

INSTALLMENT FINANCING AND SECURITY AGREEMENT

BETWEEN

PINNACLE BANK

AND

TOWN OF APEX, NORTH CAROLINA

DATED AS OF
AUGUST [31], 2023

INSTALLMENT FINANCING AGREEMENT

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and is not part of the Installment Financing Agreement.)

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THIS INSTRUMENT HAS BEEN PRE-AUDITED IN THE MANNER REQUIRED BY THE LOCAL GOVERNMENT BUDGET AND FISCAL CONTROL ACT.

Antwan Morrison
Finance Director
TOWN OF APEX, NORTH CAROLINA

INSTALLMENT FINANCING AND SECURITY AGREEMENT

This **INSTALLMENT FINANCING AND SECURITY AGREEMENT**, dated as of August [31], 2023 (this “**Agreement**”), is between **PINNACLE BANK** (the “**Lender**”), and its successors and assigns, and the **TOWN OF APEX, NORTH CAROLINA** (the “**Town**”).

PREAMBLES

WHEREAS, the Town has the power, pursuant to the General Statutes of North Carolina to (1) enter into installment contracts in order to purchase, or finance or refinance the purchase of, real or personal property and to finance or refinance the construction or repair of fixtures or improvements on real property and (2) create a security interest in some or all of the property financed or refinanced to secure repayment of the purchase price;

WHEREAS, the Town Council of the Town (the “**Town Council**”) has previously determined that it is in the best interests of the Town (a) to pay the capital costs of the acquisition of the motor vehicles listed on Exhibit 1 of this Agreement (collectively the “**Vehicles**”), and (b) to place a security interest and lien on the Vehicles;

WHEREAS, in order to obtain the s to pay the costs of the Vehicles, the Town Council has determined that it is in the best interests of the Town to enter into this Agreement with the Lender under which the Town will make Installment Payments and Additional Payments in consideration thereof;

WHEREAS, the Lender will advance a principal amount of \$1,785,000 (the “**Advance**”) to the Town pursuant to this Agreement to be used to pay the cost of the Vehicles and for other purposes as set forth in this Agreement;

WHEREAS, the execution, performance and delivery of this Agreement have been authorized, approved and directed by the Town Council by a resolution finally passed and adopted by the Town Council on August 22, 2023;

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

WHEREAS, the obligation of the Town to make the Installment Payments and Additional Payments will constitute a limited obligation of the Town, payable solely from currently budgeted appropriations of the Town; will not constitute a general obligation or other indebtedness of the Town within the meaning of the Constitution of the State of North Carolina (the “**State**”); and will 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 further secure the Town’s obligations under this Agreement, the Town has granted to the Lender a security interest in the Vehicles under this Agreement; and

WHEREAS, no deficiency judgment may be rendered against the Town in any action for breach of a contractual obligation under this Agreement, 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 money due under this Agreement;

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants in this Agreement 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 Lender, any expenses of the Lender in defending an action or proceeding in connection with this Agreement 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 Lender is expressly required to pay as a result of this Agreement (together with interest that may accrue thereon in the event that the Town fails to pay the same, as set forth in this Agreement).

“Advance” means the original aggregate principal amount equal to \$1,785,000 advanced by the Lender to enable the Town to (a) acquire the Vehicles under this Agreement and (b) pay the costs of executing and delivering this Agreement, as such amount advanced may be adjusted by amendment to this Agreement.

“Business Day” means a day on which the Lender, at its designated corporate office, is not required or authorized by law to remain closed.

“Closing Date” means August [31], 2023.

“Closing Costs” means and further includes all items of expense directly or indirectly payable by or reimbursable to the Town relating to the financing of the Vehicles, including, but not limited to, filing and recording costs, settlement costs, printing costs, word processing costs, reproduction and binding costs, legal fees and charges and financing and other professional consultant fees.

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

“Cost of Acquisition” is deemed to include the payment of, or the reimbursement to the Town for the following items:

- (1) obligations incurred or assumed in connection with the acquisition of the Vehicles;
- (2) any and all costs of acquisition of the Vehicles; and

(3) all other costs which are considered to be a part of the costs of the acquisition of the Vehicles in accordance with generally accepted accounting principles and which will not affect the tax status for federal income tax purposes of the designated interest component of the Installment Payments payable by the Town under this Agreement, including sums required to reimburse the Town for advances made by the Town that are properly chargeable to the acquisition of the Vehicles.

“Default Rate” means the interest rate in effect under this Agreement immediately prior to an event of default hereunder, plus 4.0% per annum; provided, however that the Default Rate shall not exceed the maximum rate of interest permitted by law.

“Determination of Taxability” means and is deemed to have occurred on the date when (a) the Town receives notice from the Lender that the Internal Revenue Service has assessed as includable in gross income the interest component of the Installment Payments made by the Town under this Agreement due to the occurrence of an Event of Taxability or (b) the Town or the Lender receives notice from the Commissioner or any District Director of the Internal Revenue Service that the interest component of the Installment Payments made by the Town under this Agreement is includable in the gross income of the Lender for federal income tax purposes due to the occurrence of an Event of Taxability.

“Event of Default” means any of the events of default as defined in Section 11.1.

“Event of Taxability” means the occurrence or existence of any fact, event or circumstance caused by either the action or inaction of the Town which has the effect of causing the interest component of the Installment Payments made by the Town under this Agreement to be includable in the gross income of the Lender for federal income tax purposes.

“Fiscal Year” means a twelve-month period commencing on July 1 of any year and ending on June 30 of the immediately succeeding year, or such other twelve-month period which may subsequently be adopted as the Fiscal Year of the Town.

“Inclusion Date” means the effective date that the interest component of the Installment Payments made by the Town under this Agreement is includable in the gross income of the Lender as a result of a Determination of Taxability.

“Installment Payments” means those payments made by the Town to the Lender as described in Article III and in the Payment Schedule attached hereto.

“Interest Rate” means 3.90% per annum, calculated on a 30-day month/360-day basis, except as otherwise provided in accordance with Section 3.1(a) and Section 8.1(c).

“Lender” means Pinnacle Bank, a corporation duly organized and existing under the laws of the State of Tennessee, and any of its successors or assigns.

“Net Proceeds” means, when used with respect to any proceeds from policies of insurance or the proceeds from any sale or lease of the Vehicles, means 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.

“Payment Schedule” means the document setting forth the Town’s Installment Payments which is attached hereto and incorporated herein by reference.

“State” means the State of North Carolina.

“Town” means the Town of Apex, North Carolina, a political subdivision of the State, validly existing under and by virtue of the Constitution, statutes and laws of the State of North Carolina, and any successor to its functions.

“Town Council” means the duly elected governing Town Council of the Town, 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 Agreement by a written certificate furnished to the Lender containing the specimen signatures of such person or persons and signed on behalf of the Town by the Mayor, the Town Manager or Interim Town Manager or the Finance Director of the Town, or (2) if any or all of the Town’s rights and obligations are assigned under this Agreement, 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.

“Vehicles” means the motor vehicles listed on Exhibit 1 of this Agreement acquired by the Town from the proceeds from the Advance and all additions and accessions thereof and thereto.

[END OF ARTICLE I]

ARTICLE II
THE ADVANCE

Section 2.1 *The Advance*. The Lender hereby makes an advance to the Town of the Advance, and the Town hereby accepts from the Lender the Advance to be applied in accordance with the terms and conditions of this Agreement. The Town agrees to use the proceeds of the Advance to pay the Cost of Acquisition of the Vehicles.

[END OF ARTICLE II]

ARTICLE III
INSTALLMENT PAYMENTS; ADDITIONAL PAYMENTS

Section 3.1 ***Amounts and Times of Installment Payments and Additional Payments.***

(a) Subject to the provisions of Article XIII hereof entitled "Limited Obligation of the Town," the Town will repay the Advance in semi-annual Installment Payments on each March 1 and September 1, commencing March 1, 2024, consisting of an interest component and a principal component as provided in this Agreement and the Payment Schedule. The Town hereby approves the Advance by the Lender to the Town pursuant to this Agreement in the amount of \$1,785,000 to be repaid by the Town in Installment Payments at an interest rate per annum equal to the Interest Rate. Notwithstanding the foregoing, upon the occurrence and during the continuation of an Event of Default, all amounts payable under this Agreement shall bear interest at the Default Rate until paid.

(b) Each Installment Payment will be paid in the amounts and at the times set forth in the attached Payment Schedule, except as otherwise provided herein. If an Installment Payment is due on any day which is not a Business Day, such Installment Payment will be due on the next succeeding Business Day and the Town will make such Installment Payment on such Business Day with no additional interest due thereon. Installment Payments will be sufficient in the aggregate to repay the principal amount of the Advance, together with interest thereon, as the same will become due and payable. The Town will pay any Additional Payments on a timely basis directly to the person or entity to which such Additional Payments are owed. All payments will be made in lawful currency of the United States.

Section 3.2 ***Place of Payments.*** All payments required to be made to the Lender hereunder will be made to the Lender (1) at the address set forth in Section 14.1 in immediately available s, (2) as wire transfers to the Lender on the payable date as directed by the Lender or (3) as may be otherwise directed in writing by the Lender.

Section 3.3 ***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 sufficient s for 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 acquisition of the Vehicles. The Town assumes and bears the entire risk of loss and damage to the Vehicles from any cause whatsoever, it being the intention of the parties that the Installment Payments will be made in all events unless the obligation to make such Installment Payments is terminated as otherwise provided herein.

Section 3.4 ***Prepayment of Advance.*** (a) Upon at least 30 days' prior written notice to the Lender (unless otherwise waived by the Lender), the Town may prepay, in whole or in part, the outstanding principal component of the Installment Payments on any date at a prepayment price equal to 100% of the principal component of the Installment Payments to be prepaid, plus accrued interest thereon to the prepayment date.

(b) Any prepayment in part shall be applied in inverse order or maturity of the principal components of the Installment Payments. Upon any such prepayment in part, the Lender shall provide the Town with a new Payment Schedule which reflects such prepayment which will replace the Payment Schedule attached hereto.

[END OF ARTICLE III]

**ARTICLE IV
USE OF PROCEEDS**

Section 4.1 ***Use of Proceeds.*** There is hereby created a separate fund to be held by the Lender, on behalf of the Town, designated as the “Town of Apex 2023 Installment Finance Acquisition Fund.” On the Closing Date, the Lender will cause the Advance to be deposited in the Acquisition Fund. The funds in the Acquisition Fund will be disbursed in accordance with the provisions of this Article IV.

The Town shall invest and reinvest the money, and any interest thereon, held in the Acquisition Fund as permitted under Section 159-30 of the General Statutes of North Carolina, as amended.

Money held in the Acquisition Fund shall be disbursed by the Town to pay the Cost of Acquisition of the Vehicles. Prior to withdrawing funds from the Acquisition Fund, the Town shall submit to the Lender a written requisition signed by an authorized officer of the Town. A form of requisition for the disbursement of funds held in the Acquisition Fund is attached hereto as Exhibit B. If amounts held to the credit of the Acquisition Fund are insufficient to pay the Cost of Acquisition of the Vehicles, then the Town shall provide any balance of funds necessary to pay the Cost of Acquisition of the Vehicles. The Town shall consult with its bond counsel regarding the disposition of any money remaining in the Acquisition Fund, if any, after acquisition of the Vehicles or the earlier termination of the Acquisition Fund, and, if so permitted by the Code, such amount shall be used to pay future Installment Payments coming due under this Agreement in the order of their due dates.

The Acquisition Fund shall be terminated at the earlier of (1) the final distribution of amounts held in the Acquisition Fund and (2) the termination of this Agreement.

Section 4.2 ***Reliance by Lender on Documents.*** The Lender may act in reliance on any writing or instrument or signature which it believes, in good faith, to be genuine and may assume the validity and accuracy of any statement or assertion contained in such a writing or instrument. The Lender is not liable in any manner for the sufficiency or correctness as to form, manner and execution, or validity of any instrument nor as to the identity, authority, or right of any person executing the same; and its duties under this Agreement are limited to the receipt of such money, instruments or other documents received by it as the Lender, and for the disposition of the same in accordance herewith.

[END OF ARTICLE IV]

ARTICLE V
COVENANTS OF THE TOWN

Section 5.1 **Care and Use.** The Town will use, and will cause the use of, the Vehicles for its intended purpose, in compliance with all applicable laws and regulations, and, at its sole cost and expense, will service, repair and maintain the Vehicles so as to keep the Vehicles in good condition, repair, appearance and working order for the purposes intended, ordinary wear and tear excepted. Any and all additions to or replacements of the Vehicles and all parts thereof will constitute accessions to the Vehicles and will be subject to all the terms and conditions of this Agreement and included in the term “**Vehicles**” as used in this Agreement.

Section 5.2 **Inspection.** The Town will authorize the Lender and its representatives and agents to enter onto the Town’s property and inspect the Vehicles from time to time and the Town will cause Town staff to cooperate with the Lender and its representatives and agents during such inspections. No right of inspection or approval contained in this Agreement imposes on the Lender any duty or obligation whatsoever to undertake any inspection or to give any approval.

Section 5.3 **Taxes.** The Town agrees to pay when due any and all taxes relating to the Vehicles.

Section 5.4 **Insurance.** The Town will obtain and maintain, at its expense, at all times until termination of this Agreement a policy of insurance covering the Vehicles and providing the insurance protection described in this Section. The Town will maintain at its own expense, to the extent applicable to these types of Vehicles, fire, casualty, public liability, property damage and theft insurance, and such other insurance in such amounts and with such deductibles, if permitted, as reasonably required by the Lender from time to time. The Vehicles will be insured in an amount at least equal to their replacement value.

All such insurance will be maintained with an insurance company or companies as will be reasonably satisfactory to the Lender and will provide that losses will be payable to the Lender and the Lender will be named as an additional insured with respect to all such insurance. The Town will deliver to the Lender evidence satisfactory to the Lender of such insurance coverage as the Lender may request. The Town agrees to cooperate fully in all accident insurance investigations, claims and litigation proceedings. The Town will cooperate fully with the Lender in filing any proof of loss with respect to any insurance policy described above. In no event will the Town voluntarily settle, or consent to the settlement of, any proceeding arising out of any insurance claim with respect to the Vehicles without the written consent of the Lender.

Prior to the expiration of any such insurance policy, the Town shall furnish to the Lender evidence satisfactory to the Lender that such insurance policy has been renewed or replaced or is no longer required by this Agreement.

In lieu of separate insurance policies, the Town may maintain blanket or umbrella insurance policies if such policies provide the same coverage required by this Section with protection against each risk not reducible by claims for other risks to amounts less than that specified in this Section and the Town deposits with the Lender a certificate or certificates of the respective insurers evidencing such coverage and stating, as required, the amount of coverage with respect to the Vehicles or any part thereof.

In lieu of policies of insurance written by commercial insurance companies meeting the requirements of this Section, the Town may maintain a program of self-insurance or participate in group risk financing programs, risk pools, risk retention groups, purchasing groups and captive insurance companies, and in state or federal insurance programs, with the prior written consent of the Lender.

Section 5.5 ***Risk of Loss.*** The Town will bear all risk of loss or damage to the Vehicles. In the event of loss or damage to the Vehicles, the Town shall either (a) continue to make the Installment Payments due hereunder and repair or replace the Vehicles or (b) prepay in full the principal components of the outstanding Installment Payments in accordance with Section 3.4 hereof. If the Net Proceeds exceed the amount necessary to repair or replace the Vehicles or prepay the then outstanding principal component of the Installment Payments, such excess will be paid to or retained by the Town.

Section 5.6 ***Performance by the Lender of the Town's Responsibilities.*** Any performance required of the Town or any payments required to be made by the Town may, if not timely performed or paid, be performed or paid by the Lender, and, in such event, the Lender will be immediately reimbursed by the Town for such payments or other performance by the Lender, with interest thereon at a rate equal to the Interest Rate.

Section 5.7 ***Financial Statements.*** The Town shall furnish to the Lender, (a) when the same become available, but in no event later than 210 days after the end of each Fiscal Year, a copy of its annual audited financial statements in an electronic format and (b) a copy of the Town's annual budget for each fiscal year in an electronic format within thirty (30) days after adoption, as well as any amendments to the budget that affect the appropriation for Installment Payments.

The Town represents and warrants to the Lender that all financial statements which have been delivered to the Lender in connection with this Agreement fairly and accurately reflect the Town's financial condition and there has been no material adverse change in the Town's financial condition as reflected in the financial statements since the date thereof.

[END OF ARTICLE V]

ARTICLE VI
TITLE; LIENS

Section 6.1 **Title.** Title to the Vehicles, once acquired, and any and all additions, accessions, repairs, replacements or modifications thereto will be in the Town from and after the date of execution and delivery of this Agreement. Upon payment or provision for payment in full of all of the Town's obligations hereunder, including the Installment Payments then outstanding and all other payments due hereunder, this Agreement will terminate.

Section 6.2 **Liens.** The Town will 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 Vehicles or any interest therein, except for: (1) the lien and security interest of the Lender in the Vehicles; and (2) such minor defects, irregularities, encumbrances and clouds on title as normally exist with respect to property of the general character of the Vehicles and as do not materially impair title thereto or the ability of the Town to operate the Vehicles. The Town will promptly, at its own expense, take such action as may be necessary to duly discharge any such mortgage, pledge, lien, security interest, charge, encumbrance or claim if the same arises at any time. The Town will reimburse the Lender for any expense incurred by the Lender in order to discharge or remove any such mortgage, pledge, lien, security interest, charge, encumbrance or claim.

Section 6.3 **Security Agreement.** The Town hereby grants to the Lender a security interest in the Vehicles and in any and all additions, accessions, repairs, replacements, substitutions, and modifications to the Vehicles, and all proceeds of all the foregoing, including any insurance proceeds paid because of loss or damage to the Vehicles to the extent necessary to secure the Town's payment obligations to the Lender under this Agreement. The Town will cause to be filed, at the Town's expense, a financing statement and other related documents as the Lender requires under Article 9 of Chapter 25 of the General Statutes of North Carolina related to the security interest in the Vehicles. Upon acquisition of the Vehicles, the Town will with reasonable dispatch list the Lender as a lienholder on the title to the Vehicles and will cause the certificates of title for the Vehicles to be delivered to the Lender at such address specified by the Lender to the Town for retention in the Lender's files throughout the term of this Agreement.

When the title to each of the Vehicles is issued, the Town shall cause the Lender to be listed as the first lienholder on the title to each of the Vehicles, as follows:

Pinnacle Bank
150 3rd Avenue S., Suite 900
Nashville, TN 37201

The Town will be responsible for the correct titling of the Vehicles.

The Vehicles are and will throughout the term of this Agreement be and remain personal property. If any of the Vehicles is permanently located on any real estate not owned in fee simple by the Town, the Town will obtain the right or the permission to use the real property on which such Vehicle is located.

[END OF ARTICLE VI]

ARTICLE VII
REPRESENTATIONS AND WARRANTIES OF THE TOWN

Section 7.1 *Representations and Warranties of the Town.* The Town represents, warrants and covenants to and with the Lender (all such representations, warranties and covenants to be continuing) that:

(a) The Town is a political subdivision 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 Agreement and to carry out its obligations hereunder;

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

(c) This Agreement and all other documents relating hereto and the performance of the Town's obligations hereunder 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 and bidding requirements, and, assuming the due authorization, execution and delivery hereof and thereof by the other parties hereto and 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 proper jurisdiction may impose;

(d) Neither the execution and delivery of this Agreement 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 Agreement 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 Agreement or any other documents relating hereto and the performance of the Town's obligations hereunder, and compliance with the provisions hereof, under the circumstances contemplated hereby, 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) 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 resolution relating to the performance by the Town of this Agreement and the transactions contemplated hereby has been duly adopted, is in full force and effect and has not been in any respect modified, revoked or rescinded;

(g) The Town will (1) cause its Town Manager or Interim Town Manager to include the Installment Payments coming due in any Fiscal Year in the corresponding annual budget request and will require the Town Manager or Interim Town Manager to use his or her best efforts to obtain an appropriation therefor and (2) require that the deletion of such funds from the Town's final budget be made only pursuant to an express resolution of the Town Council which explains the reason for such action. This covenant on the part of the Town contained in this Section 7.1(g) is deemed to be and will be construed to impose by law ministerial duties and it will be the duty of each and every public official of the Town to take such action and do such things as are required by law in the performance of the official duty of such officials to enable the Town to carry out and perform the covenant in this subparagraph and the agreements in this Agreement to be carried out and performed by the Town; *provided, however*, that nothing contained in this Section 7.1(g) obligates the Town to so appropriate the funds included in such proposed budget;

(h) The Town acknowledges and agrees that this transaction is an arm's-length commercial transaction between the Town and the Lender. In connection with this transaction, the Lender is acting solely as a principal and not as a municipal advisor, financial advisor, agent or fiduciary to the Town or any other person or entity. The Lender has not assumed any advisory or fiduciary responsibility to the Town with respect to this transaction, and nothing in this transaction or in any prior relationship between the Town and the Lender shall be deemed to create an advisory, fiduciary or agency relationship between the Town and the Lender in respect of this transaction. The Town has consulted its own legal and other advisors to the extent it has deemed appropriate.

[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 such action would adversely affect the exclusion from gross income of the interest portion of the obligations created by this Agreement for federal income tax purposes. The Town will not directly or indirectly use or permit the use of any proceeds of any fund created under this Agreement or any funds of the Town, or take or omit to take any action that would cause the obligations created by this Agreement 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 Lender, or (2) any assignee of the Installment Payments due under this Agreement, as the registered owner of such Installment Payments. The Town further covenants that this Agreement 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 will 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 under this Agreement from time to time. This covenant will survive the termination of this Agreement pursuant to Section 6.1.

(c) In the event of a Determination of Taxability, the interest rate payable under this Agreement, from and after the Inclusion Date, shall be adjusted to preserve the Lender’s after-tax economic yield with respect to the interest components of the Installment Payments, taking into account any interest expense deductions lost by the Lender as a direct or indirect result of the Town’s actions. In addition, the Town shall pay to the Lender, to the fullest extent permitted by applicable law, (i) an amount necessary to reimburse the Lender for any interest, penalties, or other charges assessed by the Internal Revenue Service and the Department of Revenue by reason of the Lender’s failure to include the interest portion of the Installment Payments in its gross income for income tax purposes, and (ii) upon request of the Lender, additional interest as a result of the increase in the interest rate on all previous payments made by the Town after the Inclusion Date. In the event of a Determination of Taxability, the Lender shall provide the Town with a new Payment Schedule which reflects the new interest rate which will replace the Payment Schedule attached hereto.

(d) Notwithstanding any provision in this Agreement to the contrary, if the Town provides to the Lender an opinion of nationally recognized bond counsel reasonably acceptable to the Lender to the effect that any action required under this Article VIII is no longer required, or to the effect that some further action is required, to maintain tax-exempt status, the Town and the Lender may rely conclusively on such opinion in complying with the provisions of this Article VIII.

[END OF ARTICLE VIII]

**ARTICLE IX
INDEMNIFICATION**

Section 9.1 ***Indemnification.*** To the fullest extent permitted by law, the Town covenants to defend, indemnify and hold harmless the Lender and its officers, directors, members, employees and agents (collectively, the “*Indemnified Party*”) against any and all losses, claims, damages or liabilities, joint or several, including fees and expenses incurred in connection therewith, to which such Indemnified Party may become subject under any statute or at law or in equity or otherwise in connection with the transactions contemplated by this Agreement and shall reimburse any such Indemnified Party for any legal or other expenses incurred by it in connection with investigating any claims against it and defending any actions, insofar as such losses, claims, damages, liabilities or actions arise out of the transactions contemplated by this Agreement. In particular, without limitation, the Town shall and hereby agrees, to the fullest extent permitted by law, to indemnify and save the Indemnified Party harmless from and against all claims, losses and damages, including legal fees and expenses, arising out of any breach or default on the part of the Town in the performance of any of its obligations under this Agreement.

[END OF ARTICLE IX]

ARTICLE X
DISCLAIMER OF WARRANTIES

Section 10.1 ***No Representations by the Lender.*** The Town acknowledges and agrees that the design for the Vehicles has not been made by the Lender, and the Lender has not supplied any plans or specifications with respect thereto and that the Lender (a) is not a manufacturer of, nor a dealer in, any of the component parts of the Vehicles; (b) has not made any recommendation, given any advice nor taken any other action with respect to (i) the choice of any supplier, vendor or designer of, or any other contractor with respect to, the Vehicles or any component part thereof or any property or rights relating thereto, or (ii) any action taken or to be taken with respect to the Vehicles or any component part thereof or any property or rights relating thereto at any stage of the construction thereof; (c) has not at any time had physical possession of the Vehicles or any component part thereof or made any inspection thereof or any property or rights relating thereto; and (d) has not made any warranty or other representation, express or implied, that the Vehicles or any component part thereof or any property or rights relating thereto (i) will not result in or cause injury or damage to persons or property, (ii) has been or will be properly designed, or will accomplish the result which the Town intends therefor, or (iii) is safe in any manner or respect.

Section 10.2 ***Disclaimer by the Lender.*** The Lender makes no express or implied warranty or representation of any kind whatsoever with respect to the Vehicles of any component part thereof to the Town or in regard to any other circumstance whatsoever with respect thereto, including but not limited to any warranty or representations with respect to: the merchantability or the fitness or suitability thereof for any purpose; the design or condition thereof; the safety, workmanship or quality thereof; compliance thereof with the requirements of any law, rule, specification or contract pertaining thereto; any latent defect; the title to or interest of the Lender therein; the ability thereof to perform any function; that the Advance will be sufficient (together with any other available funds of the Town) to pay the cost of implementing the Vehicles; or any other characteristics of the Vehicles, it being agreed that all risks relating to the Vehicles, the completion thereof or the transactions contemplated hereby are to be borne by the Town and the benefits of any and all implied warranties and representations of the Lender are hereby waived by the Town.

[END OF ARTICLE X]

ARTICLE XI
DEFAULT AND REMEDIES

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

- (a) The Town fails to pay any Installment Payment or Additional Payment when due;
- (b) The Town fails to budget and appropriate money sufficient to pay all Installment Payments and the reasonably estimated Additional Payments coming due in the following Fiscal Year of the Town;
- (c) The Town deletes from its duly adopted budget any appropriation for the purposes specified in clause (b) above;
- (d) The Town fails to perform or observe any term, condition or covenant of this Agreement on its part to be observed or performed, other than as referred to in clauses (a), (b) or (c) above, or breaches any warranty by the Town herein contained, for a period of 30 days after written notice specifying such failure and requesting that it be remedied has been given to the Town by the Lender, unless the Lender agrees in writing to an extension of such time prior to its expiration; provided, however, that if the failure stated in the notice cannot be corrected within the applicable period and if corrective action is instituted by the Town within the applicable period and diligently pursued, the Town shall have such additional period of time to correct the failure as shall be necessary to correct such failure so long as such correction is diligently pursued;
- (e) 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 90 days after the institution or occurrence thereof;
- (f) Any representation, warranty or statement made by the Town herein 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
- (g) An attachment, levy or execution is levied on or against any of the Vehicles.

Section 11.2 ***Remedies on Default.*** Upon the occurrence of any Event of Default, the Lender may exercise any one or more of the following remedies as the Lender, in its sole discretion, elects:

- (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;
- (b) Proceed by appropriate court action to enforce the performance by the Town of the applicable covenants of this Agreement or to recover for any 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 hereunder and to sell, lease, sublease or make other disposition of the same 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 Agreement and, thereafter, to pay any remaining proceeds to the Town; or

- (d) Pursue any other remedy available at law or equity to the Lender.

NOTWITHSTANDING ANY OTHER PROVISIONS HEREIN, 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 LENDER 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 HEREUNDER WHEN THE SALE OF ALL OR ANY PORTION OF THE VEHICLES IS INSUFFICIENT TO PRODUCE ENOUGH MONEY TO PAY IN FULL ALL REMAINING OBLIGATIONS UNDER THIS AGREEMENT.

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

[END OF ARTICLE XI]

ARTICLE XII
ASSIGNMENT

Section 12.1 *Assignment.* Except pursuant to this 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 Agreement, and the Vehicles (except for any permitted encumbrances under Section 6.2) without the prior written consent of the Lender. The Town's interest in this Agreement may not be assigned or transferred by operation of law.

Except as set forth below, the Lender may, at any time and from time to time, assign all or any part of its interest in the Vehicles or this Agreement, including, without limitation, the Lender's rights to receive Installment Payments payable to the Lender hereunder. Any assignment made by the Lender or any subsequent assignee will not purport to convey any greater interest or rights than those held by the Lender pursuant to this Agreement.

The Town agrees that this Agreement may become part of a pool of obligations at the Lender's or its assignee's option. Any assignment by the Lender may be only to a bank, insurance company, or similar financial institution. Notwithstanding the foregoing, no assignment or reassignment of the Lender's interest in this Agreement will be effective unless and until the Town receives a duplicate original counterpart of the document by which such assignment or reassignment is made disclosing the name and address of each such assignee.

The Town agrees to execute any document reasonably required in connection with any assignment. Any assignor must provide notice of any assignment to the Town, and the Town will keep a complete and accurate record of all assignments as required by the Code. After the giving of any such notice, the Town will thereafter make all payments in accordance with the notice to the assignee named therein and will, if so requested, acknowledge such assignment in writing, but such acknowledgment will in no way be deemed necessary to make the assignment effective.

[END OF ARTICLE XII]

ARTICLE XIII
LIMITED OBLIGATION OF THE TOWN

Section 13.1 *Limited Obligation of the Town.* No provision of this Agreement will be construed or interpreted as creating a pledge of the faith and credit of the Town within the meaning of any State constitutional debt limitation. No provision of this Agreement will 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 Agreement will not directly or indirectly or contingently obligate the Town to make any payments beyond any payments appropriated in the sole discretion of the Town for any Fiscal Year in which this Agreement is in effect; *provided, however,* that any failure or refusal by the Town to appropriate funds which results in its failure to make any payment coming due hereunder will in no way obviate the occurrence of an 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 hereunder, and the taxing power of the Town is not and may not be pledged directly or indirectly or contingently to secure any amounts due hereunder. No provision of this Agreement will be construed to pledge or to create a lien on any class or source of the Town's funds, nor will any provision of this Agreement restrict the future issuance of any of the Town's bonds or obligations payable from any class or source of the Town's funds. To the extent of any conflict between this Article XIII and any other provision of this Agreement, this Article XIII will take priority.

[END OF ARTICLE XIII]

**ARTICLE XIV
MISCELLANEOUS**

Section 14.1 **Notices.** Any and all notices, requests, demands, and other communications given under or in connection with this Agreement are only effective if made in writing and delivered either personally, by overnight delivery service or mailed by certified or registered mail, postage prepaid, or return receipt requested, and addressed as follows:

IF TO THE TOWN: Town of Apex
 73 Hunter Street
 Apex, North Carolina 27502
 Attention: [Town Manager]

IF TO THE LENDER: Pinnacle Bank
 3515 Glenwood Avenue, Suite 100
 Raleigh, North Carolina 27612
 Attention: James R. Graham

The Town and the Lender may, by written notice to each other, designate any further or different addresses or method of delivery to which subsequent notices, certificates or other communications will be sent.

Section 14.2 **Time.** Time is of the essence of this Agreement and each and all of its provisions.

Section 14.3 **If Payment or Performance Date not a Business Day.** If the date for making any payment, or the last date for performance of any act or the exercising of any right, as provided in this Agreement, 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 Agreement, and no interest will accrue for the period after such nominal date.

Section 14.4 **Waiver.** No covenant or condition of this Agreement can be waived except by the written consent of the Lender. Any failure of the Lender to require strict performance by the Town or any waiver by the Lender of any terms, covenants or contracts in this Agreement will not be construed as a waiver of any other breach of the same or any other term, covenant or contract in this Agreement.

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

Section 14.6 **Entire Agreement.** This Agreement, together with the schedules and Exhibits attached to this Agreement, constitutes the entire agreement between the parties, and this Agreement will not be modified, amended, altered or changed except as the Town and the Lender may subsequently agree in writing.

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

Section 14.8 **Covenants of Town not Covenants of Officials Individually.** No covenant, stipulation, obligation or agreement contained herein will be deemed to be a covenant, stipulation,

obligation or agreement of any present or future member, agent or employee of the Town in such person's individual capacity, and neither the members of the Town Council nor any other officer of the Town Council or the Town will be subject to any personal liability or accountability by reason of the execution of this Agreement. No member of the Town Council or any agent or employee of the Town will 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 Agreement.

Section 14.9 ***Severability***. If any portion of this Agreement is determined to be invalid under any applicable law, such provision will be deemed void and the remainder of this Agreement will continue in full force and effect.

Section 14.10 ***Governing Law***. This Agreement will be construed, interpreted and enforced in accordance with, the laws of the State.

Section 14.11 ***Execution in Counterparts; Electronic Signature***. This Agreement may be executed in any number of counterparts, by manual, facsimile, digital, electronic, or .pdf signatures, each of which will be deemed an original, but all of which taken together will constitute but one and the same instrument. An executed copy of this Agreement delivered by facsimile, email, or other electronic means will be deemed to have the same legal effect as delivery of a manual signed copy of this Agreement. This Agreement and related documents may be sent and stored by electronic means.

Section 14.12 ***E-Verify***. The Lender understands that “*E-Verify*” is a federal program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees pursuant to federal law in accordance with Section 64-25(5) of the General Statutes of North Carolina, as amended. The Lender uses E-Verify to verify the work authorization of its employees in accordance with Section 64-26(a) of the General Statutes of North Carolina, as amended. The Lender will not use any subcontractors in connection with this Agreement.

Section 14.13 ***Iran Divestment Act Certification***. As of the date of this Agreement, the Lender is not on any list created and maintained by the North Carolina Department of State Treasurer pursuant to the Iran Divestment Act of 2015, Article 6E of Chapter 147 of the General Statutes of North Carolina.

Section 14.14 ***Companies that Boycott Israel Act Certification***. As of the date of this Agreement, the Lender is not listed on any list created and maintained by the North Carolina Department of State Treasurer pursuant to the Divestment from Companies that Boycott Israel Act, Article 6G, as amended, of Chapter 147 of the General Statutes of North Carolina.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Town and the Lender have caused this Installment Financing Agreement to be executed by their duly authorized officers as of the day and year first above written.

TOWN OF APEX, NORTH CAROLINA

[SEAL]

By: _____
[]

ATTEST:

Allen Coleman
Clerk to the Town Council
of the Town of Apex, North Carolina

[SIGNATURES CONTINUED ON THE FOLLOWING PAGE]

[TOWN SIGNATURE PAGE TO THE INSTALLMENT FINANCING AND SECURITY AGREEMENT (DATED AS OF AUGUST [31], 2023 BETWEEN PINNACLE BANK AND THE TOWN OF APEX, NORTH CAROLINA)]

[COUNTERPART SIGNATURE PAGE TO THE INSTALLMENT FINANCING AND SECURITY AGREEMENT
(DATED AS OF AUGUST [31], 2023 BETWEEN PINNACLE BANK AND THE TOWN OF APEX, NORTH
CAROLINA)]

PINNACLE BANK
as Lender

By: _____

Name: James R. Graham

Title: Senior Vice President

EXHIBIT A

PAYMENT SCHEDULE

<u>PAYMENT DATE</u>	<u>INSTALLMENT PAYMENT – PRINCIPAL COMPONENT</u>	<u>INSTALLMENT PAYMENT – INTEREST COMPONENT*</u>	<u>TOTAL INSTALLMENT PAYMENT</u>
03/01/2024			
09/01/2024			
03/01/2025			
09/01/2025			
03/01/2026			
09/01/2026			
03/01/2027			
09/01/2027			
TOTAL			

EXHIBIT 1

1. The Vehicles consists of all motor vehicles and all other items of personal property acquired with the proceeds of the Installment Financing and Security Agreement, dated as of August [31], 2023, between Pinnacle Bank and the Town of Apex, North Carolina, all additions, attachments, accessions, substitutions and replacements thereof or thereto, any rental payments due or to become due thereunder, and any and all proceeds thereof, including without limitation, the proceeds of insurance thereon.

EXHIBIT B

FORM OF REQUISITION

ACQUISITION FUND REQUISITION

[To Be Prepared on Town's Letterhead for Submission]

[Date]

Pinnacle Bank, as Custodian
Attn: James R. Graham
3515 Glenwood Avenue, Suite 100
Raleigh, NC 27612

RE: Request for disbursement of funds from the Acquisition Fund related to the Installment Financing and Security Agreement, dated as of August [31], 2023, between the Town of Apex, North Carolina and Pinnacle Bank (the "Agreement")

Ladies and Gentlemen:

The Town of Apex, North Carolina (the "Town"), requests the disbursement of funds from the Acquisition Fund established under the terms and provisions of the Agreement for the following Costs of Acquisition of the Vehicles and/or Closing Costs of the above-referenced Agreement:

[insert description and Costs of Acquisition of the Vehicles and/or Closing Costs]

This is requisition number ____ from the Acquisition Fund.

Disbursements will be made to the [Town][Vendor] as follows:

Amount:

Applicable Vendor Invoices:

Description of Costs of Acquisition of the Vehicles/Closing Costs:

Location of Vehicles/Facilities:

To receive funds via wire transfer please include:

Receiving Bank:

ABA Routing Number:

Beneficiary Name:

Beneficiary Physical Address:

Account Number:

The Town makes this requisition pursuant to the following representations:

1. The purpose of this disbursement is for partial payment of the Costs of Acquisition of the Vehicles and/or Closing Costs under the Agreement.
2. The requested disbursement has not been subject to any previous requisition.
3. No notice of any lien, right to lien or attachment upon, or claim affecting the right to receive payment of, any of the moneys payable herein to any of the persons, firms or corporations named herein has been received, or if any notice of any such lien, attachment or claim has been received, such lien, attachment or claim has been released or discharged or will be released or discharged upon payment of this requisition.
4. This requisition contains no items representing payment on account of any percentage entitled to be retained on the date of this requisition.
5. Each amount requested for payment in this requisition either (a) represents reimbursement to the Town for a cost related to either the Cost of Acquisition of the Vehicles and/or related Closing Costs of the Agreement which have been previously paid by the Town, or (b) as directed by the Town in this requisition, will be paid by the Custodian from the Acquisition Fund directly to the third party vendors described in this requisition to provide for payment of either the Cost of Acquisition of the Vehicles and/or related Closing Costs of the Agreement.
6. Attached is evidence that demonstrates that the amounts shown in this requisition are properly payable at this time, such as bills, receipts, invoices, architects' payment certifications or other appropriate documents.

TOWN OF APEX, NORTH CAROLINA

By: _____

Name: _____

Title: _____

APPROVED BY PINNACLE BANK:

By: _____

Name: _____

Title: _____