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JUN-30-1989 04:03PM 89-186114

CRP 6116 P 470

LAND USE RESTRICTION AGREEMENT

THIS LAND USE RESTRICTION AGREEMENT (the "Restriction Agreement"), made and entered into as of June 29, 1989, by and between the City of Delray Beach, Florida, a municipal corporation under the laws of the State of Florida (the "City"), and Auburn Trace, Ltd., a Florida limited partnership, and its successors and assigns (the "Developer");

W I T N E S S E T H:

WHEREAS, the City holds legal title to certain real property upon which is to be developed a residential rental project (the "Project"), more fully described in Schedule "A" attached hereto and made a part hereof; and

WHEREAS, the Project will be financed in part by loans for the City to the Developer in the principal amount of \$5,328,000 (the "Loan"); and

WHEREAS, the Loan will be secured by one or more second mortgages granted by the Developer to the City (collectively, the "Mortgage") and recorded in the land records of Palm Beach County, Florida ("the County"); and

WHEREAS, in order for the Project to enjoy the benefits of the financing provided by the City, the City requires the Developer, as a condition of making the Loan, to agree that the restrictions set forth in this Agreement shall be restrictions running with the land and binding on all of the Developer's assigns and successors in interest, for the Qualified Project Period (as herein defined); and

NOW, THEREFORE, the parties do hereby agree as follows:

Section 1. Definitions and Interpretation. The following terms shall have the respective meanings set forth below:

"Certificate of Continuing Compliance" shall mean the certificate required to be delivered by the Developer to the City pursuant to Section 4(e).

"Closing Date" shall mean the date the Loan is made to the Developer against receipt of the Mortgage.

"Code" shall mean the Internal Revenue code of 1986 and the Regulations promulgated thereunder.

"County" shall mean Palm Beach County, Florida.

"Eligible Person" shall mean persons of families whose income does not exceed 80% of the County's median income.

"HUD" shall mean the United States Department of Housing and Urban Development.

"Land" shall mean the real property described in Exhibit B attached hereto.

"Lender Loan" shall mean the loan made to the Developer by the Lender to finance a portion of the Project.

"Lender Mortgage" shall mean the Mortgage and Security Agreement granting a first mortgage and security interest in the Land, buildings and equipment comprising the Project made from the Developer to the Lender.

"Loan" shall mean the loan made to the Developer by the City to finance a portion of the Project.

"Low or Moderate Income Persons" shall mean persons and families within the meaning of the term "individuals of low or moderate income" as used in Section 142(d) of the Code.

"Mortgage" shall mean the Mortgage and Security Agreement granting a mortgage on and security interest in the Land, buildings and equipment comprising the Project, made from the Developer to the City which Mortgage will be second in priority to the Lender Mortgage.

"Note" shall mean the interest-bearing instrument that contains the absolute promise of the Developer to pay the sum of money stated therein at the time stated therein and that evidences the obligation of the Developer to repay the Loan.

"Project" shall mean the multifamily residential rental housing development to be acquired and constructed in part with the proceeds of the Loan and Developer Loan.

"Qualified Project Period" shall mean the period beginning with the Closing Date and ending on the later of (a) the date that is fifteen years after the Closing Date; (b) the date the Loan is paid; and (c) the date all UDAG Requirements shall cease to be applicable to the Project.

"Regulations" shall mean the regulations promulgated or proposed by the United States Department of the Treasury pursuant to the Code, as amended from time to time.

"State" shall mean the state of Florida.

"UDAG Requirements" shall mean

Unless the context clearly requires otherwise, as used in this Agreement, words of the masculine, feminine or neuter gender shall be construed to include any other gender when appropriate, and words of the singular number shall be construed to include the plural number, and vice versa, when appropriate. This Agreement and all the terms and provisions hereof shall be construed to effectuate the purposes set forth herein and to sustain the validity hereof.

The titles and headings of the sections of this Agreement have been inserted for convenience of reference only, and are not to be considered a part hereof and shall not in any way modify or restrict any of the terms or provisions hereof or be considered or given any effect in construing this Agreement or any provisions hereof or in ascertaining intent, if any question of intent shall arise.

Section 2. Residential Rental Property. The Developer hereby represents, covenants, warrants and agrees that:

(a) (1) The Project will be acquired and constructed for the purpose of providing multifamily "residential rental property" as such phrase is used in Section 142(d) of the Code, (2) the Developer shall own the entire Project for federal tax purposes, and (3) the Project shall be owned, managed and operated as a multifamily residential rental property comprised of a building or structure or several buildings or structures containing similarly constructed units, together with any functionally related subordinate facilities and no other facilities, in accordance with Section 142(d) of the Code and Sections 1.103-8(b)(4) and 1.103-8(a)(3) of the Regulations (as modified by Section 142(d) of the Code).

(b) The project will comprise one or more similarly constructed units, each of which will contain separate and complete facilities for living, sleeping, eating, cooking and sanitation for an individual or a family, including a living area, a sleeping area, bathing and sanitation facilities and cooking facilities equipped with a cooking range, refrigerator and sink.

(c) None of the units in the Project will at any time be utilized on a transient basis or will be used as a hotel, motel, dormitory, fraternity or sorority house, rooming house, nursing home, hospital, sanitarium, rest home or trailer court or park.

(d) All of the units will be similarly constructed and will be rented or available for rent on a continuous basis to members of the general public, with a first priority to tenant applicants who are already residents of the City, and

the Developer will not give any other preference to any particular class or group in renting the units in the Project, except to the extent that units are required to be leased or rented to Low or Moderate Income Persons or Eligible Persons, Low or Moderate Income Persons will have equal access to and enjoyment of all common facilities of the Project.

(e) The Land consists of a parcel of real property or parcels of real property that are contiguous except for the interposition of a road, street, stream or similar property, and the Project comprises buildings, structures and facilities that are proximate and financed pursuant to a common plan.

(f) If the Project is receiving Section 8 assistance, the Developer will comply with all Section 8 requirements in administering these restrictions.

The requirements of this Section 2 shall terminate at the end of the Qualified Project Period.

SECTION 3. Low or Moderate Income Persons and Eligible Persons. The Developer hereby represents, warrants and covenants as follows:

(a) At all times during the Qualified Project, not less than fifty-one percent (51%) of the completed units shall be occupied by Low or Moderate Income Persons.

(b) At all times during the Qualified Project Period, those units that are not occupied by Low or Moderate Income Persons and are available for rental to tenants other than Low or Moderate Income Persons in accordance with Section 3(a) hereof will be rented to or available for rent by Eligible Persons.

(c) At all times during the Qualified Project Period, the annual rent charged Low or Moderate Income Persons shall not exceed 30% of 69.6% of the County median income, and the annual rent charged Eligible Persons shall not exceed 30% of 80% of the County median income.

Individuals or families of low or moderate income are defined in final Treasury regulations Section 1.103-8 in a manner consistent with Section 8 of the United States Housing Act of 1937 (or if such program is terminated, under such program as was in effect immediately before such termination), except that (i) the percentage of median gross income which qualifies as low or moderate income shall not exceed sixty percent (60%), since the Developer has elected fifty-one percent (51%) above, with adjustment for family size; and (ii) the occupants of a unit shall not be considered to be of low or moderate income if all the occupants are students (as defined

in Section 1.103-8(b)(8) of the Treasury Regulations, no one of whom is entitled to file a joint return under Section 6013 of the Code). The method of determining low or moderate income in effect on the Closing Date will be determinative even if such method is subsequently changed.

(d) The determination of whether the income of a resident of a unit exceeds the applicable income limit shall be made at least annually on the basis of the current income of the resident. For purposes of paragraphs (a), (b) and (c) of this Section 3, a unit occupied by an individual or family who at the commencement of the occupancy of such unit is a Low or Moderate Income Person (or Eligible Person) shall be counted as occupied by a Low or Moderate Income Person (or Eligible Person) during such individual's or family's tenancy in such unit, even though such individual or family ceases to be a Low or Moderate Income person (or Eligible Person). Unless the income of this individual or family, after adjustment for family size, exceeds 140 percent of the applicable income limit, if after such determination, but before the next determination, any residential unit of comparable or smaller size in the Project is occupied by a new resident whose income exceeds the applicable income limit. In addition, a unit that was occupied by a Low or Moderate Income Person (or Eligible Person) shall be counted as occupied by a Low or Moderate Income Person (or Eligible Person) until it is reoccupied for a period in excess of thirty-one (31) days, at which time the unit shall be considered to be occupied by a Low or Moderate Income Person (or Eligible Person) only if the individual or family then occupying the unit satisfies the definition of a Low or Moderate Income Person (or Eligible Person).

(e) Leases shall provide for termination and eviction if a tenant has certified that he or she is an individual or family of low or moderate income, and has failed to so qualify, at the time of commencement of the occupancy. The form of lease to be utilized by the Developer in renting all dwelling units in the Project shall be subject to the City's approval. The lease must comply with all applicable Section 8 requirements if the Project is receiving a subsidy pursuant to Section 8 of the United States Housing Act of 1937.

#### SECTION 4. Reporting Requirements.

(a) During the Qualified Project Period, the Developer shall obtain from each Low or Moderate income Person, at the time of such tenant's initial occupancy in the Project, an income certification dated immediately prior to the initial occupancy of such Low or Moderate Income Person in the Project, in the form and containing the information required by Section 1.167(k)-3(b) of the Regulations, as the same may be amended from time to time, or in such other form and manner as may be

required by applicable rules, rulings, policies, procedures, regulations or other official statements now or hereafter promulgated, proposed or made by the Department of the Treasury or the Internal Revenue Service with respect to obligations issued under Section 142(d) of the Code.

(b) During the period commencing on the date that the first unit in the Project is occupied and continuing until the end of the Qualified Project Period, the Developer shall obtain from each Eligible Person residing in the Project, at the time of such person's or family's initial occupancy in the Project, and on an annual basis thereafter, an income certification acceptable to the City.

(c) The Developer shall file with the City, on the first business day of each month, copies of the income certifications specified in Sections 4(a) and (b) hereof obtained by the Developer during the previous month.

(d) The Developer shall maintain complete and accurate records pertaining to the incomes of (as of the date of initial occupancy of each tenant) and rentals charged to Low or Moderate Income Persons and Eligible Persons residing in the Project, and shall permit, upon five (5) business days' notice to the Developer, any duly authorized representative of the City to inspect the books and records of the Developer pertaining to the incomes of and rentals charged to all tenants residing in the Project.

(e) The Developer shall prepare and submit to the City on the first business day of each month, rent rolls and a Certificate of Continuing Compliance executed by the Developer stating (i) the percentage of units that were occupied by Low or Moderate Income Persons and Eligible Persons, respectively, as of the 20th day of the previous month, (ii) that at all times during the previous month at least 40% of the units were occupied by Low or Moderate Income Persons (as determined in accordance with Section 3 of this Land Use Restriction Agreement), and (iii) that no default has occurred under this Agreement or, if such a default has occurred, the nature of such default and the steps, if any, the Developer has taken or proposes to take to correct such default.

**SECTION 5. Indemnification of City.** The Developer hereby covenants and agrees that it shall indemnify and hold harmless the City and its officers, directors, officials and employees from and against (i) any and all claims arising from any act or omission of the Developer or any of its agents, contractors, servants, employees, or licensees, in connection with the Mortgage or the Project; and (ii) all costs, counsel fees, expenses or liabilities incurred in connection with any such claim or proceeding brought hereon. In the event that any action or proceeding brought against the City or any of its

officers, directors, officials or employees with respect to which indemnity may be sought hereunder, the Developer, upon written notice from the indemnified party, shall assume the investigation and defense thereof, including the employment of counsel and the payment of all expenses. The indemnified party shall have the right to employ separate counsel in any such action or proceeding and to participate in the investigation and defense thereof, and the Developer shall pay the fees and expenses of such separate counsel, provided, however, that, unless such separate counsel is employed with the approval and consent of the Developer, the Developer shall not be required to pay the fees and expenses of such separate counsel.

**SECTION 6. Fair Housing Laws.** The Developer will comply with all fair housing laws, rules, regulations or orders applicable to the Project.

**SECTION 7. Covenants to Run With the Land.** The covenants, reservations and restrictions set forth herein shall be deemed covenants running with the Land and, except as provided in Section 8 hereof, shall pass to and be binding upon the Developer's heirs, assigns and successors in title to the Land or the Project; provided, however, that upon the termination of this Agreement in accordance with the terms hereof said covenants, reservations and restrictions shall expire. Except as provided in Section 8 hereof, each and every contract, deed or other instrument hereafter executed covering or conveying the Land or the Project or any portion thereof shall conclusively be held to have been executed, delivered and accepted subject to such covenants, reservations and restrictions, regardless of whether such covenants, reservation and restrictions are set forth in such contract, deed or other instruments. If a portion or portions of the Project are conveyed, all of such covenants, reservations and restrictions shall run to each portion of the Project. Developer, at its cost and expense, shall cause this Agreement to be duly recorded or filed and re-recorded or refiled in such places, and shall pay or cause to be paid all recording, filing, or other taxes, fees and charges, and shall comply with all such statutes and regulations as may be required by law in order to establish, preserve and protect the ability of the City to enforce this Agreement.

**SECTION 8. Terms.** This Agreement shall remain in full force and effect until the expiration of the Qualified Project Period, provided, however, that this Agreement may be terminated at the election of the City, upon a determination by the City that such termination will be in the best interest of the City in the event of involuntary non-compliance with the provisions of this Agreement caused by fire, seizure, requisition, foreclosure or transfer by deed in lieu of foreclosure, change in a federal law or an action of a federal agency that

prevents the City from enforcing the provisions hereof, or condemnation or a similar event, but only if within a reasonable period thereafter (i) the Loan is retired in full at the earliest practicable date, or (ii) the proceeds received as a result of such event are used to finance a development that complies with the provisions hereof and any other applicable requirements of the Code and the Regulations.

**SECTION 9. Correction of Noncompliance.** The failure of the Developer to comply with any of the provisions of either Section 2 or 3 of this Agreement shall not be deemed a default hereunder unless such failure has not been corrected within a period of sixty (60) days following the date that any of the parties hereto learned of such failure or should have learned of such failure by the exercise of reasonable diligence. No later than the business day next succeeding the day on which the City learns of such failure, the City shall attempt with reasonable diligence to notify the Developer and First Mortgagee (Southeast Bank, N.A.) of such failure by telephonic communication.

**SECTION 10. Modification of Tax Covenants.** To the extent any amendments, modifications or changes to the Regulations or the Code shall impose requirements upon the ownership, occupancy or operation of developments similar to the Project, which are financed with tax-exempt bonds, different than those imposed by the Regulations or the Code and stated herein, this Agreement shall be amended and modified in accordance with such requirements. The parties hereto agree to execute, deliver, and record, if applicable, any and all documents or to effectuate the intent of this Section 10.

**SECTION 11. City to Monitor Compliance.** The City shall examine all reports, certifications and other documents required to be delivered hereunder. The City reserves the right to appoint any public or private entity or person to monitor compliance on behalf of the City.

**SECTION 12. Burden and Benefit.** The City and the Developer hereby declare their understanding and intent that the burden of the covenants set forth herein touch and concern the Land in that the Developer's legal interest in the Land and the Project is rendered less valuable thereby. The Developer hereby further declares its understanding and intent that the benefit of such covenants touch and concern the Land by enhancing and increasing the enjoyment and use of the Land and the Project by Low or Moderate Income Persons and Eligible Persons, the intended beneficiaries of such covenants, reservations and restrictions, and by furthering the public purposes for which the Loan was made.

**SECTION 13. Uniformity; Common Plan.** The covenants, reservations and restrictions hereof shall apply uniformly to the entire Project.



SECTION 14. Remedies; Enforceability. If a violation of any of the provisions hereof occurs or is attempted, the City and its successors and assigns may institute and prosecute any such violation or attempted violation, to compel specific performance hereunder, or to recover monetary damages caused by such violation or attempted violation. The provisions hereof are imposed upon and made applicable to the Land and shall run with the Land and shall be enforceable against the Developer or any other person or entity that has or had an ownership interest in the Project at the time of such violations or attempted violation. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof or to obtain relief against or recover for the continuation or repetition of such breach or violation or any similar breach or violation hereof at any later time or times.

SECTION 15. Filing. This Agreement shall be duly recorded in the office of the Register of Deeds for Palm Beach County, Florida, on or before the Closing Date.

SECTION 16. Governing Law. This Agreement shall be governed by the laws of the State.

SECTION 17. Interpretations. Except where the context otherwise requires, terms used in this Agreement shall have the same meanings given to such terms in final Treasury regulations Section 1.103-8 published on October 15, 1982, as modified by Section 142(d) of the Code and any proposed temporary or final regulations thereunder. In the event of a transfer of the Project the term "Developer" shall be construed to include any transferee.

SECTION 18. Amendment. Amendment of this Agreement is conditioned upon the prior written approval of HUD for as long as the UDAG Requirements, if any, remain in effect.

SECTION 19. Transfer Restrictions. Prior to any transfer of the Project, Developer agrees to secure from transferee a written agreement stating that transferee will assume in full Developer's obligations and duties under this Agreement. This limited transfer restriction shall not affect the rights of HUD to approve the proposed transferee as required under the UDAG Requirements. All amendments shall be duly recorded in the office of the Register of Deeds for Palm Beach County, Florida.

SECTION 20. Notice. Any notice required to be given hereunder shall be given by certified or registered mail, postage pre-paid, return receipt requested, at the addresses specified below, or at such other addresses as may be specified in writing by the parties hereto:

City: City of Delray Beach  
100 N.W. 1st Avenue  
Delray Beach, Florida 33444  
Attention: David M. Huddleston  
Finance Director

Developer: Auburn Trace, Ltd  
4723 W. Atlantic Avenue, #9  
Delray Beach, Florida 33444  
Attention: Jay Felner

First Mortgagee: Southeast Bank, N.A.  
701 Northpoint Parkway, #415  
West Palm Beach, Florida 33407  
Attention: Gilbert Pomar, III

Notice shall be deemed given on the third business day after the date of mailing.

SECTION 21. Severability. If any provision hereof shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portions hereof shall not in any way be affected or impaired thereby.

SECTION 22. Multiple Counterparts. This Agreement may be simultaneously executed in multiple counterparts, all of which shall constitute one and the same instrument, and each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the City and the Developer have executed this Agreement by duly authorized representatives, all as of the date first written hereinabove.

(SEAL)

Attest:

*David S. Campbell, III*  
City Clerk

CITY OF DELRAY BEACH, FLORIDA

By:

*David S. Campbell, III*  
Doak S. Campbell, III, Mayor

Approved as to Form:  
*Jeffrey A. Hunt*

Assistant City Attorney

AUBURN TRACE, LTD., a Florida  
limited partnership

By: AUBURN TRACE JOINT VENTURE,  
a Florida general  
partnership

By:

*Jay Felner*  
Jay Felner, General Partner President  
Felner Development Corp.,  
managing partner

ORE 4116 Pg 480

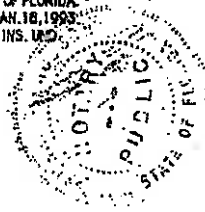
STATE OF FLORIDA     )  
                              )ss  
COUNTY OF PALM BEACH)

The foregoing instrument was acknowledged before me this 29th day of June, 1989, by Jay Felner, as General Partner of AUBURN TRACE JOINT VENTURE, a Florida general partnership, the general partner of AUBURN TRACE LTD., a Florida limited partnership, on behalf of the partnership.

*Susan H. Hudson*  
Notary Public  
My Commission Expires:

(NOTARIAL SEAL)

NOTARY PUBLIC STATE OF FLORIDA  
MY COMMISSION EXP. JAN. 18, 1993  
BONDED THRU GENERAL INS. UNID



ORP 6116 Ps 481

Schedule A

Components of the residential rental project includes:

- a. 256 units of rental housing (64 one bedroom units; 140 two bedroom units; 52 three bedroom units)
- b. On-site and off-site road and drainage improvements
- c. Day Care Center
- d. Swimming pool
- e. Tennis Courts
- f. Tot lots and recreation areas
- g. Laundry facilities
- h. Guardhouse
- i. Rental office and recreational center building

RECORDER'S MEMO: Legibility  
of Writing, Typing or Printing  
unsatisfactory in this document  
when received.

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EXHIBIT "B"

That part of the Subdivision of Section 20, Township 46 South, Range 43 East, Palm Beach County, Florida, according to the plat recorded in Plat Book 1, Page 4 of the Public Records of Palm Beach County, Florida, described as follows:

The West half of Lot 25, less the North 25 feet thereof; the East half of Lot 25, less the North 25 feet thereof, less the east 25 feet thereof, less the South 10 feet thereof and less the North 310.20 feet of the South 320.20 feet (as measured parallel with the East line of said Lot 25) of the West 295.20 feet of the East 320.20 feet (as measured parallel with the South line of said Lot 25); the South 10 feet of the West 25 feet of the East half of Lot 25; the West 25 feet of the East half of Lot 26; the West half of Lot 26; and the East half of Lot 18.

RECORDER'S MEMO: Legibility  
of Writing, Typing or Printing  
unsatisfactory in this document  
when received.

RECORD VERIFIED  
PALM BEACH COUNTY, FLA.  
JOHN B. DUNKLE  
CLERK CIRCUIT COURT