

INTRODUCED: September 9, 2024

AN ORDINANCE No. 2024-233

To authorize the Chief Administrative Officer, for and on behalf of the City of Richmond, to execute a Performance Agreement between the City of Richmond, 1203 E Brookland LLC, and the Economic Development Authority of the City of Richmond for the purpose of facilitating the construction of an affordable housing development located at 1203 East Brookland Park Boulevard.

\_\_\_\_\_  
Patron – Mayor Stoney

\_\_\_\_\_  
Approved as to form and legality  
by the City Attorney  
\_\_\_\_\_

PUBLIC HEARING: SEP 23 2024 AT 6 P.M.

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That the Chief Administrative Officer, for and on behalf of the City of Richmond, be and is hereby authorized to execute a Performance Agreement between the City of Richmond, 1203 E Brookland LLC, and the Economic Development Authority of the City of Richmond for the purpose of facilitating the construction of an affordable housing development located at 1203 East Brookland Park Boulevard. The Performance Agreement shall be approved as to form by the City Attorney and shall be substantially in the form of the document attached to this ordinance.

AYES: \_\_\_\_\_ NOES: \_\_\_\_\_ ABSTAIN: \_\_\_\_\_

ADOPTED: \_\_\_\_\_ REJECTED: \_\_\_\_\_ STRICKEN: \_\_\_\_\_

§ 2. This ordinance shall be in force and effect upon adoption.

APPROVED AS TO FORM:

  
\_\_\_\_\_  
CITY ATTORNEY'S OFFICE



# City of Richmond

900 East Broad Street  
2nd Floor of City Hall  
Richmond, VA 23219  
www.rva.gov

## Master

**File Number: Admin-2024-0815**

**File ID:** Admin-2024-0815

**Type:** Request for Ordinance or Resolution

**Status:** Regular Agenda

**Version:** 1

**Reference:**

**In Control:** City Clerk Waiting Room

**Department:**

**Cost:**

**File Created:** 07/25/2024

**Subject:** 1203 East Brookland Park Boulevard Performance Grant

**Final Action:**

**Title:**

**Internal Notes:** Performance Grant for an affordable housing development project located at 1203 East Brookland Park Boulevard

**Code Sections:**

**Agenda Date:** 09/09/2024

**Indexes:**

**Agenda Number:**

**Patron(s):**

**Enactment Date:**

**Attachments:** Admin-2024-0815 WD- Ordinance - Performance Grant 1203 East Brookland Park- AATF, Admin-2024-0815 1203 East Brookland Park Blvd City of Richmond Performance Grant Agreement AATF and signed

**Enactment Number:**

**Contact:**

**Introduction Date:**

**Drafter:** Michelle.Peters@rva.gov

**Effective Date:**

**Related Files:**

### Approval History

Version	Seq #	Action Date	Approver	Action	Due Date
1	1	7/25/2024	Merrick Malone	Approve	7/27/2024
1	2	7/30/2024	Matt Welch	Approve	7/30/2024
1	3	7/30/2024	Alecia Blackwell - FYI	Notified - FYI	
1	4	8/5/2024	Sharon Ebert	Approve	8/1/2024
1	5	8/5/2024	Meghan Brown	Approve	8/7/2024
1	6	8/8/2024	Sheila White	Escalated	8/7/2024
1	7	8/8/2024	Michael Nguyen	Approve	8/9/2024
1	8	8/8/2024	Cynthia Osborne - FYI	Notified - FYI	
1	9	8/8/2024	Sabrina Joy-Hogg	Approve	8/12/2024
1	10	8/8/2024	Caitlin Sedano - FYI	Notified - FYI	
1	11	8/8/2024	Jeff Gray	Approve	8/12/2024
<b>Notes:</b> Approved: Out of Office					
1	12	8/21/2024	Lincoln Saunders	Approve	8/19/2024
1	13	8/29/2024	Mayor Stoney	Approve	8/30/2024

### History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
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**Text of Legislative File Admin-2024-0815**

**City of Richmond**  
Intracity Correspondence

**O&R Request**

**DATE:** July 1, 2024

**THROUGH:** The Honorable Levar M. Stoney, Mayor

**THROUGH:** J.E. Lincoln Saunders, Chief Administrative Officer

**THROUGH:** Sabrina Joy-Hogg, DCAO - Finance and

Administration

**THROUGH:** Sheila White, Director of Finance

**THROUGH:** Meghan Brown, Director of Budget and Strategic

Planning

**THROUGH:** Sharon L. Ebert, DCAO - Planning & Economic Development Portfolio

**THROUGH:** Matthew Welch, Acting Director of Economic Development

**FROM:** Merrick Malone, Acting Director of Housing and Community

**RE:** Approval of a Performance Grant for an Affordable Housing Development Project

**ORD. OR RES. No.**

**PURPOSE:** To authorize the Chief Administrative Officer (“CAO”) to execute, for and on behalf of the City of Richmond (“City”), the Grant Agreements attached hereto by and between the City, the Economic Development Authority (“EDA”), and the following recipient:

- 1203 E Brookland LLC

**REASON:** Council approval is necessary to authorize the City’s execution of the Grant Agreement.

**RECOMMENDATION:** The City Administration recommends approval.

**BACKGROUND:** In 2022, the Virginia General Assembly approved HB1194, which amended Ch. 49, Title 15.2 of the Code of Virginia to authorize industrial/economic development authorities “to make grants associated with the construction of affordable housing to promote safe and affordable housing in the Commonwealth.”

These Grant Agreements will induce the Recipients to construct and operate development projects (the “Project”) that will result in significant investment and economic development on the sites located at the identified addresses in **Attachment A** and will promote safe and affordable housing in the City, and result in substantial benefits to the welfare of the City and its inhabitants, as well as is in the public interest, and serves governmental interests:

Grant payments will be solely limited to incremental real estate tax revenues generated by the Project and received by the City and such payments will be conditioned upon the Recipients’ completion of Project construction and continued maintenance thereafter. To qualify for grant payments, the Projects each must include at least the number of residential units that restrict occupancy and rents to identified AMIs, according to standards promulgated by the State Housing Finance Agency (i.e., Virginia Housing), for a minimum of thirty (30) years. See **Exhibit A**.

**FISCAL IMPACT / COST:** The one-year fiscal impact is estimated based on the projected construction costs as a proxy for the assessed value of the property at the time of the commencement of the Grant Period. The current assessed value, before the commencement of the Grant Period, does not account for the development of new real estate and vastly under-values the assessment value of the property at the time of commencement of the Grant Period. The true baseline for incremental tax revenues will be determined at the time of commencement of the Grant Period.

The real estate tax revenue today, based on 2024 assessed value, would be \$2,868.00 the estimated real estate tax revenue at the time of commencement of the Grant Period would be \$149,200.20 As such the increase from the Effective Date to the first year of the Grant Period would be \$146,332.20 This is not the incremental increase that is to be paid to the grant Recipient for each year of the Grant Period. The Incremental Real Estate Tax Revenue upon commencement of the Grant Period can only be accurately determined from the true assessment value of the property at the time of the commencement of the Grant Period. The City of Richmond’s average assessed value increased 7.6% between 2023 and 2024. As such property producing \$149,200.20 in Real Estate Tax Revenue in 2023 would produce approximately \$160,539.42 in Real Estate Tax Revenue in 2024 making the one-year Incremental Real Estate Tax \$11,339.22 between 2023 and 2024. Based on recent trends, it is assumed that property value assessments in the City of Richmond will continue to increase in

the coming years. However, the future rate of increase is unknown at this time. This estimate was calculated at the real estate tax rate of \$1.20 per \$100 of assessed value and does not account for Special Assessment District rates.

**FISCAL IMPLICATIONS:** The approval of this performance grant will allow the City to meet one of its primary affordable housing goals, to produce new affordable housing units that are critically needed as evidenced by the City’s declaration of a “housing crisis”. There are no direct fiscal implications as the grant payments are solely limited to incremental tax revenues above and beyond the identified baselines of current real estate tax revenues received by the City for such baselines for each of the projects.

**BUDGET AMENDMENT NECESSARY:** None

**REVENUE TO CITY:** N/A

**DESIRED EFFECTIVE DATE:** Upon adoption

**REQUESTED INTRODUCTION DATE:** September 9, 2024

**CITY COUNCIL PUBLIC HEARING DATE:** September 23, 2024

**REQUESTED AGENDA:** Consent

**RECOMMENDED COUNCIL COMMITTEE:** Finance & Economic Development

**CONSIDERATION BY OTHER GOVERNMENTAL ENTITIES:** N/A

**AFFECTED AGENCIES:** Housing & Community Development,  
Economic Development, Finance, Budget, City Attorney’s Office

**RELATIONSHIP TO EXISTING ORD. OR RES.:** N/A

**REQUIRED CHANGES TO WORK PROGRAM(S):** None

**ATTACHMENTS:** Grant Agreement for the proposed recipient.

**STAFF:** Matthew Welch, Acting Director of Economic Development  
Merrick Malone, Acting Director of Housing and Community

## PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** (this “Agreement”) is made and entered this \_\_\_\_ day of \_\_\_\_, 2024 (the “Effective Date”), by and among the **CITY OF RICHMOND, VIRGINIA**, a municipal corporation of the Commonwealth of Virginia (the “City”), **1203 E BROOKLAND LLC**, a Virginia limited liability company, or its assigns or successors (the “Recipient”), and the **ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF RICHMOND**, a political subdivision of the Commonwealth of Virginia (the “Authority”).

### RECITALS

- A. The Recipient plans to develop and operate on the Site, as defined below, the Project, as defined below.
- B. In connection with its development of the Project, Recipient intends to divide the Assemblage and create the Site, whereupon the Site will be designated as a parcel in the tax records of the City and assigned a tax parcel identification number.
- C. The City and the Authority have determined that the Project will result in significant investment and economic development on the Site, will promote safe and affordable housing in the City of Richmond, will result in substantial benefits to the welfare of the City and its inhabitants, is in the public interest, and serves governmental interests.
- D. The City plans to fund a semi-annual economic development monetary Performance (the “AGREEMENT”) by the Authority to the Recipient for the purpose of inducing the Recipient to construct and operate the Project in the City of Richmond.
- E. Payment of the Performance Agreement will be conditioned upon the Recipient’s completion of Project construction and continued maintenance of the Project, as defined herein, and the funds comprising payments of the Performance Agreement will be solely limited to a portion of the incremental real estate tax revenues for the Site generated by the Project (i.e., including both the fee interest (and leasehold interest, if applicable) in the land and all improvements), all as set forth herein.
- F. The City is authorized by Section 15.2-953 of the Code of Virginia and other laws, and the Authority is authorized by the Industrial Development and Revenue Bond Act, contained in Chapter 49, Title 15.2 of the Code of Virginia and other laws to perform the activities contemplated in this Agreement. The Authority is authorized by the Code of Virginia to make grants to non-public organizations such as Recipient in furtherance of the purpose of promoting economic development and affordable housing.
- G. This Agreement sets forth the understanding of the parties concerning the Recipient’s obligations, the Authority’s obligations, and the incentives offered by the City, subject to the approval of the Authority’s Board and the Richmond City Council and subject to appropriations.

**NOW, THEREFORE**, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.



## **Section 1. Preliminary Provisions**

**1.1 Incorporation of Recitals.** The foregoing recitals are incorporated herein by reference.

**1.2 Definitions.** For the purposes of this Agreement, the following terms shall have the following definitions:

“AMI” means area median gross income for the Richmond-Petersburg Metropolitan Statistical Area for the applicable year of the Performance Agreement Period.

“Assemblage” means, collectively, that certain real property comprised of (i) those certain parcels of 0.615 acres currently owned by Enterprise Community Development, Inc. located respectively at 1203 East Brookland Park Boulevard Richmond, Virginia and currently referred to in the records of the City Assessor as Parcel Nos. N0000917006.

“Base Real Estate Tax Revenue” means \$2,868 per year, being the amount equal to the real estate taxes levied on the Site for the current tax year as of the Performance Agreement Commencement Date. For the avoidance of doubt, the Base Real Estate Tax Revenue is calculated based on the tax rate of \$1.20 per every \$100.00 of assessment value attributed to the portions of the Assemblage that comprise the Site, with thirty percent (30.0%) of the real estate taxes levied on Parcel No. N0000917006 included in the figure above.

“Performance Agreement” has the meaning set forth in the recitals of this Agreement.

“ Payment” means, for each real estate tax year during the Performance Agreement Period, an amount equal to one hundred percent (100%) of the Incremental Real Estate Tax Revenue for such corresponding tax year. The Parties acknowledge that the annual real estate tax levy is and may in the future be billed and due in installments (currently twice a year); therefore, as used herein “Performance Agreement Payment” shall include payments of Incremental Real Estate Tax Revenue for each installment payment corresponding to the applicable Real Estate Tax Levy.

“ Payment Request” means a written request for a Payment, which shall include (1) documentation showing its full payment of the Real Estate Tax Levy (including all applicable penalties and interest), and (2) the amount of the requested Payment and explanation of the calculation thereof (i.e., Real Estate Tax Levy *minus* Base Real Estate Tax Revenue *equals* Incremental Real Estate Tax Revenue, as pro-rated for the applicable installment period).

“ Performance Period” means that certain period commencing upon January 1<sup>st</sup> of the first real estate tax year following Recipient’s completion of Project construction, as shall be evidenced by receipt of a temporary Certificate of Occupancy (“Performance Commencement Date”) and ending on last day of the thirtieth (30th) real estate tax year following the Commencement Date (“Performance Expiration Date”). The parties acknowledge that the “Real Estate Tax Levy” for the last year of the Performance Period may not be received by the City until after the Performance Agreement Expiration Date, and that a Performance Payment shall be paid to the Recipient corresponding to such Real Estate Tax Levy.

“Grant Management Fee” means one time non-refundable fee and an annual payment equal to 1% of the Grant Payment to cover the administrative expenses of the Authority for managing the Performance Agreement during the Performance Agreement Period.

“Incremental Real Estate Tax Revenue” means, for each applicable real estate tax year during the Performance Agreement Period, the amount by which the Real Estate Tax Levy exceeds the Base Real Estate Tax Revenue, provided the Recipient pays the Real Estate Tax Levy to the City in full (including any applicable penalties and interest for late payment in accordance with any applicable provision of the Richmond City Code), subject to the applicable cure periods. The Parties acknowledge that the Real Estate Tax Levy is and may in the future be billed and due in installments (currently twice a year); therefore, as used herein “Incremental Real Estate Tax Revenue” shall be determined based on the applicable payment (or installment) of the Real Estate Tax Levy for each applicable real estate tax year.

“Land Records” means the Clerk’s Office of the Circuit Court of the City of Richmond, Virginia.

“Maintain” means the Recipient’s continued maintenance and operation of the Project following completion of Project construction, as set forth by Section 2.3.2 of this Agreement.

“Mortgage” means any mortgage, deed of trust, deed to secure debt or other similar instrument created for the purpose of securing indebtedness of Recipient, and recorded among the Land Records, or any mortgage, deed of trust, deed to secure debt or other similar instrument created for the purposes of refinancing such indebtedness and recorded among the Land Records.

“Mortgagee” means the secured party under a Mortgage.

“Project” means a development on the Site containing not less than 43 residential units, subject to income and rent restrictions as shown on **Exhibit A** and monitored by the State Housing Finance Agency.

“Real Estate Tax Levy” means the amount of real estate taxes levied by the City on the Site (including both the fee interest (and leasehold interest, if applicable) and Project (i.e., including land and all improvements) for a given real estate tax year, pursuant to Chapter 26 of the Code for the City of Richmond (“City Code”) .

“Recipient” means 1203 E Brookland LLC and its successors and assigns, to the extent permitted by this Agreement.

“Site” means the Assemblage. “State Housing Finance Agency” means Virginia Housing (formerly known as Virginia Housing Development Authority), a political subdivision of the Commonwealth of Virginia, or its successor.

## **Section 2. Recipient’s Obligations**

### **2.1 Performance Agreement Management Fee.**

The Recipient shall pay a Performance Agreement Management Fee consisting of (i) a one-time, non-refundable \$500.00 fee immediately upon execution of the agreement to the Authority, and, (ii) thereafter, the Recipient shall pay annually to the Authority 1% of the Performance Payment for the duration of the Performance Agreement Period. The Authority will invoice the Recipient on or before October 1 of each year and the Recipient shall remit payment within 30 days of issuance of the invoice.

## **2.2 Completion of Project Construction; Timeline.**

**2.2.1 Plan of Development.** Recipient shall submit a Plan of Development or similar permit submission for the Project to the City's Director of Planning and Development Review no later than nine (9) months of the Effective Date, which shall comply with the relevant provisions of the Richmond City Code and shall contain all elements of the Project as defined herein.

**2.2.2 Commencement of the Project Construction.** Recipient shall commence construction of the Project within eighteen (18) months of the Effective Date, (the "Construction Commencement Date"), which shall be evidenced by the issuance of all permits necessary for the commencement of construction of the Project.

**2.2.3 Completion of Project Construction.** Recipient shall complete the Project within three (3) years of the Construction Commencement Date, which shall be evidenced by the issuance of a temporary certificate of occupancy for the Project.

**2.2.4 Failure to Comply.** If the Recipient fails to timely comply with any of the provisions of this Section 2.2 then the City's Chief Administrative Officer ("CAO"), in his sole discretion, may either extend the time by which Recipient must comply with the corresponding requirement or provide written notice of the City's intent to terminate this Agreement. If Recipient fails to cure its failure to comply within sixty (60) days of such written notice then this Agreement, including all rights and obligations herein, shall, upon the City's election and subject to the rights of a Mortgagee under Section 6.3 hereof, terminate and neither the City nor the Authority shall have any further obligation to the Recipient and Recipient shall no longer be eligible for any Performance Agreement Payments hereunder.

## **2.3 Continued Maintenance and Operation of Project.**

**2.3.1 Continued Control of the Project by Recipient.** Recipient shall continue to own, lease, or otherwise control the Site until completion of Project construction pursuant to Section 2.2.3 of this Agreement and thereafter shall continue to own, lease, or otherwise control the Project until expiration of the Performance Agreement Period. Notwithstanding the foregoing, Recipient may transfer the ownership or control interest in the Project to third parties ("Transferee"), and Recipient may (1) assign this Agreement, including the rights and obligations herein to such party or parties at the time it transfers ownership or control of the Project (including any leasehold interests), and (2) if this Agreement is assigned, Recipient shall provide the City and Authority 30 days' prior written notice of its intent to transfer ownership or control of the Project, which notice shall include the contemplated date of transfer, the name of the party or parties to which it intends to transfer, and a written statement from such party that it is aware that this Agreement, including the rights and obligations herein, will be assigned to such party. Following the transfer of ownership or control in the Project to the Transferee as provided above, the term "Recipient" as used herein shall mean the Transferee. For the avoidance of doubt, this Section 2.3.1 shall not apply to any transfer by foreclosure or deed-in-lieu of foreclosure or to any transfer of interests in Recipient or the extent of the City or Authority of its rights to remove the general partner or managing member of Recipient and any such transfer shall not require notice to nor the

**2.3.2 Continued Maintenance and Operation of the Project.** Following Recipient's completion of Project construction as set forth in Section 2.2.3 of this Agreement, the Recipient shall continue to Maintain the Project until the expiration of the Performance Agreement Period.

## **2.4 MBE Participation.**

**2.4.1 Goal.** The Recipient agrees to diligently work towards the following goal: Where capacity, capability and competitive pricing among minority business enterprises and emerging small businesses exists, 30% of all expenditures for those construction costs of the Project that will be paid to third party subcontractors unaffiliated with the Recipient will be spent with minority business enterprises and emerging small businesses that perform commercially useful functions with regard to the prosecution and completion of the Project. The terms "minority business enterprise" and "emerging small business" have the meaning ascribed to them in Chapter 21 of the City Code. The Recipient shall include this goal in its contracts with all assignees, contractors and subcontractors who will be providing any portion of the Project.

**2.4.2 Reporting.** To enable the City to measure the achievements of the Recipient and its assignees, contractors and subcontractors with regard to the participation goals set forth above, during the period prior to completion of Project construction, the Recipient shall submit a report upon request detailing all expenditures with minority business enterprises and emerging small businesses, showing, at a minimum, (i) the name of the business, (ii) an itemization of what the business provided, (iii) the amount paid for each item, (iv) the total amount of spending to date with minority business enterprises and emerging small businesses and (v) the percentage of total expenditures for the quarter spent with minority business enterprises and emerging small businesses. If the City chooses, the Recipient shall submit these reports on forms prescribed by the City. The City will use these reports in evaluating the good faith minority business enterprise and emerging small business participation efforts, as defined in Section 21-4 of the City Code, of the Recipient and its assignees, contractors, and subcontractors that compete for City contracts.

## **2.5 Affordable Housing.**

The Recipient agrees to restrict occupancy and rents of the Project according to the schedule shown on **Exhibit A**, according to standards promulgated by the State Housing Finance Agency or as otherwise approved by the Authority. Ongoing compliance monitoring and approvals by the State Housing Finance Agency, as provided to the City upon the City's request, shall serve as evidence of the Recipient's compliance with this section.

## **2.6 Continued Investment and Capital Improvements**

For purposes of continued investment and upkeep of the Project to the benefit of its tenants, payment of Performance Agreement Payments subsequent to the initial fifteen (15) years of the Performance Agreement Period shall be contingent upon receipt of proof that the Recipient has made capital improvements to the Project in an aggregate amount of four-hundred thirty thousand and No/100 Dollars

(\$430,000.00) since the Performance Agreement Commencement Date. On each fifth anniversary of the Performance Agreement Commencement Date, the Recipient shall upon request submit a report of capital improvements made to the Project since the Performance Agreement Commencement Date.

**Section 3. Disbursement of Performance Agreement.**

**3.1. Performance Agreement.** During the Performance Agreement Period, the City shall pay to Recipient (or such party to which Recipient has assigned Performance Agreement Payments pursuant to Section 9.1 of this Agreement), through the Authority, the Performance Agreement Payments for such real estate tax year subject to the provisions of this Section 3.

**3.2. Performance Agreement Payment Requests.** The Recipient shall submit each Performance Agreement Payment Request to the CAO, with copies to the Department of Economic and Community Development, the Authority, and the Office of the City Attorney at the respective addresses set forth in Section 8.

**3.3. Disbursement of Performance Agreement Payment.** Upon receipt of a Performance Agreement Payment Request, the City shall review the accuracy of the request. The City shall not make a Performance Agreement Payment if Recipient did not make full and timely payment (except when all penalties and interest for late payment have been paid in accordance with any applicable provisions of the Richmond City Code), of the Real Estate Tax Levy for the applicable installment and shall not make a Performance Agreement Payment if Recipient is delinquent in payment (except when all penalties and interest for late payment have been paid in accordance with any applicable provision of the Richmond City Code) of any other taxes levied by the City for the Project. Within fifteen (15) business days of receipt of a Performance Agreement Payment Request, the City shall notify Recipient either that (1) the City denies the request and will not make a Performance Agreement Payment for the foregoing reasons, (2) the City approves the request and intends to make a Performance Agreement Payment in the amount requested, or (3) the City approves making a payment to Recipient but in a different amount than the amount requested because the amount requested is inconsistent with this Agreement, in which case the City shall indicate the correct Performance Agreement Payment amount it intends to make. Notwithstanding the foregoing, the City's failure to respond within fifteen (15) business days shall not constitute approval of a requested Performance Agreement Payment and the Recipient shall not be entitled to any such payment due solely to the City's failure to timely respond. Subject to any necessary City Council action, including any necessary budget amendment or appropriation of funds, the City agrees to, within fifteen (15) business days of the City's approval of any Performance Agreement Payment, transfer the funds for the Performance Agreement Payment to the Authority. The Authority agrees, subject to any necessary approvals by its Board of Directors, to pay the Performance Agreement Payment to Recipient (or such party to which Recipient has assigned Performance Agreement Payments pursuant to Section 9.1 of this Agreement), within fifteen (15) business days of receipt of the funds from the City.

**3.4 Recipient's Relief.** Should Recipient believe the City failed to comply with Section 3.3 of this Agreement, Recipient may seek relief in accordance with Section 9.2 of this Agreement. Provided, however, Recipient's sole remedy shall be to receive payment for a Performance Agreement Payment to which it was entitled (subject to the restrictions set forth in this Agreement, including, but not limited to, Sections 3.3 and 9.5) and for which it did not receive payment.

**Section 4. General Administration of Performance Agreement**

**4.1** The City agrees to transfer to the Authority, as and when appropriated by the City Council, the funds necessary for the Authority to meet its obligations under this Agreement relating to the Performance Agreement. No administrative fees or expenses shall be paid by the City.

**4.2** The Authority's obligation to undertake the activities herein is specially conditioned upon the City providing funding to the Authority on a timely basis; provided, however, the City's obligation to provide funding to the Authority is subject to appropriation by the City Council and availability of funds.

**4.3** The Authority agrees to provide the CAO, or the designee thereof, with copies of all documents related to this Agreement and will keep the CAO fully and timely informed of all matters related to this Agreement.

**4.4** The Authority agrees that all funds transferred by the City to the Authority for the Performance Agreement shall be deposited by the Authority within a Project Fund, to be used only to satisfy the obligations contained in this Agreement related to the Performance Agreement.

**4.5** It is the intent of the parties not to impose upon the Authority any responsibility, duty, or obligation other than what may be required to implement the Performance Agreement as set forth in this Agreement. Accordingly, the Authority does not assume any responsibility or liability whatsoever except as specifically stated in this Agreement. If litigation involving the Performance Agreement is initiated or expected to be filed against the Authority, the Authority shall immediately notify the City Attorney and CAO.

**4.6** The Authority shall keep records of its financial transactions, if any, related to this Agreement in accordance with generally accepted accounting principles. The City Auditor or his designee may at any time audit the financial transactions undertaken under this Agreement. The Authority shall cooperate to ensure that the City Auditor is granted reasonable access on a timely basis to all books and records of the Authority necessary to complete such audits

**4.7** The Authority shall not be required to furnish the City a blanket corporate fidelity bond with surety.

**Section 5. Representations of the Recipient**

**5.1** The Recipient is empowered to enter into this Agreement, to be bound hereby, and to perform according to the terms hereof.

**5.2** Any and all actions necessary to enable the Recipient to enter into this Agreement, and to be bound hereby, have been duly taken.

**5.3** The person or persons executing or attesting the execution of this Agreement on behalf of the Recipient has or have been duly authorized and empowered to so execute or attest.

**5.4** The execution of this Agreement<sup>7</sup> on behalf of the Recipient will bind and

obligate the Recipient to the extent provided by the terms hereof.

**5.5** There exists no litigation pending against the Recipient or to the Recipient's knowledge threatened, which if determined adversely, would materially and adversely affect the ability of the Recipient to carry out its obligations under this Agreement or the transactions contemplated hereunder.

**Section 6. Default.**

**6.1 Events of Default.** Each of the following events (hereinafter called an "Event of Default") shall be a default hereunder by the Recipient as described:

**6.1.1** Failure by the Recipient to maintain its corporate existence or the declaration of bankruptcy by the Recipient;

**6.1.2** The failure of Recipient to comply with Section 2 of this Agreement; and

**6.1.3** The failure of Recipient to pay the annual Real Estate Tax Levy.

**6.2 Effect of Event of Default.** Subject to Section 6.3 below, in the case of an occurrence of an Event of Default, the Performance Agreement provisions of Section 3 of this Agreement shall, at the City's option, terminate ninety (90) days after the City's notice to Recipient, each Mortgagee and Investor, unless Recipient cures the Event of Default to the City's satisfaction within such ninety (90) days, and neither the City nor the Authority shall have any further obligation relating thereto and the Recipient shall no longer be eligible for any Performance Agreement Payments hereunder. If the default cannot be reasonably cured within thirty (30) days, then the Recipient shall have such additional time as it shall reasonably require so long as the Recipient is proceeding with reasonable diligence to cure the default.

**6.3 Notice and Right to Cure.** Written notice of any default by Recipient under this Agreement shall be provided simultaneously to any Mortgagee and Investor. Each Mortgagee and the Investor shall be permitted to cure any default by Recipient under this Agreement. Such Mortgagees and Investor shall have the same period, after the giving of such notice upon it, for remedying any default or causing the same to be remedied, as is given Recipient after the giving of such notice to Recipient, plus an additional thirty (30) days, to remedy, commence remedying or cause to be remedied the defaults specified in any such notice. If the default cannot be reasonably cured within thirty (30) days, then the Mortgagee or Investor, as applicable, shall have such additional time as it shall reasonably require so long as the Mortgagee or Investor, as applicable, is proceeding with reasonable diligence to cure the default. The City and the Authority each agree to accept payment or performance by any Mortgagee or Investor as though the same had been done by Recipient.

**Section 7. Recipient Reporting.**

The Recipient shall provide, at Recipient's expense, detailed updates and verification reasonably satisfactory to the City of Recipient's progress regarding completion of Project construction and, following Project construction, of Recipient's continued compliance with Section 2.3 of this Agreement.

**Section 8. Notices.**

Any notices required or permitted under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail or overnight courier package not accepted by the addressee):

if to the Recipient, to:

1203 E Brookland LLC  
c/o Enterprise Community Development, Inc.  
8403 Colesville Road, Suite 115  
Silver Spring, Maryland  
Attention: Kathleen Kramer

with a copy to:

Klein Horning  
1325 G Street NW, Suite 770  
Washington DC 20005  
Attention: Jessica Worthington

if to the City, to:

Chief Administrative Officer  
City of Richmond, Virginia  
900 East Broad Street Suite 201  
Richmond, VA 23219

with a copy to:

Department of Economic Development  
City of Richmond, Virginia  
1500 East Main Street  
Richmond, VA 23219

if to the Authority, to:

Economic Development Authority  
of Richmond VA – Attn: Chairman  
501 East Franklin Street  
Richmond, VA 23219

with a copy to:

City Attorney  
City of Richmond, Virginia  
900 East Broad Street Suite 300  
Richmond, VA 23219

**Section 9. General Terms and Conditions.**

**9.1 Entire Agreement; Amendments; Assignments.** This Agreement constitutes the entire agreement among the parties hereto and may not be amended or modified, except in writing, signed by each of the parties hereto, and subject to the prior written consent of each Mortgage and Investor. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, including, without limitation, a Mortgagee or its designee upon a foreclosure or deed-in-lieu of foreclosure of the Site or the Project; provided, however, that in no event may this Agreement or any of the rights, benefits, duties, or obligations of the parties hereto be assigned, transferred or otherwise disposed of without the prior written consent of the other, which consent neither party shall be obligated to give, except that Recipient may assign its right to receive payment to another entity authorized to transact business in Virginia by furnishing the City and the Authority with notice identifying the entity and providing both contact and payment information in a form acceptable to the City and the Authority. Notwithstanding anything to the contrary herein, (a) Recipient shall have the right to assign its interest in the Site and Project to any future owner provided the Recipient first shall have complied with the requirements set forth in Section 2.3.1 of this Agreement and shall have submitted to the City the form of all instruments by which it purports to make such assignment and shall have obtained the City’s prior written approval thereof, which approval shall not be unreasonably withheld, in which event the assignor shall be released from all obligations and liabilities under this Agreement; and (b) Recipient shall have the



right to grant to a Mortgagee a security interest in, and assignment of, Recipient's rights hereunder as collateral for the loan to be provided by such Mortgagee for the development of the Project, and any action taken by such Mortgagee to realize on such security interest or assignment and performance thereafter shall be deemed permitted under this Agreement, provided the Recipient first shall have submitted to the City the form of all instruments by which it purports to grant such security interest and assignment and shall have obtained the City's prior written approval thereof, which approval shall not be unreasonably withheld. Neither the City's nor Authority's consent shall be required to the exercise by Mortgagee or any assignee of Mortgagee of its right to perform Recipient's obligations hereunder after a default by Recipient under the applicable loan documents. The City agrees that Mortgagee shall not have any liability for any act or omission of Recipient hereunder and shall only be liable hereunder for obligations arising during such time as it is the owner of Recipient's interests in the Site and Project pursuant to foreclosure, deed in lieu of foreclosure or otherwise. For the avoidance of doubt, no transfer by foreclosure or deed-in-lieu of foreclosure pursuant to a Mortgage and no transfer of interests in Recipient or the exercise by Investor of its rights to remove the general partner or managing member of Recipient shall require notice to or the approval of the City or Authority.

**9.2 Governing Law; Venue.** All issues and questions concerning the construction, enforcement, interpretation, and validity of this Agreement, or the rights and obligations of the parties shall be governed by, and construed and interpreted in accordance with, the laws of the Commonwealth of Virginia, without giving effect to any choice of law or conflict of laws rules or provisions, whether of the Commonwealth of Virginia or any other jurisdiction, that would cause the application of the laws of any jurisdiction other than those of the Commonwealth of Virginia. All disputes, claims, and causes of action arising out of or in connection with this Agreement, or any performances made hereunder, shall be brought, and any judicial proceeding shall take place, only in the Circuit Court of the City of Richmond, Virginia. Each party shall be responsible for its own attorneys' fees in the event of any litigation or other proceedings arising from this Agreement.

**9.3 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

**9.4 Severability.** If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

**9.5 Subject-to-Appropriations.** All payments and other performances by the City and the Authority under this Agreement are subject to City Council approval, Authority Board approval and annual appropriations by the City Council. It is understood and agreed among the parties that the City and the Authority shall be bound hereunder only to the extent of the funds available or which may hereafter become available for the purpose of this Agreement. Under no circumstances shall the City's or the Authority's total liability under this Agreement exceed the total amount of funds appropriated by the City Council for the payments hereunder for the performance of this Agreement.

**9.6 Public Disclosure.**

**9.6.1 Applicable Law.** The parties to this Agreement acknowledge that records maintained by or in the custody of the City and the Authority are subject to the provisions of the

Virginia Public Records Act, Va. Code §§ 42.1-76 through 42.1-90.1, and the Virginia Freedom of Information Act, Va. Code §§ 2.2-3700 through 2.2-37 14 and thus are subject to the records retention and public disclosure requirements set forth in those statutes.

**9.6.2 Challenges to Nondisclosure.** If a party submitting records to the City or the Authority requests that those records not be disclosed under applicable law and the City or the Authority consequently denies a request for disclosure of such records based on the submitting party's request, and the City's or the Authority's denial of a request for disclosure of records is challenged in court, the submitting party shall indemnify, hold harmless and defend the City or the Authority, their respective officers and employees from any and all costs, damages, fees and penalties (including attorney's fees and other costs related to litigation) relating thereto.

**9.7 No Waiver.** Neither failure on the part of the City or the Authority to enforce any covenant or provision contained in this Agreement nor any waiver of any right under this Agreement shall discharge or invalidate such covenant or provision or affect the right of the City or the Authority to enforce the same right in the event of any subsequent default.

**9.8 Effective Date of the Agreement.** The effective date of this Agreement shall be the date upon which it has been fully executed by the parties following approval by the City Council and by the Authority's Board of Directors.

**9.9 No Partnership or Joint Venture.** It is mutually understood and agreed that nothing contained in this Agreement is intended or shall be construed in any manner or under any circumstance whatsoever as creating and establishing the relationship of copartners or creating or establishing a joint venture between or among any of the parties or as designating any party to this Agreement as the agent or representative of any other party to this Agreement for any purpose.

**9.10 No Third-Party Beneficiaries.** Except as otherwise provided in Section 9.1 of this Agreement, the parties agree that except for any Mortgagee and Investor (i) no individual or entity shall be considered, deemed or otherwise recognized to be a third-party beneficiary of this Agreement; (ii) the provisions of this Agreement are not intended to be for the benefit of any individual or entity other than the City, the Authority, or the Recipient; (iii) no other individual or entity shall obtain any right to make any claim against the City, the Authority, or the Recipient under the provisions of this Agreement; and (iv) no provision of this Agreement shall be construed or interpreted to confer third-party beneficiary status on any individual or entity. Each Mortgagee and Investor shall be a third-party beneficiary of this Agreement.

**9.11 Signature Authority.** Except as specifically otherwise set forth in this Agreement, the CAO or the designee thereof may provide any authorization, approvals, and notices contemplated herein on behalf of the City.

**SIGNATURE PAGE TO FOLLOW**



Approved as to Form:

By: \_\_\_\_\_  
General Counsel to the Authority

## **EXHIBIT A**

### **Affordable Housing Schedule**

The Project shall restrict occupancy and rents to an average income designation of 60% of AMI, according to standards promulgated by the State Housing Finance Agency, for a minimum of thirty (30) years.