

INTERCREDITOR AND
SUBORDINATION AGREEMENT

THIS **INTERCREDITOR AND SUBORDINATION AGREEMENT** (this "**Agreement**") is made as of _____, 20__, by and among _____, having an address at _____ (such entity, together with any subsequent holder of the Bank Loan Documents (hereinafter defined), the "**Bank**"), **KENTUCKY HOUSING CORPORATION**, a de jure municipal corporation and political subdivision of the Commonwealth of Kentucky, having an address at 1231 Louisville Road, Frankfort, Kentucky 40601 (such entity, together with any subsequent holder of the KHC Loan Documents (hereinafter defined), "**KHC**") and _____ having an address at _____ ("**Borrower**").

PRELIMINARY STATEMENT

A. Borrower is the owner of the real property, personal property and improvements located on the real estate more fully described on Exhibit A attached hereto and incorporated herein (the "Property").

B. KHC has made or is about to make a loan to Borrower pursuant to the terms and conditions of a loan agreement (the "KHC Loan Agreement"), in the original principal amount of \$ _____ (the "KHC Loan"), which KHC Loan is evidenced by a Promissory Note, dated as of _____, 20__ made by Borrower to KHC in the amount of the KHC Loan (the KHC Note") secured in part by a Real Estate Mortgage dated _____, 20__ of record in Mortgage Book ____, Page ____, in the Office of the Clerk of _____ County, Kentucky, (the "KHC Mortgage"), an Assignment of Rents and Leases dated _____, 20__, recorded in Deed Book ____, Page ____ in the office aforesaid (the "KHC Assignment"), and by UCC-1 Financing Statements (the "KHC Financing Statements") recorded in the Kentucky Secretary of State's office. The KHC Loan Agreement, KHC Note, KHC Mortgage, the KHC Assignment and the KHC Financing Statements shall sometimes be hereinafter collectively referred to as the "KHC Loan Documents".

C. Bank has made or is about to make a loan to Borrower pursuant to the terms and conditions of a loan agreement (the "Bank Loan Agreement") in the amount of up to _____ Dollars (\$__.00) (the "Bank Loan") which Bank Loan is evidenced by a Promissory Note dated _____, 20__ in the amount of the Bank Loan (the "Bank Note") secured in part by a _____ dated _____, 20__, of record in Mortgage Book ____, Page ____ in the aforesaid clerk's office (the "Bank Mortgage"), an Assignment of Rents and Leases dated _____, 20__, recorded in Deed Book ____, Page ____ in the office aforesaid (the "Bank Assignment"), and by UCC-1 Financing Statements (the "Bank Financing Statements") recorded in the Kentucky Secretary of State's office. The Bank Loan Agreement, Bank Note, Bank Mortgage, the Bank Assignment and the Bank Financing Statements shall sometimes be hereinafter collectively referred to as the "Bank Loan Documents".

D. As a condition precedent to Bank's disbursement of the proceeds of the Bank Loan, KHC has agreed to subordinate the KHC Loan Documents to the extent of its interests in the Property and in all respects to the liens and security interests of the Bank Loan Documents.

E. It is of substantial benefit to KHC and to Borrower to enter into this Agreement with Bank.

F. KHC and Bank desire to set forth certain of their respective rights with respect to the Property.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements set forth herein and for other good and valuable consideration, the mutuality, receipt and sufficiency of which are hereby acknowledged, the parties hereto do hereby agree as follows:

1. *Disbursement of Loan Proceeds.* In addition to the disbursement procedures (the "Disbursement Provisions") set forth in the Bank Loan Agreement and the KHC Loan Agreement, the parties hereby agree and acknowledge that the proceeds of the Bank Loan and the KHC Loan shall be disbursed as follows:

a. If applicable, a partial disbursement of proceeds from the Bank Loan shall be disbursed first for the acquisition of the Property; then

b. Until all of the proceeds of the KHC Loan have been fully disbursed, KHC shall disburse from the KHC Loan pursuant to the draw request from the Borrower and approved by KHC; then

c. After the proceeds of the KHC Loan have been fully disbursed, Bank shall disburse the remaining proceeds of the Bank Loan pursuant to the draw request from the Borrower and approved by the Bank; and

d. It is the intent of the parties hereto that the provisions of this Paragraph 1 shall supplement, rather than supersede, the Disbursement Provisions; provided however, that if there is any conflict between the provisions of this Paragraph 1 and the Disbursement Provisions of the Bank Loan Agreement or the KHC Loan Agreement, the provisions of this Paragraph 1 shall govern.

2. *Priority of Mortgages.* Notwithstanding (a) the time, place, order of execution or recordation of the Bank Loan Documents or the KHC Loan Documents, or the method of creation, attachment or perfection of the respective liens granted pursuant thereto or the invalidity, unenforceability, avoidability or recharacterization of the liens granted pursuant thereto, (b) any terms or provisions of the Bank Loan Documents or the KHC Loan Documents to the contrary, or (c) any law, rule or regulation of any applicable governmental body to the contrary, the Bank, KHC and Borrower hereby confirm and agree that: (i) the lien of the KHC Loan Documents (including, without limitation, any protective advances made thereunder and any post-petition interest accrued upon a bankruptcy event is hereby expressly made subject and

subordinate in priority to the lien of the Bank Loan Documents (including, without limitation, all liens securing any protective advances made thereunder); (ii) the KHC Loan shall be subject and subordinate in payment to the Bank Loan (provided, until a bankruptcy event occurs or until KHC receives notice from Bank that a default has occurred, KHC shall have the right to all payments due on the KHC Loan and all other benefits of the KHC Loan Documents), and (iii) the terms and provisions of the KHC Mortgage and the KHC Loan Documents are expressly hereby made subject and subordinate to the terms and provisions of the Bank Mortgage and the Bank Loan Documents. Without limiting the foregoing, KHC agrees that all rights of KHC to the KHC Loan under the KHC Loan Documents shall be expressly subject and subordinate: (x) to the rights of the Bank to the Bank Loan and under the Bank Loan Documents; (y) to any and all protective advances made and other expenses incurred by Bank under the Bank Loan Documents; and (z) all extensions, modifications, consolidations, supplements, amendments, replacements, refinancings and restatements of and/or to the Bank Loan Documents; provided, the KHC Loan shall not be subordinate to any amendment or modification of the Bank Loan Documents that (A) increases the principal amount of the Bank Loan or (B) increases the interest rate on the Bank Loan. Protective advances made pursuant to the Bank Loan Documents are not deemed to be increases in the principal amount of the Bank Loan.

3. *Payments to Creditors.* Notwithstanding any other provision of this Agreement, the Borrower shall be entitled to pay, and the holder of the KHC Note shall be entitled to receive, so long as no default has occurred under the Bank Note or the Bank Loan Documents, the scheduled payments of interest and principal as and when due under the KHC Note. After the occurrence of a default under the Bank Note or the Bank Loan Documents and receipt by KHC or other holder of the KHC Note of written notice of such default from Bank, the Borrower shall not make, and the holder of the KHC Note shall not receive, any direct or indirect payments of principal, interest, fees or expenses under the KHC Note or the KHC Loan Documents or any other document or instrument evidencing or securing the same.

4. *Security.* Except for the KHC Loan and the Bank Loan, the Borrower shall not grant and the holder of the Bank Note shall not take any lien on or security interest in the Property without the prior written consent of KHC.

5. *Use of Property Payments; Turnover of Improper Payments.*

(a) Bank acknowledges that, pursuant to the KHC Loan Agreement, Borrower is to pay into an Operating Reserve Account, Replacement Reserve Account and Asset Management Compliance Guarantee Funding Account established with KHC (the “**Accounts**”) and that such Accounts will be held or disbursed by KHC pursuant to the KHC Loan Agreement. All funds that are in the Accounts before the earlier of the occurrence of a bankruptcy event or receipt by KHC of notification by Bank of a default on the Bank Loan, may be used by KHC or Borrower as set forth in the KHC Loan Agreement. Bank has no interest in or right to funds deposited in the Accounts before a bankruptcy event or notice of a default.

(b) Notwithstanding anything to the contrary, from and after the time Bank has notified KHC of a default under any of the Bank Loan Documents or if a bankruptcy event has occurred, Borrower shall not make any payment, whether by loan, by payment

into the Accounts or otherwise, to KHC and, after receipt of notification from the Bank of Borrower's default under the Bank Loan Documents, KHC shall not take or receive from Borrower or any other party, by set-off or in any other manner, the whole or any part of any monies, principal or interest, now or hereafter owing by Borrower to KHC the payment of which is secured by the Property. If KHC receives any such payment in violation of the immediately preceding sentence, KHC shall immediately pay, deliver and assign over to Bank any such payments for application to the Bank Loan in accordance with the Bank Loan Documents, and, until so delivered, the same shall not be commingled with any assets of KHC.

6. *Cure Rights.*

(a) The Bank and KHC shall each give the other notice of a default under its respective loan documents. Notwithstanding the notice requirements set forth in the preceding sentence of this paragraph, the failure of either the Bank or KHC to provide to the other any such notice shall not affect, limit, modify, or waive in any manner or respect (i) Borrower's obligations and/or default under the Bank Loan Documents or under the KHC Loan Documents or (ii) the Bank's and KHC's respective rights and other obligations under this Agreement, provided, however, that neither shall have any liability to the other for failure to provide such notice.

(b) The Bank and KHC shall each have the right, but not the obligation, to cure such default by payment or performance thereof within the greater of (i) the applicable grace or cure period given under the respective loan documents or (ii) ninety (90) days following receipt of such notice of default, provided, however, that such cure does not require the possession, operation or management of the Property. The Bank and KHC shall each accept such payment or performance by the other, if timely and complete, as though such payment or performance was effectuated by Borrower. Notwithstanding any such successful cure by either the Bank or KHC, as the case may be, each hereby absolutely and irrevocably waives, to the fullest extent permitted by applicable law, and agrees that it shall not seek to enforce in any manner whatsoever, any rights it may have, by contract, at law or in equity, to be subrogated to the rights of the other against Borrower under the respective loan documents or to the liens, interests, estates or rights on, in or to the Property until payment in full by Borrower of the indebtedness which was successfully cured.

7. *Additional Agreements.* For so long as the Bank shall encumber any portion of the Property:

(a) In the event that the Bank makes any or all insurance proceeds or condemnation awards available for the restoration of the Property, KHC shall make the insurance proceeds and condemnation awards available for the restoration of the Property and if the Bank holds such proceeds or awards and/or monitors the disbursement thereof, KHC agrees that the Bank shall also hold and monitor the disbursement of such proceeds and awards to which KHC is entitled; and

(b) KHC shall give a non-disturbance agreement to any tenant of the Property to which the Bank shall have delivered a non-disturbance agreement, and such non-disturbance agreement shall be on the same terms and conditions; and

(c) In the event of any foreclosure, KHC hereby expressly consents to and authorizes, at the option of the Bank, the sale, either separately or together, of all or any portion of the Property; and

(d) During any period the Bank is collecting payments from Borrower for the purpose of escrowing for (i) taxes, assessments or other charges imposed on the Property or (ii) insurance premiums due on the insurance policies required under any of the Bank Loan Documents, KHC shall not exercise its right, if any, under the KHC Mortgage to require such escrow (the Bank agreeing to collect only such amounts for those escrow accounts as are reasonable and as are customary under Bank's standard practice); and

(e) Notwithstanding anything to the contrary in any of the Bank Loan Documents, Bank approves the KHC Mortgage and all of the other pledges and grants of security interests set forth in the KHC Loan Documents. KHC hereby agrees that (i) the KHC Mortgage shall not be deemed to evidence approval by the Bank of any further encumbrance on the Property other than the liens and other encumbrances arising from the KHC Loan Documents, and (ii) notwithstanding anything to the contrary contained in the KHC Mortgage, KHC hereby consents to an increase in amount secured by the Bank Mortgage by the amount of any protective advances made thereunder and accrued and unpaid interest due thereunder and to any modification of the Bank Loan Documents entered into between the Borrower and the Bank; except only that the KHC Loan shall not be subordinate to any modification of the Bank Loan Documents that (A) increase the principal amount of the Bank Loan or (B) increase the interest rate on the Bank Loan (protective advances made pursuant to the Bank Loan Documents are not deemed to be increases in the principal amount of the Bank Loan); and

(f) Without the prior written consent of both the Bank and KHC, the parties shall not disturb the possession of any tenant or other occupant of the Property nor take any action that would terminate any lease or other agreement or other rights held by or granted to third parties with respect to the Property.

8. *Miscellaneous.*

(a) *Further Acts.* The parties to this Agreement shall cooperate fully with each other in order to promptly and fully carry out the terms and provisions of this Agreement. Each party shall from time to time execute and deliver such other agreements, documents or instruments and take such other actions as may be reasonably necessary or desirable to effectuate the terms of this Agreement.

(b) *No Waiver.* No failure or delay on the part of either the Bank or KHC in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other

or further exercise thereof or the exercise of any other right, power or remedy hereunder or under their respective loan documents.

(c) *Equitable Remedies.* Each party acknowledges that to the extent that no adequate remedy at law exists for breach of its obligations under this Agreement, the Bank and/or KHC shall have the right to obtain specific performance of the obligations of such defaulting party, injunctive relief or such other equitable relief as may be available.

(d) *Notices.* Any notice to be given under this Agreement shall be in writing and shall be deemed to be given when received or rejected by the party to whom it is addressed. Notices shall be in writing and sent by certified mail, hand delivery or by a nationally recognized courier service (in each case, with receipt of delivery or notation of rejection). Notices to the parties hereto shall be sent to the address set forth in the first paragraph hereof or such other address or addressees as shall be designated by such party in a written notice to the other parties sent in accordance with this paragraph.

A copy of all notices to the Bank shall also be concurrently given to:

Attention: _____.

A copy of all notices to KHC shall also be concurrently given to:

Lisa A. Beran, Esq.
Kentucky Housing Corporation
1231 Louisville Road
Frankfort, KY 40601

(e) *Inconsistent Provisions.* In the event of any conflict between the provisions of this Agreement and the provisions of any of the Bank Loan Documents and the KHC Loan Documents, the provisions of this Agreement shall control.

(f) *No Third Party Beneficiaries.* Only the Bank and KHC and their respective successors and assigns as holders of the Bank Mortgage and the KHC Mortgage shall have the right to enforce any provision of this Agreement. No other person, including, without limitation, Borrower, shall have any right to enforce any provision of this Agreement.

(g) *Counterparts.* This Agreement may be executed in two or more counterparts (which may be an original, a facsimile transmission or another electronically transmitted instrument) each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

(h) *No Oral Amendment.* No amendment, supplement or modification of this Agreement shall be effective against a party against whom the enforcement of such

amendment, supplement or other modification would be asserted, unless such amendment, supplement or modification was made in a writing signed by such party.

(i) *Provisions Severable.* In case any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein, and any other application thereof, shall not in any way be affected or impaired thereby.

(j) *Applicable Law.* This Agreement shall be construed in accordance with and governed by the laws of the Commonwealth of Kentucky, without regard to principles of conflict of laws. This Agreement may be recorded in the appropriate real estate records. Any legal suit, action or proceeding against the Bank or KHC arising out of or relating to this Agreement shall be commenced in the Circuit Court or the United States District Court, having jurisdiction for the county in which the Property is located and each party hereto expressly and irrevocably submits itself to the exclusive jurisdiction of such courts.

(k) *Termination.* This Agreement shall terminate upon the payment in full of the Bank Loan and the satisfaction of all obligations under the Bank Loan Documents. The Bank shall promptly thereafter deliver all property remaining in its possession, if any, to KHC. The parties agree to promptly execute and deliver each to the other an instrument in form for recordation evidencing such termination.

[The space below intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

BANK:

By: _____

Name:

Title:

STATE OF _____)

) SS:

COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20____,
by _____, as _____ of
_____, on behalf of the _____.

My commission expires: _____.

(SEAL)

Notary Public

KENTUCKY HOUSING CORPORATION

By: _____

Name:

Title:

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____, as _____ of Kentucky Housing Corporation, a de jure municipal corporation and political subdivision of the Commonwealth of Kentucky, on behalf of the corporation.

My commission expires: _____.

(SEAL)

Notary Public

BORROWER:

By: _____
Name:
Title:

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____, as _____ of _____, a _____, on behalf of said _____.

My commission expires: _____.

(SEAL)

Notary Public

This Instrument Prepared By:

Lisa A. Beran, Esq.
Kentucky Housing Corporation
1231 Louisville Road
Frankfort, KY 40601
(502) 564-7630

