

OPTION AGREEMENT

The OPTION AGREEMENT (this “Agreement”) is made and entered into by and between TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, a public and official agency of the State of Texas, established by Chapter 2306, Texas Government Code, with a mailing address of 221 East 11th Street, P.O. Box 13941, Austin, Texas 78722-3941 for and on behalf of the HOUSING TRUST FUND created by Texas Government Code §2306.201 (together with its successors, the “Department” or “DEPARTMENT”) and [_____], with a mailing address of _____ (together with its successors and assigns, the “Development Owner”).

WITNESSETH

WHEREAS, on _____, a _____, (the “Development Owner”) was duly organized to create the ownership and development of an affordable multifamily rental property more fully described in Exhibit “A” which is attached hereto and incorporated herein by reference for all purposes (the “Development”); and

WHEREAS, the Development Owner is defined and referred to in that certain Tax Credit Exchange Program Subaward Agreement (the “Exchange Agreement”) entered into by and among the Department, the Development Owner, dated the _____ day of _____, _____; and

WHEREAS, in entering into the Exchange Agreement the Department has, as provided for in the laws and rules of the United States of America and the applicable policy guidance and rulings of the United States Department of the Treasury and Internal Revenue Service (collectively the “federal requirements”), assumed significant legal responsibilities including, but not limited to, responsibilities for asset management and responsibility for recapture in the event that certain of the federal requirements are not fully and timely complied with by the Development Owner or any successor in interest to the Development Owner; and

WHEREAS, the State of Texas has anticipated certain requirements to be met in the award by the Department in the building, acquiring, or rehabilitating affordable housing property using state or federal resources assigned to the state as called for under the Texas Government Code §2306.185, §2306.6713, and §2306.6737; and

WHEREAS, The development and operation of the Development are further subject to the applicable laws and rules of the State of Texas and the policies of the Department applicable to the tax credit exchange program (the “Exchange”) created by §1602 of the American Recovery and Reinvestment Act of 2009 (“ARRA”), collectively the “state requirements;” and

WHEREAS, the Development Owner acknowledges that by granting the Department certain rights to acquire, as provided for herein, direct ownership in the Development Owner, the Development Owner will be specifically providing the Department with enhanced and material legal rights, protections, and notices with the effect that Department’s position in carrying out its responsibilities under the state and federal requirements will be facilitated and enhanced.

NOW, THEREFORE, IN CONSIDERATION OF THE COVENANTS AND PREMISES SET FORTH HEREIN, including the recitals, which are contractual in nature, and for certain other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and confessed, Development Owner and Department, each intending to be bound legally, do hereby agree as follows:

- 1) *Granting of a Purchase Option.* The Development Owner hereby irrevocably grants to the Department an option (*the “Option”*), to the fullest extent permitted by applicable state and/or federal law from time to time in effect, to acquire a _____ percent interest (_____%)¹ as a limited partner or member, of the Development Owner (the “Option Interest”), subject to the provisions hereof:
 - a. The purposes of granting this Option include, specifically and by way of emphasis and not by way of limitation:
 - i. When duly recorded, this will provide reasonable assurance that Department will receive notice of any transfer of the Development as is required under the Land Use Restriction Agreement;
 - ii. Will ensure that the long term viability of the Development will be maintained as required under state requirements; and
 - iii. Will allow the Department to be assured that any new owner will have the actual capacity and be of sufficient experience to provide for the needs of the low income tenants and meet the requirements called for under Land Use Restriction Agreement.
 - b. The right of the Department to exercise the Option may be transferred or assigned by the Department without prior notice, and Development Owner agrees to recognize any such transferee or assignee upon receipt of written

¹ The percentage of the option is based on the number of 30% units include in the original Exchange application and reflected in the Subaward Agreement

confirmation by the Department that such transfer or assignment has occurred.

- c. The Option may be exercised upon 90 days prior written notice from the Department or its assignee or transferee to the Development Owner at the point when the Department shall be notified of a potential sale of the Development.
- d. The Option shall terminate without action when all Land Use Restriction Agreements on the Development terminate.
- e. This Option is irrevocable until terminated by exercising the Option, failure to exercise the Option within the timeframe required, or by the termination called for under this Agreement.
- f. The Option may only be exercised in the event of a *bona fide* sales contract or transfer of the Development to a party that is not an Affiliate of the Development Owner, or a creditor at the time of the original closing of the Exchange Subaward.
- g. The purchase price for the option shall \$100 to be paid at the time of the exercising of the Option.

2) *Securities registration.* The Option has not been registered under either state or federal law as a security. The Development Owner has concluded, upon advice of its own counsel, that the granting of the Option is exempt from such registration.

3) *Representations, warranties, and covenants of the Development Owner.*

- a. The Development Owner is duly organized as a _____ and is validly existing under the laws of the State of _____.
- b. If organized in a state other than Texas, the Development Owner has qualified to do business in the State of Texas.
- c. The Development Owner is in good standing with the Texas Comptroller of Public Accounts.
- d. The execution, delivery, and performance of this Agreement have been authorized by all necessary corporate and other action on behalf of the Development Owner.
- e. The execution, delivery, and performance of this Agreement will not conflict with any of the Development Owner's constitutive documents or any agreement or order to which it is subject.
- f. This Agreement represents, the legal valid, and binding agreement of the Development Owner, enforceable in accordance with its terms, except as the same may be altered or affected by the laws of bankruptcy or insolvency.
- g. The Development Owner will file, or caused to be filed, the Agreement in the property records of the county where the Development is sited.
- h. The Development Owner will neither take nor permit any action that would result in any dilution of the Option Interest without the prior written consent of the Department, which consent may be withheld if the Department in its sole reasonable judgment, determines that such action is

not necessary to the financial and operational wellbeing of the Development Owner and its continuing ability to comply with all applicable state and federal requirements.

- i. The Development Owner specially finds, believes, and agrees that Department's actions in entering into this Agreement are valid at the time executed

4) *General*

- a. This Agreement is made and entered into subject to the laws of the State of Texas, except as federal law may otherwise apply.
- b. Venue for any suit or other action to enforce this Agreement lies exclusively in State District Court for and in Travis County, Texas.
- c. Nothing herein shall be deemed a waiver or abridgment or admission of a waiver or abridgment of the right of the Department (which includes the members of its governing board, its Executive Director, and its employees) to sovereign immunity and/or qualified immunity.
- d. If any provision hereof is found to be illegal, invalid, or unenforceable, that portion shall be deemed struck and omitted *ab initio* and the remainder hereof construed and administered so as most nearly to effectuate the intention of the parties.
- e. Except as otherwise specifically provided herein, all notices, demands or other communications hereunder shall be in writing and shall be deemed to have been given (i) two (2) Business Days after being deposited in the United States mail and sent by certified or registered mail, postage prepaid, (ii) one (1) Business Day after being delivered to a nationally recognized overnight delivery service, (iii) on the day sent by telecopier or other facsimile transmission, answerback requested, or (iv) on the day delivered personally, in each case, to the parties at the addresses set forth below or at such other addresses as such parties may designate by notice to each other:
 - (i) If to the Department, at:

Texas Department of Housing and Community Affairs
PO BOX 13941, Austin, Texas 78711-3941
221 East 11th St., Austin, Texas 78701
Attention: Teresa A. Shell, Housing Tax Credit Exchange
Administrator

(ii) If to the Development Owner, at:

Attention: _____

f. Unless the context clearly indicates to the contrary, the following rules apply to the construction of this Agreement:

1. Words importing the singular number include the plural number and words importing the plural number include the singular number;
2. Words of the masculine gender include correlative words of the feminine and neuter genders, and vice-versa;
3. The headings or captions used in this Agreement are for convenience of reference and do not constitute a part of this Agreement, nor affect its meaning, construction, or effect;
4. Words importing persons include any individual, corporation, partnership, limited liability company, joint venture, association, joint stock company, trust, unincorporated organization, or government or agency or political subdivision thereof;
5. Any reference in this Agreement to a particular "Article," "Section," or other subdivision shall be to such Article, Section, or subdivision of this Agreement unless the context shall otherwise require;
6. Each reference in this Agreement to an agreement or contract shall include all amendments, modifications, and supplements to such agreement or contract unless the context shall otherwise require; and
7. When any reference is made in this document or any of the schedules or exhibits attached hereto to the Agreement, it shall mean this Agreement, together with all other schedules and exhibits attached hereto, as though one document.
8. A Business Day is any weekday other than an official holiday on which the Department is closed for business.

9. Any other capitalized term used but not defined herein shall have the meaning given it in the Tax Credit Exchange Subaward Agreement.

g. The covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the heirs, legal representatives, successors and assignees of the respective parties hereto, except in each case as expressly provided to the contrary in this Agreement.

IN WITNESS WHEREOF, each of the Parties has executed this Agreement as of the date of the closing as contemplated in the Exchange Agreement:

DEPARTMENT:

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, a public and official department of the State of Texas

By: _____

Name: _____

Title: _____

Department Address: 221 E. 11th Street, Austin, Texas 78701

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 20__.

Notary Public in and for the State of Texas

DEVELOPMENT OWNER:

By: _____
[Name], [Title]

SUBSCRIBED AND SWORN TO before me this ____ day of
_____, 20__.

Notary Public in and for the State of Texas

DESCRIPTION OF DEVELOPMENT SITE

(attached behind)