

**INSTALLMENT FINANCING CONTRACT**

BETWEEN

**BANK OF AMERICA, N.A.**

AND

**TOWN OF NAGS HEAD, NORTH CAROLINA**

DATED AS OF  
JANUARY 1, 2002

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**INSTALLMENT FINANCING CONTRACT**

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Rhonda Sommer  
Finance Officer

## INSTALLMENT FINANCING CONTRACT

**THIS INSTALLMENT FINANCING CONTRACT**, dated as of January 1, 2002 (the "*Contract*"), is between **BANK OF AMERICA, N.A.** (the "*Bank*"), a national banking association organized and existing under the laws of the United States with its principal corporate offices located in Charlotte, North Carolina, and the **TOWN OF NAGS HEAD, NORTH CAROLINA** (the "*Town*"), a municipal corporation validly organized and existing under the laws of the State of North Carolina (the "*State*");

### *PREAMBLES*

**WHEREAS**, the Town has the power, pursuant to Section 160A-20 of the General Statutes of North Carolina, as amended, to (1) purchase real and personal property, (2) enter into installment financing contracts in order to finance the purchase of real and personal property used, or to be used, for public purposes, and (3) finance the construction of fixtures or improvements on real property by contracts that create in the fixtures or improvements and in the real property on which such fixtures or improvements are located a security interest to secure repayment of moneys advanced or made available for such construction;

**WHEREAS**, the Board of Commissioners of the Town (the "*Board*") has previously determined, and hereby further determines, that it is in the best interests of the Town to provide funds in order to acquire real property as more particularly described in Exhibit A (the "*Site*") and the recreational facility thereon as more particularly described in Exhibit B (the "*Facility*", together with the Site, the "*Mortgaged Property*", collectively, the "*Project*") for the use of the Young Men's Christian Association of South Hampton Roads (the "*YMCA*");

**WHEREAS**, in order to obtain a portion of the funds to acquire the Project, the Board has determined that it is in the best interests of the Town to enter into this Contract with the Bank under which it will make Installment Payments and Additional Payments in consideration thereof;

**WHEREAS**, the proceeds from the advance of funds by the Bank to the Town under this Contract (the "*Purchase Price*") are to be used for a portion of the costs of the acquisition of the Project and for other purposes set forth in this Contract;

**WHEREAS**, the Town will lease the Project to the YMCA under a Lease Agreement dated as of January 1, 2002 among the Town, the YMCA and the Bank (the "*Lease Agreement*") and the YMCA will agree in the Lease Agreement to pay directly to the Bank, on behalf of the Town, the Installment Payments due under this Contract;

**WHEREAS**, the execution, performance and delivery of this Contract and the Lease Agreement have been authorized, approved and directed by the Board by a resolution finally passed and adopted by the Board on December 5, 2001;

**WHEREAS**, the execution, delivery and performance of this Contract and the Lease Agreement by the Bank, have been authorized, approved and directed by all necessary and appropriate action of the Bank;

**WHEREAS**, the execution, delivery and performance of the Lease Agreement by the YMCA, have been authorized, approved and directed by all necessary and appropriate action of the YMCA;

**WHEREAS**, the obligation of the Town to make Installment Payments and Additional Payments shall constitute a limited obligation of the Town, payable solely from currently budgeted appropriations of the Town (such obligation to be discharged by the YMCA under the terms of the Lease Agreement); shall not constitute a general obligation or other indebtedness of the Town within the meaning of the Constitution of the State; and shall not constitute a direct or indirect pledge of the faith and credit or taxing power of the Town within the meaning of the Constitution of the State;

**WHEREAS**, in order to secure further the obligations of the Town under this Contract, the Town has entered into a Deed of Trust and Security Agreement, dated as of January 1, 2002 (the "*Deed of Trust*"), with the deed of trust trustee named therein for the benefit of the Bank creating a lien on all of the right, title and interest of the Town in the Mortgaged Property; and

**WHEREAS**, no deficiency judgment may be rendered against the Town in any action for breach of a contractual obligation under this Contract, and the taxing power of the Town is not and may not be pledged in any way directly or indirectly or contingently to secure any moneys due under this Contract;

**NOW, THEREFORE**, for and in consideration of the premises and the mutual covenants in this Contract contained, the parties hereto agree as follows:

## ARTICLE I

### DEFINITIONS

Section 1.1. **Definitions.** The following terms have the meanings specified below unless the context clearly requires otherwise:

**"Additional Payments"** means the reasonable and customary expenses and fees of the Bank, any expenses of the Bank in defending an action or proceeding in connection with this Contract and any taxes or any other expenses, including, but not limited to, licenses, permits, state and local income, sales and use or ownership taxes or property taxes which the Bank is expressly required to pay as a result of this Contract (together with interest that may accrue thereon in the event that the Town shall fail to pay the same, as set forth in this Contract).

**"Bank"** means Bank of America, N.A., a national banking association, and its successors and assigns.

**"Bank Representative"** means any person or persons at the time designated to act on behalf of the Bank for purposes of performing any act on behalf of the Bank under this Contract by a written certificate furnished to the Town containing the specimen signatures of such person or persons and signed on behalf of the Bank by its vice president.

“*Board*” means the duly elected governing Board of Commissioners of the Town, or any successor to its functions.

“*Business Day*” means a day on which the Bank, at its principal corporate offices, is not required or authorized by law to remain closed.

“*Code*” means the Internal Revenue Code of 1986, as amended, including regulations promulgated thereunder.

“*Deed of Trust*” means the Deed of Trust and Security Agreement, dated as of January 1, 2002, from the Town to the deed of trust trustee named therein, for the benefit of the Bank or its assignees, creating a lien in and to the Mortgaged Property, and as the same may be amended from time to time as provided in the Deed of Trust, all of the terms, definitions, conditions and covenants of which are incorporated herein by reference and are made a part of this Contract as if fully set forth herein.

“*Deed of Trust Trustee*” means Ashley L. Hogewood, as trustee named in the Deed of Trust, and any successor trustee thereto.

“*Event of Default*” means one or more events of default as defined in Section 11.1.

“*Installment Payments*” means those payments made by or on behalf of the Town to the Bank as described in Article III with interest thereon at the Interest Rate.

“*Interest Rate*” means a variable rate of interest (expressed as a percentage) equal to (a) the LIBOR Rate (rounded up to the nearest 1/100 of 1%), times (b) 65%, plus (c) 1.14% per annum, calculated on the basis of a 360-day year of twelve 30-day months, such rate being calculated by the Bank on the date of the initial execution and delivery of this Contract and on each Interest Payment Date thereafter for purposes of calculating the interest component of the Installment Payments due on the next following Interest Payment Date.

“*Interest Payment Date*” means each date on which an interest component of the Installment Payments are due under this Contract.

“*Lease Agreement*” means the Lease Agreement dated as of January 1, 2002 among the Town, the YMCA and the Bank.

“*LIBOR Rate*” means the rate per annum (rounded up to the nearest 1/16 of 1%), as published by the *Wall Street Journal* (or, if the *Wall Street Journal* is not published, a financial newspaper of general circulation in New York, New York) on the Business Day of calculation, in the London interbank market for deposits in immediately available funds, in lawful money of the United States, of amounts comparable to the outstanding principal component of the Installment Payments for a term of 90 days.

“*Net Proceeds*,” when used with respect to any proceeds from policies of insurance, proceeds of any condemnation award arising out of the condemnation of all or any portion of the Project, or the proceeds from any sale or lease of the Project pursuant to the Deed of Trust or otherwise, mean the amount remaining after deducting from the gross proceeds thereof all expenses (including, without limitation, attorneys’ fees and costs) incurred in the collection of such proceeds.

*“Principal Payment Schedule”* means the document attached hereto and incorporated herein by reference, which sets forth the principal component of the Town’s Installment Payments.

*“Project”* means the acquisition of a recreational facility as more specifically described in Exhibit B attached hereto within the Town on the Site.

*“Purchase Price”* means the total aggregate amount of \$3,833,000 advanced by the Bank to enable the Town to acquire the Project under the terms of this Contract, as such amount advanced may be adjusted by amendment to this Contract.

*“Revenues”* means (a) all Net Proceeds not applied to the replacement of the Project; (b) all Installment Payments; and (c) all other revenues derived from the Contract.

*“Site”* means the real property associated with the Project within the Town and described in Exhibit A attached hereto and incorporated herein by reference, as the same may be amended from time to time so as to add real property thereto or release real property therefrom.

*“State”* means the State of North Carolina.

*“Title Policy”* means that policy of title insurance issued by [Title Insurance Company] in connection with the Site.

*“Town”* means the Town of Nags Head, North Carolina or any successor to its functions.

*“Town Representative”* means (1) the person or persons at the time designated to act on behalf of the Town for the purpose of performing any act under this Contract by a written certificate furnished to the Bank containing the specimen signatures of such person or persons and signed on behalf of the Town by its Town Manager, or (2) if any or all of the Town’s rights and obligations are assigned under this Contract, the person or persons at the time designated to act on behalf of the Town and the assignee by a written certificate similarly furnished and of the same tenor.

*“YMCA”* means the Young Men’s Christian Association of South Hampton Roads.

[END OF ARTICLE I]

## ARTICLE II

### ADVANCE OF THE PURCHASE PRICE

Section 2.1. *Advance of the Purchase Price.* The Bank hereby makes an advance to the Town of the Purchase Price, and the Town hereby accepts from the Bank the Purchase Price to be applied in accordance with the terms and conditions of this Contract. The Bank will pay the Purchase Price, on behalf of the Town, directly to the YMCA for the Town's acquisition of the Project.

[END OF ARTICLE II]



## ARTICLE III

### INSTALLMENT PAYMENTS; ADDITIONAL PAYMENTS

Section 3.1. **Amounts and Times of Installment Payments and Additional Payments.** The Town hereby approves the advance of the Purchase Price by the Bank to the Town pursuant to this Contract in the amount of \$3,833,000 to be repaid by the Town in the Installment Payments as provided in this Contract. The Town shall repay the Purchase Price in quarterly installments of interest in arrears on the last day of each December, March, June and September of each year, beginning December 31, 2001 at the Interest Rate and quarterly installments of principal in arrears beginning March 31, 2002. The amounts and the times for the payment of the principal portion of the Installment Payments are set forth on the Principal Payment Schedule attached hereto. Each installment of principal and/or interest shall be deemed to be an Installment Payment. If an Installment Payment is due on a day which is not a Business Day, such Installment Payment shall be due on the next succeeding Business Day and the Town shall make such Installment Payment on such Business Day with no additional interest due thereon. Installment Payments shall be sufficient in the aggregate to pay the principal of and interest on the Purchase Price as the same become due and payable. The Town shall pay Additional Payments on a timely basis directly to the person or entity to which such Additional Payments are owed. The obligation of the Town to make the Installment Payments and Additional Payments hereunder shall be deemed satisfied and discharged to the extent of the corresponding payment made by the YMCA to the Bank under the Lease Agreement.

Section 3.2. **Place of Payments.** All payments required to be made to the Bank under this Contract shall be made to the Bank at the address set forth in Section 17.4 in immediately available funds or as may be otherwise directed in writing by the Bank.

Section 3.3. **Late Charges.** If any Installment Payment is not paid within 15 days of the due date thereof, such Installment Payment is subject to a late payment charge of 4.0% of the amount of the past due payment.

Section 3.4. **No Abatement.** There will be no abatement or reduction of the Installment Payments or Additional Payments by the Town for any reason, including but not limited to, any failure by the Town to appropriate funds to the payment of the Installment Payments or Additional Payments, any defense, recoupment, setoff, counterclaims or any claim (real or imaginary) arising out of or related to the Site or the construction of the Project. The Town assumes and shall bear the entire risk of loss and damage to the Project from any cause whatsoever, it being the intention of the parties that the Installment Payments shall be made in all events unless the obligation to make such Installment Payments is terminated as otherwise provided in this Contract.

Section 3.5. **Prepayment of Purchase Price.**

(a) The Town shall have the option to prepay or provide for the prepayment of all or a portion of the principal component of the Installment Payments then outstanding, plus accrued interest thereon to the date of prepayment, on any Business Day, without premium.

(b) In the event of loss or condemnation of or damage to the Project, if the YMCA determines not to apply any Net Proceeds to the repair, restoration, modification, improvement or replacement of the Project as permitted by Section 9.2(b) of the Lease Agreement and if the Town has otherwise performed all of its obligations under this Contract, the Town shall prepay the principal component of the Installment Payments then outstanding, plus accrued interest

thereon to the date of prepayment, on any date selected by the Town, in full or in part, at a prepayment price of the principal amount being prepaid, without premium, by paying such Net Proceeds, and any other funds provided by the YMCA, to the Bank.

(c) In the event of a partial prepayment of the principal component of the Installment Payments then outstanding, such prepayment shall be deemed a prepayment on the principal component of the Installment Payments then outstanding and will be applied to the Principal Payment Schedule in the inverse order of maturity.

[END OF ARTICLE III]

**ARTICLE IV**

**[RESERVED]**

[END OF ARTICLE IV]

## ARTICLE V

### TITLE; LIENS

Section 5.1. **Title.** Title to the Mortgaged Property and any and all additions, repairs, replacements or modifications thereto shall be in the Town from and after the date of execution and delivery of this Contract so long as the Town is not in default under this Contract and, subject to the purchase option set forth in Section 5.3 of the Lease Agreement, shall vest permanently in the Town on the payment in full of the Purchase Price, free and clear of any lien or security interest of the Bank therein. Simultaneously with the execution and delivery of this Contract, the Town shall deliver to the Bank the Deed of Trust in form suitable for recordation. On payment or provisions for payment in full of all of the Town's obligations under this Contract, including the Purchase Price and all other payments due under this Contract, the Bank or its assignee, at the Town's expense and request, shall cancel the Deed of Trust and this Contract will terminate.

Section 5.2. **Liens.** The Town shall not directly or indirectly create, incur, assume or suffer to exist any mortgage, pledge, lien, charge, security interest, encumbrance or claim on or with respect to the Mortgaged Property or any interest therein, except for: (1) the lien and security interest of the Bank therein; (2) the Lease Agreement; (3) utility, access and other easements and rights of way, restrictions and exceptions which do not interfere with or impair the intended use of the Project; (4) permitted encumbrances as defined in the Deed of Trust; and (5) such minor defects, irregularities, encumbrances and clouds on title as normally exist with respect to property of the general character of the Mortgaged Property and as do not materially impair title to the Mortgaged Property. The Town shall promptly, at its own expense, take such action as may be necessary duly to discharge any such mortgage, pledge, lien, security interest, charge, encumbrance or claim if the same shall arise at any time. The Town shall reimburse the Bank for any expense incurred by it in order to discharge or remove any such mortgage, pledge, lien, security interest, charge, encumbrance or claim.

[END OF ARTICLE V]

## ARTICLE VI

### DAMAGE, DESTRUCTION AND CONDEMNATION

Section 6.1. ***Damage, Destruction or Condemnation.*** If, during the term hereof, (1) the Mortgaged Property or any portion thereof is destroyed, or is damaged by fire or other casualty; (2) title to or the temporary or permanent use of the Mortgaged Property or any portion thereof or the estate of the Town or the Bank or its assignee in the Mortgaged Property or any portion thereof is taken under the power of eminent domain by any governmental authority; (3) a material defect in construction of the Project becomes apparent; or (4) title to or the use of all or any portion of the Mortgaged Property is lost by reason of a defect in title thereto, then the Town shall continue to be obligated to pay the amounts specified in Section 3.1 at the respective times.

Section 6.2. ***Cooperation of Bank.*** The Bank shall cooperate fully in filing any proof of loss with respect to any insurance policy covering the events described in Section 6.1. In no event shall the Town voluntarily settle, or consent to the settlement of, any proceeding arising out of any insurance claim with respect to the Project without the written consent of the Bank and the YMCA.

[END OF ARTICLE VI]

## ARTICLE VII

### WARRANTIES AND REPRESENTATIONS OF THE TOWN

Section 7.1. *Warranties and Representations of the Town.* The Town warrants and represents to the Bank (all such representations and warranties being continuing) that:

(a) The Town is a municipal corporation of the State, validly organized and existing under the laws of the State and has all powers necessary to enter into the transactions contemplated by this Contract and the Deed of Trust and to carry out its obligations under this Contract;

(b) The Town agrees that during the term of this Contract it will take no action that would adversely affect its existence as a municipal corporation in good standing in the State, cause the Town to be consolidated with or merge into another municipal corporation of the State or permit one or more other municipal corporation of the State to consolidate with or merge into it, unless the Town is the surviving municipal corporation or the municipal corporation of the State created thereby expressly assumes in writing the Town's obligations under this Contract;

(c) This Contract, the Deed of Trust and all other documents relating hereto and the performance of the Town's obligations hereunder and thereunder have been duly and validly authorized, executed and delivered by the Town and approved under all laws, regulations and procedures applicable to the Town including, but not limited to, compliance with public meeting requirements, and, assuming due authorization, execution and delivery thereof by the other parties thereto, constitute valid, legal and binding obligations of the Town, enforceable in accordance with their respective terms, subject to bankruptcy, insolvency and other laws affecting the enforcement of creditors' rights generally and such principles of equity as a court having jurisdiction may impose;

(d) Neither the execution and delivery of this Contract or the Deed of Trust or the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions hereof conflicts with or results in a breach of the terms, conditions, or provisions of any restriction or any agreement or instrument to which the Town is now a party or by which the Town is bound or constitutes a default under any of the foregoing, nor conflicts with or results in a violation of any provision of applicable law or regulation governing the Town and no representation, covenant and warranty in this Contract is false, misleading or erroneous in any material respect;

(e) There is no action, suit, proceeding or investigation at law or in equity before or by any court, public board or body pending or, to the best of the Town's knowledge, threatened, against or affecting the Town challenging the validity or enforceability of this Contract, the Deed of Trust or any other documents relating hereto and the performance of the Town's obligations hereunder and thereunder, and compliance with the provisions hereof or thereof, under the circumstances contemplated hereby or thereby, does not and will not in any material respect conflict with, constitute on the part of the Town a breach of or default under, or result in the creation of a lien or other encumbrance on any property of the Town (except as contemplated herein or therein) pursuant to any agreement or other instrument to which the Town is a party, or any existing law, regulation, court order or consent decree to which the Town is subject;

(f) The cost of acquiring the Project is not less than \$3,833,000 and no approval or consent is required from any governmental authority with respect to the entering into or performance by the Town of this Contract, the Deed of Trust and all other documents related thereto and the transactions contemplated hereby and thereby or if such approval is required, it has been duly obtained;

(g) There are no liens or encumbrances on the Mortgaged Property other than the lien created by the Deed of Trust, the Lease Agreement and the other liens permitted thereby;

(h) A public hearing was held by the Board of Commissioners of the Town on May 2, 2001 regarding the acquisition and construction of the Project and the proposed financing of such pursuant to an installment financing contract in accordance with Section 160A-20 of the General Statutes of North Carolina, as amended;

(i) The resolutions relating to the performance by the Town of this Contract, the Deed of Trust, the Lease Agreement and the transactions contemplated hereby and thereby, have been duly adopted, are in full force and effect, and have not been in any respect modified, revoked or rescinded;

(j) The acquisition and construction and use of the Project is essential to the proper, efficient and economical operation of the Town and the delivery of its services and the construction and equipping of the Project will provide an essential use and permit the Town to carry out public functions that it is authorized by law to perform;

(k) The Town reasonably believes funds will be available to satisfy all of its obligations under this Contract;

(l) The Town will have good and marketable title to the Site upon which the Project will be located upon acquisition of the Project in consideration for payment of the Purchase Price directly to the YMCA from the Bank on behalf of the Town as set forth in Section 2.1.

[END OF ARTICLE VII]

## ARTICLE VIII

### TAX COVENANTS AND REPRESENTATIONS

#### Section 8.1. *Tax Covenants and Representations.*

(a) The Town covenants that it will not take any action, or fail to take any action, if any such action or failure to take action would adversely affect the exclusion from gross income for federal income tax purposes of the interest component of the payment obligations created by this Contract under Section 103 of the Code. The Town will not directly or indirectly use or permit the use of any proceeds of any fund created under this Contract or any funds of the Town, or take or omit to take any action that would cause the obligation created by this Contract to be an “*arbitrage bond*” within the meaning of Section 148(a) of the Code. The Town will maintain books on which will be recorded (1) the Bank or (2) any assignee of the Installment Payments due under this Contract as the registered owner of such Installment Payments. To that end, the Town has executed the Arbitrage and Tax Regulatory Certificate, dated January \_\_\_, 2002 (the “*Tax Regulatory Certificate*”), and will comply with all requirements of Section 148 of the Code to the extent applicable. The Town further covenants that this Contract is not a “*private activity bond*” as defined in Section 141 of the Code.

(b) Without limiting the generality of the foregoing, the Town agrees that there shall be paid from time to time all amounts required to be rebated to the United States of America pursuant to Section 148(f) of the Code and any temporary, proposed or final Treasury Regulations as may be applicable to the obligation created by this Contract from time to time. This covenant shall survive the termination of this Contract pursuant to Section 5.1.

(c) Notwithstanding any provision of this Article, if the Town provides to the Bank an opinion of counsel to the effect that any action required under this Section or the Tax Regulatory Certificate is no longer required, or to the effect that some further action is required, to maintain the exclusion from gross income of the interest on the obligation created by this Contract pursuant to Section 103 of the Code, the Town and the Bank may rely conclusively on such opinion in complying with the provisions of this Article.

(d) The Town hereby designates this Contract as a “*qualified tax-exempt obligation*” eligible for the exception from the disallowance of the deduction of interest by financial institutions allocable to the cost of carrying tax-exempt obligations in accordance with the provisions of Section 265(b)(3) of the Code. The Town does not reasonably anticipate issuing more than \$10,000,000 of qualified tax-exempt obligations pursuant to such Section 265(b)(3), including all entities which issue obligations on behalf of the Town and all subordinate entities of the Town, during calendar year 2001 and will not designate more than \$10,000,000 of qualified tax-exempt obligations pursuant to such Section 265(b)(3) during calendar year 2001. If the Town, including all entities which issue obligations on behalf of the Town and all subordinate entities of the Town, issues and designates more than \$10,000,000 of qualified tax-exempt obligations pursuant to such Section 265(b)(3) during calendar year 2001 or otherwise breaches the representations contained in this paragraph, the Interest Rate and the remaining interest components of the Installment Payments under this Contract shall be adjusted upward to preserve the Bank’s after-tax economic yield with respect to the Installment Payments under this Contract, such adjustment to take into account any interest expense deductions lost by the Bank as a direct or indirect result of the Town’s actions.



(e) The Town acknowledges that the Bank is providing the Purchase Price at the Interest Rate based on the premise that the interest component of the Installment Payments received under this Contract is exempt from federal and State taxation and based on other State and federal laws in effect as of the date hereof. If, as a result of any action or failure to take any action by the YMCA or the Town, the income received by the Bank is deemed to be taxable income to the Bank by any governmental agency, then, at the sole option of the Bank, either (1) the remaining Installment Payments shall become immediately due and payable or (2) the Interest Rate and remaining interest component of the Installment Payments will be adjusted upward to provide for the payment of interest by the Town at a taxable rate (determined by the Bank in its sole discretion) which will preserve the Bank's after-tax economic yield with respect to the obligation created by this Contract. In such event, the YMCA under Section 7.12 of the Lease has agreed to pay the revised Interest Rate and to indemnify and hold harmless the Town and the Bank from any cost and expense incurred as a result of the loss of the tax-exempt status of interest on the Purchase Price.

[END OF ARTICLE VIII]

## ARTICLE IX

### INDEMNIFICATION

Section 9.1. **Indemnification.** To the fullest extent permitted by law, the Town hereby agrees to indemnify, protect and save the Local Government Commission of North Carolina, the Bank and the Escrow Agent and their respective officers, employees, directors, members and agents harmless from all liabilities, obligations, losses, claims, damages, actions, suits, proceedings, costs and expenses, including attorneys' fees that (1) arise in tort, in contract, under 42 U.S. Code §1983 or under the public bidding laws of the State or (2) arise out of, are connected with, or result, directly or indirectly, from the Project or any portion thereof, including, without limitation, the manufacture, selection, acquisition, delivery, possession, condition, construction, improvement, environmental or other condition, lease, use operation or return of the Project or any portion thereof. The indemnification arising under this Article shall continue in full force and effect notwithstanding the payment in full of all obligations under this Contract.

[END OF ARTICLE IX]

## ARTICLE X

### DISCLAIMER OF WARRANTIES

Section 10.1. ***No Representations by the Bank.*** The Town acknowledges and agrees that it has agreed to acquire the Project based on its own judgment and disclaims any reliance on any statements or representations by the Bank with respect thereto.

Section 10.2. ***Disclaimer by the Bank.*** THE BANK MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, AS TO THE CONDITION, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROJECT OR ANY OTHER REPRESENTATION OR WARRANTY WITH RESPECT TO THE PROJECT.

[END OF ARTICLE X]

## ARTICLE XI

### DEFAULT AND REMEDIES

Section 11.1. **Definition of Event of Default.** The Town shall be deemed to be in default under this Contract upon the happening of any of the following events of default (each, an “*Event of Default*”):

- (a) The Town fails to make any Installment Payment or Additional Payment when due;
- (b) The Town fails to perform or observe any term, condition or covenant of this Contract on its part to be observed or performed, other than as referred to in (a) above, or of the Deed of Trust on their parts to be observed or performed, or breaches any warranty by the Town herein or therein contained, for a period of 30 days after written notice to the Town and the YMCA specifying such failure in conjunction with a request that the Bank receive all available remedies from the Town unless the Bank shall agree in writing to an extension of such time prior to its expiration;
- (c) Any bankruptcy, insolvency or reorganization proceedings or similar litigation, is instituted by the Town, or a receiver, custodian or similar officer is appointed for the Town or any of its property, and such proceedings or appointments are not vacated or fully stayed within 60 days after the institution or occurrence thereof;
- (d) Any warranty, representation or statement made by the Town in this Contract, in the Deed of Trust or in any other document executed or delivered in connection herewith is found to be incorrect or misleading in any material respect on the date made; or
- (e) An attachment, levy or execution is levied on or against any portion of the Mortgaged Property.

Section 11.2. **Remedies on Default.** On the occurrence of any Event of Default, the Bank may exercise any one or more of the following remedies as the Bank, in its sole discretion, shall elect:

- (a) Declare the unpaid portion of the then outstanding principal component of the Installment Payments immediately due and payable without notice or demand to the Town or the YMCA;
- (b) Proceed by appropriate court action to enforce performance by the Town of the applicable covenants of this Contract or to recover for the breach thereof;
- (c) Exercise all the rights and remedies of a secured party or creditor under the Uniform Commercial Code of the State and the general laws of the State with respect to the enforcement of the security interest granted or reserved under this Contract including, without limitation, to the extent permitted by law, reenter and take possession of the Project without any court order or other process of law and without liability for entering the premises and lease, sublease the Project or sell or make other disposition of the Project in a commercially reasonable manner for the account of the Town, and apply the proceeds of any such sale, lease, sublease or other disposition, after deducting all costs and expenses, including court costs and attorneys’ fees, incurred with the recovery, repair, storage and other sale, lease, sublease or other disposition,

toward the balance due under this Contract and, thereafter, shall pay any remaining proceeds to the YMCA; or

(d) Enforce its security interest or direct the Deed of Trust Trustee to institute foreclosure proceedings under the Deed of Trust and sell the Project.

NOTWITHSTANDING ANY OTHER PROVISIONS IN THIS CONTRACT, IT IS THE INTENT OF THE PARTIES HERETO TO COMPLY WITH SECTION 160A-20 OF THE GENERAL STATUTES OF NORTH CAROLINA, AS AMENDED. NO DEFICIENCY JUDGMENT MAY BE ENTERED AGAINST THE TOWN IN FAVOR OF THE BANK IN VIOLATION OF SECTION 160A-20 OF THE GENERAL STATUTES OF NORTH CAROLINA, AS AMENDED INCLUDING, WITHOUT LIMITATION, ANY DEFICIENCY JUDGMENT FOR AMOUNTS THAT MAY BE OWED UNDER THIS CONTRACT WHEN THE SALE OF ALL OR ANY PORTION OF THE PROJECT IS INSUFFICIENT TO PRODUCE ENOUGH MONEY TO PAY IN FULL ALL REMAINING OBLIGATIONS UNDER THIS CONTRACT.

Section 11.3. **Further Remedies.** This Contract shall remain in full force and effect and the Town shall be and remain liable for the full performance of all its obligations under this Contract. All remedies of the Bank are cumulative and may be exercised concurrently or separately. The exercise of any one remedy shall not be deemed an election of such remedy or preclude the exercise of any other remedy.

Section 11.4 **YMCA Right to Cure Default.** On the occurrence of an Event of Default, the YMCA shall have the right, for the benefit of the Town, to do and perform all acts and things contemplated in this Contract to be done or performed by Town, as may be accomplished by the YMCA within 30 days written notice of an Event of Default, as provided in Section 7.8 of the Lease Agreement, prior to the Bank's ability to seek all available Remedies as provided in Section 11.2 above.

[END OF ARTICLE XI]

## ARTICLE XII

### ASSIGNMENT

Section 12.1. **Assignment.** Except pursuant to the Deed of Trust and the Lease Agreement, the Town will not sell, assign, lease, sublease, pledge or otherwise encumber or suffer a lien or encumbrance on or against any interest in this Contract or the Mortgaged Property (except for any permitted encumbrances under Section 5.2) without the prior written consent of the Bank. The Town's interest in this Contract may not be assigned or transferred by operation of law. In addition, the Town shall not remove any portion of the Project from its place of installation without the prior written consent of both the Bank and the YMCA. The Bank may only transfer and assign its interests in this Contract to a bank, an insurance company or a similar financial institution which at the date of transfer and assignment has assets of not less than \$100,000,000.

[END OF ARTICLE XII]

## ARTICLE XIII

### LIMITED OBLIGATION OF THE TOWN

Section 13.1. *Limited Obligation of the Town.* NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A PLEDGE OF THE FAITH AND CREDIT OF THE TOWN WITHIN THE MEANING OF ANY CONSTITUTIONAL DEBT LIMITATION. NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED OR INTERPRETED AS CREATING A DELEGATION OF GOVERNMENTAL POWERS NOR AS A DONATION BY OR A LENDING OF THE CREDIT OF THE TOWN WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE. THIS CONTRACT SHALL NOT DIRECTLY OR INDIRECTLY OR CONTINGENTLY OBLIGATE THE TOWN TO MAKE ANY PAYMENTS BEYOND THOSE APPROPRIATED IN THE SOLE DISCRETION OF THE TOWN FOR ANY FISCAL YEAR IN WHICH THIS CONTRACT IS IN EFFECT; PROVIDED, HOWEVER, ANY FAILURE OR REFUSAL BY THE TOWN TO APPROPRIATE FUNDS WHICH RESULTS IN THE FAILURE BY THE TOWN TO MAKE ANY PAYMENT COMING DUE UNDER THIS CONTRACT WILL IN NO WAY OBVIATE THE OCCURRENCE OF THE EVENT OF DEFAULT RESULTING FROM SUCH NONPAYMENT. NO DEFICIENCY JUDGMENT MAY BE RENDERED AGAINST THE TOWN IN ANY ACTION FOR BREACH OF A CONTRACTUAL OBLIGATION UNDER THIS CONTRACT, AND THE TAXING POWER OF THE TOWN IS NOT AND MAY NOT BE PLEDGED DIRECTLY OR INDIRECTLY OR CONTINGENTLY TO SECURE ANY MONEYS DUE UNDER THIS CONTRACT. NO PROVISION OF THIS CONTRACT SHALL BE CONSTRUED TO PLEDGE OR TO CREATE A LIEN ON ANY CLASS OR SOURCE OF THE TOWN'S MONEYS, NOR SHALL ANY PROVISION OF THIS CONTRACT RESTRICT THE FUTURE ISSUANCE OF ANY OF THE TOWN'S BONDS OR OBLIGATIONS PAYABLE FROM ANY CLASS OR SOURCE OF THE TOWN'S MONEYS. TO THE EXTENT OF ANY CONFLICT BETWEEN THIS ARTICLE AND ANY OTHER PROVISION OF THIS CONTRACT, THIS ARTICLE SHALL TAKE PRIORITY.

[END OF ARTICLE XIII]

## ARTICLE XIV

### MISCELLANEOUS

Section 14.1. **Waiver.** No covenant or condition of this Contract can be waived except by the written consent of the Bank. Any failure of the Bank to require strict performance by the Town or any waiver by the Bank of any terms, covenants or contracts in this Contract shall not be construed as a waiver of any other breach of the same or any other term, covenant or contract in this Contract.

Section 14.2. **Severability.** If any portion of this Contract is determined to be invalid under any applicable law, such provision shall be deemed void and the remainder of this Contract shall continue in full force and effect.

Section 14.3. **Governing Law.** This Contract shall be construed, interpreted and enforced in accordance with the laws of the State.

Section 14.4. **Notices.** Any and all notices, requests, demands, and other communications given under or in connection with this Contract are effective only if in writing and either personally delivered or mailed by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to the Town:

Town of Nags Head, North Carolina  
5401 S. Croatan Hwy.  
P.O. Box 99  
Nags Head, North Carolina 27959  
Attention: Finance Officer

If to the Bank:

Bank of America, N.A.  
VA6-100-03-01  
One Commercial Place, 3<sup>rd</sup> Floor  
Norfolk, VA 23510-2103  
Attention: Ms. Buffy J. Barefoot

If to the YMCA:

Young Men's Christian Association of South Hampton Roads  
312 West Bute Street  
Norfolk, Virginia 23510  
Attention: Vice President of Finance

If to the Escrow Agent:

Bank of America, N.A.  
VA6-100-03-01  
One Commercial Place, 3<sup>rd</sup> Floor  
Norfolk, VA 23510-2103



Attention: Ms. Linda Fisher

The Town, the YMCA, the Bank and the Escrow Agent may, by written notice to the others, designate any further or different addresses to which subsequent notices, certificates or other communications shall be sent. Any and all notices, requests, demands, and other communications given to the Town under or in connection with this Contract shall also be given to the YMCA.

Section 14.5. **Section Headings.** All section headings contained in this Contract are for convenience of reference only and are not intended to define or limit the scope of any provision of this Contract.

Section 14.6. **Entire Contract.** This Contract, together with the schedules and Exhibits hereto, constitutes the entire Contract between the parties and this Contract shall not be modified, amended, altered or changed except as the Town and the Bank may subsequently agree in writing.

Section 14.7. **Binding Effect.** Subject to the specific provisions of this Contract, this Contract is binding on and inures to the benefit of the parties and their respective successors and assigns (including expressly any successor of the Bank).

Section 14.8. **Time.** Time is of the essence of this Contract and each and all of its provisions.

Section 14.9. **If Payment or Performance Date Not a Business Day.** If the date for making payment, or the last date for performance of any act or the exercising of any right, as provided in this Contract, is not a Business Day, such payment may be made or act performed or right exercised on the next succeeding Business Day, with the same force and effect as if done on the nominal date provided in this Contract, and no interest shall accrue for the period after such nominal date.

Section 14.10. **Covenants of Town not Covenants of Officials Individually.** No covenant, stipulation, obligation or agreement contained in this Contract shall be deemed to be a covenant, stipulation, obligation or agreement of any present or future member, agent or employee of the Town in his individual capacity, and neither the members of the Board nor any other officer of the Board or the Town shall be subject to any personal liability or accountability by reason of the issuance of the Certificates. No member of the Board or any agent or employee of the Town shall incur any personal liability in acting or proceeding or if not acting or not proceeding, in good faith, reasonably and in accordance with the terms of this Contract.

Section 14.11. **Execution in Counterparts.** This Contract may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

*IN WITNESS WHEREOF*, the parties hereto have caused this Contract to be executed by their duly authorized officers as of the day and year first above written.

**TOWN OF NAGS HEAD, NORTH CAROLINA**

[SEAL]

By: \_\_\_\_\_  
Robert W. Muller  
Mayor

ATTEST:

\_\_\_\_\_  
Carolyn Morris  
Town Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Thomas L. White, Jr., Esq.  
Town Attorney

[SIGNATURES CONTINUED ON THE FOLLOWING PAGE]

[COUNTERPART SIGNATURE PAGE TO THE INSTALLMENT FINANCING CONTRACT]

**BANK OF AMERICA, N.A.,**  
as Bank

By: \_\_\_\_\_  
Buffy J. Barefoot  
Vice President

[SIGNATURES CONTINUED ON THE FOLLOWING PAGE]

[COUNTERPART SIGNATURE PAGE TO THE INSTALLMENT FINANCING CONTRACT]

CONSENTED TO AND ACCEPTED:

**BANK OF AMERICA, N.A.,**  
as Escrow Agent

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[COUNTERPART SIGNATURE PAGE TO THE INSTALLMENT FINANCING CONTRACT,  
DATED AS OF JANUARY 1, 2002, BETWEEN BANK OF AMERICA, N.A.  
AND THE TOWN OF NAGS HEAD, NORTH CAROLINA ]

THIS CONTRACT HAS BEEN APPROVED UNDER  
THE PROVISIONS OF SECTION 159-152 OF THE  
GENERAL STATUTES OF NORTH CAROLINA, AS AMENDED

By: \_\_\_\_\_  
Deputy Director of the Local Government Commission  
of North Carolina

**PRINCIPAL PAYMENT SCHEDULE**

<i>DATE</i>	<i>INSTALLMENT PAYMENT PRINCIPAL COMPONENT</i>	<i>DATE</i>	<i>INSTALLMENT PAYMENT PRINCIPAL COMPONENT</i>
06/30/2001		06/30/2009	\$ 35,000
09/30/2001		09/30/2009	78,000
12/31/2001		12/31/2009	37,000
03/31/2002	\$ 60,000	03/31/2010	35,000
06/30/2002	52,000	06/30/2010	35,000
09/30/2002	102,000	09/30/2010	82,000
12/31/2002	234,000	12/31/2010	35,000
03/31/2003	60,000	03/31/2011	37,000
06/30/2003	46,000	06/30/2011	37,000
09/30/2003	101,000	09/30/2011	37,000
12/31/2003	230,000	12/31/2011	37,000
03/31/2004	59,000	03/31/2012	37,000
06/30/2004	45,000	06/30/2012	37,000
09/30/2004	101,000	09/30/2012	37,000
12/31/2004	230,000	12/31/2012	37,000
03/31/2005	43,000	03/31/2013	37,000
06/30/2005	38,000	06/30/2013	37,000
09/30/2005	129,000	09/30/2013	37,000
12/31/2005	184,000	12/31/2013	37,000
03/31/2006	37,000	03/31/2014	37,000
06/30/2006	35,000	06/30/2014	37,000
09/30/2006	80,000	09/30/2014	37,000
12/31/2006	178,000	12/31/2014	37,000
03/31/2007	35,000	03/31/2015	37,000
06/30/2007	35,000	06/30/2015	37,000
09/30/2007	80,000	09/30/2015	37,000
12/31/2007	131,000	12/31/2015	37,000
03/31/2008	35,000	03/31/2016	37,000
06/30/2008	35,000	06/30/2016	37,000
09/30/2008	80,000	09/30/2016	37,000
12/31/2008	98,000	12/31/2016	37,000
03/31/2009	35,000		
		TOTAL	\$3,833,000

**EXHIBIT A**  
**SITE DESCRIPTION**  
**[TO BE PROVIDED]**

## **EXHIBIT B**

### **DESCRIPTION OF THE PROJECT**

The acquisition of the recreational facility to be located on property acquired by the Town for the use of the Young Men's Christian Association of South Hampton Roads.