

TENNESSEE HOUSING DEVELOPMENT AGENCY
INTERCREDITOR AGREEMENT
(With Syndicator)

This Intercreditor Agreement (“Agreement”) is made as of _____, 2009, by and among _____, a _____ (and together with its permitted successors and assigns, the “[Senior/Private] Lender”), _____, a Tennessee limited partnership (“Borrower”), _____, a _____ (“[Syndicator]”), and the Tennessee Housing Development Agency, a political subdivision and instrumentality of the State of Tennessee (“THDA”).

RECITALS:

THDA is making a loan in the maximum amount of \$_____ (the “THDA Loan”) to Borrower subject to the terms and conditions set forth in the THDA Loan Agreement. The THDA Loan is evidenced by the THDA Assistance Note and, among other things, is secured by the THDA Assistance Deed of Trust.

[Senior/Private] Lender is making a construction loan in the amount of \$_____ (together with all replacements or refinancing thereof that meet the requirements of Section 2(e) the “[Senior/Private] Loan”) to Borrower. [If certain conditions are met, the [Senior/Private] Loan will convert to a permanent loan.] The [Senior/Private] Loan is evidenced by the [Senior/Private] Note and secured by the [Senior/Private] Deed and the [Senior/Private] Assignment.

The Loan Documents require Borrower to use the proceeds of the [Senior/Private] Loan and the THDA Loan to fund the costs of constructing/rehabilitating a multi-family rental housing development with ___ units of affordable rental housing (the “Development”) on the Property.

THDA issued a [2009/2008] Low-Income Housing Tax Credit Reservation Notice for the Development.

[Borrower has sold or will sell one or more limited partnership interests, for which it will receive equity contributions from the limited partners (collectively, the “Syndicator Equity”).]

THDA and [Senior/Private] Lender have interests in the same real and personal property; they wish to set forth their priorities and other agreements relating to the Development and to coordinate some of their activities relating to the THDA Loan and the [Senior/Private] Loan, respectively.

NOW, THEREFORE, for and in consideration of \$10.00, the mutual covenants set forth below and other good and valuable consideration, the receipt, adequacy, and sufficiency of which are acknowledged, the parties agree as follows:

1. Definitions. In addition to terms defined elsewhere in this Agreement, the following capitalized terms shall have the following meanings:

“Collateral” means the personal property described in Exhibit B, which is attached hereto and incorporated by this reference.

“Construction and Expenditure Schedule” means the schedule attached as Exhibit E, which is attached hereto and incorporated herein by this reference.

“Development Budget” means the construction and development budget attached as Exhibit C, which is attached hereto and incorporated by this reference.

“Draw Request” means a request for a disbursement of [Senior/Private] Loan proceeds or THDA Loan proceeds by Borrower and means the form attached as Exhibit D, which is attached hereto

and incorporated by this reference, or any other form acceptable to [\[Senior/Private\]](#) Lender and THDA, together with all required supporting documentation.

“Foreclosure” or “Foreclose” includes the exercise of a power of sale under a deed to secure debt or a deed in lieu of foreclosure.

“Lender” means THDA or [\[Senior/Private\]](#) Lender.

“Lenders” means THDA and [\[Senior/Private\]](#) Lender.

“[THDA](#) Loan Agreement” means the Tennessee Housing Development Agency [TCAP/Section 1602] Loan Agreement dated _____, 2009, between Borrower and THDA.

“Loan Documents” means the THDA Loan Documents and the [\[Senior/Private\]](#) Loan Documents.

“Loans” means the THDA Loan and the [\[Senior/Private\]](#) Loan.

“Syndication Agreement” means the agreement between Borrower and Syndicator dated _____, which agreement covers syndication of the low income housing tax credits for the Development.

“THDA Deed of Trust” means the Tennessee Housing Development Agency [TCAP/Section 1602] Program Deed of Trust, dated _____, 2009, encumbering the Property as security for the THDA Note and granting THDA a security interest in the Collateral.

“THDA Loan Documents” means all documents identified in Article VII, Section 2 of the [THDA](#) Loan Agreement and any other instrument or agreement from Borrower to THDA executed now or in the future relating to the THDA Loan, the Development, or the Collateral;

“THDA Note” means the Tennessee Housing Development Agency [TCAP/Section 1602] Program Promissory Note from Borrower to THDA in the amount of _____, dated _____, 2009.

[“\[Senior/Private\] Assignment” means the assignment of leases and rents document executed by Borrower in favor of Senior Lender, if such document is required and executed in connection with the Senior Loan.](#)

“[\[Senior/Private\]](#) Deed of Trust” means the deed of trust from Borrower to [\[Senior/Private\]](#) Lender, conveying the Property as security for the [\[Senior/Private\]](#) Loan, dated _____, 2009.

“[\[Senior/Private\]](#) Loan Documents” means the [\[Senior/Private\]](#) Note, [\[Senior/Private\]](#) Deed, [\[Senior/Private\]](#) UCC, and any other agreements or instruments relating to the [\[Senior/Private\]](#) Loan.

“[\[Senior/Private\]](#) Note” means the promissory note from Borrower to [\[Senior/Private\]](#) Lender in the amount of \$ _____, dated _____, 2009.

“[\[Senior/Private\]](#) UCC” means the UCC financing statement, naming Borrower as “Debtor” and [\[Senior/Private\]](#) Lender as “secured party” and describing all or part of the Collateral;

“Property” means the real property described in [Exhibit A](#), a copy of which is attached hereto and incorporated by this reference.

“Work” means Borrower’s [construction/rehabilitation] of the Development on the Property.

When used in this Agreement, “including” means “including (but not limited to)” unless otherwise provided, and “its Loan Documents” or “respective Loan Documents” or similar phrases means the loan documents of a Lender or of the Lender or Lenders that are referenced in the sentence in which the phrase appears.

2. Priority.

- (a) Notwithstanding any provisions to the contrary in any Loan Documents, ~~F~~the Lenders hereby agree that the priority of the Loan Documents and the security interests created or granted under the THDA Loan Documents and the [Senior/Private] Loan Documents and the rights, powers, and privileges granted to the Lenders under their respective Loan Documents shall be as follows:

first priority - [Senior/Private] Loan Documents; and
second priority - THDA Loan Documents.

- (b) From and after the date of this Agreement, all of the debt, rights, title, lien, and interests of THDA created or evidenced by the THDA Loan Documents shall be subject and subordinate to all of the debt, rights, title, lien, and interests created or evidenced by the [Senior/Private] Loan Documents (but not including any debt that is covered by the [Senior/Private] Loan Documents solely due to a “dragnet” clause in the [Senior/Private] Loan Documents). This priority shall prevail notwithstanding any of the following: (1) the time of the making of the Loans; (2) the time or order of recording or filing of any of the Loan Documents; (3) the time of the funding of the Loans; or (4) any contrary language in any of the Loan Documents; provided, however, the subordinations and relative priorities contained in this Agreement with respect to the Property and the Collateral are conditioned upon the prior interest or interests being properly perfected or recorded and non-voidable by a bankruptcy trustee.

- (c) If THDA acquires, by subrogation or otherwise, a lien or interest in the Property or the Collateral, any such lien or interest is also subject and subordinate to [Senior/Private] Lender’s debt, rights, title, lien, and interests created or evidenced in the Private Loan Documents as provided above. Notwithstanding the foregoing or any other provision of this Agreement, however, until THDA receives written notice that Borrower is in monetary default under the [Senior/Private] Loan Documents, THDA may accept and retain all payments from Borrower under the THDA Loan Documents.

- (d) Notwithstanding any other provision of this Agreement, if a Lender Forecloses Borrower’s interest in the Property, the Foreclosure shall be subject to the provisions of section 42(h)(6)(E)(ii) of the Internal Revenue Code of 1986, as amended, or any similar successor provision (the “Code”). This section shall apply notwithstanding the order of recording of any of the Loan Documents and the Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits for the Property executed in connection with the Loan and the allocation of federal low income housing tax credits by THDA to Borrower for the Development.

- ~~(e)~~(e) Notwithstanding any contrary provision, the priority of the [Senior/Private] Loan and the [Senior/Private] Loan Documents shall continue as the [Senior/Private] Loan and the [Senior/Private] Loan Documents are amended, modified, extended and/or refinanced from time to time so long as (i) the maximum principal balance of the [Senior/Private] Loan is not increased beyond its current maximum and (ii) the revised [Senior/Private] Loan Documents do not materially and adversely affect the rights of THDA. In the event the [Senior/Private] Loan is amended, modified, extended and/or refinanced, in accordance with the above requirements, THDA agrees to execute an Intercreditor Agreement on the same terms set forth herein upon reasonable request of the then [Senior/Private] Lender.

3. Loan Administration and Funding. (a) The Work will be performed pursuant to the Development Budget and the Construction and Expenditure Schedule. Lenders hereby affirm receipt and approval of the Development Budget and the Construction and Expenditure Schedule. Total development costs for the Development ~~are currently estimated~~ shall not to exceed \$ _____. [Senior/Private] Lender and Syndicator acknowledge and agree that no additional amount of Assistance Funds (as defined in the THDA Loan Agreement shall be made available to Borrower in the event of cost overruns or otherwise.
- (b) The Lenders, Syndicator, and Borrower agree the costs set forth in the Development Budget shall be funded as follows:
- (i) ~~An initial installment portion~~ of Syndicator Equity in the amount of \$ _____ to be received by Borrower on or about the date of closing of the [Senior/Private] Loan and the THDA Loan, shall be used to fund all ~~soft costs or other~~ costs incurred to date associated with the Development Work that are not includable in eligible basis. None of the proceeds of the THDA Loan shall be used for that purpose, but [Senior/Private] Loan proceeds may be so used to the extent allowed by the [Senior/Private] Loan Documents. [TCAP only—Notwithstanding the foregoing, THDA Loan proceeds may also be used to reimburse land acquisition costs, on-site demolition costs, and hazardous waste remediation costs, if any.] If ~~a portion of the initial installment of~~ there is Syndicator Equity remaining after the payment of such costs, the remainder of the initial installment of ~~that~~ Syndicator Equity shall be applied towards hard costs of construction until it is exhausted and before the proceeds of the Lenders' Loans are used.
 - (ii) After the initial installment of ~~above~~ Syndicator Equity is exhausted, the proceeds of the Lenders' Loans shall be disbursed on a pro rata basis as the Draw Requests from Borrower are received and approved by them in accordance with Paragraph 4 of this Agreement.
 - (iii) Borrower shall be responsible for funding any remaining amounts owed for the Work or development of the Development from Syndicator Equity or some other source. No additional amounts of Assistance Funds (as defined in the THDA Loan Agreement) will be made available therefor.
4. Draw Procedures. The Loan Documents contain provisions relating to how and when the proceeds of the Loans are to be disbursed to or for the benefit of Borrower. Except as specifically and expressly modified by this Agreement, the requirements and conditions for disbursing funds under those Loan Documents are not superseded by this Agreement. The Lenders and Borrower agree, however, that the following unified draw procedures shall apply:
- (a) Draw Requests. Borrower shall submit copies of all Draw Requests to the Lenders at the same time. The form of the Draw Request that Borrower shall use is the form required by the Senior Lender, together with THDA required certifications and other items as THDA may request; provided, however, if the Senior Lender does not have a draw request form or if the Senior Lender's form is reasonably unacceptable to THDA, Borrower shall use the form attached to this Agreement as Exhibit D for draws on the [TCAP/Section 1602] Loan, and ~~All~~ Draw Requests shall be accompanied by all required supporting invoices and documentation. To the extent necessary or reasonable, the Lenders shall cooperate in reviewing the Draw Requests submitted to them, and Borrower shall promptly provide them with any additional information or documentation they may request. ~~The initial Draw Request to THDA must satisfy the conditions contained in Exhibit F, a copy of which is attached hereto and incorporated herein by this reference.~~
 - (b) Inspections. The Lenders will use a common inspector engaged by [Senior/Private] Lender, or as identified below, for purposes of inspecting the status, quality, and degree of completion

- of the Work and advising the Lenders about the conformity of the Work with the plans and specifications, the Development Budget and the Construction and Expenditure Schedule and whether they should disburse in accordance with a pending Draw Request. The inspector engaged by the [Senior/Private] Lender, or otherwise mutually selected by the Lenders if the Senior Lender has not otherwise engaged an inspector,~~chosen for that purpose~~ is _____ . At any time, however, upon notice to the other Lender and Borrower, but without the other Lender's or Borrower's approval, a Lender may use a different inspector for those purposes. Upon receipt of a Draw Request from Borrower, if an inspection report relating to the Draw Request has not already been performed, [Senior/Private] Lender shall notify the inspector that it is needed. [Senior/Private] Lender agrees to provide, without warranty or liability, copies of all inspection reports provided to [Senior/Private] Lender ~~provided by the inspector to THDA.~~ If a Lender checks the title to the Property in connection with any Draw Request, that Lender shall provide the other Lender with the results of any such title check.
- (c) Approval or Disapproval. The Lenders shall review the Draw Requests in a timely manner and shall use reasonable efforts to approve or disapprove a Draw Request within ten (10) business days after the receipt of the Draw Request and all required supporting invoices, documentation, affidavits, certificates, and inspection reports. If a Lender approves or disapproves of the Draw Request, it shall notify the other Lender and Borrower in writing, and any notice of disapproval shall specify, in reasonable detail, the amounts and items being disapproved and the reasons for the disapproval. The Lenders and Borrower shall diligently and in good faith attempt to resolve any dispute relating to a Draw Request, but Borrower has the burden of correcting any deficiency in the Work or the Draw Request.
- (d) Disbursements. Upon approval of a Draw Request (other than the final Draw Request) by all Lenders, the Lenders shall disburse proceeds of the Loans if required to do so under Section 3 above. [Senior/Private] Lender shall disburse _____ of the net approved amount (less any retainage required or permitted under the [Senior/Private] Loan Documents), and THDA shall disburse _____ of the net approved amount (less retainage). Disbursements by THDA will be made on the same terms as disbursements by [Senior/Private] Lender. Borrower shall fund any amounts not funded by the Lenders. Disbursements shall be wired to Borrower's construction account (the "Account") at _____, being account number _____ (the wiring instructions for the Account are: _____). No Lender shall be required to disburse any amount pursuant to a Draw Request unless all Lenders have approved the Draw Request and have agreed to disburse, but any Lender may disburse at any time if it so desires. No Lender shall be required to disburse any amount if there is a default under its Loan Documents.
- (e) Change Orders. Borrower must obtain the prior written approval of both Lenders for all change orders in accordance with the requirements of the Loan Documents. Any proposed change order shall be submitted to both Lenders along with any supporting information or documentation, including any consents or documents required. Upon request of a Lender, Borrower shall promptly provide any additional information or documentation the Lender may request. If a Lender approves or disapproves the change order, it shall notify Borrower and the other Lender in writing of that approval or disapproval and, if it is a disapproval, the reasons for it. In the event of any disapproval, the disapproving Lender(s) and Borrower shall diligently and in good faith attempt to resolve any differences relating to the change order request, but no Lender shall be liable to Borrower or any other person for its failure to approve a change order.
- (f) Final Disbursement. Upon Completion of Construction (as defined in the THDA Loan Documents) and full or substantial completion of the Work (as required by the ~~individual~~ [Senior/Private] Lender in accordance with ~~and~~ its Loan Documents for the final disbursement) and satisfaction of any requirements or conditions in the Loan Documents for a final disbursement, the Lenders shall disburse the amounts previously withheld as retainage

(if any) plus any additional amounts approved pursuant to the final Draw Request not previously disbursed. ~~The final Draw Request to THDA must satisfy the conditions of Exhibit G, a copy of which is attached hereto and incorporated herein by this reference.~~

5. Additional Advances. Without the prior consent of the other Lender, a Lender shall not make advances under its Loan Documents that would cause the outstanding principal balance to exceed the maximum principal amounts set forth in the Recitals, unless the advance is needed to protect the Lender's interest in the Property (such as payment for real estate taxes, property insurance premiums that are in arrears, repairs, or completion of the Work). ~~, or payments under Sections or~~. The foregoing does not, however, prohibit a Lender from waiving any of its rights and privileges under its Loan Documents or permitting any departure by Borrower from the performance of its duties and obligations, and any such waiver or departure shall not require the consent of any other Lender. No Lender shall make any other loans to Borrower that are secured by the Property or Collateral without the prior written consent of the other Lender.
6. Amendments.
 - (a) Subject to the provisions of Sections 2(e) and 5, without the prior consent of the other Lender (which consent shall not be unreasonably withheld), a Lender shall not amend, modify, renew, or extend the provisions of its Loan Documents. If, however, there is a default under the [Senior/Private] Note, which default has not been cured by Borrower within any applicable cure period or by THDA pursuant to Section 11(b) of this Agreement, [Senior/Private] Lender may amend, modify, renew, or extend the provisions of the [Senior/Private] Loan Documents without any notice to or consent from THDA.
 - (b) Subject to the provisions of Section 5, without the prior consent of THDA (which consent shall not be unreasonably withheld), Syndicator shall not amend, modify, renew, or extend the provisions of the Syndication Agreement in a manner that materially and adversely alters the requirements for contribution of the Syndicator Equity. If, however, there is a default under the Syndication Agreement, which default has not been cured by Borrower within any applicable cure period or by THDA pursuant to Section 11(b) of this Agreement, Syndicator may amend, modify, renew, or extend the provisions of the Syndication Agreement without any notice to or consent from THDA.
7. THDA Representations. THDA warrants that Exhibits H and I are true, correct, and complete copies of the THDA Note and the THDA Deed of Trust; the debt evidenced by the THDA Note is the only debt secured by the THDA Deed of Trust; and there is currently no default under the THDA Loan and no event has occurred, which with the giving of notice or the passage of time, would be such a default.
8. [Senior/Private] Lender Representations. [Senior/Private] Lender warrants that Exhibits J, K and L are true, correct, and complete copies of the [Senior/Private] Note, the [Senior/Private] Deed of Trust, and the [Senior/Private] Assignment; the debt evidenced by the [Senior/Private] Note is the only debt secured by the [Senior/Private] Deed or [Senior/Private] Assignment; and there is currently no default under the [Senior/Private] Loan and no event has occurred, which with the giving of notice or the passage of time, would be such a default.
9. Syndicator Representations. Syndicator warrants that Exhibit M is a true, correct, and complete copy of the Syndication Agreement and there is currently no default under the Syndication Agreement ~~Private Loan~~ and no event has occurred, which with the giving of notice or the passage of time, would be such a default.
10. No Default Created by Loans. Each Lender agrees that Borrower's execution and delivery of the other Lender's Loan Documents (or the assumption of liability under those Loan Documents) does not create an event of default under its Loan Documents. Notwithstanding any prohibition of inferior liens in the [Senior/Private] Loan Documents, but subject to the terms of this Agreement,

[Senior/Private] Lender agrees that THDA may record the THDA Deed of Trust, and any of the other THDA Loan Documents that need to be recorded.

11. Notice and Cure Provisions.

- (a) [Senior/Private] Lender/Syndicator Cure Period. If a default occurs under the THDA Loan Documents, THDA shall notify the [Senior/Private] Lender and Syndicator in writing within five (5) business days of THDA's knowledge of the default, which notice shall specify the nature of the default. For a period of thirty (30) days following the [Senior/Private] Lender's receipt of such notice and the Syndicator's receipt of such notice (the "[Senior/Private] Lender/Syndicator Cure Period"), THDA will not exercise any of its remedies under the THDA Loan Documents or institute any legal action against the Borrower or the Property, including accelerating the maturity of its Note or instituting Foreclosure. During the [Senior/Private] Lender/Syndicator Cure Period, [Senior/Private] Lender and/or Syndicator shall have the right (but not the obligation) to cure Borrower's default without meeting any requirements as to the assumption of the THDA Note. If [Senior/Private] Lender and/or Syndicator cures the default within the [Senior/Private] Lender/Syndicator Cure Period or if Borrower cures the default, as otherwise permitted, then the THDA Loan shall be deemed reinstated, and, in the latter case, THDA shall notify [Senior/Private] Lender and/or Syndicator of the cure. If neither [Senior/Private] Lender nor Syndicator cures the default within the [Senior/Private] Lender/Syndicator Cure Period or if Borrower does not cure the default, as otherwise permitted, or if [Senior/Private] Lender and/or Syndicator informs THDA during the [Senior/Private] Lender/Syndicator Cure Period that it does not intend to cure the default and Borrower's right to cure, if any, has expired, THDA may then exercise its rights and remedies under the THDA Loan Documents (including the right to waive the default or forbear from exercising its remedies) without further notice to or consent from [Senior/Private] Lender and/or Syndicator (but subject to the rights of [Senior/Private] Lender under the [Senior/Private] Loan Documents and/or Syndicator under the [Senior/Private] Syndicator Agreement).
- (b) THDA Cure Period. If a default occurs under the [Senior/Private] Loan Documents, [Senior/Private] Lender shall notify THDA in writing within five (5) business days of [Senior/Private] Lender's knowledge of the default, which notice shall specify the nature of the default or if a default occurs under the Syndication Agreement, Syndicator shall notify THDA in writing within five (5) business days of Syndicator's knowledge of the default, which notice shall specify the nature of the default. For a period of thirty (30) days after THDA's receipt of such notice from [Senior/Private] Lender or from Syndicator (the "THDA Cure Period"), THDA shall have the right (but not the obligation) to cure the default under the [Senior/Private] Loan Documents or under the Syndication Agreement. If the default is a non-monetary default that THDA is incapable of curing (such as a bankruptcy, the insolvency of Borrower, or an assignment for the benefit of creditors by Borrower), THDA shall have the right to pay the [Senior/Private] Loan in full in accordance with the terms of the [Senior/Private] Loan Documents and obtain the release of the Property and Collateral from any lien or security interest or title created under the [Senior/Private] Loan Documents. During the THDA Cure Period, [Senior/Private] Lender shall not accelerate the debt evidenced by the [Senior/Private] Note, begin Foreclosure proceedings, or exercise any other remedies it may have under the [Senior/Private] Loan Documents. During the THDA Cure Period, Syndicator shall not exercise any remedies it may have under the Syndication Agreement. If THDA cures the default within the THDA Cure Period or if Borrower cures the default within any cure period in the [Senior/Private] Loan Documents or Syndication Agreement, respectively, the [Senior/Private] Loan and/or Syndication Agreement shall be deemed reinstated. If Borrower cures the default, [Senior/Private] Lender and/or Syndicator shall promptly notify THDA of the cure. If THDA does not cure the default within the THDA Cure Period or Borrower does not cure the default as otherwise permitted, or THDA notifies [Senior/Private] Lender and/or Syndicator during the THDA Cure Period that it does not intend to cure the default and Borrower's right to cure, if any, has expired, [Senior/Private]

Lender shall have no further obligation to allow THDA to cure the default and [Senior/Private] Lender and/or Syndicator may then exercise any rights and remedies under the [Senior/Private] Loan Documents (including the right to waive the default or forbear from exercising its remedies) and/or the Syndication Agreement, respectively, without further notice to or consent from THDA (but subject to the rights of THDA under the THDA Loan Documents, this Agreement).

- (c) If Borrower's default is not cured, and [Senior/Private] Lender has not Foreclosed Borrower's interest in the Property within one hundred twenty (120) days of THDA's receipt of notice of default under the [Senior/Private] Loan, THDA may pursue whatever remedies it may then have against Borrower.
12. Exercise of Other Rights. To the extent either Lender or Syndicator elects to exercise any rights they, respectively, may have with respect to changing the ownership structure of Borrower (including adding or removing general partners or managing members), replacing the contractor, changing the ownership structure of the developer (including adding or removing parties), replacing the developer, replacing the property management company, enforcing guarantees, or other similar actions, such actions shall be taken by a Lender only with the consent of the other Lender or by the Syndicator only with the consent of THDA, which consent shall not be unreasonably withheld. To the extent [Senior/Private] Lender and/or Syndicator elect to exercise any rights they, respectively, may have, with respect to adjustments to amount and/or timing of payment of developer fees in connection with the Development, such actions shall be taken only with the express written consent of THDA, which shall not be unreasonably withheld.
13. Casualty and Condemnation. If there is a taking or threatened taking by condemnation or the exercise of a power of eminent domain (collectively, a "Taking") or the Property is damaged or destroyed by fire or some other hazard (collectively, a "Casualty"), THDA agrees that its right to participate in any action, adjustment, settlement, award, or insurance proceeds resulting from the Taking or Casualty (under the THDA Loan Documents or otherwise) is subordinate to [Senior/Private] Lender's rights under the [Senior/Private] Loan Documents. [Senior/Private] Lender shall have the sole right to determine how the proceeds or award received due to a Taking or Casualty shall be applied, but agrees to consult with THDA in good faith regarding the application of such amounts. If [Senior/Private] Lender makes insurance proceeds or a condemnation award to which it is entitled under the [Senior/Private] Loan Documents available to Borrower for the restoration of the Property, THDA shall also make available to Borrower for the purpose of restoration the insurance proceeds or condemnation award (if any) to which it is entitled under the THDA Loan Documents. If [Senior/Private] Lender applies such proceeds or award towards payment of the [Senior/Private] Loan, its rights and interests in any such amounts shall terminate upon the [Senior/Private] Loan being paid in full and any excess shall be promptly delivered to THDA and will be applied in accordance with the THDA Loan Agreement.
14. Distribution of Proceeds of Property and/or Collateral. Any and all realizations upon the Property and/or Collateral by either of the Lenders shall be distributed in accordance with the following procedure:
- (a) All realizations upon the Property and/or Collateral shall be applied first to the [Senior/Private] Lender's claims pursuant to the [Senior/Private] Loan Documents, but only to the extent of the [Senior/Private] Lender's interest.
- (b) After the [Senior/Private] Lender's interest has been paid or otherwise satisfied in full, any remaining realizations upon the Property and/or Collateral shall be paid to THDA claims pursuant to the THDA Loan Documents until they are paid or otherwise satisfied in full.
- (c) After all of the claims have been paid or otherwise satisfied in full, the balance of realizations upon the Property and/or Collateral, if any, shall be paid to Borrower or as otherwise required by applicable law.

15. Escrows and Reserves. If [Senior/Private] Lender is collecting payments from Borrower to be escrowed for the payment of real estate taxes, assessments, insurance premiums, and like charges or to set up a special purpose reserve fund, THDA shall not, separately, require payments from Borrower to be escrowed for such purposes, provided the escrow or reserve being administered by [Senior/Private] Lender is reasonably acceptable to THDA and is being funded in an amount approved by THDA. [Senior/Private] Lender and Borrower acknowledges and agrees that THDA's prior written consent, which shall not be unreasonably withheld, is required before funds may be disbursed from any operating reserve and/or replacement reserve or any such other, similar reserve. If [Senior/Private] Lender stops collecting some or any escrow payments from Borrower before the THDA Loan has been paid in full, THDA shall have the immediate right to require the establishment of any such escrow or reserve. If the [Senior/Private] Loan is paid in full before the THDA Loan is paid in full and if the [Senior/Private] Lender is holding any escrow or reserve amounts at such time, it shall promptly transfer the balance of any such escrow or reserve to THDA or its designee.

16. Notices. Any notice, demand, or other communication required or permitted under this Agreement shall be deemed given and received on the date it is personally delivered to the party to whom it is addressed or on the third day after it is deposited in the U.S. mail, certified mail, return receipt requested, postage prepaid or when hand delivered by the party or a courier or overnight delivery service. The addresses to be used for the parties are:

If to [Senior/Private] Lender:

If to THDA (during construction/rehabilitation, prior to issuance of IRS forms 8609):

Tennessee Housing Development Agency
404 James Robertson Parkway, Suite 1200
Nashville, TN 37243-0900
Attention: Ed Yandell
Phone: (615) 815-2142
Fax: (615) 564-2700

If to THDA (following issuance of IRS forms 8609):

Tennessee Housing Development Agency
404 James Robertson Parkway, Suite 1200
Nashville, TN 37243-0900
Attention: Donna Duarte
Phone: (615) 815-2210
Fax: (615) 564-2700

If to Borrower:

Attn: _____

If to Syndicator:

Attn: _____

17. No Modification to or Approval of Documents.

- (a) This Agreement is not intended to modify and shall not be construed to modify any terms or provisions of the [Senior/Private] Loan Documents or THDA Loan Documents, but, if there is a conflict or inconsistency between the terms of this Agreement and the terms of a Lender's Loan Documents, the terms of this Agreement shall control as between the Lenders. By executing this Agreement, a Lender is not approving the terms of the other Lender's Loan Documents, and, apart from section 6, nothing in this Agreement limits the right of a Lender or Borrower to negotiate regarding the terms of the loan from that Lender. ~~Each Lender has extended credit to Borrower based on the Lender's own assessment of the creditworthiness of Borrower, and neither Lender has relied upon the other Lender or any information it may have provided in making its decision.~~ Apart from specific information or notices that must be given to the other Lender under this Agreement, a Lender is not required to notify the other Lender of its dealings with Borrower, Borrower's financial status, or any other information relating to Borrower or its loan to Borrower. By executing this Agreement, a Lender is not assuming any responsibility to oversee Borrower's application of any advances made to Borrower.
- (b) This Agreement is not intended to modify and shall not be construed to modify any terms or provisions of the Syndication Agreement, but, if there is a conflict or inconsistency between the terms of this Agreement and the terms of the Syndication Agreement, the terms of this Agreement shall control as between THDA and the Syndicator. By executing this Agreement, Syndicator is not approving the terms of either Lender's Loan Documents, and, apart from Section 6, nothing in this Agreement limits the right of the Syndicator or Borrower to negotiate regarding the terms of the Syndication Agreement. Syndicator has made its own determination with respect to Borrower and the Syndication Agreement and has not relied upon THDA or [Senior/Private] Lender in making its decision. Apart from specific information or notices that must be given to THDA or Private Lender under this Agreement, the Syndicator is not required to notify THDA or Private Lender of its dealings with Borrower, Borrower's financial status, or any other information relating to Borrower. By executing this Agreement, Syndicator is not assuming any responsibility to oversee Borrower's application of any advances made to Borrower.

18. Further Assurances. So long as this Agreement is in effect, each Lender or any subsequent holder of each Lender's security interest (as the case may be) shall execute, acknowledge, and deliver upon reasonable demand of the other Lender any further documents or instruments for the purpose of confirming and effecting the subordination and the agreements set forth in this Agreement.

19. Estoppel Certificates. Within fifteen (15) days after receipt of written demand from the other Lender, the Lender receiving the demand shall execute, acknowledge, and deliver to the other Lender a certificate stating the total amount of debt owed to the Borrower and secured by the Property and whether, to the Lender's knowledge, a default exists under any of the Lender's Loan Documents or any condition exists, which with the giving of notice or passage of time, would result in a default. All such certificates shall be conclusive as to the matters stated in them and shall be binding upon the party giving the certificate. A Lender shall not be obligated to give such a certificate more frequently than once every calendar quarter.

20. Priority Retained. This Agreement is expressly limited in application to [Senior/Private] Lender and THDA and the [Senior/Private] Loan Documents and the THDA Loan Documents, and, notwithstanding the subordination and priorities between the parties set forth in this Agreement, the parties' priorities are retained as against all third parties and other instruments or liens as if this Agreement did not exist.

21. Benefit. This Agreement shall inure to the benefit of and be binding on the parties and their respective successors and assigns (including all subsequent holders of any note, deed of trust, assignment, or other instrument mentioned in this Agreement).
22. Term. The term of this Agreement shall begin on the date of this Agreement and continue until the first of the following occurs: (a) the later of the payment in full of either the THDA Loan or the [Senior/Private] Loan; (b) [Senior/Private] Lender's acquisition of title to the Property by Foreclosure; or (c) THDA's acquisition of title to the Property by Foreclosure, provided the acquisition by [Senior/Private] Lender or THDA is not in violation of this Agreement.
23. Waiver of Right to Require Marshaling. Except as set forth in this Agreement to the contrary, each Lender hereby expressly waives any right that it otherwise might have to require the other Lender to marshal assets or to resort to Property or Collateral in any particular order or manner, whether provided for by common law or statute.
24. Miscellaneous.
- (a) Relationship of Parties. This Agreement is not intended to create and does not create the relationship of partners or joint venturers between or among the parties.
 - (b) Governing Law. This Agreement and all matters relating thereto shall be governed by, construed, and interpreted in accordance with the laws of the State of Tennessee.
 - (c) Amendment. This Agreement shall not be amended except in a writing signed by all parties.
 - (d) Third-Party Beneficiary. The parties do not intend that any third party shall be a third-party beneficiary of this Agreement.
 - (e) Recitals and Exhibits. The Recitals and the attached exhibits are a part of this Agreement.
 - (f) Borrower Acknowledgement. Borrower acknowledges and agrees that nothing in this Agreement grants Borrower a cure period (unless a right to cure is contained in the Lender's Loan Documents or Syndication Agreement) or extends or alters the time within which Borrower may cure a default, if such time is given under a Lender's Loan Documents or Syndication Agreement or gives Borrower the right to notice of a default, unless that right to notice is contained in the Loan Documents or Syndication Agreement.
 - (g) Contesting Liens. Except for enforcing the agreed upon priority set forth in section 2, neither Lender shall contest the validity, perfection, priority or enforceability of any lien, security interest, or security title granted to the other.

[This space intentionally left blank]

[Signatures on next page]

[EXECUTION PAGE FOR INTERCREDITOR AGREEMENT]

IN WITNESS WHEREOF, through their duly authorized officers or partners, Private Lender, Borrower, and THDA have executed this Agreement under seal on the above date.

PRIVATE LENDER: _____

By: _____

Name: _____

Title: _____

BORROWER: _____

By: _____

Name: _____

Title: _____

SYNDICATOR: _____

By: _____

Name: _____

Title: _____

THDA: Tennessee Housing Development Agency

By: _____

Name: _____

Title: _____

SPECIMEN

TENNESSEE HOUSING DEVELOPMENT AGENCY
TCAP/SECTION 1602 PROGRAM
OWNER CLOSING CERTIFICATE
_____, 2009

I certify that I am the duly elected and acting _____ of _____, a [corporation/limited liability company] (the "General Partner"), which is the sole [general partner/managing member] of _____, a _____ limited partnership ("Owner"). In connection with a \$_____ [TCAP/Section 1602] loan (the "THDA Loan") from Tennessee Housing Development Agency ("THDA") to Owner for _____ ("Development") and the closing of the THDA Loan, I HEREBY CERTIFY, as of the date hereof, the following:

1. All representations, warranties, certifications, acknowledgments, covenants and/or agreements made in each of the following documents, which are incorporated herein by this reference, ~~are~~ were true and accurate as of their date; are, in all material respects, as of the date hereof, true and accurate in all material respects, except for changes previously approved by THDA; and are hereby ratified and affirmed:

Assistance Deed of Trust

[TCAP/Section 1602] Loan Agreement

TCAP & Section 1602 Conditional Commitment Letter

TCAP & Section 1602 Application

Exchange Application

Carryover Allocation Agreement

Initial Application

2. All information provided to THDA in or with respect to the following items, which are incorporated herein by this reference, ~~is~~ were true and accurate as of their date; are, in all material respects, as of the date hereof, true and accurate in all material respects and contain no changes from the information as submitted to THDA, except for changes previously approved by THDA; and is hereby ratified and affirmed:

Materials and documents submitted in response to the [TCAP & Section 1602] Conditional Commitment Letter

TCAP & Section 1602 Application

Exchange Application

Carryover Allocation Agreement

Initial Application

3. Owner has made good faith efforts to secure the maximum amount of [senior/private] financing for the Development based on potential rents. Owner reaffirms all statements and representations it has made to THDA to demonstrate that it has made this good faith effort and acknowledges that THDA has relied upon its statements and representations in making the determination that Owner is eligible for the THDA Loan.

4. Owner has made good faith efforts to obtain investment commitments for tax credits in lieu of the THDA Loan. Owner reaffirms all statements and representations it has made to THDA to demonstrate that it has made this good faith effort and acknowledges that THDA has relied upon its statements and representations in making the determination that Owner is eligible for the THDA Loan.
5. Attached hereto as Exhibit ___ is a true, complete and accurate copy of the Development Budget, as of the date hereof, which is identical to the Development Budget previously submitted to THDA.
6. Total Development Costs for the Development shall not exceed \$_____.
7. Total Developer Fee to be paid in connection with the Development shall not exceed \$_____.
8. Attached hereto as Exhibit ___ is a true, complete and accurate copy of the Expenditure and Construction Schedule, as of the date hereof, which is identical to the Expenditure and Construction Schedule previously submitted to THDA.
9. [\[Senior/Private\]](#) Financing has closed in the amount of \$_____/All conditions and requirements to allow the [\[Senior/Private\]](#) Financing, in the amount of \$_____, to close simultaneously with the closing of the THDA Loan have been met.]
10. Owner is not in default [beyond any applicable cure period](#) in connection with the [\[Senior/Private\]](#) Financing or any agreements with [\[Senior/Private\]](#) Lender.
11. [The syndication has closed and the amount of the Syndication Equity is \$_____/All conditions and requirements to allow the Syndication Equity, in the amount of \$_____, to close simultaneously with the closing of the THDA Loan have been met.]
12. Owner is not in default [beyond any applicable cure period](#) --under the Syndication Agreement or any agreements with the Syndicator.
13. All advances [to date](#) of [\[Senior/Private\]](#) Financing, if any, and/or Syndication Equity, if any, have been applied to costs shown on the Development Budget.
14. No proceedings by or against Owner or any general partner of Owner have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, [which have not been dismissed within sixty \(60\) days](#), nor has Owner or any general partner of Owner made an assignment for the benefit of creditors, admitted in writing his, her, or its inability to pay debts generally as they become due, or filed or had filed against him, her, or it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of Owner or any such general partner.
15. No judicial proceeding has been filed or is pending for the dissolution of Owner, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of Owner. No notice has been given by the Secretary of State that such office intends to terminate the existence of Owner.
16. [To the knowledge of Owner](#),~~F~~ there is no action, suit or proceeding pending, or threatened, against or affecting, the Development or Owner in any court at law or in equity, or before or by any governmental instrumentality, whether federal, state, county or municipal.
17. The consummation of the transactions herein contemplated and the performance or observance of Owner's obligations in connection with the THDA Loan, have been duly authorized by the Owner, will not conflict with or result in a breach of any of the terms, conditions or provisions of

documents and filings pursuant to which Owner has been organized and is existing, or of any law or any regulation, order, injunction or decree of any court or governmental instrumentality, or of any agreement or instrument to which Owner is now a party or is subject, or constitute a default thereunder, or (except in connection with the THDA Loan) result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon the Development or any of the property or assets of Owner pursuant to the terms of any such agreement or instrument.

18. No authority or proceedings for the authorization of the THDA Loan or the submission and execution of all documents in connection with the closing of the THDA Loan has or have been repealed, rescinded or revoked.
19. No consent or authorization of or registration, declaration or filing with any governmental instrumentality having jurisdiction over the Development is required in connection with the valid execution and delivery of the Loan Documents or the performance of any of the transactions required thereby, or, if required such consent or authorization shall have been obtained or such registration, declaration or filing shall have been accomplished prior to the date such consent is required to have been obtained.
20. The construction of the Development and the proposed use thereof will be in compliance, in all material respects, with all applicable zoning, subdivision, environmental protection, use and building codes, energy conservation standards, historic preservation requirements, laws, regulations and ordinances, at the federal, state and local level and Owner has no knowledge of any notice of violations of any laws, ordinances, codes, requirements or orders of any governmental instrumentality having jurisdiction over the Development.
21. Any and all federal, state and local income tax returns required to be filed by Owner have been filed, and all taxes reflected upon any such tax returns, all past due taxes, interest and penalties and all estimated payments required to be paid have been paid.
22. Owner has good and marketable title to an indefeasible fee simple estate in the Property, subject to no lien, charge or encumbrance, except such as are listed as exceptions to title or exclusions from coverage in the Title Insurance Policy being issued concurrently with the recording of the Deed of Trust.
23. All personal property with respect to which Owner has granted to THDA a security interest pursuant to any of the Loan Documents is owned by Owner free and clear of all liens, encumbrances and security interests, except for Permitted Exceptions (as defined in the Assistance Deed of Trust).
24. Owner has not executed and is not a party to any contract or agreement of any kind which could give rise to a right by the other party thereto to acquire a lien against the Property, except for Permitted Exceptions (as defined in the Assistance Deed of Trust), ~~in connection with the Private Financing~~ [and no work or site activity has been commenced prior to the execution of this Agreement and the recordation of the Deed of Trust, except for such work or site activity insured over in the Title Insurance Policy]. [The Construction Contract and the Architect's Agreement are each in full force and effect and neither party thereto is in default thereunder.]
25. Only costs includable in eligible basis will be funded by the THDA Loan. Cost overruns will be funded by Owner from sources other than the THDA Loan.
26. Owner has not treated, stored, recycled, disposed of or discharged any hazardous, toxic or polluting substances on or into the Property, and Owner has no actual knowledge of any other person or entity, including, without limitation, any previous owner of the Property, having treated, stored, recycled, disposed of or discharged any hazardous, toxic or polluting substances on or into the Property.

27. Owner has no actual knowledge of any notification having been filed with regard to the discharge of hazardous, toxic or polluting substances on or into the Property under the Federal Comprehensive Environmental Response, Compensation and Liability Act or under any other federal or state law pertaining to protection of the environment.
28. ~~Since the date of the _____,~~ Owner has no knowledge of any materially adverse change in its financial position, results of operations or financial condition from that set forth in documentation and materials supplied to THDA in connection with the Tax Credit Program Requirements and the [TCAP/Section 1602] Program and, to the best of ~~Owner's~~ ~~our~~ knowledge, no event affecting Owner or the Development which should be disclosed to THDA so that all prior documentation and materials submitted to THDA are true and accurate in all material respects has occurred.
29. All capitalized terms, used herein, but not otherwise defined, shall have the same meaning as in the Loan Agreement.
30. [General Partner/Managing Member], for itself and on behalf of Owner, and all individuals and entities ~~involved~~ with a controlling interest in [General Partner/Managing Member] and/or Owner, acknowledges that Tennessee Code Annotated, Section 13-23-133, makes it a Class E felony for any person to knowingly make, utter or publish a false statement of substance for the purpose of influencing THDA to allow participation in any of its programs, including the Low Income Housing Tax Credit Program and the [TCAP/Section 1602] Program and further acknowledges that the statements contained in this Certificate are statements of substance made for the purpose of influencing THDA to make the THDA Loan to Owner for the Development.
31. This Certificate is given for the benefit of THDA and any title insurer of THDA, and, in connection with the THDA Loan, THDA may rely upon all certifications and statements in it.
32. [TCAP only] In connection with the Development, Owner has not entered into any contract with a contractor who is debarred, suspended, or otherwise excluded from or ineligible for participation in federal assistance programs. Owner has complied with subpart C of 2 CFR Part 180, as required by 2 CFR Part 2424.
33. [TCAP only] Owner has developed and shall ~~develop and~~ manage the Development in compliance with the following Federal requirements, to the extent applicable:
- a. Fair Housing Act (42 U.S.C. 3601-19) and implementing regulations at 24 CFR Part 100 and the regulations at 24 CFR Part 107 (Equal Opportunity in Housing).
 - b. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000(d)) (Nondiscrimination in Federally Assisted Programs) and implementing regulations at 24 CFR Part 1.
 - c. The Age Discrimination Act of 1975 (42 U.S.C. 6101-07) and implementing regulations at 24 CFR Part 146 "Nondiscrimination on the Basis of Age in HUD Programs or Activities Receiving Federal Financial Assistance."
 - d. Affirmative Marketing - When marketing units in the Development, Owner shall comply with the THDA affirmative fair housing marketing plan and procedures approved by THDA.
 - e. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 CFR Part 8 "Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development."
 - f. National Environmental Policy Act (NEPA) and Related Laws - Owner shall comply with all laws referenced by, and requirements set forth in, 24 CFR Part 58.6, including ongoing requirements related to any required mitigation for the Development resulting from the NEPA review and clearance, and flood insurance as required by the National Flood Insurance Reform Act of 1994, if applicable.

- g. The Lead-Based Paint Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act of 1992 and implementing regulations at 24 CFR Part 35 - applicable if the Development involves rehabilitation.
- h. Davis-Bacon Prevailing Wages – All contracts between Owner and Contractor and Contractor and all subcontractors meet the wage rate requirements of section 1606 of Division A of the American Recovery and Reinvestment Act of 2009.
- i. “Anti-Lobbying” Restrictions - (Restrictions on lobbying in 31 USC 1352 and implementing regulations at 24 CFR Part 87 “New Restrictions on Lobbying”). No federally appropriated funds, including the Funds, have been paid or will be paid, by or on behalf of Owner, to any person to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
- j. 2 CFR Part 2424 “Non-procurement Debarment and Suspension” - Owner has not and will not enter into any contract with a contractor who is debarred, suspended, or otherwise excluded from or ineligible for participation in federal assistance programs. Owner shall comply with subpart C of 2 CFR Part 180, as required by 2 CFR Part 2424.
- k. Owner and Contractor has or will provide a drug-free workplace for its employees in accordance with the requirements of [Tenn. Code Ann. Section 50-9-101 et seq.](#) ~~O.C.G.A. § 50-24-3 (b)(7).~~
- l. Required Signage - Development signage must be posted in a manner consistent with criteria established by HUD.
- ~~l.~~ Executive Orders Concerning MBE/WBE – Executive Orders 11625, 12432, 12138, and their respective implementing regulations.
- ~~m.~~ n. Other Requirements - All other applicable federal, state and local laws, regulations and requirements.

IN WITNESS THEREOF, we have hereunto set our hands as of this ___ day of _____, 2009.

Exhibits

- (A)
- (B)
- (C)
- (D)
- (E)
- (F)
- (G)
- (H)
- (I)
- (J)
- (K)
- (L)
- (M)
- (N)
- (O)
- (P)

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