**DELIVERY ASSURANCE AGREEMENT**

**(Unfunded Forwards)**

This **DELIVERY ASSURANCE AGREEMENT** (this “**Agreement**”) dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ is made by and between **[NAME OF BORROWER]**, a **[DESCRIPTION OF BORROWER]** (together with its permitted successors and assigns, “**Borrower**”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (together with its successors and assigns, “**Lender**”).

**RECITALS:**

1. Lender has entered into a commitment with Borrower dated \_\_\_\_\_\_\_\_\_\_\_\_\_ (the “**Lender Commitment**”), to make a mortgage loan to Borrower (the “**Mortgage Loan**”) in an amount not to exceed $\_\_\_\_\_\_\_\_\_\_\_ (the “**Maximum Mortgage Loan Amount**”) to finance a multifamily housing project known as \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, located in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “**Property**”). Capitalized terms not otherwise defined in this Agreement shall have the meanings set forth in the Lender Commitment. **[DRAFTING NOTE: LENDER MUST CONFIRM THAT ALL DEFINED TERMS USED BUT NOT DEFINED HEREIN, INCLUDING “TERMINATION DATE” AND “CONVERSION DATE,” ARE DEFINED IN THE LENDER COMMITMENT.]**
2. Fannie Mae has entered into a commitment with Lender dated \_\_\_\_\_\_\_\_\_\_\_\_ to purchase the Mortgage Loan (the “**Forward Commitment**”) upon satisfaction of the conditions set forth in the Forward Commitment.
3. In consideration of Lender’s commitment to originate the Mortgage Loan, and Fannie Mae’s commitment to purchase the Mortgage Loan, Borrower has agreed to pay certain fees in the event of either a shortfall between the final Mortgage Loan amount and the Maximum Mortgage Loan Amount or a termination of the Forward Commitment under certain circumstances, all in accordance with this Agreement and the Lender Commitment.

NOW THEREFORE, in consideration of the above recitals and the promises contained in this Agreement, the receipt and sufficiency of which are acknowledged, the parties hereby agree as follows.

1. **Good Faith Deposit.**

Pursuant to the Lender Commitment, Borrower has **[DRAFTING NOTE: INSERT APPLICABLE SELECTION AND DELETE THE ALTERNATIVE LANGUAGE]** [deposited with Lender the good faith deposit in the amount equal to $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, which is [\_\_\_] percent ([\_\_]%)of the Maximum Mortgage Loan Amount (the “**Good Faith Deposit**”)] **OR** [caused the issuance of an irrevocable letter of credit in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, expiring on \_\_\_\_\_\_\_\_\_\_\_\_, which letter of credit will be available to Lender as a source of payment of the good faith deposit in an amount equal to [\_\_\_] percent ([\_\_]%) of the Maximum Mortgage Loan Amount (the “**Good Faith Deposit**”)].

1. **Delivery Assurance Fee.**

If the terms and conditions in the Lender Commitment have not been met or Conversion does not occur in accordance with the timing requirements in the Lender Commitment, Borrower shall pay a delivery assurance fee in accordance with this Section (the “**Delivery Assurance Fee**”).

The Delivery Assurance Fee shall be calculated as follows:

* + - 1. **Stabilization Failure**. If Conversion does not occur in accordance with the timing requirements in the Lender Commitment, because, in spite of the best efforts of Borrower, the Project fails to satisfy the Minimum Occupancy Requirement (“**Stabilization Failure**”), the Delivery Assurance Fee shall be in the amount calculated in accordance with Exhibit A.
			2. **Any Other Reason**. If Conversion does not occur in accordance with the timing requirements in the Lender Commitment, for any reason other than a Stabilization Failure or if Fannie Mae terminates the Forward Commitment in accordance with its terms, the Delivery Assurance Fee shall be in the amount calculated in accordance with Exhibit B.

If the Delivery Assurance Fee becomes due in accordance with this Agreement, Lender shall **[DRAFTING NOTE: INSERT IF AN LOC HAS BEEN ACCEPTED AS THE GOOD FAITH DEPOSIT:** draw on the letter of credit held for the Good Faith Deposit and] apply the Good Faith Deposit towards the Delivery Assurance Fee. If the amount of the Delivery Assurance Fee exceeds the Good Faith Deposit, Borrower shall pay Lender the excess amount. The Delivery Assurance Fee shall be due and payable on the date Fannie Mae terminates the Lender Commitment in accordance with its terms.

1. **Shortfall Fee.**

If the Mortgage Loan closes but the funded original principal amount of the Mortgage Loan (“**Actual Loan Amount**”) is less than ninety percent (90%) of the Maximum Mortgage Loan Amount (because the Maximum Mortgage Loan Amount was reduced as a condition to Conversion in accordance with the Lender Commitment, as determined by Lender), Borrower shall pay a shortfall fee calculated in accordance with Exhibit C (the “**Shortfall Fee**”).

If a Shortfall Fee becomes due in accordance with this Agreement, Lender shall **[DRAFTING NOTE: INSERT IF AN LOC HAS BEEN ACCEPTED AS THE GOOD FAITH DEPOSIT:** draw on the letter of credit held for the Good Faith Deposit and**]** apply the Good Faith Deposit towards the Shortfall Fee. If the amount of the Shortfall Fee exceeds the Good Faith Deposit, Borrower shall pay Lender the excess amount. The Shortfall Fee shall be due and payable on or before the Conversion Date, and payment of the Shortfall Fee shall be a condition precedent to the obligation of Lender to make the Mortgage Loan.

1. **Security.**

Borrower’s payment obligations under this Agreement shall also be secured by a mortgage, deed of trust or deed to secure debt dated as of the date of this Agreement from Borrower for the benefit of Lender (the “**Delivery Assurance Security Instrument**”), which will be recorded against the Property.

1. **[Interest.] [Intentionally Deleted.] [DRAFTING NOTE: LENDER MAY INCLUDE THE FOLLOWING DEFAULT INTEREST PROVISION AT ITS DISCRETION. IF THIS SECTION IS NOT INCLUDED, THE DEFINITION OF “DEFAULT INTEREST” SET FORTH IN THE MODIFICATION TO SECURITY INSTRUMENT SHOULD BE MODIFIED IN ACCORDANCE WITH THE DRAFTING NOTE INCLUDED THEREIN:**

Borrower agrees to pay interest on the unpaid balance of the Delivery Assurance Fee or the Shortfall Fee which becomes due under this Agreement from the date such fee becomes due and payable to the date it is paid in full at the per annum rate of the Prime Rate plus four percentage points, or, if less, the highest maximum rate permitted to be charged by applicable law (the “**Default Rate**”).  “Prime Rate” means an annual rate of interest published in The Wall Street Journal as the “prime rate”.  For any particular day, the Prime Rate shall be the rate most recently announced or published as of 8:30 a.m. Eastern Time on such day.  Any change in the interest rate under this Agreement due to a change in the Prime Rate shall take effect on the date of publication.  Interest shall be computed on the basis of a 360-day year and twelve (12) 30-day months.**]**

1. **Remedies.**

Should the Delivery Assurance Fee or the Shortfall Fee become payable and not be paid when due, Lender shall have the right to take such action at law or in equity, without notice or demand, as it deems advisable to protect and enforce the rights of Lender against Borrower and/or in and to the Project and to exercise any and all rights and remedies available to it under this Agreement and the Delivery Assurance Security Instrument.

1. **No Remedy Exclusive.**

Each right, power and remedy of Lender under this Agreement or under applicable law shall be cumulative and concurrent, and the exercise of any one or more of them shall not preclude the simultaneous or later exercise by Lender of any or all such other rights, powers or remedies. No failure or delay by Lender to insist upon the strict performance of any one or more provisions of this Agreement or to exercise any right, power or remedy under this Agreement constitute a waiver thereof or preclude Lender from exercising any such right, power or remedy. In order to entitle Lender to exercise any remedy reserved to Lender, it shall not be necessary to give any notice.

1. **Limits on Personal Liability.**

Borrower shall have no personal liability for payment obligations described in this Agreement. The only recourse of Lender for the satisfaction of such payment obligations shall be Lender’s exercise of its rights and remedies under this Agreement, as secured by the Property and any other collateral described in the Delivery Assurance Security Instrument.

1. **Successors and Assigns.**

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

1. **Entire Agreement; Amendment and Waiver.**

This Agreement, together with the attached Exhibits, contains the complete and entire understanding of Borrower with respect to the matters covered and no change or amendment shall be valid unless it is made in writing and executed by Borrower with the written consent of Lender. No specific waiver of any of the terms of this Agreement by Lender shall be considered as a general waiver. The invalidity or unenforceability of any provision of this Agreement shall not affect or impair the validity or enforceability of any other provision of this Agreement.

1. **Governing Law.**

This Agreement shall be governed by and construed in accordance with the substantive law of **[DRAFTING NOTE: INSERT LENDER’S JURISDICTION OR PREFERRED VENUE]** \_\_\_\_\_\_\_\_\_\_\_\_without regard to the application of choice of law principles that would result in the application of the laws of another jurisdiction.

1. **Property Jurisdiction.**

Each of the undersigned agrees that any controversy arising under or in relation to this Agreement shall be litigated exclusively in the **[DRAFTING NOTE: INSERT LENDER’S JURISDICTION OR PREFERRED VENUE] \_\_\_\_\_\_\_\_\_\_\_\_**. The district and federal courts and authorities with jurisdiction in the **[DRAFTING NOTE: INSERT LENDER’S JURISDICTION OR PREFERRED VENUE] \_\_\_\_\_\_\_\_\_\_\_\_** shall have exclusive jurisdiction over all controversies which shall arise under or in relation to this Agreement with respect to the subject matter hereof. Each of the undersigned irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

1. **WAIVER OF JURY TRIAL.**

**TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EACH OF** **THE UNDERSIGNED AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS AGREEMENT OR ANY RELATED DOCUMENT OR THE RELATIONSHIP BETWEEN THE PARTIES THAT IS TRIABLE OF RIGHT BY A JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY THE UNDERSIGNED, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.**

1. **Exhibits.**

Any exhibits attached to this Agreement are incorporated fully into this Agreement by this reference and each constitutes a substantive part of this Agreement.

1. **Counterparts.**

This Agreement may be executed in any number of counterparts and by different parties in separate counterparts. Each counterpart when so executed shall be deemed to be an original and all of which together shall constitute one and the same agreement.

1. **Construction.**
	1. The captions and headings of the sections of this Agreement are for convenience only and shall be disregarded in construing this Agreement.
	2. Any reference in this Agreement to an “Exhibit” or “Schedule” or a “Section” or an “Article” shall, unless otherwise explicitly provided, be construed as referring, respectively, to an exhibit or schedule attached to this Agreement or to a Section or Article of this Agreement.
	3. Use of the singular in this Agreement includes the plural and use of the plural includes the singular.
	4. Unless otherwise provided in this Agreement, if Lender’s or Fannie Mae’s approval, designation, determination, selection, estimate, action or decision is required, permitted or contemplated hereunder, such approval, designation, determination, selection, estimate, action or decision shall be made in Lender’s or Fannie Mae’s (as applicable) sole and absolute discretion.
	5. All references in this Agreement to a separate instrument or agreement shall include such instrument or agreement as the same may be amended or supplemented from time to time pursuant to the applicable provisions thereof.

**[Remainder of Page Intentionally Blank]**

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

**BORROWER**:

By: (SEAL)

Name:

Title:

**LENDER**:

By: (SEAL)

Name:

Title:

**Schedule I**

For the purpose of Exhibits attached hereto, the following terms shall have the meaning set forth below:

“**Guaranty Fee Rate**” means the rate of the fee received by Fannie Mae for the Mortgage Loan, expressed as an annualized percentage.

“**Net Coupon Rate**” means the interest rate for a Mortgage Loan less the Servicing Fee Rate and the Guaranty Fee Rate.

“**Servicing Fee Rate**” means the rate of the fee received by the servicer for the collection of payments and management of operational procedures related to the Mortgage Loan, expressed as an annualized percentage.

“**Shortfall Amount**” means the difference between (1) ninety percent (90%) of the Maximum Mortgage Loan Amount and (2) the Actual Loan Amount.

“**Yield Maintenance Period Term**” means the period commencing from the date on which the Mortgage Loan was expected to have been originated and ending on the last calendar day of the fourth month prior to the month in which the maturity date of the Mortgage Loan would have occurred, and during which any prepayment of the Mortgage Loan would have had to be accompanied by a prepayment premium as provided in the loan documents.

“**Yield Rate**” means the yield calculated by interpolating the yields for the immediately shorter and longer term U.S. “Treasury constant maturities” (as reported in the Federal Reserve Statistical Release H.15 Selected Interest Rates (the “**Fed Release**”) under the heading “U.S. government securities”) closest to the Yield Maintenance Period Term of the Mortgage Loan, as follows (rounded to three (3) decimal places):

a = the yield for the longer U.S. Treasury constant maturity;

b = the yield for the shorter U.S. Treasury constant maturity;

x = the term of the longer U.S. Treasury constant maturity;

y = the term of the shorter U.S. Treasury constant maturity;

z = “n” (as defined in the present value factor calculation above) divided by twelve (12).

Notwithstanding any provision to the contrary, if “z” equals a term reported under the U.S. “Treasury constant maturities” subheading in the Fed Release, the yield for such term shall be used, and interpolation shall not be necessary. If publication of the Fed Release is discontinued by the Federal Reserve Board, Lender shall determine the Yield Rate from another source selected by Lender. Any determination of the Yield Rate by Lender will be binding absent manifest error.

**Exhibit A**

**Delivery Assurance** **Fee**

**(Stabilization Failure)**

The Delivery Assurance Fee under this Exhibit A is the greater of:

(1) 2% of the Maximum Mortgage Loan Amount; or

(2) an amount calculated by multiplying:

* the difference between (a) the Net Coupon Rate for the Mortgage Loan in the Forward Commitment and (b) the Net Coupon Rate for an immediate funding loan with the same terms as the Mortgage Loan on the Termination Date or, if terminated prior to the Termination Date, the date on which the Forward Commitment is terminated; BY
* the Maximum Mortgage Loan Amount; BY
* a present value factor, calculated using the following formula:

1 - (1+r)-n/12

r

* where:

r = the Net Coupon Rate used in (2)(b) above; and

n = the number of months in the Yield Maintenance Period Term of the Mortgage Loan.

**Exhibit B**

**Delivery Assurance** **Fee**

**(Any Other Reason)**

The Delivery Assurance Fee under this Exhibit B is the greater of:

(1) 2% of the Maximum Mortgage Loan Amount; or

(2) an amount calculated by multiplying:

* the difference between (a) the interest rate for the Mortgage Loan and (b) the Yield Rate (as defined below) on the Termination Date or, if terminated prior to the Termination Date, the date on which the Forward Commitment is terminated; BY
* the Maximum Mortgage Loan Amount; BY
* a present value factor, calculated using the following formula:

1 - (1+r)-n/12

r

* where:

r = the Yield Rate; and

n = the number of months in the Yield Maintenance Period Term of the Mortgage Loan.

**Exhibit C**

**Shortfall Fee**

The Shortfall Fee is the greater of:

(1) 2% of the Shortfall Amount; or

(2) an amount calculated by multiplying:

* the difference between (a) the Net Coupon Rate for the Mortgage Loan in the Forward Commitment and (b) the Net Coupon Rate for an immediate funding loan with the same terms as the Mortgage Loan on the date Lender delivers the Mortgage Loan to Fannie Mae; BY
* the Shortfall Amount; BY
* a present value factor, calculated using the following formula:

1 - (1+r)-n/12

r

* where:

r = the Net Coupon Rate used in (2)(b) above; and

n = the number of months in the Yield Maintenance Period Term of the Mortgage Loan.