



TAX CREDIT EXCHANGE WRITTEN AGREEMENT

AGREEMENT (this "Agreement") entered into this ___ day of _____, 2010 by and between The Commonwealth of Massachusetts, acting by and through the Department of Housing and Community Development ("DHCD") and _____ ("Borrower"), a _____, having its principal place of business at _____.

Background:

- A. The Borrower intends to develop a low-income housing project (the "Project") that will constitute a qualified low-income building or project for purposes of Section 42 of the Internal Revenue Code of 1986, as amended (the "Code");
- B. DHCD has received funding provided by the United States Treasury Department (the "Treasury") under the Tax Credit Exchange Program (the "TC-X Program") pursuant to Section 1602 of the American Recovery and Reinvestment Tax Act of 2009, Public Law 111-5, 123 Stat. 115 (February 17, 2009) and the implementing guidance related thereto (as now in effect or as it may be amended from time to time) ("TC-X"; such funds being "TC-X Funds") for the assistance of certain projects that would otherwise qualify for LIHTC under Section 42 of the Code; and,
- C. The Borrower applied for an award of TC-X Funds from DHCD and DHCD has issued the award letter attached hereto as Exhibit A (the "TC-X Award Letter") notifying Borrower of its selection for an award (the "TC-X Award") to be provided in the form of a loan (the "TC-X Loan") to fund costs of the Project provided that the Borrower, among other things: (i) enter into this Agreement, (ii) complete and execute the TC-X Allocation form attached hereto as Exhibit B (the "TC-X Allocation") (iii) execute certain loan documents (the "TC-X Loan Documents"), (iv) enter into and record a tax credit regulatory agreement serving as the "extended low-income housing commitment" required by Section 42 of the Code as applicable to a TC-X Award (the "Regulatory Agreement"), and (v) grant to DHCD a mortgage on the Project as security for the TC-X Loan.

Agreements:

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do hereby agree as follows:

- 1) ***Regulatory Agreement.*** The Project shall be subject to the same LIHTC requirements, including, but not limited to, rent, income, use restrictions and compliance monitoring, as required under Section 42 and shall satisfy the requirements to be a "qualified low-income building within the meaning of Section 42(c)(2) of the Code. The Borrower shall comply in all respects with the requirements of the Regulatory Agreement. All requirements contained in this Agreement shall be in addition to all requirements contained in the Regulatory Agreement.
- 2) ***TC-X Compliance.*** The Borrower shall (i) utilize TC-X Funds only as permitted or required under the TC-X Program, (ii) develop and use the Property only as permitted or required for projects assisted by TC-X, (iii) otherwise comply with the terms, covenants and restrictions of the TC-X Program and (iv) not perform or fail to perform any act the performance or non-performance of which would result in noncompliance with TC-X Program requirements, including, without limitation, the requirements contained in this Agreement. The Borrower acknowledges that in addition to the rules, regulations and guidance for the TC-X Program issued as of the date hereof, Treasury and DHCD may adopt additional guidelines, rules or regulations, including additional requirements with respect to this Agreement. The Borrower



shall comply with all applicable TC-X Program requirements and shall, upon request of DHCD, execute an amendment to this Agreement as may be needed to comply with any such TC-X Program requirements.

3) **General Terms of the TC-X Funding.**

- a) TC-X Funds will be provided to the Borrower as a loan evidenced by a note and secured by a mortgage on the Property in accordance the TC-X Loan Documents executed or to be executed between the parties.
- b) No TC-X Funds shall be advanced unless all financing for the Project closes within 120 days of the date of the TC-X Award Letter and construction of the Project commences within 45 days thereafter.
- c) The principal amount of the TC-X Loan shall not exceed 85% of the eligible basis of the Project as determined at the end of the first year of the credit period (as defined in Section 42(f)(1) of the Code, including any increase in such eligible basis pursuant to Section 42(d)(5)(B)). Any funds advanced in excess of such amount shall be immediately refunded to DHCD.
- d) The TC-X Loan shall be repayable only in the event (a "Recapture Event") that:
 - (1) the Project does not meet the requirements set forth in Section 5 hereof, or
 - (2) at any time during the tax credit compliance period for the Project (as defined in Section 42(i)(1) of the Code), the "applicable fraction" for the Project (within the meaning of Section 42(c)(1)(B) of the Code) is less than the greater of (a) the minimum set aside for the Project elected pursuant to Code Section 42(g) of the Code and (b) the lesser of (i) the ratio expressed as a percentage equal to the fully advanced principal amount of the TC-X Loan over the eligible basis of the Project (increased, if applicable, pursuant to Section 42(d)(5)(B) of the Code) and (ii) the applicable fraction with respect to the Project specified in the Regulatory Agreement pursuant to Section 42(h)(6)(B)(i) of the Code.
- e) The amount repayable upon the occurrence of a Recapture Event shall be limited to an amount (the "Recapture Amount") equal to the difference between (i) the then outstanding principal amount of the TC-X Loan and (ii) 6.67% of such principal amount multiplied by the number of years (pro rated for partial years), if any, that the TC-X Loan was outstanding during the 15 year tax compliance period for the Project (as defined in Section 42(i)(1)).

4) **Time Schedule.** The Borrower shall:

- a) demonstrate by the date specified in the TC-X Allocation that its adjusted basis in land and depreciable property included in the Project is at least 10% of the total reasonably expected adjusted basis of the Project (the "Expected Cost"),
- b) demonstrate by December 31, 2010 that its adjusted basis in land and depreciable property included in the Project is at least 30% of the Expected Cost,
- c) place the Project in service by the date specified in the TC-X Allocation, and
- d) expend its entire TC-X Award on or before December 31, 2011.

5) **Records and Reports.** The Borrower shall maintain records and submit such information and reports, as may be required by DHCD, in order to assist DHCD in meeting its recordkeeping and reporting requirements under TC-X, including, without limitation, information regarding the number of;

- a) construction jobs created,
- b) construction jobs retained,



- c) non-construction jobs created,
- d) non-construction jobs retained
- e) total housing units newly constructed,
- f) total housing units rehabilitated,
- g) low-income units newly constructed, and
- h) low-income units rehabilitated.

During the term of this Agreement, the Borrower shall maintain all Project records in accordance with TC-X and DHCD requirements. After the end of the term of this Agreement, the Borrower shall maintain records adequate to demonstrate compliance with the terms and conditions of this Agreement and the TC-X Loan Documents.

- 6) **Asset Management.** The Borrower shall provide such reports and take such management actions as may be required in the sole discretion of DHCD or its designee to ensure the long-term viability of the Project and DHCD's compliance with its asset management obligations under the TC-X Program and Section 42.
- 7) **Miscellaneous Representations, Covenants and Warranties of Borrower.** The Borrower hereby represents, covenants and warrants as follows:
 - a) The Borrower (i) is a _____ and is qualified to transact business under the laws of the Commonwealth of Massachusetts, (ii) has the power and authority to own its properties 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 Agreement.
 - b) The execution and performance of this Agreement by the Borrower (i) will not violate or, as applicable, have not violated any provision of law, rule or regulation, or any order of any court or other agency or governmental body, and (ii) will not violate or, as applicable, have not violated any provision of any indenture, agreement, mortgage, mortgage note, or other instrument to which the Borrower 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) 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 Borrower, 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 Agreement) or would materially adversely affect its financial condition.
 - d) The Project constitutes or will constitute a qualified low-income building or qualified project, as applicable, as defined in Section 42 of the Code and applicable regulations.
- 8) **Events of Default.** Any of the following shall constitute an Event of Default hereunder:
 - a) the occurrence of a Recapture Event or determination by DHCD that a Recapture Event is likely to occur as a result of Borrower's failure to comply with TC-X Program requirements;
 - b) the failure by Borrower to comply with or perform any of the conditions, requirements or covenants contained in this Agreement, or the policies and procedures promulgated by DHCD.
 - c) the determination by DHCD that a representation or warranty made by the Borrower with regard to its TC-X application or the Project is or was false or materially misleading;



- d) if, after taking into account any applicable grace or cure period thereunder, the Borrower shall fail to comply with any of the terms of the TC- X Loan Documents, the Regulatory Agreement, or any other instrument relating to the TC-X Loan.
- 9) **Remedies.** Upon the occurrence of an Event of Default, DHCD shall have the right to exercise one or more of the following remedies, in addition to any and all other remedies available to it under this Agreement or at law or in equity:
- a) Institute and prosecute any proceeding for an injunction or for specific performance of the Borrower's obligations hereunder.
 - b) Replace the general partner or manager of the Borrower with an entity acceptable to DHCD, which may be either DHCD, a sister agency of DHCD, a quasi-governmental entity located within the Commonwealth of Massachusetts or a private entity. The Borrower hereby irrevocably constitutes and appoints DHCD its true and lawful attorney-in-fact, with full power of substitution, to execute, acknowledge and deliver any instruments and do and perform any acts which are necessary to accomplish such replacement, in the name and on behalf of the Borrower. The power vested in DHCD as attorney-in-fact is, and shall be deemed to be, coupled with an interest and irrevocable.
 - c) Terminate any obligation or commitment to provide additional TC-X Funds for the Project.
 - d) Upon the occurrence of a Recapture Event, demand immediate repayment of TC-X Funds theretofore provided by DHCD for the Project to the extent of the Recapture Amount.

In the event of a threatened breach or violation of any of the covenants and agreements contained herein, DHCD shall have the right to the remedy described in subparagraph (a) above. DHCD, in its sole and absolute discretion, may, in writing, (i) give the Borrower a period of up to thirty (30) days to cure an Event of Default, provided that such default can be cured without affecting the rights of any bona fide tenants who have executed leases with the Borrower, or (ii) waive any of the provisions of this Agreement. No such waiver shall be effective unless it is in writing. Further, no delay or waiver in enforcing the provisions hereof as to any Event of Default shall impair, damage or waive the right of DHCD to enforce this Agreement in the event of a continuation or repetition of such Event of Default or any similar breach or violation hereof at any later time.

10) **Miscellaneous.**

- a) Expiration. Except as otherwise provided in this Agreement or pursuant to applicable laws, all the requirements contained in this Agreement shall become null and void and of no further force or effect upon the expiration of the term of the Regulatory Agreement.
- b) Severability. The invalidity of any clause, part or provision of this Agreement shall not affect the validity of the remaining portions thereof.
- c) Notices. Any notice, request, instruction or other document to be given hereunder to either party by the other shall be in writing and delivered personally or sent by recognized overnight courier, receipt confirmed or sent by certified or registered mail, postage prepaid, to the addresses set forth in this Agreement. Either party may change the address to which notices are to be sent to it by giving written notice of such change of address to the other party in the manner herein provided for giving notice. Any such notice, request, instruction or other document shall be conclusively deemed to have been received and be effective on the day on which personally delivered or, if sent by certified or registered mail, three (3) days after the day on which mailed or, if sent by overnight courier, on the day after delivered to such courier.



i) DHCD: Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114
ATTENTION: Tax Credit Program Director

With a copy to: Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114
ATTENTION: Chief Counsel

ii) To the Borrower: _____

ATTENTION: _____

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

- 11) **Amendment.** This Agreement may not be amended without the express written consent of DHCD and the Borrower. The Borrower agrees that it will take all actions necessary to effect the amendment of this Agreement as may be necessary to comply with TC-X Program requirements.
- 12) **Governing Law.** This Agreement shall be governed by the laws of the Commonwealth of Massachusetts and, where applicable, the laws of the United States of America.



IN WITNESS WHEREOF, the parties have executed this Agreement as of the date stated hereinabove.

[Department of Housing and Community Development]

By: _____

Name:

Title:

[BORROWER]

By: _____

Name:

Title: