

**TOWN OF WEST NEW YORK  
COUNTY OF HUDSON, STATE OF NEW JERSEY**

**ORDINANCE #16/18**

**AN ORDINANCE OF THE BOARD OF COMMISSIONERS OF THE TOWN OF WEST NEW YORK APPROVING AND AUTHORIZING THE EXECUTION OF AMENDMENTS TO AGREEMENTS BETWEEN THE TOWN OF WEST NEW YORK AND OVERLOOK TERRACE URBAN RENEWAL CORPORATION AND EXCEL PROPERTIES URBAN RENEWAL ASSOCIATES, L.L.C. FOR PROPERTIES COMMONLY REFERRED TO AS OVERLOOK TERRACE APARTMENTS FOR EXTENSION OF PAYMENTS IN LIEU OF TAXES**

**BE IT ORDAINED** by the Board of Commissioners of the Town of West New York, County of Hudson, New Jersey that:

**Section 1.** Overlook Terrace Urban Renewal Corporation is the owner of property, including a residential building containing 300 units located at 5601 Boulevard East, otherwise known as Block 72, Lot 17 & Block 73, Lot 15 on the tax map of the Town of West New York (the “Town”) commonly known to as Overlook Terrace South.

**Section 2.** Excel Properties Urban Renewal Associates, L.L.C. is the owner of property, including a residential building containing 300 units located at 5701 Boulevard East, otherwise known as Block 58, Lot 1 & Block 62, Lot 18 on the tax map of the Town commonly known to as “Overlook Terrace North” (Overlook Terrace North and Overlook Terrace South are collectively referred to as “Overlook Terrace” herein).

**Section 3.** On October 10, 1968, the Town and Overlook Terrace entered in that certain agreement (the “Financial Agreement”) providing for the properties to be exempt from all real and personal property taxes levied or imposed by the Town and that Overlook Terrace shall make payments in lieu of taxes to the Town based on a percentage of annual gross shelter rent from the properties.

**Section 4.** On October 8, 2009, Overlook Terrace was partitioned into two separate entities designated as (1) Overlook Terrace Urban Renewal Corp., located at 5601 Boulevard East, West New York, commonly referred to as “Overlook Terrace South” and (2) Excel Properties Urban Renewal Associates, L.L.C., located at 5701 Boulevard East, West New York, commonly referred to as “Overlook Terrace North”.

**Section 5.** As a result of the partition, on October 8, 2009, the Financial Agreement was amended by the Town to address the obligation for each owner to continue to make payments in lieu of taxes for each property consistent with the Financial Agreement.

**Section 6.** On October 4, 2017, the Town entered into agreements with Overlook Terrace North and Overlook Terrace South as to the applicability of the Town Rent Control Ordinance and related issues to the properties.

**Section 7.** Pursuant to and in accordance with the provisions of the Long Term Tax Exemption Law, constituting Chapter 431 of the Pamphlet Laws of 1991 of the State, and the acts amendatory thereof and supplement thereto (the “Long Term Tax Exemption Law”, as codified in N.J.S.A. 40A:20-1 et seq.), specifically Section 13, the Town is authorized to extend a financial agreement to coincide with existing first mortgage financing.

**Section 8.** Pursuant to Ordinance #25/17, adopted on November 30, 2017, the Town approved an amendment to the Financial Agreements between the Town and Overlook Terrace North and Overlook Terrace South to extend the term of the Financial Agreement for one year from November 1, 2017 to October 31, 2018.

**Section 9.** The Town and Overlook Terrace North and Overlook Terrace South desire to enter into a further amendment to the Financial Agreements to extend the term of the Financial Agreements for one year from November 1, 2018 to October 31, 2019.

**BE IT FURTHER ORDAINED** by the Board of Commissioners of the Town of West New York, County of Hudson, New Jersey that:

**Section 1.** The Town has agreed to extend the term of the Financial Agreements pursuant to Section 13 of the Long Term Tax Exemption Law.

**Section 2.** The Financial Agreements shall be further amended to extend the term for one year from November 1, 2018 to October 31, 2019.

**Section 3.** Except as expressly amended and supplemented by this Ordinance, the Financial Agreements and all applicable Amendments remain in full force and effect and are hereby ratified and confirmed in their entirety.

**Section 4.** The Town and Overlook Terrace South and Overlook Terrace North shall enter into separate agreements to amend the Financial Agreements.

**Section 5.** Amendments to the Financial Agreements as set forth above are hereby authorized and a Third Amended Financial Agreements shall be executed and delivered on behalf of the Town by the Mayor in substantially the form attached hereto as Exhibit A. The Town Clerk is hereby authorized and directed to attest to the execution of the Third Amended Financial Agreements by the Mayor and to affix the corporate seal of the Town to the Third Amended Financial Agreement.

**BE IT FURTHER ORDAINED** by the Board of Commissioners of the Town of West New York, County of Hudson, New Jersey that this ordinance shall take effect upon final passage and publication as required by law.

**Introduced: 9/19/2018**

**Adopted: 10/17/2018**

**EXHIBIT A**

**FORM OF THIRD AMENDED FINANCIAL AGREEMENTS BETWEEN THE  
TOWN AND OVERLOOK TERRACE NORTH AND OVERLOOK TERRACE  
SOUTH**

# THIRD AMENDED FINANCIAL AGREEMENT

For

## OVERLOOK TERRACE SOUTH

### PREAMBLE

**THIS THIRD AMENDED FINANCIAL AGREEMENT** (the "Agreement" or "Third Amended Financial Agreement") is made as of this \_\_\_ day of \_\_\_\_\_, 2018, by and between Overlook Terrace Urban Renewal Corporation (d/b/a Overlook Terrace South), a corporation organized under N.J.S.A. 14A:1-1 et. seq., the New Jersey Business Corporation Act, and N.J.S.A. 40A:20-1 et. seq., the Long Term Tax Exemption Law, with offices located at 5601 Boulevard East, West New York, NJ 07093, otherwise known as Block 72, Lot 17 & Block 73, Lot 15 on the local tax map, (the "Entity" or "Overlook Terrace South"), and the Town of West New York, a Commission Form of Government organized pursuant to N.J.S.A. 40:70-1 et. seq., with offices located at 428 60<sup>th</sup> Street, West New York, NJ 07093 (the "Town" or "West New York"). Overlook Terrace North and West New York are hereinafter collectively referred to as the ("Parties").

### RECITALS

**WHEREAS**, in 1968 the construction of Overlook Terrace, a multifamily apartment complex in West New York, was financed with a fifty (50) year mortgage by the New Jersey Housing Finance Agency ("HFA"), the predecessor to the New Jersey Housing and Mortgage Finance Agency ("HMFA"); and

**WHEREAS**, Overlook Terrace Urban Renewal Corporation is the owner of property, including a residential building containing 300 units located at 5601 Boulevard East, otherwise known as Block 72, Lot 17 & Block 73, Lot 15 (the "Project") on the tax map of the Town of West New York (the "Town") commonly known to as Overlook Terrace South; and

**WHEREAS**, on October 10, 1968, the Town and Overlook Terrace entered in that certain agreement (the "Financial Agreement") providing for the properties to be exempt from all real and personal property taxes levied or imposed by the Town and that Overlook Terrace shall make payments in lieu of taxes to the Town based on a percentage of annual gross shelter rent from the properties; and

**WHEREAS**, on October 8, 2009, Overlook Terrace was partitioned into two separate entities designated as (1) Overlook Terrace Urban Renewal Corp., located at 5601 Boulevard East, West New York, commonly referred to as "Overlook Terrace South" and (2) Excel Properties Urban Renewal Associates, L.L.C., located at 5701 Boulevard East, West New York, commonly referred to as "Overlook Terrace North"; and

**WHEREAS**, as a result of the partition, on October 8, 2009, the Financial Agreement was amended by the Town to address the obligation for each owner to continue to make payments in lieu of taxes for each property consistent with the Financial Agreement; and

**WHEREAS**, on October 4, 2017, the Town entered into an agreement with Overlook Terrace South as to the applicability of the Town Rent Control Ordinance and related issues to the property; and

**WHEREAS**, pursuant to and in accordance with the provisions of the Long Term Tax Exemption Law, constituting Chapter 431 of the Pamphlet Laws of 1991 of the State, and the acts amendatory thereof and supplement thereto (the “Long Term Tax Exemption Law”, as codified in N.J.S.A. 40A:20-1 et seq.), specifically Section 13, the Town is authorized to extend a financial agreement to coincide with existing first mortgage financing; and

**WHEREAS**, the Entity currently has existing first mortgage financing for Overlook Terrace South; and

**WHEREAS**, the Entity was created for the purposes of acquiring, owning, holding, developing, maintaining, financing, mortgaging, improving, operating, leasing, managing, using, refinancing, selling, subdividing, or otherwise dealing with Overlook Terrace South; and

**WHEREAS**, on November 30, 2017, the Town adopted an ordinance authorizing a one year extension of the First Amended Financial Agreement with the Entity for the period from November 1, 2017 to October 31, 2018 (the “Second Amendment to the Financial Agreement”); and

**WHEREAS**, the Town and the Entity have reached agreement with respect to, among other things, the terms and conditions relating to the Annual Service Charges and desire to execute a Third Amended Financial Agreement for Overlook Terrace South, which terms and conditions are stated below.

**NOW, THEREFORE, BE IT ORDAINED AND ENACTED** by the Board of Commissioners of the Town of West New York, County of Hudson, New Jersey, as follows:

**Section 1.** The Town acknowledges that Overlook Terrace Urban Renewal Corporation, by effectuating the continued operation of the Project, will significantly limit its profits due to the extraordinary costs to be borne by the Entity, which will provide significant and long-term benefits to the Town of West New York.

**Section 2.** The Town makes the following findings:

- A. 1. Overlook Terrace South has been providing housing to

Town residents for more than 50 years and while the housing is no longer subject to HMFA affordability controls, the Town and Entity recently entered into an agreement as to the applicability of the Town Rent Control Ordinance and related issues to the property, including establishing rents and rental increases.

2. The Property is currently subject to a financial agreement for the payment of annual service charges in lieu of Ordinary Taxes, which has a positive impact on rents charged to residents of Overlook Terrace North.

3. The current Annual Service Charge being paid for the Property is approximately \$500,000 and is projected to increase over the term of this Financial Agreement.

4. The Town has determined that the benefits significantly outweigh the costs to the Town.

B. Assessment of the importance of the Tax Exemption defined in maintaining the Property:

1. The relative stability and predictability of the Annual Service Charge will make the Property more attractive to new tenants; and

2. The relative stability and predictability of the Annual Service Charge will allow stabilization of the Project operating budget, allowing reasonable rents and allowing the Entity to maintain the appearance of the buildings and to provide quality housing to Town residents and to insure that it will have a positive impact on the surrounding area.

C. Based upon the above determinations by the Town and the provisions of N.J.S.A. 40A:20-12, this Agreement contains appropriate tax exemption provisions and an appropriate Annual Service Charge schedule.

**WHEREAS**, by the adoption of Ordinance No. 2018-\_\_ on \_\_\_\_\_, 2018 (the "**Ordinance**"), the Board of Commissioners approved findings and authorized the execution of this Third Amended Financial Agreement, which supersedes and replaces the Original Financial Agreement and all prior amendments.

**NOW THEREFORE**, in consideration of the mutual covenants herein, contained, and for other good and valuable consideration, it is mutually covenanted and agreed as follows:

**ARTICLE 1**  
**GENERAL PROVISIONS**

**Section 1.1 Governing Law.** This Agreement shall be governed by the provisions of the Long Term Tax Exemption Law, as amended and supplemented, N.J.S.A. 40A:20-1 et seq., and the Ordinance, which authorized the execution of this Agreement. The Town has relied upon the facts, data, and representations contained in the Application in granting this tax exemption.

**Section 1.2 General Definitions.** Unless specifically provided otherwise or the context otherwise requires, when used in this Agreement, the following terms shall have the following meanings:

i. Allowable Net Profit – The amount determined by applying the Allowable Profit Rate to Total Project Cost pursuant to N.J.S.A. 40A:20-3(c).

ii. Allowable Profit Rate – The greater of 12% or the percentage per annum arrived at by adding 1.25% to the annual interest percentage rate payable on the Entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a governmental agency, the mortgage insurance premium or similar charge, if payable on a per annum basis, shall be considered as interest for this purpose. If there is no permanent mortgage financing, or if the financing is internal or undertaken by a related party, the Allowable Profit Rate shall be the greater of 12% or the percentage per annum arrived at by adding 1.25% per annum to the interest rate per annum that the Town determines to be the prevailing rate on mortgage financing on comparable improvements in Somerset County. The provisions of N.J.S.A. 40A:20-3(b) are incorporated herein by reference.

iii. Annual Gross Revenue – The amount equal to annual gross rents and other income derived by the Entity in connection with the Project, together with any insurance, operating and maintenance expenses paid by a tenant that are ordinarily paid by a landlord.

iv. Annual Service Charge – The amount the Entity has agreed to pay the Town for Town services supplied to the Project, which sum is in lieu of any taxes on the Improvements, pursuant to N.J.S.A. 40A:20-13.

v. Auditor's Report — A complete financial statement outlining the financial status of the Project (for a period of time as indicated by context), which shall include a certification of Annual Gross Revenue and clear computation of Net Profit. The contents of the Auditor's Report shall be prepared in conformity with generally accepted accounting principles and shall contain any applicable items required by the Law. The Auditor's Report shall be certified as to its conformance with such principles by a certified public accountant that is licensed to practice in the State of New Jersey.

vi. Certificate of Occupancy — A document, whether temporary or permanent, issued by the Town authorizing occupancy of a building, in whole or in part, pursuant to N.J.S.A. 52:27D-133.

vii. Default — A breach of or the failure of the Entity to perform any obligation imposed upon the Entity by the terms of this Agreement, or under the Law, beyond any applicable grace or cure periods.

vii. Entity — The term "Entity" within this Agreement shall be as defined in the Recitals as the Redeveloper, and includes any subsequent purchasers or successors in interest of the Project, provided they are formed and operate under the Law and the transfer has been duly approved by the Town in accordance with Article VII below.

viii. Improvements or Project — Any building, structure or fixture permanently affixed to the land and tax exempted under this Agreement.

ix. In Rem Tax Foreclosure or Tax Foreclosure — A summary proceeding by which the Town may enforce a lien for taxes due and owing by tax sale, under N.J.S.A. 54:5-1 to 54:5129 et seq.

x. Law — The Long Term Tax Exemption Law, as amended and supplemented, N.J.S.A. 40A:20-1 et seq. and the Ordinance that authorized the execution of this Agreement, and all other relevant Federal, State or Town statutes, ordinances, resolutions, rules and regulations.

xi. Minimum Annual Service Charge — By agreement of the parties and in satisfaction of the Law, the Minimum Annual Service Charge shall be the annual service charge paid by the Entity for the period November 1, 2017 to October 31, 2018.

xii. Net Profit — The gross revenue of the Entity, less all operating and non-operating expenses of the Entity, all determined in accordance with generally accepted accounting principles and the provisions of N.J.S.A. 40A:20-3(c).

xiii. Ordinary Taxes — the taxes on the land and improvements that would ordinarily be due and payable in the absence of a Tax Exemption.

xiv. Pronouns — He or it shall mean the masculine, feminine or neuter gender, the singular, as well as the plural, as context requires.

xv. Termination — Any act or omission which by operation of the terms of this Financial Agreement shall cause the Entity to relinquish its tax exemption.

## **ARTICLE II** **APPROVAL**

**Section 2.1 Approval of Tax Exemption.** The Town approves a tax exemption for all the Improvements on the property and maintained in accordance with the terms and conditions of this Agreement and the provisions of the Law.

**Section 2.2 Approval of Entity.** Approval is granted to the Entity. Entity represents that its Certificate of Formation contains all the requisite provisions of the Law; has been reviewed and approved by the Commissioner of the New Jersey Department of Community Affairs ("DCA"); and has been filed with, as appropriate, the Office of the State Treasurer, all in accordance with N.J.S.A. 40A:20-5.

**Section 2.3 Improvements.** The Entity represents that existing improvements on the property consists of 300 residential rental units, together other improvements.

**Section 2.4 Ownership, Management and Control.** The Entity is the owner of the Property and the Improvements. Any sale of the Project by the Entity shall require approval of the Town.

**Section 2.5. Financial Plan.** The Entity has an existing first mortgage on the Property and Improvements.

**Section 2.6 Statement of Estimated Rents.** The Entity's good faith projections of the rents are set forth in the Exhibit B.

**Section 2.7 Compliance with the Law.** The Entity shall, at all times prior to the expiration or termination of this Agreement, remain bound by the provisions of the Law.

### **ARTICLE III** **DURATION OF AGREEMENT**

**Section 3.1 Term.** So long as there is compliance with the Law and this Agreement, the Annual Service Charge due under this Agreement shall become effective upon the issuance of the first Certificate of Occupancy for the applicable phase of the Project, and remain in effect for a term of thirty (30) years. The tax exemption shall only be effective and shall continue in force only while the Project is owned by a corporation or association formed and operating under the Law.

### **ARTICLE IV** **ANNUAL SERVICE CHARGE & ANNUAL ADMINISTRATIVE FEE**

**Section 4.1 Annual Service Charge.** In consideration of the tax exemption, the Entity shall make payment to the Town of an amount equal to the greater of (1) the Minimum Annual Service Charge or (2) \_\_% of the Annual Gross Revenues or (3) Ordinary Taxes in accordance with the Law.

**Section 4.2 Staged Adjustments.** The Annual Service Charge shall be adjusted in Stages over the term of the tax exemption in accordance with N.J.S.A. 40A:20-12(b) as follows:

i. Stage One: From the 1st day of November 2018 until October 31, 2024 (six (6) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge or (b) an amount equal to \_\_\_% of Annual Gross Revenues;

ii. Stage Two: Beginning on the 1st day of November 2024 until October 31, 2033 (seven (7) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to \_\_\_% of Annual Gross Revenues, or (c) an amount equal to 20% of the Ordinary Taxes.

iii. Stage Three: Beginning on the 1st day of November 2033 until October 31, 2038 (five (5) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to \_\_\_% of Annual Gross Revenues, or (c) an amount equal to 40% of the Ordinary Taxes;

iv. Stage Four: Beginning on the 1st day of November 2038 until October 31, 2043 (five (5) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to \_\_\_% of Annual Gross Revenues, or (c) an amount equal to 60% of the amount of the Ordinary Taxes;

v. Final Stage: Beginning on the 1st day of November 2043 until October 31, 2048 (five (5) year period), the date the tax exemption expires, the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to \_\_\_% of Annual Gross Revenues, or (c) an amount equal to 80% of the amount of the Ordinary Taxes.

**Section 4.3 Administrative Fee.** In addition to the Annual Service Charge, the Town reserves the right to charge the Entity an annual administrative fee ("Annual Administrative Fee") in an amount equal to two percent (2%) of the Annual Service Charge.

**Section 4.5 Quarterly Installments.** The Entity shall pay the Annual Service Charge in quarterly installments on those dates when real estate tax payments are due; subject, nevertheless, to adjustment for over or underpayment within thirty (30) days after the close of each calendar year. In the event that the Entity fails to pay the Annual Service Charge or the Annual Administrative Fee in full, the unpaid amount shall bear the highest rate of interest permitted in the case of unpaid taxes or tax liens on the land until paid.

**Section 4.6 Material Conditions.** It is expressly agreed and understood that the timely payments of Minimum Annual Service Charges, Annual Service Charges, Administrative Fee, including adjustments thereto, and any interest thereon, are material conditions ("Material Conditions") of this Agreement.

**Section 4.7 Other Municipal Services.** Nothing herein shall exempt the Entity from the payment of any municipal services, including sewer and water charges, rendered to the Property. The Entity shall timely pay for municipal services rendered to the Property.

## **ARTICLE V** **ANNUAL REPORTS**

**Section 5.1 Accounting System.** The Entity shall maintain, or cause to be maintained, a system of accounting and internal controls established and administered in accordance with generally accepted accounting principles.

### **Section 5.2 Periodic Reports**

A. **Auditor's Report:** Within ninety (90) days after the close of each fiscal or calendar year, depending on the Entity's accounting basis, that this Agreement shall continue in effect, the Entity shall submit its Auditor's Report for the preceding fiscal or calendar year to the Tax Collector and Town Clerk. The Auditor's Report shall include, but not be limited to: rents received by the Entity, and the terms and interest rate on any mortgage(s) associated with the purchase or construction of the Project, and such details as may relate to the financial affairs of the Entity and to its operation and performance hereunder, pursuant to the Law and this Agreement. The Report shall clearly identify and calculate the Net Profit for the Entity during the previous year.

B. **Disclosure Statement:** Upon written request, the Entity shall submit a Disclosure Statement to the Town Clerk, listing the persons having an ownership interest in the Project, and the extent of the ownership interest of each.

C. **Town Certification:** Upon written request, the Town shall certify that the financial agreement with the Entity has been entered into and is in effect as required by Law.

**Section 5.3 Inspection.** Upon request, the Entity shall permit the inspection of its property, equipment, buildings and other facilities of the Project by representatives duly authorized by the Town and the Local Government Services Division of DCA. The Entity shall permit, upon request, an examination and audit of its books and records. Such examination or audit shall be made during the reasonable hours of the business day, in the presence of an officer or agent designated by the Entity.

## **ARTICLE VI** **LIMITATION OF PROFITS AND RESERVES**

**Section 6.1 If Applicable, Limitation of Profits and Reserves.** During the period of tax exemption as provided herein, the Entity shall be subject to a limitation of its profits pursuant to the provisions of N.J.S.A. 40A:20-15.

The Entity may establish a reserve against vacancies, unpaid rents, and reasonable reserves and contingencies in an amount equal to five (5%) percent of the Gross Revenue of the Entity for the last full fiscal year preceding the year and may retain such part of the excess Net Profits as is necessary to eliminate a deficiency in that reserve, as provided in N.J.S.A. 40A:20-15. The reserve is to be non-cumulative, it being intended that no further credits thereto shall be permitted after the reserve shall have attained the allowable level of five (5%) percent of the preceding year's Gross Revenue.

**Section 6.2 Annual Payment of Excess Net Profit.** If Net Profits in any fiscal year exceed the Allowable Net Profits for such period, the Entity, within ninety (90) days after the end of such fiscal year, shall pay such excess Net Profits to the Town as an additional service charge; provided, however, that the Entity may maintain a reserve as determined pursuant to Section 6.1 above.

**Section 6.3 Payment of Excess Net Profit upon Termination, Expiration or Sale.** The date of termination, expiration or sale shall be considered to be the close of the fiscal year of the Entity. Within ninety (90) days after such date, the Entity shall pay to the Town the excess Net Profit, if any, maintained by it pursuant to this section.

## **ARTICLE VII**

### **ASSIGNMENT AND/OR ASSUMPTION**

**Section 7.1 Assignment.** Any sale or fee interest transfer of the Project or any portion thereof shall be subject to the approval of the Town and the terms of this Agreement provided that (a) the transferee does not own any other work or undertaking pursuant to a redevelopment plan adopted pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., at the time of transfer; (b) the transferee is formed and eligible to operate under the Law; (c) the Entity is not then in default of this Agreement or the Law; and (d) the transferee assumes all the Entity's obligations under this Agreement.

## **ARTICLE VIII**

### **COMPLIANCE**

**Section 8.1 Operation.** During the term of this Agreement, the Project shall be maintained and operated in accordance with the provisions of the Law. The Entity may terminate this Agreement as provided by N.J.S.A. 40A:20-1 et seq., as currently amended and supplemented. The Town may also terminate this Agreement in the event of a Default under this Agreement. The Entity's failure to comply with the Law shall constitute a Default under this Agreement and the Town shall, among its other remedies, have the right to terminate the tax exemption and/or this Agreement.

## **ARTICLE IX**

### **DEFAULT**

**Section 9.1 Default.** Default is hereby defined as (i) the failure of the Entity to pay the Annual Service Charge, or any part thereof, beyond any applicable notice, cure or grace period or (ii) the failure of the Entity to perform any obligations imposed by the Agreement and the Law and that the Entity fails to cure within sixty (60) days after written notice thereof. If, in the reasonable opinion of the Town, the Default cannot be cured within sixty (60) days using reasonable diligence, the Town will extend the time to cure.

Should the Entity fail to pay any charges defined as Material Conditions in Section 4.6 above, such failure shall not be subject to the default remedies provided in Section 9.2 below, but shall allow the Town to proceed immediately to terminate the Agreement as provided in Article XI below.

Should the Entity fail to pay any charges defined as Material Conditions in Section 4.6 above, the Tenant shall have the right to pay such charges within the timeframes set forth in the Agreement. If the Tenant timely cures any default of Material Conditions, then the Agreement will not be terminated by the Town.

**Section 9.2 Remedies upon Default.** The Town shall, among its other remedies provided hereunder, have the right to proceed against the Project Site pursuant to the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-1 et seq. and/or may declare a Default and terminate this Agreement. Any default arising out of the Entity's failure to pay the Minimum Annual Service Charge, Additional Consideration or the Annual Service Charge shall not be subject to the default procedural remedies as provided in this Article IX, but shall allow the Town to proceed immediately to terminate the Agreement as provided in Article X below. All of the remedies provided in this Agreement to the Town, and all rights and remedies granted to it by law and equity, shall be cumulative and concurrent. No termination of any provision of this Agreement shall deprive the Town of any of its remedies or actions against the Entity because of its failure to pay the Minimum Annual Service Charge, the Annual Service Charge or Additional Consideration. This right shall apply to arrearages that are due and owing at the time of termination. Further, the bringing of any action for the Minimum Annual Service Charge, the Annual Service Charge or Additional Consideration, or for breach of covenant, or the resort to any other remedy herein provided, shall not be construed as a waiver of the rights to terminate the tax exemption or proceed with a tax sale or Tax Foreclosure action or any other specified remedy.

## **ARTICLE X** **TERMINATION**

**Section 10.1 Termination upon Default of the Entity.** If the Entity fails to cure or remedy the Default within the time period provided in Section 9.1, the Town may terminate this Agreement upon thirty (30) days written notice to the Entity ("**Notice of Termination**").

**Section 10.2 Voluntary Termination by the Entity.** The Entity may, one year after the Substantial Completion of the Project, notify the Town that, as of a certain date designated in the notice; it relinquishes its status as a tax exempt project. As of the date so set, the tax exemption, the Annual Service Charges and the profit and dividend restrictions shall terminate.

**Section 10.3 Final Accounting.** Within ninety (90) days after the date of termination, whether by affirmative action of the Entity, by virtue of the provisions of the Law or pursuant to the terms of this Agreement, the Entity shall provide a final accounting and pay to the Town the reserve, if any, pursuant to the provisions of N.J.S.A. 40A:20-13 and 15 as well as any excess Net Profits. For purposes of rendering a final accounting, the termination of the Agreement shall be deemed to be the end of the fiscal year for the Entity.

**Section 10.4 Conventional Taxes.** Upon Termination or expiration of this Agreement, the tax exemption for the Property shall expire and the land and the Improvements thereon shall thereafter be assessed and conventionally taxed according to the general law applicable to other nonexempt taxable Property in the Town.

## **ARTICLE XI** **DISPUTE RESOLUTION**

**Section 11.1 Arbitration.** Upon a Default of this Agreement by either of the parties hereto, or a dispute arising between the parties in reference to the terms and provisions as set forth herein, either party may apply to the Superior Court of New Jersey, by an appropriate proceeding, to settle and resolve the dispute in such fashion as will tend to accomplish the purposes of the Law. If the Superior Court does not entertain jurisdiction, the parties shall submit the dispute to the American Arbitration Association in New Jersey to be determined in accordance with its rules and regulations in such a fashion to accomplish the purpose of the Long Term Tax Exemption Law. The cost for the arbitration shall be borne equally by the parties. The parties agree that the Entity may not file an action in Superior Court or with the Arbitration Association unless the Entity has first paid in full all Annual Service Charges.

## **ARTICLE XII** **WAIVER**

**Section 12.1 Waiver.** Nothing contained in this Agreement shall constitute a waiver or relinquishment by the Town of any rights and remedies, including, without limitation, the right to terminate the Agreement and tax exemption for violation of any of the conditions provided herein. Nothing herein shall be deemed to limit any right of recovery of any amount that the Town has under law, in equity, or under any provision of this Agreement.

## **ARTICLE XIII** **INDEMNIFICATION**

**Section 13.1 Indemnification.** If the Town is named as party defendant in any action as a result of the Entity's alleged breach, default or a violation of any of the provisions of this Agreement and/or the provisions of N.J.S.A. 40A:20-1 et seq., the Entity shall defend, indemnify and hold the Town harmless against any and all liability, loss, cost, or expense (including reasonable attorney's fees and costs, through trial and all stages of any appeal, including the cost of enforcing this indemnity) arising out of this Agreement. However, the Town maintains the right to intervene as a party thereto, to which intervention the Entity consents; the expense thereof to be borne by the Town. The Entity shall not be obligated to indemnify the Town for any suit or claim arising from the gross negligence, willful or intentional misconduct or actions of the Town.

In the event the Town shall be named as party defendant in any action alleging any breach, default or a violation of any of the provisions of this Agreement and/or the provisions of N.J.S.A. 40A:20-1 et seq., the Entity and the Tenant reserve the right, in their sole and absolute discretion, to indemnify and hold the Town harmless against any and all liability, loss, cost, or expense (including reasonable attorney's fees and costs, through trial and all stages of any appeal, including the cost of enforcing this indemnity) arising out of this Agreement. If the Entity and/or the Tenant do not exercise such right to indemnify in accordance herewith, the Town may terminate this Agreement.

#### **ARTICLE XIV** **NOTICE**

**Section 14.1 Certified Mail.** Any notice required hereunder shall be sent by certified or registered mail, return receipt requested.

**Section 14.2 Sent by Town.** When sent by the Town to the Entity, the notice shall be addressed to:

Overlook Terrace Urban Renewal Corporation  
5601 Boulevard East  
West New York, NJ 07093

or at such other address to which the Entity has notified the Town in writing.

Provided that the Town is sent written notice, in accordance with this Agreement, of the name and address of Entity's Mortgagee, the Town shall provide such Mortgagee with a copy of any notice sent to the Entity.

**Section 14.3 Sent by Entity.** When sent by the Entity to the Town, it shall be addressed to:

Town Clerk  
**Town of West New York**  
428 60<sup>th</sup> Street

West New York, NJ 07093

or at such other address to which the Town has notified the Entity in writing, with a copy to the Town Attorney.

**ARTICLE XV**  
**SEVERABILITY**

**Section 15.1 Severability.** If any term, covenant or condition of this Agreement or the Application is judicially declared to be invalid or unenforceable, the remainder of this Agreement or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant or condition of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

**ARTICLE XVI**  
**MISCELLANEOUS**

**Section 16.1 Interpretation.** This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey, and without regard to or aid of any presumption or other rule requiring construction against the party drawing or causing this Agreement to be drawn, since counsel for both the Entity and the Town have combined in their review and approval of same.

**Section 16.2 Conflicts.** In the event of a conflict between the Application and the language contained in the Agreement, the Agreement shall govern and prevail. In the event of conflict between the Agreement and the Law, the Law shall govern and prevail.

**Section 16.3 Oral Representations.** There have been no oral representations made by either party hereto that is not contained in this Agreement. This Agreement, the Ordinance authorizing the Agreement and the Application constitute the entire agreement between the parties, and there shall be no modifications thereto other than by a written instrument approved and executed by both parties.

**Section 16.4 Entire Document.** This Agreement and all conditions in the Ordinance of the Town Board of Commissioners approving this Agreement are incorporated in this Agreement and made a part hereof.

**Section 16.5 Good Faith.** The Entity and the Town shall exercise good faith in dealing with each other.

**Section 16.6 Amendment.** This Agreement may only be amended in writing signed by the parties, and, prior to taking effect, such amendment must be approved by Ordinance duly adopted by the Town upon the recommendation of the Mayor or other chief executive officer.

**ARTICLE XVIII**  
**EXHIBITS**

The following Exhibits are attached hereto and incorporated as if set forth herein:

- A. Ordinance of the Town authorizing the execution of this Agreement.

**IN WITNESS WHEREOF**, the parties have caused these presents, the Third Amended Financial Agreement, to be executed the day and year first above written.

Witness:

**TOWN OF WEST NEW YORK**

\_\_\_\_\_

Town Clerk

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

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

Title: \_\_\_\_\_

Attest:

**OVERLOOK TERRACE URBAN  
RENEWAL CORPORATION D/B/A  
OVERLOOK TERRACE SOUTH**

\_\_\_\_\_

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

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

Title: \_\_\_\_\_

Ordinance of the Town Approving and  
Authorizing the Execution of this Agreement

**THIRD AMENDED FINANCIAL AGREEMENT**

**For**

**OVERLOOK TERRACE NORTH**

**PREAMBLE**

**THIS THIRD AMENDED FINANCIAL AGREEMENT** (the "Agreement" or "Third Amended Financial Agreement) is made as of this \_\_\_ day of \_\_\_\_\_, 2018, by and between Excel Properties Urban Renewal Associates, L.L.C. (d/b/a Overlook Terrace North), a limited liability company organized under then N.J.S.A. 42:2B-1 et. seq., now the N.J.S.A. 42:2C-1 et. seq., the Revised Uniform Limited Liability Company Act, and N.J.S.A. 14A:1-1 et. seq., the New Jersey Limited Dividend Law, and N.J.S.A. 40A:20-1 et. seq. and N.J.S.A. 40A:20-1 et. seq., the Long Term Tax Exemption Law, with offices located at 5701 Boulevard East, West New York, NJ 07093, (the "Entity" or "Overlook Terrace North"), and the Town of West New York, a Commission Form of Government organized pursuant to N.J.S.A. 40:70-1 et. seq., with offices located at 428 60<sup>th</sup> Street, West New York, NJ 07093 (the "Town" or "West New York"). Overlook Terrace North and West New York are hereinafter collectively referred to as the ("Parties").

**RECITALS**

**WHEREAS**, in 1968 the construction of Overlook Terrace, a multifamily apartment complex in West New York, was financed with a fifty (50) year mortgage by the New Jersey Housing Finance Agency ("HFA"), the predecessor to the New Jersey Housing and Mortgage Finance Agency ("HMFA"); and

**WHEREAS**, Excel Properties Urban Renewal Associates, L.L.C. is the owner of property, including a residential building containing 300 units located at 5701 Boulevard East, otherwise known as Block 58, Lot 1 & Block 62, Lot 18 (the "Project") on the tax map of the Town commonly known to as "Overlook Terrace North" or the "Property"; and

**WHEREAS**, on October 10, 1968, the Town and Overlook Terrace entered in that certain agreement (the "Original Financial Agreement") providing for the properties to be exempt from all real and personal property taxes levied or imposed by the Town and that Overlook Terrace shall make payments in lieu of taxes to the Town based on a percentage of annual gross shelter rent from the properties; and

**WHEREAS**, on October 8, 2009, Overlook Terrace was partitioned into two separate entities designated as (1) Overlook Terrace Urban Renewal Corp., located at 5601 Boulevard East, West New York, commonly referred to as "Overlook Terrace South" and (2) Excel Properties Urban Renewal Associates, L.L.C., located at 5701 Boulevard East, West New York, commonly referred to as "Overlook Terrace North"; and

**WHEREAS**, as a result of the partition, on October 8, 2009, the Original Financial Agreement was amended by the Town to address the obligation for each owner to continue to make payments in lieu of taxes for each property consistent with the Original Financial Agreement; and

**WHEREAS**, on October 4, 2017, the Town entered into an agreement with Overlook Terrace North as to the applicability of the Town Rent Control Ordinance and related issues to the property; and

**WHEREAS**, pursuant to and in accordance with the provisions of the Long Term Tax Exemption Law, constituting Chapter 431 of the Pamphlet Laws of 1991 of the State, and the acts amendatory thereof and supplement thereto (the “Long Term Tax Exemption Law”, as codified in N.J.S.A. 40A:20-1 et seq.), specifically Section 13, the Town is authorized to extend a financial agreement to coincide with existing first mortgage financing; and

**WHEREAS**, the Entity currently has existing first mortgage financing for Overlook Terrace North; and

**WHEREAS**, the Entity was created for the purposes of acquiring, owning, holding, developing, maintaining, financing, mortgaging, improving, operating, leasing, managing, using, refinancing, selling, subdividing, or otherwise dealing with Overlook Terrace North; and

**WHEREAS**, on November 30, 2017, the Town adopted an ordinance authorizing a one year extension of the First Amended Financial Agreement with the Entity for the period from November 1, 2017 to October 31, 2018 (the “Second Amendment to the Financial Agreement”); and

**WHEREAS**, the Town and the Entity have reached agreement with respect to, among other things, the terms and conditions relating to the Annual Service Charges and desire to execute a Third Amended Financial Agreement for Overlook Terrace North, which terms and conditions are stated below.

**NOW, THEREFORE, BE IT ORDAINED AND ENACTED** by the Board of Commissioners of the Town of West New York, County of Hudson, New Jersey, as follows:

**Section 1.** The Town acknowledges that Excel Properties Urban Renewal Associates, L.L.C., by effectuating the continued operation of the Project, will significantly limit its profits due to the extraordinary costs to be borne by the Entity, which will provide significant and long-term benefits to the Town of West New York.

**Section 2.** The Town makes the following findings:

- C.
  - 1. Overlook Terrace North has been providing housing to Town residents for more than 50 years and while the housing is no longer subject to HMFA affordability controls, the Town and Entity recently entered into an agreement as to the applicability of the Town Rent Control Ordinance and related issues to the property, including establishing rents and rental increases.
  - 2. The Property is currently subject to a financial agreement for the payment of annual service charges in lieu of Ordinary Taxes, which has a positive impact on rents charged to residents of Overlook Terrace North.
  - 3. The current Annual Service Charge being paid for the Property is approximately \$500,000 and is projected to increase over the term of this Financial Agreement.
  - 4. The Town has determined that the benefits significantly outweigh the costs to the Town.
- D. Assessment of the importance of the Tax Exemption defined in maintaining the Property:
  - 1. The relative stability and predictability of the Annual Service Charge will make the Property more attractive to new tenants; and
  - 2. The relative stability and predictability of the Annual Service Charge will allow stabilization of the Project operating budget, allowing reasonable rents and allowing the Entity to maintain the appearance of the buildings and to provide quality housing to Town residents and to insure that it will have a positive impact on the surrounding area.
- C. Based upon the above determinations by the Town and the provisions of N.J.S.A. 40A:20-12, this Agreement contains appropriate tax exemption provisions and an appropriate Annual Service Charge schedule.

**WHEREAS**, by the adoption of Ordinance No. 2018-\_\_\_ on \_\_\_\_\_, 2018 (the "**Ordinance**"), the Board of Commissioners approved findings and authorized the execution of this Third Amended Financial Agreement, which supersedes and replaces the Original Financial Agreement and all prior amendments.

**NOW THEREFORE**, in consideration of the mutual covenants herein, contained, and for other good and valuable consideration, it is mutually covenanted and agreed as follows:

**ARTICLE 1**  
**GENERAL PROVISIONS**

**Section 1.1 Governing Law.** This Agreement shall be governed by the provisions of the Long Term Tax Exemption Law, as amended and supplemented, N.J.S.A. 40A:20-1 et seq., and the Ordinance, which authorized the execution of this Agreement. The Town has relied upon the facts, data, and representations contained in the Application in granting this tax exemption.

**Section 1.2 General Definitions.** Unless specifically provided otherwise or the context otherwise requires, when used in this Agreement, the following terms shall have the following meanings:

ii. Allowable Net Profit – The amount determined by applying the Allowable Profit Rate to Total Project Cost pursuant to N.J.S.A. 40A:20-3(c).

ii. Allowable Profit Rate – The greater of 12% or the percentage per annum arrived at by adding 1.25% to the annual interest percentage rate payable on the Entity's initial permanent mortgage financing. If the initial permanent mortgage is insured or guaranteed by a governmental agency, the mortgage insurance premium or similar charge, if payable on a per annum basis, shall be considered as interest for this purpose. If there is no permanent mortgage financing, or if the financing is internal or undertaken by a related party, the Allowable Profit Rate shall be the greater of 12% or the percentage per annum arrived at by adding 1.25% per annum to the interest rate per annum that the Town determines to be the prevailing rate on mortgage financing on comparable improvements in Somerset County. The provisions of N.J.S.A. 40A:20-3(b) are incorporated herein by reference.

iii. Annual Gross Revenue – The amount equal to annual gross rents and other income derived by the Entity in connection with the Project, together with any insurance, operating and maintenance expenses paid by a tenant that are ordinarily paid by a landlord.

iv. Annual Service Charge – The amount the Entity has agreed to pay the Town for Town services supplied to the Project, which sum is in lieu of any taxes on the Improvements, pursuant to N.J.S.A. 40A:20-13.

v. Auditor's Report — A complete financial statement outlining the financial status of the Project (for a period of time as indicated by context), which shall include a certification of Annual Gross Revenue and clear computation of Net Profit. The contents of the Auditor's Report shall be prepared in conformity with generally accepted accounting principles and shall contain any applicable items required by the Law. The Auditor's Report shall be certified as to its conformance with such principles by a certified public accountant that is licensed to practice in the State of New Jersey.

vi. Certificate of Occupancy — A document, whether temporary or permanent, issued by the Town authorizing occupancy of a building, in whole or in part, pursuant to N.J.S.A. 52:27D-133.

vii. Default — A breach of or the failure of the Entity to perform any obligation imposed upon the Entity by the terms of this Agreement, or under the Law, beyond any applicable grace or cure periods.

vii. Entity — The term "Entity" within this Agreement shall be as defined in the Recitals as the Redeveloper, and includes any subsequent purchasers or successors in interest of the Project, provided they are formed and operate under the Law and the transfer has been duly approved by the Town in accordance with Article VII below.

viii. Improvements or Project — Any building, structure or fixture permanently affixed to the land and tax exempted under this Agreement.

ix. In Rem Tax Foreclosure or Tax Foreclosure — A summary proceeding by which the Town may enforce a lien for taxes due and owing by tax sale, under N.J.S.A. 54:5-1 to 54:5129 et seq.

x. Law — The Long Term Tax Exemption Law, as amended and supplemented, N.J.S.A. 40A:20-1 et seq. and the Ordinance that authorized the execution of this Agreement, and all other relevant Federal, State or Town statutes, ordinances, resolutions, rules and regulations.

xi. Minimum Annual Service Charge — By agreement of the parties and in satisfaction of the Law, the Minimum Annual Service Charge shall be the annual service charge paid by the Entity for the period November 1, 2017 to October 31, 2018.

xvi. Net Profit — The gross revenue of the Entity, less all operating and non-operating expenses of the Entity, all determined in accordance with generally accepted accounting principles and the provisions of N.J.S.A. 40A:20-3(c).

xvii. Ordinary Taxes — the taxes on the land and improvements that would ordinarily be due and payable in the absence of a Tax Exemption.

xviii. Pronouns — He or it shall mean the masculine, feminine or neuter gender, the singular, as well as the plural, as context requires.

xix. Termination — Any act or omission which by operation of the terms of this Financial Agreement shall cause the Entity to relinquish its tax exemption.

## **ARTICLE II** **APPROVAL**

**Section 2.1 Approval of Tax Exemption.** The Town approves a tax exemption for all the Improvements on the property and maintained in accordance with the terms and conditions of this Agreement and the provisions of the Law.

**Section 2.2 Approval of Entity.** Approval is granted to the Entity. Entity represents that its Certificate of Formation contains all the requisite provisions of the Law; has been reviewed and approved by the Commissioner of the New Jersey Department of Community Affairs ("DCA"); and has been filed with, as appropriate, the Office of the State Treasurer, all in accordance with N.J.S.A. 40A:20-5.

**Section 2.3 Improvements.** The Entity represents that existing improvements on the property consists of 300 residential rental units, together other improvements.

**Section 2.4 Ownership, Management and Control.** The Entity is the owner of the Property and the Improvements. Any sale of the Project by the Entity shall require approval of the Town.

**Section 2.5. Financial Plan.** The Entity has an existing first mortgage on the Property and Improvements.

**Section 2.6 Statement of Estimated Rents.** The Entity's good faith projections of the rents are set forth in the Exhibit B.

**Section 2.7 Compliance with the Law.** The Entity shall, at all times prior to the expiration or termination of this Agreement, remain bound by the provisions of the Law.

### **ARTICLE III** **DURATION OF AGREEMENT**

**Section 3.1 Term.** So long as there is compliance with the Law and this Agreement, the Annual Service Charge due under this Agreement shall become effective upon the issuance of the first Certificate of Occupancy for the applicable phase of the Project, and remain in effect for a term of thirty (30) years. The tax exemption shall only be effective and shall continue in force only while the Project is owned by a corporation or association formed and operating under the Law.

### **ARTICLE IV** **ANNUAL SERVICE CHARGE & ANNUAL ADMINISTRATIVE FEE**

**Section 4.1 Annual Service Charge.** In consideration of the tax exemption, the Entity shall make payment to the Town of an amount equal to the greater of (1) the Minimum Annual Service Charge or (2) 15% of the Annual Gross Revenues or (3) Ordinary Taxes in accordance with the Law.

**Section 4.2 Staged Adjustments.** The Annual Service Charge shall be adjusted in Stages over the term of the tax exemption in accordance with N.J.S.A. 40A:20-12(b) as follows:

i. Stage One: From the 1st day of November 2018 until October 31, 2024 (six (6) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge or (b) an amount equal to 15% of Annual Gross Revenues;

ii. Stage Two: Beginning on the 1st day of November 2024 until October 31, 2033 (seven (7) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to 15% of Annual Gross Revenues, or (c) an amount equal to 20% of the Ordinary Taxes.

iii. Stage Three: Beginning on the 1st day of November 2033 until October 31, 2038 (five (5) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to 15% of Annual Gross Revenues, or (c) an amount equal to 40% of the Ordinary Taxes;

iv. Stage Four: Beginning on the 1st day of November 2038 until October 31, 2043 (five (5) year period), the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to 15% of Annual Gross Revenues, or (c) an amount equal to 60% of the amount of the Ordinary Taxes;

v. Final Stage: Beginning on the 1st day of November 2043 until October 31, 2048 (five (5) year period), the date the tax exemption expires, the Annual Service Charge shall be the greater of (a) the Minimum Annual Service Charge, (b) an amount equal to 15% of Annual Gross Revenues, or (c) an amount equal to 80% of the amount of the Ordinary Taxes.

**Section 4.3 Administrative Fee.** In addition to the Annual Service Charge, the Town reserves the right to charge the Entity an annual administrative fee ("Annual Administrative Fee") in an amount equal to two percent (2%) of the Annual Service Charge.

**Section 4.5 Quarterly Installments.** The Entity shall pay the Annual Service Charge in quarterly installments on those dates when real estate tax payments are due; subject, nevertheless, to adjustment for over or underpayment within thirty (30) days after the close of each calendar year. In the event that the Entity fails to pay the Annual Service Charge or the Annual Administrative Fee in full, the unpaid amount shall bear the highest rate of interest permitted in the case of unpaid taxes or tax liens on the land until paid.

**Section 4.6 Material Conditions.** It is expressly agreed and understood that the timely payments of Minimum Annual Service Charges, Annual Service Charges, Administrative Fee, including adjustments thereto, and any interest thereon, are material conditions ("Material Conditions") of this Agreement.

**Section 4.7 Other Municipal Services.** Nothing herein shall exempt the Entity from the payment of any municipal services, including sewer and water charges, rendered to the Property. The Entity shall timely pay for municipal services rendered to the Property.

## **ARTICLE V** **ANNUAL REPORTS**

**Section 5.1 Accounting System.** The Entity shall maintain, or cause to be maintained, a system of accounting and internal controls established and administered in accordance with generally accepted accounting principles.

### **Section 5.2 Periodic Reports**

B. Auditor's Report: Within ninety (90) days after the close of each fiscal or calendar year, depending on the Entity's accounting basis, that this Agreement shall continue in effect, the Entity shall submit its Auditor's Report for the preceding fiscal or calendar year to the Tax Collector and Town Clerk. The Auditor's Report shall include, but not be limited to: rents received by the Entity, and the terms and interest rate on any mortgage(s) associated with the purchase or construction of the Project, and such details as may relate to the financial affairs of the Entity and to its operation and performance hereunder, pursuant to the Law and this Agreement. The Report shall clearly identify and calculate the Net Profit for the Entity during the previous year.

B. Disclosure Statement: Upon written request, the Entity shall submit a Disclosure Statement to the Town Clerk, listing the persons having an ownership interest in the Project, and the extent of the ownership interest of each.

C. Town Certification: Upon written request, the Town shall certify that the financial agreement with the Entity has been entered into and is in effect as required by Law.

**Section 5.3 Inspection.** Upon request, the Entity shall permit the inspection of its property, equipment, buildings and other facilities of the Project by representatives duly authorized by the Town and the Local Government Services Division of DCA. The Entity shall permit, upon request, an examination and audit of its books and records. Such examination or audit shall be made during the reasonable hours of the business day, in the presence of an officer or agent designated by the Entity.

## **ARTICLE VI** **LIMITATION OF PROFITS AND RESERVES**

**Section 6.1 If Applicable, Limitation of Profits and Reserves.** During the period of tax exemption as provided herein, the Entity shall be subject to a limitation of its profits pursuant to the provisions of N.J.S.A. 40A:20-15.

The Entity may establish a reserve against vacancies, unpaid rents, and reasonable reserves and contingencies in an amount equal to five (5%) percent of the Gross Revenue of the Entity for the last full fiscal year preceding the year and may retain such part of the excess Net Profits as is necessary to eliminate a deficiency in that reserve, as provided in N.J.S.A. 40A:20-15. The reserve is to be non-cumulative, it being intended that no further credits thereto shall be permitted after the reserve shall have attained the allowable level of five (5%) percent of the preceding year's Gross Revenue.

**Section 6.2 Annual Payment of Excess Net Profit.** If Net Profits in any fiscal year exceed the Allowable Net Profits for such period, the Entity, within ninety (90) days after the end of such fiscal year, shall pay such excess Net Profits to the Town as an additional service charge; provided, however, that the Entity may maintain a reserve as determined pursuant to Section 6.1 above.

**Section 6.3 Payment of Excess Net Profit upon Termination, Expiration or Sale.** The date of termination, expiration or sale shall be considered to be the close of the fiscal year of the Entity. Within ninety (90) days after such date, the Entity shall pay to the Town the excess Net Profit, if any, maintained by it pursuant to this section.

## **ARTICLE VII**

### **ASSIGNMENT AND/OR ASSUMPTION**

**Section 7.1 Assignment.** Any sale or fee interest transfer of the Project or any portion thereof shall be subject to the approval of the Town and the terms of this Agreement provided that (a) the transferee does not own any other work or undertaking pursuant to a redevelopment plan adopted pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., at the time of transfer; (b) the transferee is formed and eligible to operate under the Law; (c) the Entity is not then in default of this Agreement or the Law; and (d) the transferee assumes all the Entity's obligations under this Agreement.

## **ARTICLE VIII**

### **COMPLIANCE**

**Section 8.1 Operation.** During the term of this Agreement, the Project shall be maintained and operated in accordance with the provisions of the Law. The Entity may terminate this Agreement as provided by N.J.S.A. 40A:20-1 et seq., as currently amended and supplemented. The Town may also terminate this Agreement in the event of a Default under this Agreement. The Entity's failure to comply with the Law shall constitute a Default under this Agreement and the Town shall, among its other remedies, have the right to terminate the tax exemption and/or this Agreement.

## **ARTICLE IX**

### **DEFAULT**

**Section 9.1 Default.** Default is hereby defined as (i) the failure of the Entity to pay the Annual Service Charge, or any part thereof, beyond any applicable notice, cure or grace period or (ii) the failure of the Entity to perform any obligations imposed by the Agreement and the Law and that the Entity fails to cure within sixty (60) days after written notice thereof. If, in the reasonable opinion of the Town, the Default cannot be cured within sixty (60) days using reasonable diligence, the Town will extend the time to cure.

Should the Entity fail to pay any charges defined as Material Conditions in Section 4.6 above, such failure shall not be subject to the default remedies provided in Section 9.2 below, but shall allow the Town to proceed immediately to terminate the Agreement as provided in Article XI below.

Should the Entity fail to pay any charges defined as Material Conditions in Section 4.6 above, the Tenant shall have the right to pay such charges within the timeframes set forth in the Agreement. If the Tenant timely cures any default of Material Conditions, then the Agreement will not be terminated by the Town.

**Section 9.2 Remedies upon Default.** The Town shall, among its other remedies provided hereunder, have the right to proceed against the Project Site pursuant to the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-1 et seq. and/or may declare a Default and terminate this Agreement. Any default arising out of the Entity's failure to pay the Minimum Annual Service Charge, Additional Consideration or the Annual Service Charge shall not be subject to the default procedural remedies as provided in this Article IX, but shall allow the Town to proceed immediately to terminate the Agreement as provided in Article X below. All of the remedies provided in this Agreement to the Town, and all rights and remedies granted to it by law and equity, shall be cumulative and concurrent. No termination of any provision of this Agreement shall deprive the Town of any of its remedies or actions against the Entity because of its failure to pay the Minimum Annual Service Charge, the Annual Service Charge or Additional Consideration. This right shall apply to arrearages that are due and owing at the time of termination. Further, the bringing of any action for the Minimum Annual Service Charge, the Annual Service Charge or Additional Consideration, or for breach of covenant, or the resort to any other remedy herein provided, shall not be construed as a waiver of the rights to terminate the tax exemption or proceed with a tax sale or Tax Foreclosure action or any other specified remedy.

## **ARTICLE X** **TERMINATION**

**Section 10.1 Termination upon Default of the Entity.** If the Entity fails to cure or remedy the Default within the time period provided in Section 9.1, the Town may terminate this Agreement upon thirty (30) days written notice to the Entity ("**Notice of Termination**").

**Section 10.2 Voluntary Termination by the Entity.** The Entity may, one year after the Substantial Completion of the Project, notify the Town that, as of a certain date designated in the notice; it relinquishes its status as a tax exempt project. As of the date so set, the tax exemption, the Annual Service Charges and the profit and dividend restrictions shall terminate.

**Section 10.3 Final Accounting.** Within ninety (90) days after the date of termination, whether by affirmative action of the Entity, by virtue of the provisions of the Law or pursuant to the terms of this Agreement, the Entity shall provide a final accounting and pay to the Town the reserve, if any, pursuant to the provisions of N.J.S.A. 40A:20-13 and 15 as well as any excess Net Profits. For purposes of rendering a final accounting, the termination of the Agreement shall be deemed to be the end of the fiscal year for the Entity.

**Section 10.4 Conventional Taxes.** Upon Termination or expiration of this Agreement, the tax exemption for the Property shall expire and the land and the Improvements thereon shall thereafter be assessed and conventionally taxed according to the general law applicable to other nonexempt taxable Property in the Town.

## **ARTICLE XI** **DISPUTE RESOLUTION**

**Section 11.1 Arbitration.** Upon a Default of this Agreement by either of the parties hereto, or a dispute arising between the parties in reference to the terms and provisions as set forth herein, either party may apply to the Superior Court of New Jersey, by an appropriate proceeding, to settle and resolve the dispute in such fashion as will tend to accomplish the purposes of the Law. If the Superior Court does not entertain jurisdiction, the parties shall submit the dispute to the American Arbitration Association in New Jersey to be determined in accordance with its rules and regulations in such a fashion to accomplish the purpose of the Long Term Tax Exemption Law. The cost for the arbitration shall be borne equally by the parties. The parties agree that the Entity may not file an action in Superior Court or with the Arbitration Association unless the Entity has first paid in full all Annual Service Charges.

## **ARTICLE XII** **WAIVER**

**Section 12.1 Waiver.** Nothing contained in this Agreement shall constitute a waiver or relinquishment by the Town of any rights and remedies, including, without limitation, the right to terminate the Agreement and tax exemption for violation of any of the conditions provided herein. Nothing herein shall be deemed to limit any right of recovery of any amount that the Town has under law, in equity, or under any provision of this Agreement.

## **ARTICLE XIII** **INDEMNIFICATION**

**Section 13.1 Indemnification.** If the Town is named as party defendant in any action as a result of the Entity's alleged breach, default or a violation of any of the provisions of this Agreement and/or the provisions of N.J.S.A. 40A:20-1 et seq., the Entity shall defend, indemnify and hold the Town harmless against any and all liability, loss, cost, or expense (including reasonable attorney's fees and costs, through trial and all stages of any appeal, including the cost of enforcing this indemnity) arising out of this Agreement. However, the Town maintains the right to intervene as a party thereto, to which intervention the Entity consents; the expense thereof to be borne by the Town. The Entity shall not be obligated to indemnify the Town for any suit or claim arising from the gross negligence, willful or intentional misconduct or actions of the Town.

In the event the Town shall be named as party defendant in any action alleging any breach, default or a violation of any of the provisions of this Agreement and/or the provisions of N.J.S.A. 40A:20-1 et seq., the Entity and the Tenant reserve the right, in their sole and absolute discretion, to indemnify and hold the Town harmless against any and all liability, loss, cost, or expense (including reasonable attorney's fees and costs, through trial and all stages of any appeal, including the cost of enforcing this indemnity) arising out of this Agreement. If the Entity and/or the Tenant do not exercise such right to indemnify in accordance herewith, the Town may terminate this Agreement.

#### **ARTICLE XIV** **NOTICE**

**Section 14.1 Certified Mail.** Any notice required hereunder shall be sent by certified or registered mail, return receipt requested.

**Section 14.2 Sent by Town.** When sent by the Town to the Entity, the notice shall be addressed to:

Excel Properties Urban Renewal Associates, L.L.C.  
5701 Boulevard East  
West New York, NJ 07093

or at such other address to which the Entity has notified the Town in writing.

Provided that the Town is sent written notice, in accordance with this Agreement, of the name and address of Entity's Mortgagee, the Town shall provide such Mortgagee with a copy of any notice sent to the Entity.

**Section 14.3 Sent by Entity.** When sent by the Entity to the Town, it shall be addressed to:

Town Clerk  
**Town of West New York**  
428 60<sup>th</sup> Street

West New York, NJ 07093

or at such other address to which the Town has notified the Entity in writing, with a copy to the Town Attorney.

**ARTICLE XV**  
**SEVERABILITY**

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**ARTICLE XVIII**  
**EXHIBITS**

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- B. Ordinance of the Town authorizing the execution of this Agreement.

**IN WITNESS WHEREOF**, the parties have caused these presents, the Third Amended Financial Agreement, to be executed the day and year first above written.

Witness:

**TOWN OF WEST NEW YORK**

\_\_\_\_\_

Town Clerk

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

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

Title: \_\_\_\_\_

Attest:

**EXCEL PROPERTIES URBAN  
RENEWAL ASSOCIATES, L.L.C.  
D/B/A OVERLOOK TERRACE NORTH**

\_\_\_\_\_

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

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

Title: \_\_\_\_\_

Ordinance of the Town Approving and  
Authorizing the Execution of this Agreement

