

DISBURSEMENT AGREEMENT

This Disbursement Agreement (this "**Agreement**") is entered into as of _____, by and among _____, _____ ("**Borrower**" and/or "**Development Owner**"), _____ ("**Senior Lender**"), _____ (the "**Lender**") (the Senior Lender and any and all individual Lender listed here collectively referred to as "**Lenders**"), and the Texas Department of Housing and Community Affairs, as the statutorily designated agency distributing Exchange Subaward funds on behalf of the State of Texas ("**Department**")

RECITALS

A. **Senior Lender** has agreed to lend to Borrower, and Borrower has agreed to borrow from Senior Lender, certain amounts, not to exceed \$ _____ (the "**Senior Loan**" or "**Senior Loan Proceeds**"), for the purpose of obtaining financing to develop an apartment Development located as described in Exhibit A (the "**Development**"). The terms and conditions of Senior Lender's obligation to lend and the Borrower's commitment to borrow are set forth in an agreement dated of even date herewith, between Borrower and Senior Lender (the "**Senior Loan Agreement**"), and in the other Loan Documents (as such term is defined in the Loan Agreement).

B. Department has agreed to make a subaward under the Exchange Program to Borrower in the form of a grant (the "**Exchange Proceeds**") in the amount of \$ _____ for the purpose of financing the development of the Development. The terms and conditions of Department's obligations are set forth in the Tax Credit Exchange Subaward Agreement (the "**Exchange Agreement**") and the exchange Agreement is hereby incorporated by reference.

C. The parties hereto wish to enter into this Agreement to set forth their mutual agreement and understanding regarding the terms, circumstances, and conditions under which proceeds of the Senior Loan and the Exchange proceeds will be made available to Borrower to pay for development costs for the Development, as hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants, conditions, and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

DEFINITIONS

The capitalized terms used in this Agreement shall have the meanings ascribed to them in the Recitals hereto and in this Article I; provided that certain capitalized terms used and not defined herein shall have the meanings ascribed to them in Section 42 of the Code or in the relevant year Qualified Allocation Plan (Title 10 Texas Administrative Code Chapter 49 and/or 50).

“**Asset Manager**” means the Department or its designee, and any successor thereto chosen by the Department.

“**Budget**” means the final sources and uses for the Development as evidenced in the Department’s underwriting report attached hereto as **Exhibit B**. The Budget must clearly show the total Development Costs of the Development and the total amount of Exchange Program Funds awarded to the Development.

“**Eligible Costs**” means any of the line-item expenditures to be reimbursed with Exchange Program Funds and such additional expenditures as may be approved by the Asset Manager from time to time. The payment of such costs must be permissible under the Program Requirements. Eligible Costs for each residential rental building in a Development, determined at the time of Cost Certification, may not exceed 85% of such building’s eligible basis.

“**Exchange Proceeds**” means the Subaward of Exchange Program Funds in the aggregate amount to be made by the Department to the Development Owner to assist in the financing of the Construction of the Development pursuant to all of the terms and conditions of this Agreement.

“**Material Change Order**” means a change order to the Budget, construction contract or any of the other Construction Documents in connection with the construction of the Improvements that would result in an overall increase or decrease in excess of five percent (5%) in development cost, reflected in the Budget.

“**Required Placed In-Service Date**” (also, “Placed In-Service Date”) means the date by which at least one unit in each building in the Development that must be Low-Income Units, and be ready and available for occupancy in accordance with State and local laws

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

SECTION 1

1. **Budget**. The parties hereto agree and acknowledge that the budget attached hereto as **Exhibit “B”** is the construction budget for the Development and has been approved by Senior Lender and Submitted to the Department as part of the Exchange Agreement. Except as provided under the terms of the Exchange Agreement, the budget may not be modified or amended without Notice to all parties. The parties hereto agree that the funding

and construction schedule for the Development is attached hereto as Exhibit “D”. The form request to be used for purposes of this Agreement is attached hereto as Exhibit “C” (the “**Draw Request**”).

SECTION 2

2. **Amendments.** Neither the Senior Loan Agreement nor the Exchange Agreement (or any agreement issued pursuant to either of them) shall be amended or modified in any manner that would affect the amount, timing, and conditions to funding of the Senior Loan or the Exchange Proceeds without the prior written notification of each party to this Agreement.

SECTION 3

3. **Draw Request Procedure.**

a. Requests for draws to the Department will be handled under the terms set out in Article IV of the Exchange Agreement and outlined in this section. Subject to section 3.(b) below, funds may be drawn monthly or less frequently as necessary, until the full amount of Exchange Proceeds is exhausted. Subject to the terms of this Agreement, any expenditure which, when added to any prior expenditure, exceeds the Budget or any line item specified in the Budget, shall require the approval of the Asset Manager (as defined in the Exchange Agreement and designated by the Department), which approval shall not be unreasonably withheld.

b. Prior to the first Draw Request for Exchange Proceeds the Borrower must certify that it has acquired the Development Site, as defined in the Exchange Agreement, with funds from a source other than Exchange Proceeds. Thereafter, the Department will disburse funds as requested in draws up to the total amount of the Exchange Proceeds with Eligible Costs verified at cost certification.

c. The Development Owner may not request a disbursement of Exchange Proceeds from the Department until such funds are needed to pay costs of the Development. Accordingly, the amount of each Draw Request must be limited to the amount of money needed to pay costs actually incurred by the Development Owner at the time of the Draw Request and may not include amounts for prospective or future needs, or placed into escrow accounts or advanced in lump sums to the Development Owner.

d. Senior Lender will review documentation for incurred costs that match the draw request and approve any draw of Exchange funds. Department reserves the right to further review, question and approve draws of Exchange Proceeds, including using third-party Asset Managers to assist in such approval.

e. Development Owner, the Contractor and the Architect will certify such Draw Request and provide back-up documentation.

f. Draw Requests for Exchange funds will be done electronically through the TDHCA Housing Contract System. Development Owner will obtain access to the system and submit draw certification and documentation electronically. The Senior Lender may also be required to obtain access to the system and electronically approve the draws.

g. Draw Requests to Senior Lender will be conducted under the mechanism designed in the Senior Loan Documents.

h. Draw Requests shall be submitted for approval to the Asset Manager together with the completed and signed documents listed in Exhibit C, each in form and substance reasonably satisfactory to the Asset Manager. The Asset Manager may withhold any draw pending completion of a site inspection as deemed necessary by the Asset Manager or the Department to ensure that construction progress is being made in accordance with the Construction Documents.

i. The Department shall submit a request for Exchange Program Funds to the Treasury in an amount equal to the approved amount of the current Draw Request (not to exceed, in the aggregate, the amount of the Subaward) within five (5) Business Days of the later to occur of (i) approval of the Draw Request by Asset Manager or (ii) receipt by the Asset Manager of all of the completed and signed Draw Documents.

j. The Development Owner shall cooperate with the Asset Manager in obtaining and providing any additional documentation that may be required by the Treasury to approve the request for Exchange Program Proceeds.

k. The Development Owner acknowledges and agrees that no Exchange Program Proceeds may be disbursed after the Expiration Date outlined in the Exchange Agreement; provided, however, that the Expiration Date may be extended in the discretion of the Department if, and only to the extent that, the expiration date for funding subawards of Exchange Program Funds set forth in Section 1602(d) of the Recovery Act is extended beyond December 31, 2011. All Draw Requests shall be submitted to the Asset Manager at least sixty (60) Business Days prior to the Expiration Date.

l. The Department will not make any payments to the Development Owner for costs that:

- a) are prohibited under Program Requirements;
- b) are not in accordance with the terms of this Agreement;
- c) were requested and/or incurred after termination of this Agreement;
- d) were requested during the occurrence and continuation of an Event of Default; or

e) were requested and/or incurred less than sixty (60) Business Days prior to the Expiration Date.

m. Borrower authorizes and requests that Department and the Senior Lender each fund Draw Requests by deposit in Borrower's name into Borrower's construction account located at Senior Lender and operated under an agreement by Borrower and Senior Lender.

n. Upon prior written notice to the Development Owner, the Department is authorized to make modifications to the disbursement procedures and Disbursement Agreement set forth herein to establish additional requirements for payment of the Exchange Proceeds to the Development Owner as may be necessary or advisable for compliance with all Program Requirements.

o. [Notwithstanding any provision in the Exchange Agreement or in any of the Exchange Security Instruments to the contrary, the Department agrees with Senior Lender that if (i) an event or condition has occurred (whether or not constituting an Event of Default or Recapture Event under and as defined in the Exchange Agreement or in any of the Exchange Security Instruments) and is continuing such that the Department would be entitled to suspend or withhold its funding of a Draw Request, but (ii) Senior Lender has funded for or agreed to fund for the costs reflected in such Draw Request, then the Department agrees to fund such costs contained in the Draw Request, up to the total funding limit in the Exchange Agreement, provided that such funding would not constitute a violation by the Department of any applicable law. In consideration of such continued funding, the Senior Lender and Department will promptly communicate regarding the feasibility of the completion of the Development and will work together in good faith to continue to fund and complete the Development with the mutual desire to operate the Development in accordance with and subject to the LURA. So long as the Department and the Senior Lender are working in good faith to identify and implement a solution to complete the project and have it operated by a qualified operator as an affordable housing development, the Senior Lender will refrain from exercising its foreclosure rights under the loan documents. If the Senior Lender determines that such a resolution is not possible, it will give written notice of this determination to the Department. For the avoidance of doubt, the parties acknowledge and agree that the foregoing agreement to work together in good faith does not (i) obligate Senior Lender to complete or cause the completion of the Development, (ii) obligate the Senior Lender to fund any proceeds of its loan to the Development Owner if such funding would be contrary to its Loan Documents (including the requirements concerning sufficiency of funds available to fund construction to completion), (iii) limit in any way Senior Lender's rights, remedies and recourses set forth in its Loan Documents, (iv) limit the application of any provision terminating the LURA upon a foreclosure of Senior Lender's deed of trust as and to the extent set forth in the LURA, or (v)

obligate Senior Lender or any party to operate the Development in accordance with the LURA following any such termination thereof.]¹

SECTION 4

4. Draw Requests and Change Orders

a. The Development Owner shall obtain the prior written consent of the Department for any Material Change Order, regardless of whether any proposed disbursement of Exchange Proceeds would be affected by such Material Change Order. As a pre-condition to the Department's consent to any Material Change Order, the Development Owner shall submit to the Department (with a copy to the Asset Manager) a description of the curative actions to be taken by the Developer and the Contractor to accelerate construction progress and/or align the sources and uses of funds for the Development notwithstanding such Material Change Order (the "Action Plan"). The Action Plan shall be in form and substance reasonably satisfactory to the Department and shall be signed by the Developer and the Development Owner as evidence of their intent to implement or cause to be implemented the Action Plan as described. Failure of the Development Owner to submit and/or cause implementation of an Action Plan reasonably acceptable to the Department shall entitle the Department to suspend making disbursements of Exchange Program Funds under this Agreement until such time as an acceptable Action Plan has been received and implementation thereof has commenced.

b. The Department will not approve any Material Change Order which would, in the reasonable determination of the Department, (i) cause the Development to fail to meet the Required In-Service Date, (ii) be in violation of state or federal law, or (iii) prevent the Exchange Proceeds from being fully disbursed in a timely manner to the Development Owner in accordance with the requirements and procedures set forth herein by the Expiration Date.

SECTION 5

5. Developer Fee Payments

a. The Developer shall be entitled to receive the Developer Fee in an amount set forth in the Budget, not to exceed the limits identified in the QAP.

b. Up to seventy-five percent (75%) of the Developer Fee may be disbursed in accordance with the percentage of construction completion of the Development. The balance of the Developer Fee may be paid upon the later to occur of (i) the Department's receipt and acceptance of Cost Certification in form and substance satisfactory to the Department, or (ii) the reasonable determination

¹ Section 3(o) is optional language and should be removed unless agreed to by all parties.

by the Department that there are sufficient sources of funds available after payment of all other Development Costs to pay the balance of the Developer Fee (unless, in each case, the Development Agreement or the Senior Loan Documents provide for later payment).

SECTION 6

6. Miscellaneous.

a. **BORROWER SHALL INDEMNIFY DEPARTMENT AND SENIOR LENDER AND HOLD EACH OF THEM HARMLESS FROM ANY AND ALL CLAIMS, LIABILITIES, LOSSES, ACTIONS, SUITS OR PROCEEDINGS AT LAW OR IN EQUITY, OR ANY OTHER EXPENSE, FEES OR CHARGES OF ANY CHARACTER OR NATURE, WHICH IT MAY INCUR OR WITH WHICH EITHER OF THEM MAY BE THREATENED BY REASON OF ITS ENTERING INTO THIS AGREEMENT, AND IN CONNECTION THEREWITH, TO INDEMNIFY SENIOR LENDER AGAINST ANY AND ALL EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES AND THE COSTS OF DEFENDING OR APPEARING IN ANY ACTION OR RESISTING ANY CLAIM; PROVIDED, HOWEVER, THAT BORROWER SHALL HAVE NO OBLIGATION TO INDEMNIFY AND HOLD DEPARTMENT AND SENIOR LENDER HARMLESS FOR ANY SUCH LIABILITIES INCURRED BY, IMPOSED UPON OR ESTABLISHED AGAINST DEPARTMENT OR SENIOR LENDER, AS THE CASE MAY BE, FOR SENIOR LENDER'S WILLFUL MISCONDUCT OR GROSS NEGLIGENCE.**

b. The Disbursement Agreement shall provide the guidance for and shall take into account all applicable state payment laws, including but not limited to Chapters 403, 2107 and 2252 of the Texas Government Code, and any applicable federal payment laws.

c. Any notice, consent, request, demand or other communication required or permitted to be given hereunder must be in writing and shall be deemed sufficiently given or made when (i) delivered in person, (ii) sent by proper courier or national overnight delivery service with proof of delivery and courier fees paid by sender, (iii) sent by telecopy with telephonic and confirmation of receipt, or (iv) three days after deposit in the United States mail by first class mail, registered or certified, return receipt requested, postage prepaid, as follows:

Senior Lender:

With a copy to:

Lender:

With a copy to:

Lender:

With a copy to:

To Borrower: _____

With a copy to: _____

Department: TDHCA
P.O. BOX 13941
Austin, Texas 78711
ATTN: Teresa A. Shell
Housing Tax Credit Exchange Administrator

d. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE OF LAWS OF THE STATE OF TEXAS AND THE APPLICABLE LAWS OF THE UNITED STATES OF AMERICA.

e. This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof.

f. Time is of the essence for the performance of the obligations of the parties hereunder.

g. This Agreement is binding upon and shall inure to the benefit of the Department, Senior Lender, and Borrower and their respective successors and assigns.

h. The Parties hereto voluntarily, knowingly, irrevocably and unconditionally waive any right to have a jury participate in resolving any dispute (whether based upon contract, tort or otherwise) between or among them arising out of or in any way related to this agreement or any relationship among the parties hereto (or any of them). This provision is a material inducement to Senior Lender to provide the financing described herein or in the Loan Agreement. Both parties acknowledge that Binding Arbitration is not a part of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in multiple counterparts as the dates below written.

BORROWER

By: _____

Name: _____

Title: _____

Date: _____, 200__

SENIOR LENDER

By: _____

Name: _____

Title: _____

Date: _____, 200__

LENDER

By: _____

Name: _____

Title: _____

Date: _____, 200__

LENDER

By: _____

Name: _____

Title: _____

Date: _____, 200__

Department

Texas Department of Housing and Community
Affairs

By: _____

Name: _____

Title: _____

Date: _____, 200__

Exhibit A

DESCRIPTION OF DEVELOPMENT SITE

[Attached Behind]

CONSTRUCTION BUDGET

[Attached Behind]

DRAW REQUEST

All draws will be processed electronically through the TDHCA Contract System. All draws will be processed by TDHCA and electronically relayed to the Texas Comptroller of Public Accounts Office for disbursement. The Development Owner must have the following items completed prior to being able to request funds:

1. Application for Texas Identification Number (TIN) – Texas Comptroller of Public Accounts: <http://www.window.state.tx.us/taxinfo/taxforms/ap-152.pdf>
2. Vendor Direct Deposit Authorization Form – Texas Comptroller of Public Accounts: <http://www.window.state.tx.us/taxinfo/taxforms/74-176.pdf>
3. TDHCA Contract System Access Request Form (Required in order to access requisition system):http://www.tdhca.state.tx.us/home-division/forms/docs/0201-contract_Sys_Access.doc

An executed requisition form and back-up documentation must be attached electronically to each draw request within the TDHCA Contract System. Such requisition form will be provided by the Department.

FINALIZED CONSTRUCTION SCHEDULE