

# UNOFFICIAL COPY



RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO:

Doc# 1706718102 Fee \$76.00

Citibank, N.A.  
Transaction Management Group/Documentation  
388 Greenwich Street, 8<sup>th</sup> Floor  
New York, New York 10013  
Attention: Tanya Jimenez  
Citi Deal ID # 23120

RHSP FEE: \$9.00 RPRF FEE: \$1.00

KAREN A. YARBROUGH

COOK COUNTY RECORDER OF DEEDS

DATE: 03/08/2017 02:18 PM PG: 1 OF 20

40016836 (30F3)

## SUBORDINATION AND INTERCREDITOR AGREEMENT

This **SUBORDINATION AND INTERCREDITOR AGREEMENT** (this "Agreement") dated as of the 1<sup>st</sup> day of March, 2017, is made by and between **HEARTLAND HOUSING, INC.**, an Illinois not-for-profit corporation ("**Junior Lender**") and **CITIBANK, N.A.**, a national banking association ("**Senior Lender**"), and acknowledged by **DIVERSEY LIMITED PARTNERSHIP**, an Illinois limited partnership ("**Borrower**").

### RECITALS:

A. The Borrower has obtained from Senior Lender a loan in the maximum principal amount of \$10,435,000 (the "**Senior Loan**") for the acquisition, construction, rehabilitation, development, equipping and/or operation of the Property (as defined below).

B. The Senior Loan is evidenced by the Senior Note (as defined below), is being advanced to Borrower pursuant to a Construction Loan Agreement dated as of December 1, 2015, between Borrower and Lender ("**Senior Loan Agreement**"), and is secured by, among other things, that certain Multifamily Mortgage, Assignment of Rents, and Security Agreement and Fixture Filing dated as of December 1, 2015 (the "**Senior Security Instrument**") and encumbering the Property.

C. Citibank, N.A. (together with its successors and assigns, "**Servicer**"), is acting as the initial servicer of the Senior Loan.

D. Junior Lender is making the following subordinate loan to Borrower: that certain fourth priority loan in the original principal amount of \$157,895 which loan is evidenced by that certain Promissory Note (DCEO) dated as of March 1, 2017, made by Borrower to Junior Lender (the "**Junior Note**") and secured by the Second Junior Mortgage, Assignment of Rents and Security Agreement (the "**Junior Mortgage**") encumbering the Property, dated as of the date of the Junior Note between Borrower and Junior Lender (collectively, the "**Junior Loan**").

E. As a condition of the Senior Loan, Senior Lender requires that Junior Lender execute and deliver this Agreement prior to the making of the Junior Loan and the granting of the Junior Security Instrument (as defined below) by Borrower.

# UNOFFICIAL COPY

NOW, THEREFORE, in consideration of the foregoing and the mutual representations, warranties, covenants and conditions contained herein, and to induce the making of the Senior Loan and to induce Senior Lender to consent to the Junior Loan and the Junior Security Instrument, Junior Lender hereby agrees as follows:

1. **Definitions.** Capitalized terms used but not defined in this Agreement shall have the meanings ascribed thereto in the Senior Security Instrument. As used in this Agreement, the terms set forth below shall have the respective meanings indicated:

**“Bankruptcy Proceeding”** means any bankruptcy, reorganization, insolvency, composition restructuring, dissolution, liquidation, receivership, assignment for the benefit of creditors, or custodianship action or proceeding under any federal or state law with respect to Borrower, any guarantor of any of the Senior Indebtedness, any of their respective properties, or any of their respective partners, members, officers, directors, or shareholders.

**“Casualty”** means the occurrence of damage to or loss of any of the Property by fire or other casualty.

**“Condemnation”** means any proposed or actual condemnation or other taking, or conveyance in lieu thereof, of all or any part of the Property, whether direct or indirect.

**“Enforcement Action”** means any exercise of any of Junior Lender’s remedies under the Junior Security Instrument or any of the other Junior Loan Documents, including, without limitation, any of the following: (i) the acceleration of all or any part of the Junior Indebtedness, (ii) the commencement of any judicial or non-judicial action or proceeding to enforce any obligation of Borrower under any of the Junior Loan Documents, collect any monies payable to Borrower or have a receiver appointed to collect any monies payable to Borrower, or foreclose the lien(s) created by the Junior Security Instrument, (iii) the filing or joining in the filing of any involuntary Bankruptcy Proceeding against Borrower or any person or entity which owns a direct or indirect interest in Borrower, (iv) the advertising of or commencement of any foreclosure or trustee’s sale proceedings, (v) the exercise of any power of sale, (vi) the acceptance of a deed or assignment in lieu of foreclosure or sale, (vii) the collecting of Rents, (viii) the obtaining of or seeking of the appointment of a receiver, (ix) the seeking of default interest, (x) the taking of possession or control of any of the Property, (xi) the commencement of any suit or other legal, administrative, or arbitration proceeding based upon the Junior Note or any other of the Junior Loan Documents, (xii) the exercise of any banker’s lien or rights of set-off or recoupment, or (xiii) the taking of any other enforcement action against Borrower, any other party liable for any of the Junior Indebtedness or obligated under any of the Junior Loan Documents, or the Property.

**“Enforcement Action Notice”** means a written notice from Junior Lender to Senior Lender, given following a Junior Loan Default and the expiration of any notice or cure periods provided for such Junior Loan Default in the Junior Loan Documents, setting forth in reasonable detail the Enforcement Action proposed to be taken by Junior Lender.

# UNOFFICIAL COPY

“**Junior Indebtedness**” means all indebtedness of any kind at any time evidenced or secured by, or arising under, the Junior Loan Documents, whether incurred, arising or accruing before or after the filing of any Bankruptcy Proceeding.

“**Junior Loan Documents**” means, collectively, the Junior Note, the Junior Security Instrument, that certain Agreement Regarding DCEO Grant between Borrower and Junior Lender dated as of the date hereof (the “**Junior Grant Agreement**”), and all other documents evidencing, securing or delivered in connection with the Junior Loan, together with such modifications, amendments and supplements thereto as are approved in writing by Senior Lender prior to their execution.

“**Junior Security Instrument**” means the Junior Mortgage, as the same may from time to time be extended, consolidated, substituted for, modified, amended or supplemented upon receipt of the consent of Senior Lender.

“**Junior Loan Default**” means any act, failure to act, event, condition, or occurrence which constitutes, or which with the giving of notice or the passage of time, or both, would constitute, an “Event of Default” as defined in the Junior Security Instrument.

“**Loss Proceeds**” means all monies received or to be received under any insurance policy, from any condemning authority, or from any other source, as a result of any Condemnation or Casualty.

“**Property**” means (i) the land and improvements known or to be known as Diversey Parkway Apartments, located in Chicago, Illinois, which Property is more particularly described on Exhibit A attached hereto, and (ii) all furniture, fixtures and equipment located at such apartments and other property, accounts, deposits and rights and interests of Borrower encumbered by the Senior Security Instrument and/or the other Senior Loan Documents.

“**Senior Indebtedness**” means all indebtedness of any kind at any time evidenced or secured by, or arising under, the Senior Loan Documents, whether incurred, arising or accruing before or after the filing of any Bankruptcy Proceeding.

“**Senior Loan Agreement**” means that certain Construction Loan Agreement dated as of December 1, 2015, by and between Borrower and Senior Lender relating to the Senior Loan.

“**Senior Loan Documents**” means, collectively, the Senior Security Instrument, the Senior Note, the Senior Loan Agreement and all of the other documents, instruments and agreements now or hereafter evidencing, securing or otherwise executed in connection with the Senior Loan, as the same may from time to time be extended, consolidated, substituted for, modified, increased, amended and supplemented in accordance with the provisions of this Agreement.

“**Senior Loan Default**” means any act, failure to act, event, condition, or occurrence which constitutes, or which with the giving of notice or the passage of time, or both, would constitute, an “Event of Default” as defined in the Senior Security Instrument.

# UNOFFICIAL COPY

“**Senior Note**” means the Note, as defined in the Senior Loan Agreement, as the same may from time to time be extended, consolidated, substituted for, modified, increased, amended and supplemented.

“**Senior Security Instrument**” means that certain Multifamily Mortgage, Assignment of Rents and Security Agreement and Fixture Filing dated as of December 1, 2015, made by Borrower for the benefit of Senior Lender, as the same may from time to time be extended, consolidated, substituted for, modified, increased, amended and supplemented.

## 2. **Junior Loan and Junior Loan Documents are Subordinate; Acts by Senior Lender do not Affect Subordination.**

(a) Junior Lender hereby covenants and agrees on behalf of itself and its successors and permitted assigns that the Junior Indebtedness is and shall at all times continue to be subordinate, subject and inferior (in payment and priority) to the prior payment in full of the Senior Indebtedness, and that the liens, rights, payment interests, priority interests and security interests granted to Junior Lender in connection with the Junior Loan and under the Junior Loan Documents are, and are hereby expressly acknowledged to be in all respects and at all times, subject, subordinate and inferior in all respects to the liens, rights, payment, priority and security interests granted to Senior Lender under the Senior Loan and the Senior Loan Documents and the terms, covenants, conditions, operations and effects thereof.

(b) Except as expressly set forth herein, repayment of the Junior Indebtedness is and shall be postponed and subordinated to repayment in full of the Senior Loan. Prior to a Senior Loan Default (regardless of whether such Senior Loan Default occurs prior to or during the pendency of a Bankruptcy Proceeding), Junior Lender shall be entitled to receive and retain payments made pursuant to and in accordance with the terms of the Junior Loan Documents; provided, however, that no such payment is made more than ten (10) days in advance of the due date thereof. Junior Lender agrees that from and after such time as it has received from either Senior Lender or Borrower written notice that a Senior Loan Default then exists (which has not been expressly waived in writing by Senior Lender) or otherwise has actual knowledge of such a Senior Loan Default, Junior Lender shall not receive or accept any payments under the Junior Loan. If (i) Junior Lender receives any payment, property, or asset of any kind or in any form on account of the Junior Indebtedness (including, without limitation, any proceeds from any Enforcement Action) after a Senior Loan Default of which Junior Lender has actual knowledge or has been given notice, or (ii) Junior Lender receives, voluntarily or involuntarily, by operation of law or otherwise, any payment, property, or asset in or in connection with any Bankruptcy Proceeding, such payment, property, or asset will be received and held in trust for Senior Lender. Junior Lender will promptly remit, in kind and properly endorsed as necessary, all such payments, properties, and assets to Senior Lender. Senior Lender shall apply any payment, asset, or property so received from Junior Lender to the Senior Indebtedness in such order, amount (with respect to any asset or property other than immediately available funds), and manner as Senior Lender shall determine in its sole and absolute discretion.

# UNOFFICIAL COPY

(c) Without limiting the complete subordination of the Junior Indebtedness to the payment in full of the Senior Indebtedness, in any Bankruptcy Proceeding, upon any payment or distribution (whether in cash, property, securities, or otherwise) to creditors (i) the Senior Indebtedness shall first be paid in full in cash before Junior Lender shall be entitled to receive any payment or other distribution on account of or in respect of the Junior Indebtedness, and (ii) until all of the Senior Indebtedness is paid in full in cash, any payment or distribution to which Junior Lender would be entitled but for this Agreement (whether in cash, property, or other assets) shall be made to Senior Lender.

(d) The subordination of the Junior Indebtedness shall continue in the event that any payment under the Senior Loan Documents (whether by or on behalf of Borrower, as proceeds of security or enforcement of any right of set-off or otherwise) is for any reason repaid or returned to Borrower or its insolvent estate, or avoided, set aside or required to be paid to Borrower, a trustee, receiver or other similar party under any bankruptcy, insolvency, receivership or similar law. In such event, the Senior Indebtedness or part thereof originally intended to be satisfied shall be deemed to be reinstated and outstanding to the extent of any repayment, return, or other action, as if such payment on account of the Senior Indebtedness had not been made.

(e) The subordination of the Junior Loan Documents and of the Junior Indebtedness shall apply and continue notwithstanding (i) the actual date and time of execution, delivery, recording, filing or perfection of the Senior Security Instrument and other Senior Loan Documents and of the Junior Security Instrument and other Junior Loan Documents, and (ii) the availability of any collateral to Senior Lender, including the availability of any collateral other than the Property.

(f) By reason of, and without in any way limiting, the full subordination of the Junior Indebtedness and the Junior Loan Documents provided for in this Agreement, all rights and claims of Junior Lender under the Junior Security Instrument or under the Junior Loan Documents in or to the Property or any portion thereof, the proceeds thereof, the Leases thereof, the Rents, issues and profits therefrom, and the Loss Proceeds payable with respect thereto, are expressly subject and subordinate in all respects to the rights and claims of Senior Lender under the Senior Loan Documents in and to the Property or any portion thereof, the proceeds thereof, the Leases thereof, the Rents, issues and profits therefrom, and the Loss Proceeds payable with respect thereto.

(g) If Junior Lender, by indemnification, subrogation or otherwise, shall acquire any lien, estate, right or other interest in any of the Property, that lien, estate, right or other interest shall be fully subject and subordinate to the receipt by Senior Lender of payment in full of the Senior Indebtedness, and to the Senior Loan Documents, to the same extent as the Junior Indebtedness and the Junior Loan Documents are subordinate pursuant to this Agreement.

(h) In confirmation, and not as a condition, of the subordination of the Junior Indebtedness and the Junior Loan Documents provided for in this Agreement, Junior Lender shall place on or attach to the Junior Note a notice to the following effect, and shall provide Senior Lender with a copy of the Junior Note showing such notice:

# UNOFFICIAL COPY

“The indebtedness evidenced by this Note is and shall be subordinate in right of payment to the prior payment in full of all amounts then due and payable (including, but not limited to, all amounts due and payable by virtue of any default or acceleration or upon maturity) with respect to the indebtedness evidenced by the Note (as defined by that certain Multifamily Mortgage, Assignment of Rents and Security Agreement and Fixture Filing by the Borrower in favor of Citibank, N.A.), in the original maximum principal amount of \$10,435,000, executed by Borrower and payable to Citibank, N.A. (“**Senior Lender**”) to the extent and in the manner provided in that certain Subordination and Intercreditor Agreement, dated as of March 1, 2017, between Senior Lender and the holder of this Note (the “**Subordination Agreement**”). The rights and remedies of the payee and each subsequent holder of this Note shall be deemed, by virtue of such holder’s acquisition of this Note, to have agreed to perform and observe all of the terms, covenants and conditions to be performed or observed by the “**Junior Lender**” under the Subordination Agreement.”

### 3. **Junior Lender Agreements.**

(a) Without the prior written consent of Senior Lender in each instance, Junior Lender shall not (i) amend, modify, waive, extend, renew or replace any provision of any of the Junior Loan Documents, or (ii) pledge, assign, transfer, convey, or sell any interest in the Junior Indebtedness or any of the Junior Loan Documents; or (iii) accept any payment on account of the Junior Indebtedness other than a regularly scheduled payment of interest or principal and interest made not earlier than ten (10) days prior to the due date thereof; or (iv) take any action which has the effect of increasing the Junior Indebtedness; or (v) appear in, defend or bring any action in connection with the Property; or (vi) take any action concerning environmental matters affecting the Property. Regardless of any contrary provision in the Junior Loan Documents, Junior Lender shall not collect payments for the purpose of escrowing for any cost or expense related to the Property or for any portion of the Junior Indebtedness.

(b) Junior Lender hereby agrees that Senior Lender may, at its option (but without any obligation to do so), at any time (including during the pendency of a Bankruptcy Proceeding), purchase the Junior Loan at par (and without liability for any prepayment premiums or liquidated damages set forth in the Junior Loan Documents). Such transfer and assignment of the Junior Loan shall be without representation or recourse, except that Junior Lender shall represent that it is the sole holder of the Junior Loan, that it has authority to assign and convey the Junior Loan Documents, that, to the best of its knowledge, there are no defaults or breaches under the Junior Loan Documents, and as to the total amount then outstanding under the Junior Loan.

(c) Junior Lender shall give Senior Lender a concurrent copy of each notice of a Junior Loan Default, Enforcement Action Notice or other material notice given by Junior Lender under the Junior Loan Documents. Senior Lender shall have the right, but shall not have any obligation, to cure any Junior Loan Default until ninety (90) days

# UNOFFICIAL COPY

following Senior Lender's receipt of an Enforcement Action Notice given by Junior Lender as a consequence of the Junior Loan Default. Senior Lender shall not be subrogated to the rights of Junior Lender under the Junior Loan Documents by reason of Senior Lender having cured any Junior Loan Default. However, Junior Lender acknowledges that all amounts advanced or expended by Senior Lender to cure a Junior Loan Default shall be added to and become a part of the Senior Indebtedness pursuant to the terms of the Senior Security Instrument.

(d) In the event and to the extent that each of Senior Lender and Junior Lender have under their respective loan documents certain approval or consent rights over the same subject matters (regardless of whether the obligations or rights are identical or substantially identical), Junior Lender agrees that Senior Lender shall exercise such approval rights on behalf of both Senior Lender and Junior Lender, and Junior Lender shall have no right to object to any such action or approval taken by Senior Lender and shall consent thereto and be bound thereby. Without limiting the generality of the foregoing, Senior Lender shall have all approval, consent and oversight rights in connection with any insurance claims relating to the Property, any decisions regarding the use of insurance proceeds after a casualty loss or condemnation awards, the hiring or firing of property managers, or otherwise related in any way to the Property, and Junior Lender shall have no right to object to any such action or approval taken by Senior Lender and shall consent thereto and be bound thereby.

(e) Junior Lender agrees that in any action commenced to enforce the obligation of Borrower to pay any portion of the Junior Indebtedness, the judgment shall not be enforceable personally against Borrower or Borrower's assets, and the recourse of Junior Lender for the collection of the Junior Indebtedness shall be limited to actions against the Property and the rents, profits, issues, products, and income from the Property.

(f) Junior Lender shall not commence or join with any other creditor in commencing any Bankruptcy Proceeding involving Borrower, and Junior Lender shall not initiate and shall not be a party to any action, motion or request, in a Bankruptcy Proceeding involving any other person or entity, which seeks the consolidation of some or all of the assets of Borrower into such Bankruptcy Proceeding. In the event of any Bankruptcy Proceeding relating to Borrower or the Property or, in the event of any Bankruptcy Proceeding relating to any other person or entity into which (notwithstanding the covenant in the first sentence of this clause) the assets or interests of Borrower are consolidated, then in either event, the Senior Loan shall first be paid in full before Junior Lender shall be entitled to receive and retain any payment or distribution in respect to the Junior Loan. Junior Lender agrees that (i) Senior Lender shall receive all payments and distributions of every kind or character in respect of the Junior Loan to which Junior Lender would otherwise be entitled, but for the subordination provisions of this Agreement (including without limitation, any payments or distributions during the pendency of a Bankruptcy Proceeding involving Borrower or the Property), and (ii) the subordination of the Junior Loan and the Junior Loan Documents shall not be affected in any way by Senior Lender electing, under Section 1111(b) of the federal bankruptcy code, to have its claim treated as being a fully secured claim. In addition, Junior Lender

# UNOFFICIAL COPY

hereby covenants and agrees that, in connection with a Bankruptcy Proceeding involving Borrower, neither Junior Lender nor any of its affiliates shall (i) make or participate in a loan facility to or for the benefit of Borrower on a basis that is senior to or pari passu with the liens and interests held by Senior Lender pursuant to the Senior Loan Documents, (ii) not vote affirmatively in favor of any plan of reorganization or liquidation unless Senior Lender has also voted affirmatively in favor of such plan (assuming Senior Lender has not exercised any rights it may have hereunder to exercise Junior Lender's voting rights), and (iii) not contest the continued accrual of interest on the Senior Indebtedness, in accordance with and at the rates specified in the Senior Loan Documents, both for periods before and for periods after the commencement of such Bankruptcy Proceedings. Junior Lender shall execute and deliver to Senior Lender powers of attorney, assignments or other instruments as may be requested by Senior Lender in order to enable it to exercise the above-described authority or powers with respect to any or all of the Junior Loan Documents, and to collect and receive any and all payments or distributions which may be payable or deliverable at any time upon or with respect to any of the Junior Loan Documents to Junior Lender.

(g) Junior Lender covenants and agrees that the effectiveness of this Agreement and the rights of Senior Lender hereunder shall be in no way impaired, affected, diminished or released by any renewal or extension of the time of payment of the Senior Loan, by any delay, forbearance, failure, neglect or refusal of Senior Lender in enforcing payment thereof or in enforcing the lien of or attempting to realize upon the Senior Loan Documents or any other security which may have been given or may hereafter be given for the Senior Loan, by any waiver or failure to exercise any right or remedy under the Senior Loan Documents, or by any other act or failure to act by Senior Lender. Junior Lender acknowledges that Senior Lender, at its sole option, may release all or any portion of the Property from the lien of the Senior Security Instrument, and may release or waive any guaranty, surety or indemnity providing additional collateral to Senior Lender, and Junior Lender hereby waives any legal or equitable right in respect of marshaling it might have, in connection with any release of all or any portion of the Property by Senior Lender, to require the separate sales of any portion of the Property or to require Senior Lender to exhaust its remedies against any portion of the Property or any other collateral before proceeding against any other portion of the Property or other collateral (including guarantees) for the Senior Loan. Senior Lender may pursue all rights and remedies available to it under the Senior Loan Documents, at law, or in equity, regardless of any Enforcement Action Notice or Enforcement Action by Junior Lender.

(h) At any time or from time to time and any number of times, without the consent or approval of Junior Lender, without notice to Junior Lender and without affecting the liability of Junior Lender, (a) the time for payment of the Senior Indebtedness may be extended or the Senior Indebtedness may be renewed in whole or in part; (b) the time for Borrower's performance of or compliance with any covenant or agreement contained in the Senior Loan Documents, whether presently existing or hereinafter entered into, may be extended or such performance or compliance may be waived; (c) the maturity of the Senior Indebtedness may be accelerated as provided in the Senior Loan Documents; (d) any Senior Loan Document may be extended, consolidated, modified or amended by Senior Lender and Borrower in any respect, including, but not



# UNOFFICIAL COPY

limited to, an increase in the principal amount; (e) any security for the Senior Indebtedness may be modified, exchanged, surrendered or otherwise dealt with or additional security may be pledged or mortgaged for the Senior Indebtedness; or (f) Senior Lender may otherwise act or fail to act with respect to any matter set forth in any Senior Loan Document (including, without limitation, the exercise of any rights or remedies, waiver, forbearance or delay in enforcing any rights or remedies, the declaration of acceleration, the declaration of defaults or events of default, the release, in whole or in part, of any collateral or other property, and any consent, approval or waiver), and any such extensions, consolidations, modifications, amendments, acts or omissions shall not release, impair or otherwise affect Junior Lender's liabilities, obligations and agreements hereunder. Junior Lender further agrees that its agreement to subordinate hereunder shall extend to any new mortgage debt which is for the purpose of refinancing all or any part of the Senior Loan (including reasonable and necessary costs associated with the closing and/or the refinancing) and, in the event of new mortgage debt, Junior Lender shall execute and deliver to Senior Lender a new subordination agreement on the same terms and conditions as this Agreement.

(i) Junior Lender acknowledges that it entered into the transactions contemplated by the Junior Loan Documents and made the Junior Loan to Borrower without reliance upon any information or advice from Senior Lender. Junior Lender made its own underwriting analysis in connection with the Junior Loan, its own credit review of Borrower, and investigated all matters pertinent, in Junior Lender's judgment, to its determination to make the Junior Loan to Borrower. Junior Lender acknowledges that it is a sophisticated, experienced commercial lender, and was represented by competent counsel in connection with this Agreement.

(j) Junior Lender hereby represents and warrants that: (i) Junior Lender is now the owner and holder of the Junior Loan Documents, (ii) the Junior Loan Documents are now in full force and effect; (iii) the Junior Loan Documents have not been modified or amended; (iv) no default or event which, with the passing of time or giving of notice would constitute a default, under the Junior Loan Documents has occurred; (v) the current unpaid principal balance of the Junior Indebtedness is \$0; (vi) no scheduled monthly payments under the Junior Note have been or will be prepaid except with the prior written consent of Senior Lender; (vii) none of the rights of Junior Lender under any of the Junior Loan Documents are subject to the rights of any third parties, by way of subrogation, indemnification or otherwise; and (viii) there are no Junior Loan Documents other than the Junior Note, the Junior Security Instrument, and the Junior Grant Agreement. Borrower further represents and warrants that it has provided to Senior Lender a true, complete, and correct copy of all the Junior Loan Documents.

(k) Junior Lender hereby agrees that notwithstanding anything to the contrary in the Junior Loan Documents, for so long as the Senior Loan is outstanding, (i) the maturity date of the Junior Note shall occur no earlier than one (1) month after the maturity date of the Senior Note, and (ii) Borrower shall not be obligated to pay more than seventy-five percent (75%) of Residual Receipts of the Project (as defined in that certain Multifamily Subordinate Note made by Borrower in favor of Citibank, N.A.,

# UNOFFICIAL COPY

dated December 22, 2015) in payments under the Junior Note and under other debt subordinate to the Senior Loan.

#### 4. **Standstill Agreement; Right to Cure Senior Loan Default.**

(a) Until such time as any of the Senior Indebtedness has been repaid in full and the Senior Security Instrument has been released and discharged, Junior Lender shall not without the prior written consent of Senior Lender, which may be withheld in Senior Lender's sole and absolute discretion, take any Enforcement Action.

(b) Senior Lender shall, simultaneously with the sending of any notice of a Senior Loan Default to Borrower, send to Junior Lender a copy of said notice under the Senior Loan Documents; provided, however, failure to do so shall not affect the validity of such notice or any obligation of Borrower to Senior Lender and shall not affect the relative priorities between the Senior Loan and the Junior Loan as set forth herein. Borrower covenants and agrees to forward to Junior Lender, within three (3) business days of Borrower's receipt thereof, a copy of any notice of a Senior Loan Default Borrower receives from Senior Lender.

(c) Junior Lender shall have the right, but shall have no obligation, to cure any Senior Loan Default; provided, if Junior Lender shall elect to cure any such Default, it shall so notify Senior Lender and shall commence and complete such curing within any applicable notice or grace period, if any, as Borrower is permitted by the terms of the Senior Loan Documents to cure such Senior Loan Default. Junior Lender shall not be subrogated to the rights of Senior Lender under the Senior Loan Documents by reason of Junior Lender having cured any Senior Loan Default. However, Senior Lender acknowledges that, to the extent so provided in the Junior Loan Documents, amounts advanced or expended by Junior Lender to cure a Senior Loan Default may be added to and become a part of the Junior Indebtedness.

(d) Junior Lender agrees that, notwithstanding any contrary provision contained in the Junior Loan Documents, a Senior Loan Default shall not constitute a default under the Junior Loan Documents if no other default occurred under the Junior Loan Documents.

(e) Junior Lender acknowledges that any conveyance or other transfer of title to the Property pursuant to a foreclosure of the Junior Security Instrument (including a conveyance or other transfer of title pursuant to the exercise of a power of sale contained in the Junior Security Instrument), or any deed or assignment in lieu of foreclosure or similar arrangement, shall be subject to the transfer provisions of the Senior Loan Documents; and the person (including Junior Lender) who acquires title to the Property pursuant to the foreclosure proceeding (or pursuant to the exercise of a power of sale contained in the Junior Security Instrument) shall not be deemed to be automatically approved by Senior Lender.

5. **Power of Attorney.** Junior Lender hereby designates and appoints Senior Lender (and all persons and entities designated by Senior Lender) as its true and lawful attorney-in-fact,

# UNOFFICIAL COPY

with full power of substitution, for the purpose of carrying out the provisions of this Agreement and taking any action and executing any instruments (including without limitation, any proof of claim, release or subordination of the Junior Loan Documents, or other instruments required to be executed by Junior Lender hereunder) which Senior Lender may deem necessary or appropriate to accomplish the purposes of this Agreement, which appointment as attorney-in-fact is coupled with interest and is irrevocable. The foregoing power of attorney includes, without limitation, the right and power to, in the name of Junior Lender or otherwise, (i) endorse the name of Junior Lender upon any check or other instrument and to take any action necessary to collect any payment, property, or asset referred to herein, (ii) to take any action or send any notice deemed necessary or appropriate by Senior Lender to effectuate the provisions of this Agreement, (iii) demand, sue for, collect, receive and give receipt for any and all payments or distributions in connection with any Bankruptcy Proceeding involving Borrower or the Property, and (iv) file, prove or vote or consent in any such proceeding with respect to any or all claims of Junior Lender relating to the Junior Loan (including without limitation, all proofs of claims regarding the Junior Loan and all Junior Lender voting rights in connection with creditor committee actions and in connection with any plan of liquidation, reorganization or extension), all of which rights are hereby irrevocably assigned by Junior Lender to Senior Lender.

6. **Insurance.** Junior Lender agrees that all original policies of insurance required pursuant to the Senior Security Instrument shall be held by Senior Lender. The preceding sentence shall not preclude Junior Lender from requiring that it be named as a loss payee, as its interest may appear, under all policies of property damage insurance maintained by Borrower with respect to the Property, provided such action does not affect the priority of payment of the proceeds of property damage insurance under the Senior Security Instrument, or that it be named as an additional insured under all policies of liability insurance maintained by Borrower with respect to the Property.

7. **Default.** Junior Lender and Borrower acknowledge and agree that a default by either such party under this Agreement shall, at the sole option of Senior Lender, constitute a default under the Senior Loan Documents. Each party hereto acknowledges that in the event any party fails to comply with its obligations hereunder, the other parties shall have all rights available at law and in equity, including the right to obtain specific performance of the obligations of such defaulting party and injunctive relief. No failure or delay on the part of any party hereto in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy hereunder.

8. **Enforcement Costs.** Borrower and Junior Lender agree to reimburse Senior Lender for any and all costs and expenses (including reasonable attorneys' fees) incurred by Senior Lender in connection with enforcing its rights against Junior Lender under this Agreement.

9. **Notices.** All notices, demands and other communications required or permitted to be given pursuant to this Agreement shall be in writing, and addressed as set forth below. Each notice shall be deemed given on the earliest to occur of (a) the date when the notice is received by the addressee; (b) the first Business Day after the notice is delivered to a recognized overnight courier service, with arrangements made for payment of charges for next Business Day delivery;

# UNOFFICIAL COPY

(c) the third Business Day after the notice is deposited in the United States mail with postage prepaid, certified mail, return receipt requested, or (d) the date when the notice is received by the addressee by confirmed facsimile transmission (provided any telecopy or other electronic transmission received by any party after 4:00 p.m., local time, as evidenced by the time shown on such transmission, shall be deemed to have been received the following Business Day.

To Junior Lender: Heartland Housing, Inc.  
208 S. LaSalle Street, Suite 1300  
Chicago, Illinois 60604  
Attention: Michael Goldberg  
Facsimile: (773) 661-0774

If to Lender: Citibank, N.A.  
388 Greenwich Street, 8<sup>th</sup> Floor  
New York, New York 10013  
Attention: Transaction Management Group  
Re: Diversey Parkway Apartments, Deal ID # 23120  
Facsimile: (212) 723-8209

AND

Citibank, N.A.  
325 East Hillcrest Drive, Suite 160  
Thousand Oaks, California 91360  
Attention: Operations Manager/Asset Manager  
Re: Diversey Parkway Apartments, Deal ID # 23120  
Facsimile: (805) 557-6924

Prior to the Conversion Date, with a copy to: Citibank, N.A.  
388 Greenwich Street, 8<sup>th</sup> Floor  
New York, New York 10013  
Attention: Account Specialist  
Re: Diversey Parkway Apartments, Deal ID # 23120  
Facsimile: (212) 723-8209

Following the Conversion Date, with a copy to: Citibank N.A.  
c/o Berkadia Commercial Servicing Department  
323 Norristown Road, Suite 300  
Ambler, Pennsylvania 19002  
Attention: Client Relations Manager  
Re: Diversey Parkway Apartments Deal ID # 23120  
Facsimile: (215) 328-0305

# UNOFFICIAL COPY

And a copy of any notices of default sent to: Citibank, N.A.  
 388 Greenwich Street  
 New York, New York 10013  
 Attention: General Counsel's Office  
 Re: Diversey Parkway Apartments, Deal ID # 23120  
 Facsimile: (646) 291-5754

Any party to this Agreement may change the address to which notices intended for it are to be directed by means of notice given to the other party in accordance with this Section 9. Each party agrees that it will not refuse or reject delivery of any notice given in accordance with this Section 9, that it will acknowledge, in writing, the receipt of any notice upon request by the other party and that any notice rejected or refused by it shall be deemed for purposes of this Section 9 to have been received by the rejecting party on the date so refused or rejected, as conclusively established by the records of the U.S. Postal Service or the courier service.

10. **WAIVER OF TRIAL BY JURY.** TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LAW, EACH OF THE PARTIES HERETO (A) COVENANTS AND AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS AGREEMENT OR THE RELATIONSHIP BETWEEN THE PARTIES THAT IS TRIABLE OF RIGHT BY A JURY AND (B) 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 EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

11. **Term.** The term of this Agreement shall commence on the date hereof and shall continue until the earliest to occur of the following events: (i) the payment of all of the principal of, interest on and other amounts payable under the Senior Loan Documents; (ii) the payment of all of the principal of, interest on and other amounts payable under the Junior Loan Documents, other than by reason of payments which Junior Lender is obligated to remit to Senior Lender pursuant to the terms hereof; (iii) the acquisition by Senior Lender of title to the Property pursuant to a foreclosure, or a deed in lieu of foreclosure, of (or the exercise of a power of sale contained in) the Senior Security Instrument upon which event, the Junior Security Instrument and the Junior Loan Documents shall automatically terminate and be of no further effect; or (iv) the acquisition by Junior Lender of title to the Property pursuant to a foreclosure, or a deed in lieu of foreclosure, of (or the exercise of a power of sale contained in) the Junior Security Instrument upon which event, the Junior Security Instrument and the Junior Loan Documents shall automatically terminate and be of no further effect, but only if such acquisition of title does not violate any of the terms of this Agreement.

12. **Miscellaneous.**

(a) Junior Lender shall, within ten (10) business days following a request from Senior Lender, provide Senior Lender with a written statement setting forth the then current outstanding principal balance of the Junior Loan, the aggregate accrued and unpaid interest under the Junior Loan, and stating whether, to the knowledge of Junior Lender, any default or event of default exists under the Junior Loan, and containing such

# UNOFFICIAL COPY

other information with respect to the Junior Indebtedness as Senior Lender may require. Upon notice from Senior Lender from time to time, Junior Lender shall execute and deliver such additional instruments and documents, and shall take such actions, as are required by Senior Lender in order to further evidence or effectuate the provisions and intent of this Agreement.

(b) This Agreement shall bind and inure to the benefit of all successors and assigns of Junior Lender and Senior Lender. Senior Lender may assign its interest in the Senior Loan Documents without notice to or consent of Junior Lender. Junior Lender may only assign its rights and interests hereunder following the prior written consent of Senior Lender, which consent may be withheld or conditioned in its sole and absolute discretion.

(c) Senior Lender hereby consents to the Junior Loan and the Junior Loan Documents; provided, however, that this Agreement does not constitute an approval by Senior Lender of the terms of the Junior Loan Documents. Junior Lender hereby consents to the Senior Loan and the Senior Loan Documents; provided, however, that this Agreement does not constitute an approval by Junior Lender of the terms of the Senior Loan Documents.

(d) This Agreement may be executed in multiple counterparts, each of which shall constitute an original document and all of which together shall constitute one agreement.

(e) IN ALL RESPECTS, INCLUDING, WITHOUT LIMITATION, MATTERS OF CONSTRUCTION AND PERFORMANCE OF THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER, THIS AGREEMENT HAS BEEN ENTERED INTO AND DELIVERED IN, AND SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED, WITHOUT GIVING EFFECT TO ANY PRINCIPLES OF CONFLICTS OF LAW.

(f) Time is of the essence in the performance of every covenant and agreement contained in this Agreement.

(g) If any provision or remedy set forth in this Agreement for any reason shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision or remedy of this Agreement and this Agreement shall be construed as if such invalid, illegal or unenforceable provision or remedy had never been set forth herein, but only to the extent of such invalidity, illegality or unenforceability.

(h) Each party hereto hereby represents and warrants that this Agreement has been duly authorized, executed and delivered by it and constitutes a legal, valid and binding agreement enforceable in all material respects in accordance with its terms.

(i) Borrower hereby acknowledges and consents to the execution of this Agreement, and agrees to be bound by the provisions hereof that are applicable to

# UNOFFICIAL COPY

Borrower. Solely as between Senior Lender and Junior Lender, to the extent of any conflict between the terms and provisions of this Agreement and the terms and provisions of the Senior Loan Documents and/or the Junior Loan Documents respectively, the terms and provisions of this Agreement shall govern and control. By executing this Agreement Borrower hereby (i) acknowledges the provisions hereof, (ii) agrees not to take any action inconsistent with Senior Lender's rights or Junior Lender's rights under this Agreement, (iii) waives and relinquishes to the fullest extent permitted by law any and all rights, defenses and claims now existing or hereinafter accruing relating to Junior Lender's forbearance from exercising any rights and remedies pursuant to Section 4 of this Agreement, including, without limitation, any defenses based on the statute of limitations or any equitable defenses, such as laches, and (iv) acknowledges and agrees that (A) this Agreement is entered into for the sole protection and benefit of Senior Lender and Junior Lender (and their respective successors, assigns and participants), and no other person (including Borrower) shall have any benefits, rights or remedies under or by reason of this Agreement, (B) nothing in this Agreement is intended, or shall be construed to, relieve or discharge the obligations or liabilities of any third party (including Borrower under the Senior Loan Documents and the Junior Loan Documents), (c) neither of them nor any of their affiliates shall be, or be deemed to be, beneficiaries of any of the provisions hereof or have any rights hereunder whatsoever, and (D) no provision of this Agreement is intended to, or shall be construed to, give any such third party (including Borrower) any right subrogating to the rights of, or action against, Senior Lender or Junior Lender.

(j) No amendment, supplement, modification, waiver or termination of this Agreement shall be effective against any party unless such amendment, supplement, modification, waiver or termination is contained in a writing signed by such party.

(k) No party other than Senior Lender and Junior Lender shall have any rights under, or be deemed a beneficiary of any of the provisions of, this Agreement.

(l) Nothing herein or in any of the Senior Loan Documents or Junior Loan Documents shall be deemed to constitute Senior Lender as a joint venturer or partner of Junior Lender.

### 13. Disbursement Provisions.

(a) Junior Lender will disburse the proceeds of the Junior Loan (the "**Junior Loan Proceeds**") only in accordance with, and subject to the terms and conditions of, the Junior Note, as approved by Senior Lender. Senior Lender will approve disbursement of the proceeds of the Senior Loan only in accordance with, and subject to the terms and conditions of, the project's development budget as approved by Senior Lender (the "**Budget**") and the Senior Loan Agreement. Except as specifically provided herein, this Agreement does not amend, modify, waive or limit any provision, term or condition of the Junior Loan Documents or the Senior Loan Documents.

(b) Junior Lender agrees that Junior Lender shall not make any disbursement of Junior Loan Proceeds without the prior written approval of Senior Lender, which shall

# UNOFFICIAL COPY

not be unreasonably withheld. Senior Lender hereby approves the single lump-sum disbursement of the Junior Loan Proceeds as set forth in the Junior Note, which disbursement shall occur within thirty (30) days hereafter. The Junior Loan Proceeds shall be used only for development expenses set forth in the Budget. No change may be made in the "hard cost" portion of the Budget without the approval of all parties to this Agreement. Reallocation of funds from the contingency reserve to the other line items does not constitute a change to the Budget.

(c) In the event that Junior Lender fails to make a disbursement of Junior Loan Proceeds that has been requested by Borrower and approved by Senior Lender (as a result of a Junior Loan Default or otherwise), Senior Lender shall have the right, but not the obligation, to make such disbursement to Borrower from Senior Lender's own funds pursuant to the Senior Loan Documents. Any and all amounts paid by Senior Lender to Borrower shall be deemed to have been advanced by Senior Lender pursuant to, and shall be secured by the lien of, the Senior Security Instrument and shall accrue interest at the Default Rate (as defined in the Senior Security Instrument).

#### 14. Attached Exhibits.

The following Exhibit is attached to this Agreement and are incorporated by reference herein as if more fully set forth in the text hereof:

#### Exhibit A – Legal Description

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]



# UNOFFICIAL COPY

IN WITNESS WHEREOF, the undersigned have duly executed and delivered this Subordination and Intercreditor Agreement or caused this Subordination and Intercreditor Agreement to be duly executed and delivered by their respective authorized representatives as of the date first set forth above. The undersigned intend that this instrument shall be deemed to be signed and delivered as a sealed instrument.

**JUNIOR LENDER:**

**HEARTLAND HOUSING, INC.,**  
an Illinois not-for-profit corporation

By: Michael Goldberg  
Michael Goldberg  
Executive Director

STATE OF ILLINOIS                    )  
  ) ss:  
COUNTY OF COOK                    )

Before me, a Notary Public for said County and State, personally appeared Michael Goldberg as Executive Director for Heartland Housing, Inc., an Illinois not-for-profit corporation, and acknowledged execution of the foregoing Subordination and Intercreditor Agreement for and on behalf of said Illinois not-for-profit corporation, and who, having been first duly sworn, stated that the representations contained herein are true.

WITNESS my hand and Seal this 2 day of March, 2017

[Signature]  
Notary Public

Kristina Butler  
Printed

My Commission Expires:  
September 12<sup>th</sup> 2020

My County of Residence:  
COOK

# UNOFFICIAL COPY

**SENIOR LENDER:**

**CITIBANK, N.A.,**  
a national banking association

By: *[Signature]*  
Name: Min Park  
Title: Authorized Signatory

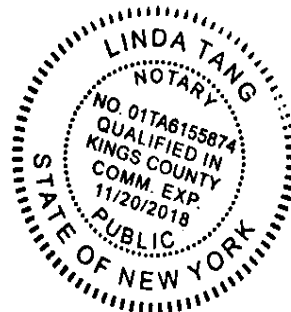
STATE OF NEW YORK )  
  )  
COUNTY OF KINGS )

The foregoing instrument, was acknowledged before me this 28 day of February, 2017, by Min Park, Authorized Signatory of Citibank, N.A., a national banking association, on behalf of such national banking association.

(Seal)

*[Signature]*  
Signature of Notary Public

My Commission Expires: 11/20/2018





# UNOFFICIAL COPY

## EXHIBIT A

### LEGAL DESCRIPTION

THE EAST ONE FOOT OF LOT 20 AND ALL OF LOTS 21,22 AND 23 IN WARNERS SUBDIVISION OF LOTS 17 AND 18 IN BICKERDIKE AND STEELE'S SUBDIVISION OF THE WEST HALF OF THE NORTHWEST QUARTER OF SECTION 28, TOWNSHIP 40 NORTH, RANGE 14, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

PROPERTY INDEX NUMBER: 14-28-115-042-0000  
COMMONLY KNOWN AS 712 W. DIVERSEY, CHICAGO, ILLINOIS 60614

Property of Cook County Clerk's Office