

WHEN RECORDED, RETURN TO  
Arizona Department of Housing  
Attn: Rental Program Administrator  
1110 W. Washington, Suite 310  
Phoenix, AZ 85007

## **DECLARATION OF AFFIRMATIVE LAND USE AND RESTRICTIVE COVENANTS AGREEMENT**

This Declaration of Affirmative Land Use and Restrictive Covenants Agreement, dated this \_\_\_\_ day of \_\_\_\_\_, 201\_\_ by and between \_\_\_\_\_ whose address is \_\_\_\_\_ and its successors and assigns (the "Owner") and the State of Arizona, Arizona Department of Housing, a constituent department and an agency of the State of Arizona, together with any successor and/or assignees to its rights, duties and obligations (the "Department").

### **RECITALS**

- A. The Department has been designated as the housing credit agency for the State of Arizona for allocation of tax credits under the Low Income Housing Tax Credit Program. *See* A.R.S. §§ 41-3901 *et seq.*, and 35-728(B) and (E);
- B. The Owner undertakes the construction and/or rehabilitation of the Project more fully described in Paragraph 3, below.
- C. The Owner applied to the Department for an allocation of Tax Credits to the Project; and the Department relied on the representations made in the Owner's application for Tax Credits, the submittal for the Ten-Percent Cost Test, and submittal for Final Allocation of Tax Credits, including any documents, materials, reports, appraisals or studies, provided by Owner's in support of the Owner's application and qualification Tax Credits; and
- D. Section 42(h)(6) of the Code conditions a taxpayer's claim for tax credits upon execution and recordation of an Extended Low-Income Housing Commitment that binds the Owner and the Project to operation and use consistent with the program requirements described in Section 42 of the Code for a period of not less than 30 years after the year the Project is placed in service; and
- E. Based upon the Owner's representations, the Department has agreed to allocate Tax Credits to the Project, provided that the Owner, by entering into this Agreement, agrees to abide by requirements of the Tax Credit program as described by the Code, the QAP, and relevant Department Guidance, and the direction of the Department to enforce the same including but not limited to the affordability requirements, occupancy restrictions, project characteristics, and suitability of the units for occupancy;
- F. The Owner, under the terms of this Agreement, intends, declares, acknowledges, and covenants for itself, its successors and assigns that the warranties, covenants, obligations, and duties set forth herein, are covenants running with the Project land for the term stated herein and are binding upon all subsequent owners of the Project land for such term; [optional language for projects with gap

financing][In partial consideration for the agreement of the Department to loan funds for the Project, the Owner has agreed to be execute and record against the Project property a Declaration of Covenants, Conditions, and Restrictions for the purpose of binding the property to the program requirements for the source of the those funds;] and,

G. U.S. Department of Housing and Urban Development (“HUD”) has agreed to loan or guarantee funds for the Project that are secured by an interest in the Project real property on the condition that such security interest be senior in time and right to the interests arising under this Agreement except as otherwise required by Section 42(h)(6)(e)(i) of the Code.

## AGREEMENT

**NOW, THEREFORE**, in consideration of the mutual promises and covenants set forth, and of all other valuable consideration, the Owner and the Department agree as follows:

1. Incorporation. The above recitals are incorporated herein as a substantive portion of this Agreement.
2. Purpose. This Agreement shall satisfy the requirements of an Extended Low-Income Housing Commitment described in Section 42(H)(6) of the Code.
3. Definitions. Unless otherwise described in the Code, capitalized terms used in this Agreement shall be understood as follows:

“Agreement” means this Declaration of Affirmative Land Use and Restrictive Covenants Agreement.

“Applicable Fraction” means the same as the definition at Section 42(c)(1) of the Code.

“Code” means Sections 38(a) and 42 of the Internal Revenue Code of 1986, as amended and the applicable regulations of the U.S. Department of the Treasury, and relevant guidance of the Internal Revenue Service.

“Compliance Period” means the compliance period described in Section 42(i)(1) of the Code, as applicable to particular building(s) in the Project.

“Consent and Subordination Agreement” means the consent and subordination agreement attached to this agreement as Attachment III executed by the lender identified in a Mortgage or such other intercreditor or subordination agreement executed by and between the a lender and the Department.

“Department” means the State of Arizona or the Arizona Department of Housing as the context requires.

“Department Guidance” means guidance provided from time to time by the Department relevant to Tax Credits and other programs that it administers including the LIHTC Compliance Manual published and as revised or amended by the Department from time to time.

“Extended Use Period” means the same as the definition at Section 42(h)(6)(D) of the Code.

“Final Allocation of Tax Credits” means submittal to the Department and review relating to issuance of I.R.S. Form 8609.

“I.R.S.” means the Internal Revenue Service.

“Lender” means any provider of funds through a loan or grant, including a government lender other than the Department, for the purpose of developing the Project. “Lender” does not include an equity investor in the Project.

“Loan Documents” means the Promissory Note, Deed of Trust, and other documents executed by the Owner in favor of the Department for the purpose of memorializing and securing loans or grants of financial assistance by the Department for the Project.

“Low-Income Units” means residential rental units reserved for occupancy as defined in Section 42(i)(3)(A) of the Code.

“Market-Rate Units” means residential rental units other than Low-Income Units or Management Units.

“Management Units” means residential rental units other than Low-Income Units or Market-Rate Units that are reserved for occupancy by one or more persons that receive a salary or rent subsidy in return for maintenance or other services related to operation of the Project.

“QAP” means the Qualified Allocation Plan adopted by the Department pursuant to Section 42(m) of the Code and as revised from time to time.

“Tax Credits” means Low Income Housing Tax Credits and the Low Income Housing Tax Credit program as described in the Code.

“Project” means the project real property, including all buildings, improvements, and fixtures thereto, that are under common ownership and control, located within the City of [name], County of [name] at [street address] and commonly known as [project name] that is more specifically described in the Legal Description attached to this Agreement as Exhibit A.

“Section 8” means the program or holders of a voucher of family participation in Section 8 of the Housing Act of 1937 (see 24 CFR Pt. 982, the Housing Choice Voucher Program).

“Ten-Percent Cost Test” means the requirements described in Section 42(h)(1)(E) of the Code for the purpose of a binding commitment to allocate Tax Credits when the Project is “placed in service” as that term is used and understood in the Code.

4. Use Restrictions. The Owner covenants that for the term of this Agreement, the Property shall be used as a multifamily rental as follows:

a) Occupancy Restrictions. Project shall be operated in accordance with affordability requirements and occupancy restrictions set forth in Attachment II, Occupancy Restrictions and Project Unit Characteristics, which is incorporated and made part of this Agreement.

i) Minimum Set-aside Requirements. Consistent with Section 42(g)(1) of the Code, the Project shall meet the requirements of a “qualified low-income housing project” in that, subject to the election of the Owner:

(1) 20 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income; or

(2) 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.

b) Rent-restricted units. Low-income units shall be rent restricted such that the gross rent with respect to such unit does not exceed 30 percent of the imputed income limitation applicable to such unit as provided by Section 42(g)(2) of the Code.

c) Applicable Fraction. The Applicable Fraction shall not be less than [#] percent.

d) Tenants’ Rights.

- i) Low-Income Units shall be leased tenants on a nontransient basis. The leases shall be in writing, signed by the Owner or the Owner's agent and the tenant, and for a term of not less than six (6) months.
  - ii) The form of lease to be utilized by the Owner in renting any residential rental unit in the Project to any person who is intended to be a low-income tenant shall provide for immediate termination of the lease and eviction in accordance with Arizona Revised Statutes for failure to qualify as a low-income tenant as a result of any material misrepresentation made by such person with respect to the income certification, or any material misrepresentation made in conjunction with execution of the lease or the failure by such tenant to execute an income certification at least annually.
  - iii) Residential rental units in the Project will be rented or available for rental to the public on a continuous basis and no tenant shall be evicted without cause.
  - iv) No prospective tenant shall be denied occupancy solely because the person holds a Section 8 voucher or certificate.
- e) Program Requirements. In addition to any requirements described in Attachment II the Owner shall:
- i) operate the Project consistent with Tax Credit program requirements described in the Code, the QAP or Department Guidance; and
  - ii) maintain the Property as safe, decent, affordable housing that is suitable for occupancy in accordance with the requirements of Code, Department Guidance, and local law.

5. Term of Agreement

- a) The warranties, covenants, obligations, and duties described in this agreement shall commence on the earlier of the first day in the Compliance Period or the date of execution of this Agreement.
- b) Except as otherwise provided in paragraph 9 of this Agreement the warranties, covenants, obligations, and duties described herein with respect to any building that is part of the Project shall be in effect during the Extended Use Period.
- c) The Extended Use Period shall terminate on December 31, [enter year].

6. Monitoring and Enforcement. The Tax Credit program requires Department to conduct periodic monitoring and review of the Project for the purpose of determining compliance with Tax Credit program requirements. The Owner must comply with Department Guidance which describes in detail the monitoring and compliance requirements. Monitoring includes on-site inspections and review of documents supplied by the Project to the Department.

- a) Entry and Inspection. The Owner shall permit, during normal business hours and upon reasonable notice, any duly authorized representative of the Department to conduct on-site inspections of the Project land and improvements and to inspect any facility, book, and record of the Owner relating to the Project.
- b) Certifications. By March 15<sup>th</sup> of each year, or as otherwise may be required by the QAP, the Owner will submit such certifications as may be required and identified Department Guidance. In addition, Owner shall provide annually or at such other times as may be directed by the Secretary of the United States Department of the Treasury, or his designee, an Annual Project Certification Report, Rental Schedule and Annual Utility Certification, with such modifications as the Department may require based upon the rules or regulations established by the Secretary.

- c) Books and Records. The Owner shall keep and maintain at the Project all books and records required by the Code, the QAP, or other Department Guidance.
  - d) Information. The Owner shall submit any other information, documents or certifications that the Department shall deem reasonably necessary.
  - e) Monitoring Fees. The Owner further covenants and agrees to pay to the Department such fees in the amounts and at such times as the Department shall, in its sole discretion, reasonably determine and require to Owner to pay for the costs of monitoring the Project. Applicable monitoring fees may be revised from time to time by the Department through the QAP. Monitoring is required by Federal law and may be performed by the Department periodically, but monitoring fees shall be assessed no more frequently than annually.
7. Breach. The Owner covenants and agrees to inform the Department by written notice of any breach of the Owner's obligations hereunder within five (5) business days of first discovering any such breach. Violations shall be cured within the deadlines described in paragraph 8, below. If any such breach is not corrected to the satisfaction of the Department within the period of time specified by the Department, without further notice the Department may declare a default under this Agreement effective on the date of such declaration of default, and the Department may apply to any court, state or federal, for any of the remedies described in paragraph 8 of this Agreement.
8. Remedies. If Owner breaches any warranty, covenant, obligation, or duty set forth in this Agreement, and if such breach remains uncured for a period of ninety (90) days after notice thereof shall have been given by the Department, the Department shall be entitled to any or all of the remedies described below:
- a) If the Department determines that the Owner has taken and diligently continues corrective action and that the breach cannot be corrected within the 90-day period, the Department may, in its sole discretion, allow the Owner up to six (6) months after first notice to cure the breach;
  - b) If the breach is not cured within forty-five (45) days after notice to the Owner, the Department shall issue I.R.S. Form 8823 or otherwise notify the I.R.S. of noncompliance with Tax Credit program requirements by such other means as may be directed by the I.R.S. from time to time.
  - c) The Department may:
    - i) demand return of all funds provided by the Department to the project, plus interest at the maximum rate permitted by law, and/or an amount attributable to the increase in equity in the property attributable to the infusion of any State Housing Funds, utilized for any purpose;
    - ii) resort to any court having jurisdiction of the subject matter for specific performance of this Agreement, for an injunction against any violation of this Agreement, for an accounting, for the appointment of a receiver to take over and operate the property in accordance with the terms of this Agreement, or for initiation of foreclosure proceedings; or such other relief as may be appropriate, it being acknowledged by Owner that the beneficiaries of owner's obligations hereunder cannot be adequately compensated by monetary damages in the event of owner's breach of this Agreement, because the beneficiaries include the low-income families to be benefited by allocation of Tax Credits to the Owner. The Department shall be entitled to reimbursement of reasonable attorneys' fees and all costs incurred in any such judicial action in which the Department shall prevail. The Department shall require reasonable assurances of security for repayments required pursuant to this section in the form of a deed of trust for such property pursuant to 24 C.F.R. Pt. 92.252, which Owner shall execute as part of this Agreement.

- d) The Owner and the Department each acknowledge that the primary purposes for requiring compliance by the Owner with the restrictions provided in this Agreement are to assure compliance of the Project and the Owner with the Code, AND BY REASON THEREOF, THE OWNER IN CONSIDERATION FOR RECEIVING LOW-INCOME HOUSING TAX CREDITS FOR THIS PROJECT HEREBY AGREES AND CONSENTS THAT THE DEPARTMENT AND THE LOW-INCOME TENANT(S) (WHETHER PROSPECTIVE, PRESENT OR FORMER OCCUPANTS OF THE PROJECT) (OR EITHER OR ALL OF THEM) SHALL BE ENTITLED, FOR ANY BREACH OF THE PROVISIONS HEREOF, AND IN ADDITION TO ALL OTHER REMEDIES PROVIDED BY LAW OR IN EQUITY, TO ENFORCE SPECIFIC PERFORMANCE BY THE OWNER OF ITS OBLIGATIONS UNDER THIS AGREEMENT IN ANY ARIZONA STATE COURT OF COMPETENT JURISDICTION, the Owner hereby further specifically acknowledging that the beneficiaries of the Owner's obligations hereunder cannot be adequately compensated by monetary damages in the event of any default hereunder.
- e) Project Decertification. Notwithstanding anything in this entire Agreement to the contrary, upon the failure of the Owner to comply fully with the Code, the warranties, covenants, and declarations of obligations and duties contained herein or with all applicable rules, rulings, policies, procedures, regulations or other official statements promulgated or proposed by the United States Department of the Treasury, the IRS or the Department from time to time pertaining to the obligations of the Owner as set forth therein or herein, the Department may, and in addition to all of the remedies provided by law or in equity, request the IRS to decertify the Project for Tax Credits and to immediately commence recapture of the tax credit dollars heretofore allocated to the Project.
- f) Notwithstanding the foregoing and unless breach of the provisions of this Agreement is an express event of default under the Loan Documents, enforcement of this Agreement shall not serve as a basis for a declaration of default under the Loan Documents or acceleration of the mortgage note or result in any claim under the mortgage or claim against the Project, the mortgage note proceeds, any reserve or deposit made with the first mortgagee in connection with the mortgage loan, or against the rents or other income from the Project.

## 9. Termination

- a) Termination upon foreclosure or inability to present a qualified contract.
- i) Except as otherwise provided in subparagraph 5 hereof, the Extended Use Period for any building which is part of the Project shall terminate:
- (1) On the date the building is acquired by foreclosure (or instrument in lieu of foreclosure) unless the Internal Revenue Service (the "IRS") determines that such acquisition is part of an arrangement with the Owner (or any successor owner of the Project) a purpose of which is to terminate this Agreement during the term hereof, or
  - (2) On the last day of the one-year period beginning on the date (after the 14th year of the Compliance Period) the Owner, or any successor thereto, submits a written request to the Department to find a person to acquire the Owner's interest in the low-income portion of the building, if the Department is unable to present during such period a qualified contract (as defined in Section 42(h)(6)(F) of the Code) for the acquisition of the low-income portion of the building by any person who will continue to operate such portion as a qualified low-income building.
- b) The termination of the Extended Use Period pursuant to paragraphs 5 or 9(a) shall not be construed to permit before the close of the three-year period following such termination:

- i) the eviction or termination of tenancy (other than for good cause) of an existing tenant of any Low-Income Unit, or
- ii) any increase in the gross rent with respect to such Low-Income Unit not otherwise permitted by the Code.

10. Representations, Covenants and Warranties of Owner. The Owner hereby warrants and covenants that the warranties, covenants, and declaration of obligations and duties set forth herein may be relied upon by the Department and all persons interested in Project compliance under the Code. In performing its duties and obligations hereunder, the Department may rely upon statements and certificates of the Owner pertaining to occupancy of the Project. In addition, the Department may consult with counsel, and the authorization and protection in respect of any action taken or suffered by the Department hereunder in good faith and in conformity with the opinion of such counsel shall be applicable to the Department's reliance upon such opinion of counsel. The Owner further represents, covenants and warrants to the Department that:

- a) The Owner
  - i) is a [type of entity] duly organized under the laws of the State of [name state], and qualified to transact business within the State of Arizona pursuant to either Title 10 or Title 29, Arizona Revised Statutes;
  - ii) has the power and requisite authority to own its properties and assets as owned, where owned, and to carry on its business as now being conducted (and as now contemplated by this Agreement and the Loan Documents); and
  - iii) has the full legal right, power, and authority to execute and deliver this Agreement and the Loan Documents and to perform all undertakings of the Owner hereunder.
- b) The execution and performance of this Agreement and the Loan Documents by the Owner:
  - i) will not violate or, if applicable, have not violated any provision of law, rule or regulation, or any order of any court or other governmental agency; and,
  - ii) will not violate or, if applicable, have not violated any provision of any indenture agreement, mortgage, mortgage note or other instrument to which the Owner is a party or by which it or the Project is bound, and (iii) will not result in the creation or imposition of any prohibited lien, charge or encumbrance of any nature.
- c) The Owner will, at the time of execution and delivery of this Agreement, have good and marketable title to the real property and improvements constituting the Project free and clear of any lien or encumbrance (subject to encumbrances created pursuant to this Agreement, the Loan Documents or other permitted encumbrances).
- d) There is presently no action, suit or proceeding at law or in equity or by or before any governmental instrumentality or other agency now pending, or, to the knowledge of the Owner, threatened against or affecting it, or any of its properties or rights, which, if adversely determined, would materially impair the Owner's right to carry on business substantially as now conducted (and as now contemplated by this Agreement and the Loan Documents) or which would materially, adversely affect its financial condition. Neither the Owner, its principals, shareholders, managers, members or general partners, as the case may be, have any judgment entered against them which would, when recorded, constitute a lien against or otherwise impair the security of the Project.

- e) The Project qualifies as a residential rental property for the purposes of the Code; the residential rental units of which will be rented or available for rental on a continuous basis to members of the general public as further restricted by Attachment II hereto. The Project consists of one or more proximate buildings or structures containing one or more similarly constructed accommodations containing separate and complete facilities for living, sleeping, eating, cooking and sanitation which are to be used on other than a transient basis as the term is defined in the Code and facilities which are functionally related and subordinate to such accommodations. No actions will be taken by the Owner which will in any way affect the use of the Project.
- f) The date the Project was “placed in service” is [enter date].
- g) To the extent that the Project involves rehabilitation of existing residential rental units, relocation of tenants complies with all the requirements of the Uniform Relocation Act.
- h) The Project is in full compliance with the requirements of the Fair Housing Act Design Standards.
- i) Owner has read and is familiar with the provisions of the Code, the Qualified Allocation Plan, and relevant federal guidance and Department Guidance that describe the obligations and duties of the Owner to operate and maintain the Project in compliance with the requirements of the Tax Credit program and other program sources of funding for the Project.
- j) Owner reviewed the terms and conditions of this Agreement and seasonably notified all Lenders that execution of this Agreement, and specifically Attachment III, Consent and Subordination Agreement, is a condition precedent to Final Allocation of Tax Credits.
- k) Owner warrants that it has advised the holder of any Mortgage that the Project is a Tax Credit project and that as a condition of issuance of I.R.S. Forms 8609 by the Department such holder must execute the Consent and Subordination Agreement attached to this Agreement as Attachment III or such other agreement of similar terms and conditions satisfactory to the Department.
- l) Release and Indemnification. The Owner warrants, covenants, and agrees that it has not relied upon or sought any information from the Arizona Department of Housing, its successors and/or assigns, its agents, counsel or employees in conjunction with the application for, issuance of and reporting to the federal government of an allocation of Tax Credits. In conjunction with the Owner’s application and allocation of Tax Credits, the Owner acknowledges and agrees for itself and on behalf of any of its partners, limited partners, special limited partners, members, special members or any other constituent entity of Owner, and Owner’s successors and assigns that it shall hereby release the Department, its agents, counsel and employees from any claim, loss, demand or judgment as a result of allocation of federal low income housing tax credit dollars to the Project or the recapture of tax credit dollars by the Internal Revenue Service to include any interest and penalties thereon; and the Owner does hereby further agree for itself, and on behalf of any of its partners, limited partners, special limited partners, members, special members or any other constituent entity of Owner, and its successors and assigns to indemnify the Department, its agents, counsel and employees from any claim, loss, demand or judgment, to include reasonable attorney’s fees as a result of allocation of tax credit dollars by the Department in the event of an assessment and deficiency determination or otherwise by the Internal Revenue Service. Furthermore, Owner, and its successors and assigns to indemnify the Department, its agents, counsel and employees from any claim, loss, demand or judgment, to include reasonable attorney’s fees as a result or arising out of any activities undertaken pursuant to this Agreement.

11. Owner’s Obligations and Duties

- a) The Owner agrees that it will not knowingly take or permit to be taken any action which would have the effect, either directly or indirectly, of subjecting the Owner or the Project to non-compliance with of the Code. Moreover, Owner agrees to take any lawful action (including amendment of this Agreement as may be necessary in the opinion of the Department) to comply fully with pertinent law and with all applicable rules, rulings, policies, procedures, regulations or other official statements promulgated or proposed by the United States Department of the Treasury or the Internal Revenue Service from time to time pertaining to Owner's obligations under the Code and affecting the Project.
- b) The Owner agrees not to discriminate on the basis of race, creed, color, sex, age, handicap, marital status, or national origin in the leases for occupancy of the Project or in conjunction with the employment or application for employment of any person or persons for the operation and management of said Project, except as provided in Attachment II.
- c) The Owner agrees that Low-Income Units shall be of comparable quality to other residential rental units in the Project unless the Owner has elected to exclude such excess costs for non-comparable Low Income Units from eligible basis in accordance with the Code.
- d) As a condition of occupancy, the Owner shall require each applicant for tenancy of a Low-Income Unit to certify in writing to the Department that the person's sources and amount of income declared for the purposes of program eligibility are true and correct. Existing tenants of Low-Income Units shall be required to certify the same to the Department annually. In addition, the Owner shall require each applicant for tenancy to provide whatever other information, documentation, or certifications deemed necessary by the Department to verify the tenant's eligibility for occupancy of a Low-Income Unit.
- e) During the term of this Agreement, Owner shall comply with all federal, state and local laws, codes, ordinances, rules and regulations, conditions, and assurances, and shall keep and maintain in effect at all times any and all licenses, permits, notices, and certifications which may be required with regard to the Project. Furthermore, Owner shall abide by all requirements of its respective corporate form, its articles of organization and bylaws, and remain at all times in good standing with the agencies having regulatory jurisdiction over it.
- f) The Owner agrees that if it shall become aware of any situation, event or condition which would result in non-compliance of the Project or the Owner with Section 42 of the Code, then the Owner shall promptly give written notice thereof to the Department.
- g) Transfer Restrictions
  - i) Except as provided in subparagraphs (ii) and (iii), below, the Owner may sell, transfer or exchange the Project or individual buildings at any time, upon prior written consent, in a form satisfactory to the Department, such consent not to be unreasonably withheld or delayed. In addition, the Department will require the written agreement in advance of the transfer of the project to any buyer or successor or other person acquiring the Project or any interest therein that the transfer is subject to the requirements of this Agreement and otherwise subject to the requirements for a sale, transfer or exchange of a Tax Credit project under the Code. Notwithstanding the foregoing, nothing in this subparagraph shall affect the rights of the senior lender to approve the proposed transfer as required under a Mortgage.
  - ii) The Owner further covenants and agrees not to dispose of less than all of its interest in any building composing the Project.

iii) The Owner shall not demolish any portion of the Project or substantially subtract from any real or personal property comprising the Project; or permit the use of any residential rental unit for any purpose other than rental housing during the term of this Agreement.

iv) The Owner shall not grant commercial leases or licenses relating to the Project (other than commercial leases with respect to insubstantial portions of the Project on a square footage basis) or permit the sale, transfer, conveyance or other encumbrance of the Project or any portion thereof (except for Residential Rental Unit leases) during the effective term of this Agreement, provided that this covenant shall not apply to any encumbrance, conveyance or transfer in conjunction with a sale, transfer or other conveyance of the Project that complies with the requirements of the Loan Documents and this Agreement.

12. Condemnation and Eminent Domain. Subject to the written requirements of any Lender, the Owner represents, warrants and agrees that if the Project, or any portion thereof, shall be damaged or destroyed or shall be condemned or acquired for public use, the Owner will use its best efforts to repair and restore same to substantially the same condition as existed prior to the event causing such damage or destruction, or to relieve the condemnation, and thereafter operate the Project in accordance with the terms of the Loan Documents and this Agreement. The Department shall be a party to any agreement relating to the use of condemnation proceeds or insurance proceeds from damage to the Project to repair and restore the Project. Provided, however, that if more than 25% of the Project is damaged or destroyed, or shall be condemned or otherwise acquired for public use, the Owner shall not be obligated to repair or restore the Project. If the Owner chooses not to repair or restore the Project, then the Department may review the Project to determine compliance with the requirements of the Code.

13. Covenants Run with the Land; Successors Bound Thereby

- a) Upon execution and delivery by the Owner, the Owner shall cause this Agreement and all amendments and exhibits hereto to be recorded and filed in the official records of the county recorder's office in the county in which this Project is located and, if applicable, with the recording office of the appropriate Indian tribe if the Project is located on tribal land, and pay all fees and charges incurred in conjunction with recording of this Agreement and all addenda or amendments thereto. Upon recording, the Owner shall immediately transmit or cause to be sent directly from the recorder's office to the Department an executed original of the recorded Agreement showing the date, book and page number of recording. The Owner acknowledges and agrees that the Department will not issue IRS Form(s) 8609 constituting final allocation of the credit unless and until the Department has received a recorded executed original of this Agreement. Where pertinent, the Department may require Owner to furnish a preliminary title report for the Project prior to or after recordation of this Agreement.
- b) The Owner intends, declares and covenants, on behalf of itself and all future owners and operators of the Project and land upon which the Project is constructed that, during the term of this Agreement, all of the covenants and restrictions set forth in this Agreement regulating and restricting the use, occupancy and transfer of the Project (i) shall be and are covenants running with the Project, encumbering the Project and land upon which the Project sits for the term of this Agreement, and are binding upon the Owner's successors in title and all subsequent owners and operators of the Project and the land upon which the Project sits, (ii) are not merely personal covenants of the Owner, and (iii) shall bind the Owner (and the benefits shall inure to the Department and any past, present, or prospective low-income tenant of the project) and its and their respective successors and assigns during the term of this Agreement.

- c) The Owner hereby agrees that any and all requirements of the laws of the State of Arizona to be satisfied in order for the provisions of this Agreement to constitute deed restrictions and covenants running with the land shall be deemed to be satisfied in full, and that any requirements or privileges of estate or title are intended to be satisfied hereby, or in the alternative, that an equitable servitude has been created to ensure that these restrictions will run with the land. For the longer of the period this credit is claimed or the term of this Agreement (including, if applicable, the three year period described in paragraph 9 (Termination) hereof, each and every contract, deed or other instrument hereinafter executed conveying the Project or any portion thereof shall expressly provide that such conveyance is subject to this Agreement, provided, however, that the covenants contained herein shall survive and be effective regardless of whether such contract, deed, or other instrument hereafter executed conveying the Project or any portion thereof provides that such conveyance is subject to this Agreement.
- d) The Owner further covenants and agrees to obtain the consent of any prior recorded lien holder on the Project to this Agreement and the recording thereof, and such consent shall be a condition precedent to the issuance of the IRS Form(s) 8609 constituting final allocation of the credit to this Project.

#### 14. Subordination

- a) As a condition to Final Allocation of Tax Credits, the Department will require all senior Lenders to execute and record the Department's current form of a consent and subordination agreement, an example of which is set forth in Attachment III (a "Consent and Subordination Agreement"). Except for the Loan Documents and other Lender mortgages expressly permitted by the Department and which are not subordinated to the Agreement by a form of Consent and Subordination Agreement attached to this Agreement as Attachment III, the Owner warrants that it has not and will not execute any other agreement or otherwise become a party to such an agreement with provisions contradictory to, or in opposition to, the provisions hereof, and that in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations herein set forth and supersede the requirements and conflicts contained in any other agreement. In the event of a conflict between the provisions of this Agreement and the Loan Documents, the provisions of the Loan Documents shall control, except as provided in any executed Consent and Subordination Agreement.
- b) Notwithstanding anything in this document to the contrary, with the exception of the requirements in Section 42(h)(6)(e)(i) of the Code, the provisions this Agreement are expressly subordinate to the HUD insured mortgage or Deed of Trust, to the HUD Regulatory Agreement, and subordinate to all applicable HUD mortgage insurance (and Section 8 of the U.S. Housing Act of 1937, if applicable) regulations and related administrative requirements. In the event of any conflict between the provisions of this document and the provisions of any applicable HUD regulations, related HUD administrative requirements, or HUD/FHA loan documents, the HUD regulations, related to HUD administrative requirements, or HUD/FHA loan documents shall control.
  - i) In the event of foreclosure or transfer of title by deed in lieu of foreclosure, any and all land use covenants contained herein shall automatically terminate.
  - ii) Failure to comply with the land-use covenants contained herein will not serve as a basis for default on the HUD insured mortgage.
  - iii) Enforcement of the covenants herein will result in any claim against the Project, any reserve or deposit required by HUD in connection with the mortgage transaction, or the rents or other income from the property other than:

- (1) Available surplus cash, if the mortgagor is profit-motivated;
- (2) Available distributions and residual receipts authorized for release by HUD, if the mortgagor is limited distribution; or
- (3) Available residual receipts authorized by HUD, if the mortgagor is nonprofit.

iv) Any subsequent amendment to this document is subject to prior HUD approval. No action shall be taken in accordance with the rights granted herein to preserve the tax exemption of the interest on the notes or bonds (and/or tax credits), or prohibiting the Owner from taking any action that might jeopardize the tax-exemption (and/or tax credits), except in strict accord with the National Housing Act, applicable mortgage insurance regulations, the HUD/FHA loan documents, or if applicable, Section 8 of the U.S. Housing Act of 1937 and the regulations thereunder.

15. Effect of Other Restrictive Covenants. In the event that the Project is subject declarations of restrictive covenants relating to other governmental sources of funding, then the more restrictive requirements shall apply. Upon the expiration or termination of any such declaration during the term of this Agreement, the affordability and other requirements of this Agreement shall apply to any unit bound by the expiring or terminating declaration.

16. Amendment. This Agreement may be amended with the prior written approval of the Department to correct factual errors contained herein or to reflect changes in pertinent law, the Code and any ruling promulgated thereunder. No amendment to this Agreement may be made without the prior written approval of the Department. The Owner hereby expressly agrees to enter into all amendments hereto which, in the opinion of the Department's legal counsel, are reasonably necessary or desirable to correct factual errors or for maintaining compliance under the Code.

17. Severability. The invalidity of any clause, part or provision of this Agreement shall not affect the validity of the remaining portions thereof.

18. Notices. All notices to be given pursuant to this Agreement shall be in writing and shall be deemed given when mailed by certified or registered mail, return receipt requested, to the parties hereto at the addresses set forth below, or to such other place as a party may from time to time designate in writing.

To the Department: Arizona Department of Housing  
1110 W. Washington Street, Suite 310  
Phoenix, AZ 85007  
Attention: Rental Programs Administrator  
[enter contact information for owner]

To the Owner:

The Department, and the Owner, may, by notice given hereunder, designate any further or different addresses to which subsequent notices; certificates or other communications shall be sent.

19. Governing Law. This Agreement shall be governed by the laws of the State of Arizona and, where applicable, the laws of the United States of America. In accordance with Arizona law, the Department and State of Arizona may cancel this Agreement without penalty or further obligation under the provisions of Arizona Revised Statutes Section 38-511. The parties further agree to use arbitration to the extent required by Arizona Revised Statutes Section 12-1518.



\_\_\_\_\_  
Notary Expiration Date

\_\_\_\_\_  
Signature of the Notary Public for the Department

[STAMP/SEAL]

SAMPLE

**ATTACHMENT I**

**LEGAL DESCRIPTION**

## ATTACHMENT II

### OCCUPANCY RESTRICTIONS AND PROJECT UNIT CHARACTERISTICS

This Attachment describes the specific affordability requirements and occupancy restrictions for the Project required by the Code and the project characteristics as described and represented to the Department by the Owner in the materials described in Recital Paragraph C. These affordability requirements and occupancy restrictions must be satisfied by no later than the close of the first year of the credit period. See I.R.C. § 42(f)(1). The Project shall be operated and maintained according to the unit mix and with the amenities described herein.

1. Residential Rental Unit Mix.

- a) The Owner acknowledges that the Project will contain # total residential rental units, of which # are occupied by a manager or maintenance individual and are considered management unit included in the common area, leaving # rent-commanding units. Of the # rent-commanding units, # are to be rented at market rates and # at restricted, low-income rents.
- b) The Project will contain Gross Floor Area of # square feet and Net Rentable Area of # square feet. The project will consist of # # -story buildings, each containing residential units. The project's unit mix will include # two-bedroom one-bathroom units, each containing # square feet, # three-bedroom two-bathroom units each containing # square feet, and # four-bedroom two-bathroom units each containing # square feet.

2. Priority Occupancy for Low-Income Tenants with Special Needs. At least #% of the Low-Income Residential Rental Units of the Project shall be occupied (or treated as occupied) by individuals or individuals or families, where at least one member of the individual or family meets one or more of the following criteria (enter number of residential rental units after each):

- a) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by homeless individual(s) or families meaning a person(s) who has lived a) in places not meant for human habitation such as cars, parks, sidewalks, abandoned buildings, etc.; b) in an emergency shelter facility; c) in a transitional housing facility (not permanent housing);
- b) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by seriously mentally ill persons, meaning adults whose emotional or behavioral functioning is so impaired as to interfere with their capacity to remain in the community without supportive treatment. The mental impairment is severe and persistent and may result in a limitation of their functional capacities for primary activities of daily living, interpersonal relationships, homemaking, self-care, employment or recreation. The mental impairment may limit their ability to seek or receive local, state or federal assistance such as housing, medical and dental care, rehabilitation services, income assistance, or protective services;
- c) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by seriously emotionally disturbed persons meaning persons between birth and age 18 who currently or at any time during the past year have had a diagnosable mental, behavioral, or emotional disorder that resulted in a functional impairment which substantially interferes with or limits the person's role or functioning in family, school, or community activities. Seriously emotionally disturbed persons are to be certified by a referral agency recognized by the Department;

- d) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by developmentally disabled persons meaning persons suffering from a severe, chronic condition attributable to a physical or mental impairment manifesting itself before the age of 22 and likely to continue indefinitely. Developmentally Disabled Persons are to be certified by a referral agency recognized by the Department;
- e) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by victims of AIDS/HIV, as certified by a licensed M.D.;
- f) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by victims of domestic violence, as certified by referral agency recognized by the Department;
- g) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by victims of chronic substance abuse, as certified by a referral agency recognized by the Department;
- h) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by physically disabled persons suffering from a physical impairment that substantially limits one or more major life activity or have a record of such impairment.

3. Priority Occupancy for Elder and Senior Low-Income Tenants

- a) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by individuals or families, where at least one individual in each unit will be 55 years of age or older.
- b) At least #% of the Low-Income Units of the Project shall be occupied (or treated as occupied) by individuals in each unit who are 62 years of age or older and are receiving supportive services.

4. Income Restrictions for Tenants of Low-Income Units

- a) At least # Low-Income Residential Rental Units, comprising # [#]-bedroom units and # [#]-bedroom units in the Project, shall be occupied (or treated as occupied as provided herein) by individuals or families whose income is 40% or less of the area median gross income as determined in accordance with the Code (said tenants to be referred to herein, collectively, as "40% AMGI low-income tenants").
- b) In addition to any set-asides stated above, at least # Low-Income Residential Rental Units, comprising # [#]-bedroom units and # [#]-bedroom units in the Project, shall be occupied (or treated as occupied as provided herein) by individuals or families whose income is 50% or less of the area median gross income as determined in accordance with the Code (said tenants to be referred to herein, collectively, as "50% AMGI low-income tenants").
- c) In addition to any set-asides stated above, all the remaining Low-Income Residential Rental Units (i.e., # units in the event there is a unit occupied by a manager of the Project, otherwise # units), comprising # [#]-bedroom units and # [#]-bedroom units in the Project, in each participating building of the Project shall be occupied (or treated as occupied as provided herein) by individuals or families whose income is 60% or less of the area median gross income as determined in accordance with the Code.
- d) The determination of whether an individual or family remains a low-income tenant at one of the AMGI levels specified in subparagraphs (a), (b), and (c), above ("a stated AMGI level"), shall be made at least annually on the basis of the current certified income of such the AMGI low-income tenant(s) and the current year applicable income limit. Any Low-Income Residential Rental Unit occupied by a individual or family who is at a stated AMGI level at the commencement of occupancy shall continue to be treated as if occupied by a qualifying low-income tenant so long as the qualifying tenant's income does not increase above 140% of the current year applicable income limit. For each qualifying

tenant whose income subsequently exceeds 140% of the current year applicable income limit, such qualifying tenant's Low-Income Residential Rental Unit will continue to be treated as if occupied by a tenant with income at the stated AMGI level so long as during the period of noncompliance each available Low-Income Unit of a comparable or smaller size is rented to a tenant who is at the stated AMGI level. Once the percentage of Low-Income Units in the project (excluding the over-income units) equals the percentage of Low-Income Units set-aside for the stated AMGI level, failure to maintain the over-income units as low-income units has no significance.

Amenities and Design Features: The Owner acknowledges that the following amenities and design features will be included in the Project upon completion of construction:

- e) Project parking will consist of # total spaces.
- f) Agreed upon Amenities for the project will be as follows:
  
- g) Agreed upon Design Features specifically installed in the project include:

### ATTACHMENT III

When recorded return to:

Arizona Department of Housing  
Attn: Rental Program Administrator  
1110 W. Washington Street, Suite 310  
Phoenix, AZ 85007

#### **FORM OF CONSENT AND SUBORDINATION AGREEMENT**

THIS CONSENT AND SUBORDINATION AGREEMENT ("Agreement"), dated this \_\_\_\_ day of \_\_\_\_\_, 201\_\_ by and between [Lender], a [type of entity] and its successors and assigns (the "Lender") and the State of Arizona, Arizona Department of Housing, a constituent department and an agency of the State of Arizona, together with its successor and/or assignees to its rights, duties and obligations (the "Department"); and acknowledged to by [name of owner] a [state] [type of entity] ("Owner").

#### RECITALS

- A. The Department has been designated by the State of Arizona pursuant to Arizona Revised Statute Section 41-3901 *et seq.*, and by the Arizona Revised Statutes Section 35-728(B) and (E) as the designated housing credit agency for the State of Arizona for allocation of tax credits under the Low Income Housing Tax Credit program ("Tax Credits") as described in Sections 38(a) and 42 of the Internal Revenue Code of 1986, as amended and the United States Department of the Treasury Regulations (collectively the "Code");
- B. The Owner is or shall acquire a fee or lessee's interest in a \_\_\_\_\_ unit residential rental housing project located on lands within the City of \_\_\_\_\_, County of \_\_\_\_\_, State of Arizona, the legal description of which is more particularly set forth in the Deed of Trust (as hereafter defined), and is incorporated herein by this reference (the "Project");
- C. In connection with the Owner's acquisition of its interest in the Project, the Lender made a loan in the original principal amount of \$ \_\_\_\_\_ to Owner (the "Loan"). The Loan is evidenced by that certain promissory note in the original principal amount of \$ \_\_\_\_\_ made by the Owner to the order of the Lender (the "Note");
- D. The Owner's repayment of the Loan and performance of the terms of the Note is secured by a lien on the Project created by that certain Deed of Trust, Assignment of Rents and Security Agreement dated \_\_\_\_\_, 201\_\_ and recorded on \_\_\_\_\_, 201\_\_ in the official records of the State of Arizona, County of \_\_\_\_\_ Recorder's Office at Instrument No. \_\_\_\_\_ (the "Deed of Trust") (the Note, the Deed of Trust and each and every other document and instrument executed by the Owner in connection with the making of the Loan by the Lender are collectively referred to as the "Lender Loan Documents");
- E. The Department and the Owner have entered into that certain Declaration of Affirmative Land Use And Restrictive Covenants Agreement dated \_\_\_\_\_, 201\_\_, and recorded in the official records of the State of Arizona, County of \_\_\_\_\_ Recorder's Office, Instrument No. \_\_\_\_\_ (the "Declaration") pursuant to which, under the terms of the Declaration, the Department shall allocate federal tax credits under the Low Income Housing Tax Credit program ("Tax Credits") as described in

Sections 38(a) and 42 of the Internal Revenue Code of 1986, as amended (collectively, the "Code") to the Project;

F. The allocation of the Tax Credits to the Project by the Department is of material benefit to the Lender;

G. Certain provisions of the Declaration are required by federal law to protect the rights of the Project's tenants in the event the Project is acquired by foreclosure or instrument in lieu of foreclosure; and

H. The Department requires the execution and delivery of this Agreement by the Lender and the Owner as a condition to the Department's entering into the Declaration.

**NOW, THEREFORE**, in consideration of the premises and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

#### AGREEMENT

1. Accuracy of the Recitals. The parties hereby acknowledge the accuracy of the Recitals which are incorporated herein by this reference.

2. Consent to Execution. The Lender hereby consents to the execution by the Owner of the Declaration.

3. Subordination. The Lender hereby subordinates its lien(s) to the rights and interests created pursuant to Section 4(b) of the Declaration such that a foreclosure (or the execution of an instrument in lieu of foreclosure) shall not extinguish such rights and interests.

4. Acknowledgment and Agreement Regarding Three-Year Period After Termination. The Lender acknowledges and agrees that pursuant to Section 8(a) of the Declaration, the Declaration will terminate on the date the project is acquired by foreclosure or instrument in lieu of foreclosure (unless it is determined that such acquisition is part of an arrangement with the Owner a purpose of which is to terminate such period); provided, however, Lender hereby acknowledges and agrees that the acquisition of the Project by any party by foreclosure or instrument in lieu of foreclosure shall be subject to the provisions of Section 8(b) of the Declaration, which provisions shall continue in full force and effect for a period of three (3) years from the date of such acquisition; provided, further, that such provisions shall not apply during such period if and to the extent that compliance therewith is not possible as a consequence of damage, destruction, condemnation or similar event with respect to the Project.

5. Lender Loan Documents. The Lender agrees that should any provision of any Lender Loan Document purport to limit or impair any rights of the Department under Section 8(b) of the Declaration, then such provision shall be null and void and of no force and effect.

6. Absolute Subordination. The Department shall have absolutely no duty or responsibility, and the priority of the provisions of Section 8(b) of the Declaration over the Lender Loan Documents shall in no way be affected or diminished by any failure of the Department regarding any act or omission by the Department relating to the provisions of Section 4(b) of the Declaration, the Owner or otherwise.

7. Controlling Instrument. In the event of any conflict between this Agreement and any of the Lender Loan Documents, this Agreement shall control.

8. Successors, Assigns and Participants. This agreement applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, participants, successors and assigns.

9. Counterparts. This agreement may be executed in any one or more counterparts, each of which in the aggregate shall constitute one and the same Agreement.

10. Governing Law. This Agreement shall be controlled by, governed in accordance with and enforced under the internal laws of the State of Arizona without regard to conflicts of law principles.

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

AGREED:

**SENIOR LENDER**

**THE DEPARTMENT**

[Lender], a [state][entity type]

By:

\_\_\_\_\_  
Lender's Authorized Signature  
Name: [Print Name, Authority]

\_\_\_\_\_  
Michael Traylor, Director

ACKNOWLEDGED:

**OWNER**

[Owner], a [state][entity type]

By: [G.P. or MM], a [state][entity type] its  
General Partner[Managing Member][Sole  
Member]

By:

\_\_\_\_\_  
Owner's Signature  
Name: [Print Name, Authority]

ACKNOWLEDGEMENTS ON FOLLOWING PAGE:

STATE OF ARIZONA            )  
  ) ss  
County of Maricopa         )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_, before me, a Notary Public, personally appeared \_\_\_\_\_, known to me or satisfactorily proven to be the person whose name is subscribed to this instrument and acknowledged that he executed the same. If this person's name is subscribed in a representative capacity, it is for the principal named and in the capacity indicated.

\_\_\_\_\_  
Notary Expiration Date

\_\_\_\_\_  
Signature of the Notary Public for the Lender

[STAMP/SEAL]

STATE OF \_\_\_\_\_         )  
  ) ss  
County of \_\_\_\_\_         )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_, before me, a Notary Public, personally appeared \_\_\_\_\_, known to me or satisfactorily proven to be the person whose name is subscribed to this instrument and acknowledged that he executed the same. If this person's name is subscribed in a representative capacity, it is for the principal named and in the capacity indicated.

\_\_\_\_\_  
Notary Expiration Date

\_\_\_\_\_  
Signature of the Notary Public for Owner

[STAMP/SEAL]

STATE OF ARIZONA            )  
  ) ss  
County of Maricopa         )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_, before me, a Notary Public, personally appeared Michael Traylor, known to me or satisfactorily proven to be the person whose name is subscribed to this instrument and acknowledged that he executed the same. If this person's name is subscribed in a representative capacity, it is for the principal named and in the capacity indicated.

\_\_\_\_\_  
Notary Expiration Date

\_\_\_\_\_  
Signature of the Notary Public for the Department

[STAMP/SEAL]