner consistent with federal, state, or local laws or regulations. The proposed Subordination subordinates the following (items (i) and (ii) below are hereinafter referred to individually as the "Declaration", collectively as the "Declarations"):

- (i) Declaration of Restrictive Covenants (Affordable Housing) dated July 31, 2019, recorded on August 6, 2019, at Instrument #115974883, in the Public Records of Broward County, securing Forty Thousand Eight Hundred Forty-nine and 00/100 Dollars (\$40,849.00) in fees waived by Broward County for the construction of seventeen (17) very low income and eighty-four (84) low income affordable housing units. The Declaration requires that the units constructed on the property be sold and rented to persons meeting the low or very low income limitations for twenty (20) years. There are approximately seventeen (17) years remaining on the restriction period; and
- (ii) Declaration of Restrictive Covenants (Age Restricted) dated July 31, 2019, recorded on August 6, 2019, at Instrument #115974930, in the Public Records of Broward County, securing Thirty-six Thousand Four Hundred Sixty-one and 00/100 Dollars (\$36,461.00) in educational impact fees waived by Broward County for the construction of one hundred one (101) units that restrict the age of its residents to prohibit the residence of school age children in a manner consistent with federal, state, or local regulations. The Declaration requires that the units shall be sold or rented only to those persons meeting the applicable age restrictions in the Broward County Code of Ordinances. The restrictions in this Declaration are effective in perpetuity.

Owner has indicated that they are in the process of refinancing a loan secured by the property through a loan to be made by JLL Real Estate Capital LLC ("Lender"), that will be assigned to Fannie Mae, in the original principal loan amount of Eight Million Fifty Thousand and 00/100 Dollars (\$8,050,000.00) ("Loan") pursuant to the terms of a Multifamily Loan and Security Agreement ("Proposed Loan Agreement") between Lender and Owner. For the avoidance of doubt, the Proposed Loan Agreement is still in draft form and is not binding on Lender and Owner until it is fully executed.

Owner and Lender propose to incorporate the Declarations by reference in the Proposed Loan Agreement and have provided the County Attorney's office with a draft of the Proposed Loan Agreement for review.

Exhibit A of the Proposed Loan Agreement adds Article 16 that obligates Owner (i) to provide Lender with notice in the event of default under the Declarations, (ii) to comply with the requirements of the Declarations, and (iii) requires Lender's consent to any modifications to the Declarations. Exhibit A further modifies Section 3.02 of the Proposed Loan Agreement to provide that Owner will be personally liable to Lender for any failure to comply with the Declarations and modifies Section 14.01(b) to provide that Owner's breach of the Declarations will be considered an event of default (subject to a specified cure period) under the Proposed Loan Agreement.

The Proposed Loan Agreement provides for a loan term of thirty (30) years. Section 2.03 of the Proposed Loan Agreement authorizes Owner to make voluntary prepayments of the Loan. Moreover, while Section 2.03 of the Proposed Loan Agreement makes reference to a "Prepayment Lockout Period" that would bar Owner from making prepayments for a certain period of time, Schedule 2 of the Proposed Loan Agreement defines Prepayment Lockout Period as year "0", indicating that Owner may prepay the Loan at any time.

Moreover, applicant executed a Declaration of Restrictive Covenants, SHIP Multi-family Rental Construction Strategy Option, recorded on October 21, 2021, at Instrument #117677207, in the Public Records of Broward County ("SHIP DRC"). Exhibit A of the SHIP DRC provides that Owner will construct one hundred ten (110) units of affordable housing for seniors. One hundred one (101) of the foregoing units will be low income housing tax credit units with eighty-nine (89) units set-aside for low income tenants, eleven (11) units set-aside for extremely low income tenants, and one unit set-aside for an on-site staff member. The remaining nine (9) units are market rate units with no income restrictions. Although Exhibit A of the SHIP DRC specifically states that Sailboat Bend II is a "senior rental affordable housing project" and states that Sailboat Bend II is "targeted to residents ages 55 and older", notwithstanding, there does not appear to be a specific binding restriction regarding age. The SHIP DRC provides for a thirty (30) year affordability period. There are approximately twenty-nine (29) years remaining of the affordability period.

In sum, the Proposed Loan Agreement does incorporate the terms of the Declarations, in the event of refinance, foreclosure, or if Owner voluntarily prepays the Loan, the affordable housing and age restricted provisions of the Declarations will not survive. Moreover, the SHIP DRC would not adequately substitute for the Declarations in the event of refinance, foreclosure, or if Owner voluntarily prepays the Loan. While the term of the SHIP DRC is greater than the term of Declaration (i), the SHIP DRC does not appear to provide for very low income tenants as it does in the Declaration (i), but does, however, provide for extremely low income tenants. Moreover, the SHIP DRC does not contain a specific binding restriction relating to age restricted housing. Even if the SHIP DRC did contain a specific binding restriction relating to age restricted housing, Declaration (ii) is effective in perpetuity while the SHIP DRC is only effective for thirty (30) years. The County's interests in the Declarations are not preserved by either the Proposed Loan Agreement or the SHIP DRC as written.

The Board should be made aware of the following nonstandard provisions:

- Provide that any transfer of the property in connection with the event of a foreclosure or deed in lieu of foreclosure will not require the County's consent.
- Obligate County to provide Lender with a concurrent copy of each material notice under or with respect to each Declaration.
- Provide that Lender shall have the right (but not be obligated) to cure any default under each Declaration.
- Provide that County shall not be permitted to modify, amend, change, or alter the Declarations without the written consent of Lender.
- Provide that in the event of foreclosure, deed in lieu of foreclosure, or similar disposition of the property by Lender, no consent will be required of the County.
- Limit County's ability to enforce the terms of the Declarations by any remedy available in law or in equity that could result in (i) the transfer of the property, (ii) collection or possession of rent generated from the property; (iii) appointment of a receiver for the property; (iv) application of insurance or condemnation proceeds other than as approved by Lender; (v) removal or replacement of the current property manager of the property; or (vi) a material adverse effect on

Lender's security interest in the property.

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