

After Recording Return to:

Housing and Community Services
Attn: Multifamily Finance and Resources Section
725 Summer Street, Suite B
Salem, OR 97301-1266

SPACE ABOVE FOR RECORDER'S USE

**HOUSING AND COMMUNITY SERVICES DEPARTMENT
STATE OF OREGON**

**OREGON AFFORDABLE HOUSING TAX CREDIT PROGRAM
DECLARATION OF LAND USE RESTRICTIVE COVENANTS**

THIS OREGON AFFORDABLE HOUSING TAX CREDIT PROGRAM DECLARATION OF LAND USE RESTRICTIVE COVENANTS, (this "Declaration"), dated as of the ____ day of _____, 20__, by [Owner Entity Name~], and its successors and assigns (the "Owner") is given as a condition precedent to the conditional award of Oregon Affordable Housing Tax Credits ("OAHTC") by the State of Oregon, acting by and through its Housing and Community Services Department, together with any successor to its rights, duties, and obligations (the "Department").

RECITALS

- A.** Owner is or shall be the owner of a [Total Number of Units~] unit rental housing development located on lands in the City of [City~], Oregon, County of [County~], State of Oregon, more particularly described in Exhibit A hereto, known as or to be known as [Project Name~] (the "Project").
- B.** The Department has been designated by the Governor of the State of Oregon as the administering agency for the State of Oregon for the OAHTC Program.
- C.** Owner has applied to the Department and received an OAHTC contingent award (the "Award") on the loan for the Project from its senior mortgage lender in an amount not to exceed [AMOUNT LONGHAND ALL CAPS~] Dollars (\$amount~).
- D.** Owner has represented to the Department in the Owner's OAHTC Application (the "Application") dated [Date~], that the Owner shall lease/rent the Project's residential units to individuals or families whose income is less than 80% of the area median gross adjusted income as determined by the United States Department of Housing and Urban Development ("HUD").
- E.** Owner, under this Declaration, intends, declares, and covenants that the regulatory and restrictive covenants set forth herein governing the use, occupancy, and transfer of the Project shall be covenants running with the land and Project for the term stated herein and binding upon all subsequent owners of the Project (or any part thereof) for such term, and are not simply personal covenants of the Owner.

DECLARATION

NOW, THEREFORE, in consideration of the promises and covenants hereinafter set forth and of other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree and the Owner declares in favor of the Department as follows:

Declaration of Land Use Restrictive Covenants – OAHTC

Project Name - Project #

Page 1 of 10

SECTION 1 – INCORPORATION; DEFINITIONS

- (a) The foregoing Recitals, Exhibit A and referenced documents are incorporated herein by reference.
- (b) All the words and phrases used in this Declaration shall have the same meaning as when used in Internal Revenue Code (“ IRC”) Section 42, ORS 317.097, Oregon Department of Revenue Administrative Rules chapter 150, and the OAHTC Administrative Rules (813-110) unless the context requires otherwise.
 - (1) "Rents Charged at the Market Interest Rate" means the rents that would be required, if the lender charged the market interest rate, in order to make the Project financially feasible.
 - (2) "Rent Reduction" means the amount rents are reduced from the Rents Charged at the Market Interest Rate as a result of the OAHTC subsidy.
 - (3) "Rent Pass Through" means the amount of Rent Reduction made available to tenants of the Project because of the reduced interest rate attributable to the OAHTC subsidy.

SECTION 2 - RECORDING AND FILING; COVENANTS TO RUN WITH THE LAND

- (a) Upon execution of this Declaration by the Owner and the Department, the Owner shall cause this Declaration and all amendments hereto to be recorded and filed in the official public land deed records of the county in which the Project is located, and shall pay all fees and charges incurred in connection therewith. Upon recording, the Owner shall immediately transmit to the Department an executed original of the recorded Declaration showing the date, deed book, and page numbers of record.
- (b) The Owner intends, declares, and covenants, on behalf of itself and all future Owners and Operators of the Project during the term of this Declaration, that this Declaration and the covenants and restrictions set forth in this Declaration regulating and restricting the use, occupancy and transfer of the Project (i) shall be and are covenants running with the Project, including the land thereof, encumbering the Project for the term of this Declaration, binding upon the Owner's successors in title and all subsequent Owners and Operators of the Project; (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 tenant of the Project) and its respective successors and assigns during the term of this Declaration. The Owner hereby agrees that any and all requirements of the laws of the State of Oregon to be satisfied in order for the provisions of this Declaration to constitute deed restrictions and covenants running with the land shall be deemed to be satisfied in full, and that any requirements of privileges of estate are intended to be satisfied, or in the alternate, that an equitable servitude has been created to insure that these restrictions run with the Project for the term of this Declaration. The covenants contained herein shall survive and be effective regardless of whether such contract, deed, or other instrument hereafter executed conveying the Project or portion thereof provides that such conveyance is subject to this Declaration.
- (c) The Owner covenants to obtain the consent to this Declaration of any prior recorded lien holder on the Project.

SECTION 3 - REPRESENTATIONS, COVENANTS AND WARRANTIES OF THE OWNER

The Owner hereby represents, covenants, and warrants as follows:

- (a) The Owner (i) is a [type of entity~] duly organized under the laws of the State of [State~], and is qualified to transact business under the laws of the State of Oregon, (ii) has the power and authority to own its properties

Declaration of Land Use Restrictive Covenants – OAHTC

Project Name - Project #

Page 2 of 10

and assets and to carry on its business as now being conducted, and (iii) has the full legal right, power and authority to execute and deliver this Declaration.

- (b) The execution and performance of this Declaration by the Owner (i) will not violate or, as applicable, has not violated any provision of law, rule or regulation, or any order of any court or other agency or governmental body, (ii) will not violate or, as applicable, has 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 encumbrance of any nature.
- (c) The Owner will, at the time of execution and delivery of this Declaration, have good and marketable title to the premises constituting the Project free and clear of any lien or encumbrance (subject to encumbrances created pursuant to this Declaration, any Loan Documents relating to the Project or other permitted encumbrances).
- (d) There is 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 its right to carry on business substantially as now conducted (and as now contemplated by this Declaration) or would materially adversely affect its financial condition.
- (e) The Project constitutes or will constitute an OAHTC Program qualified low-income building or qualified low-income project, as applicable, including as provided for in statute, in Oregon Administrative Rules (Chapter 813, Division 110, as amended), and applicable OAHTC Program manuals or directives of the Department.
- (f) The Owner represents, warrants and agrees that each unit in the Project contains complete facilities for living, sleeping, eating, cooking and sanitation (unless the Project qualifies as a single-room occupancy project or transitional housing for the homeless) which are to be used on other than a transient basis and that they will remain continuously habitable for the term of this Declaration.
- (g) The Owner agrees that all statements in the Application are true, correct and complete, and that the statements are made expressly for the benefit of the State of Oregon, acting by and through the Department, or otherwise, and for the Tenants of the Project.
- (h) Subject to the requirements of ORS 317.097, OAR 813-110 (as amended), and this Declaration, the Owner may sell, transfer, or exchange the entire Project at any time, but the Owner shall notify in writing and obtain the agreement of the transferee or any person with controlling interest therein that such acquisition is subject to the requirements of this Declaration. This provision shall not act to waive any other restriction on sale, transfer, or exchange of the Project or any portion of the Project. The Owner agrees that the Department may void any sale, transfer, or exchange of the Project if the buyer or successor or other person fails to assume in writing the requirements of this Declaration and the requirements of ORS 317.097 and OAR 813-110, as amended.
- (i) The Owner agrees to notify the Department at least 90 days prior to any sale, transfer, or exchange of the entire Project or any portion of the Project.
- (j) The Owner shall not demolish any part of the Project, substantially subtract from any real personal property of the Project, or permit the use of any residential rental unit for any purpose other than rental housing consistent with the provisions of this Declaration during the term of this Declaration unless required by law or unless the Department has given its prior written consent.

- (k) The Owner represents, warrants, and agrees that if the Project, or any part thereof, shall be damaged, destroyed, shall be condemned, or acquired for public use, the Owner will use its best efforts, subject to the rights of any mortgagee, to repair and restore the Project to substantially the same condition as existed prior to the event causing such damage or destruction, or to relieve the condemnation, and thereafter to operate the Project in accordance with the terms of this Declaration.
- (l) The Owner warrants that it has not and will not execute any other Declaration with provisions contradictory to, or in opposition to, the provisions hereof, and that in any event, the requirements of this Declaration are paramount and controlling as to the rights and obligations herein set forth and supersede any other requirements in conflict herewith.

SECTION 4 - INCOME RESTRICTIONS; RENTAL RESTRICTIONS

The Owner represents, warrants, and covenants throughout the term of this Declaration that:

- (a) All residential units shall be leased, rented or made available only to members of the general public whose annual adjusted household incomes are less than 80 percent of the area median income and, if the Owner has received an allocation of Low-Income Housing Tax Credits (“LIHTC”), the Owner agrees to further reduce the Project rents consistent with the LIHTC Reservation and Extended Use Agreement and any related LIHTC Declaration.
- (b) The determination of whether or not a tenant meets the income restrictions shall be made by the Owner or his designated agent, and appropriately documented to the satisfaction of the Department at least annually on the basis of the current income of said tenant, not to exceed 80% of household adjusted area median income.

SECTION 5 - RENT REDUCTION

The Owner represents, warrants and covenants that, throughout the term of this Declaration;

- (a) The Owner shall be in compliance with the rent limitations (i) established in the Department’s OAHTC Administrative Rules (OAR 813-110, as amended), as well as applicable Department manuals and directives, and (ii) when applicable, the rent limitations established pursuant to IRC Section 42.
- (b) Residential unit rents in the Project will be reduced annually by a total of at least \$[Total amount reduced~]. This Rent Reduction is calculated from the Rents Charged at the Market Interest Rate indicated in the Owner’s OAHTC Application. Such rents may be adjusted annually based on the percentage increase in the area median gross household adjusted income where the Project is located as announced by the Department of Housing and Urban Development. In no event, shall rents be required to decrease as a result of such adjustment below the Rent Reduction rates shown in the Application.
- (c) The Rent Pass Through per month per unit to respective tenants, in order to accomplish the Rent Reduction mandated in subsection (b) above will be an average amount of \$[Per unit reduction~] with the combination of all monthly Rent Pass Through to the tenants in the Project on an annual basis totaling not less than \$[Total amount reduced~].
- (d) The Owner shall comply with the Department’s OAHTC Administrative Rule 813-110-015(2), as amended, by ensuring that the Rent Reduction shall equal or exceed the amount of projected interest savings from the reduced interest rate loan, including as represented by Owner in its OAHTC Application.

SECTION 6 - TERM OF DECLARATION

Except as hereinafter provided, this Declaration shall commence immediately upon recordation and the Owner and its successors and assigns shall comply with all terms and conditions herein, including restrictive covenants and equitable servitudes created hereby, not later than the first day in the Project period on which any building which is part of the Project is placed in service. This Declaration, including the restrictive covenants and equitable servitudes created hereby, shall remain in full force and effect until [date approximately 20 years from this Declaration] or upon the expiration of the corresponding OAHTC, whichever is later. Notwithstanding the foregoing, this Declaration shall terminate on the date, if any, that the Project is acquired by foreclosure or instrument in lieu of foreclosure by other than a Related Person (as that term is defined in IRC Section 42), except that then current Project tenants shall be entitled to remain and be treated in a manner consistent with tenants covered by IRC Section 42 (h)(6)(E).

SECTION 7 - ENFORCEMENT OF DEPARTMENT'S OCCUPANCY RESTRICTIONS

- (a) The Owner agrees to permit, during normal business hours and upon reasonable notice, any duly authorized representative of the Department, to inspect any books and records of the Owner regarding the Project with respect to the incomes of the tenants which pertain to compliance with the Department's Occupancy Restrictions specified in this Declaration.
- (b) The Owner shall submit any other information, documents, or certifications requested by the Department that the Department shall deem reasonably necessary or appropriate to substantiate the Owner's continuing compliance with the terms and conditions of this Declaration.
- (c) The Department retains authority to waive or release any covenants, servitudes, or other rights or interests established under this Declaration (in whole or in part) at its sole discretion, notwithstanding any rights or interests of tenants or other third-parties established hereby, all of which are subordinate to the rights and interests of the Department established hereunder.
- d) Third-party beneficiaries under this Declaration shall have no claim, cause of action or other right of recourse against Department with respect to any action or lack of action taken by Department with respect to this Declaration, the OAHTC, the Award, or the Project, arising from their rights under this Declaration or otherwise.

SECTION 8 - COMPLIANCE OF OCCUPANCY RESTRICTIONS

- (a) The Owner covenants that it will not violate or permit any action that would result in a violation of the requirements of this Declaration, the OAHTC Program, applicable law, including but not limited to ORS chapters 317 and 456 (collectively the "ORS"), all related Administrative Rules as amended, and Department directives. Moreover, the Owner covenants that it will not violate or permit any action that would result in a violation of (and further covenants to take any lawful action, including amendment of this Declaration as may be necessary, in the opinion of the Department to comply fully with) all applicable laws, rules, rulings, policies, procedures, regulations or other official statements promulgated by HUD, the USDA, the United States Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS"), as well as any rules, rulings, policies, procedures, regulations or other official statements proposed and published from time to time by HUD, the USDA, Treasury and the IRS pertaining to the Owner's obligations and affecting the Project.
- (b) The Owner acknowledges that a primary purpose for requiring compliance by the Owner with restrictions provided in this Declaration is to assure compliance of the Project and the Owner with the OAHTC Program regulations and, where applicable, the requirements of the LIHTC Program, AND BY REASON THEREOF,

Declaration of Land Use Restrictive Covenants – OAHTC

Project Name - Project #

Page 5 of 10

THE OWNER IN CONSIDERATION FOR RECEIVING OAHTC FOR THIS PROJECT HEREBY AGREES AND CONSENTS THAT THE DEPARTMENT AND ANY INDIVIDUAL WHO MEETS THE INCOME LIMITATION APPLICABLE UNDER THE OAHTC PROGRAM (WHETHER PROSPECTIVE, PRESENT OR FORMER OCCUPANT) 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 DECLARATION IN A STATE COURT OF COMPETENT JURISDICTION. The Owner hereby further specifically acknowledges that the beneficiaries of the Owner's obligations hereunder cannot be adequately compensated by monetary damages in the event of any default hereunder.

- (c) The Owner hereby agrees that the representations and covenants set forth herein may be relied upon by the Department and all persons interested in Project and Owner compliance with this Declaration, including under applicable law.
- (d) The Owner covenants and agrees to take any and all actions reasonably required by the Department to substantiate the Owner's compliance with this Declaration, including but not limited to occupancy and rent restrictions as now constituted or subsequently amended and other occupancy and rent restrictions of the Department as now constituted or subsequently adopted with respect to the Project, and will pay promptly a reasonable fee to the Department for the Department's monitoring of the Owner's compliance based upon the Department's monitoring costs.
- (e) This Declaration may be enforced by the Department or its designee in the event the Owner fails to satisfy any of the requirements herein. In addition, the occupancy and rent restrictions of this Declaration shall be deemed a contract enforceable by one or more tenants as third-party beneficiaries of this Declaration. In the event the Owner fails to satisfy the requirements of this Declaration and legal costs are incurred by the Department or one or more of the tenants or beneficiaries, such legal costs, including attorney fees and court costs (including costs of appeal), are the responsibility of, and may be recovered from, the Owner.

SECTION 9 - MISCELLANEOUS

- (a) **Severability.** The invalidity of any clause, part, or provision of this Declaration shall not affect the validity of the remaining portions thereof.
- (b) **Notices.** All notices to be given pursuant to this Declaration 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: Oregon Housing and Community Services Department
ATTN: OAHTC PROGRAM
725 Summer St NE, Suite B
Salem, Oregon 97301-1266

To the Owner: [Redacted]
ATTN: [Redacted]
[Redacted]

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.

- (c) **Amendment.** The Owner agrees that it will take all actions necessary to effect amendment of this Declaration as may be necessary, including to comply with the ORS, IRC, and any and all applicable rules, regulations, policies, procedures, rulings, or other official statements pertaining to the OAHTC. The Department, together with the Owner, may execute and record any amendment or modification to this Declaration and such amendment or modification shall be binding on third-parties granted rights under this Declaration.
- (d) **Subordination of Declaration.** This Declaration and the restrictions hereunder are subordinate to the senior lender's permanent loan documents on the Project in an original principal amount not to exceed \$[Permanent loan amount +10%~], except insofar as IRC Section 42 (h)(6) otherwise requires (for example, existing low-income tenants in the Project retain tenancy rights at restricted rents for a three-year period). The Department may subordinate this Declaration to other financing, in its sole discretion, and such subordination shall be binding on all third-parties granted rights under this Declaration.
- (e) **Indemnity.** Owner shall save, hold harmless, indemnify and (subject to ORS chapter 180) defend the State of Oregon, Department and their officers, agents, employees, members and assigns, from all suits, actions, claims, losses or damages of whatsoever nature, kind or description related to this Declaration or resulting from or arising out of the acts, omissions, neglect or misconduct of Owner, its subcontractors, agents, or employees under this Declaration or related to the Project.
- (f) **Time of the Essence.** Time is of the essence in the performance by Owner of the terms and conditions of this Agreement.
- (g) **Attorney Fees.** In the event a lawsuit is instituted regarding this Declaration, the prevailing party in any dispute arising under this Declaration shall, to the extent permitted by law, be entitled to recover from the other its reasonable attorney fees and all costs and disbursements incurred at trial and on appeal. Notwithstanding any other provision in this Declaration or incorporated documents, reasonable fees shall not exceed the rate charged the Department by its attorneys.
- (h) **Governing Law; Venue: Consent to Jurisdiction.** This Declaration shall be governed by the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between Department and Recipient related to this Agreement shall be conducted exclusively within the Circuit Court of Marion County, Oregon (unless Oregon law requires that it be brought and conducted where the real property is located) or, if necessary, the United States District Court for the District of Oregon. In no event shall this provision be construed as a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. OWNER, BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.
- (i) **Survival of Obligations and Remedies.** The obligations of the Owner as set forth herein and in the Application shall survive the certification of the OAHTC and shall not be deemed to terminate or merge with the certification. Available remedies hereunder or otherwise available at law shall survive the termination of this Declaration.

[The balance of this page is intentionally left blank.]

IN WITNESS WHEREOF, the Owner and Department have caused this Declaration to be signed by its duly authorized representatives, as of the day and year first written above.

DEPARTMENT: **STATE OF OREGON**, acting by and through its **Housing and Community Services Department**

By: _____
Heather Pate, Manager
Multifamily Programs Section

STATE OF OREGON)
 : ss
County of Marion)

The foregoing instrument was acknowledged before me this ____ day of _____20__, by Heather Pate, who is the Manager of the Multifamily Programs Section, Housing and Community Services Department, on behalf of the Department.

NOTARY PUBLIC FOR OREGON
My Commission Expires: _____

[The balance of this page is intentionally left blank.]

OWNER:

[ENTITY NAME (IN CAPS)]
a [~non-profit/for-profit~] [type of entity~]
Tax ID: _____

By: _____
Title: _____

STATE OF OREGON)
 : ss
County of _____)

The foregoing instrument was acknowledged before me this ____ day of _____ 20__, by _____
_____ of _____, an _____, and that he/she executed the foregoing on
behalf of said Owner.

NOTARY PUBLIC FOR OREGON
My Commission Expires: _____

[The balance of this page is intentionally left blank.]

EXHIBIT A
[Property Description]

Real property in the County of _____, State of Oregon, described as follows: