

RIGHT OF FIRST REFUSAL AGREEMENT
([Project Name])

Right of First Refusal Agreement (the "Agreement") dated as of [Closing Date] between [OWNER ENTITY], a [State] limited liability limited partnership (the "Owner" or the "Company"), [ROFR Grantee], a [State] nonprofit corporation, (the "Grantee"), and is consented to by [ALL Parties to the Partnership or Operating Agreement, including where applicable but not limited to the following parties] [MANAGING GENERAL PARTNER ENTITY], a [State] [entity type] (the "Managing General Partner"), [INVESTOR ENTITY], a _____ [State] [entity type] (the "Investor Partner", and [SPECIAL LIMITED PARTNER ENTITY NAME], a [State] [entity type] (the "Special Limited Partner"). The Managing General Partner, the Investor Partner and the Special Limited Partner are sometimes collectively referred to herein as the "Consenting Partners". The Investor Partner and Special Limited Partner are sometimes collectively referred to herein as the "Non-Managing Partners". This Agreement shall be fully binding upon and inure to the benefit of the parties and their successors and assigns to the foregoing.

Recitals

- A. The Owner, pursuant to its [Amended and Restated] Partnership Agreement dated on or about the date hereof among Grantee and the Consenting Partners (the "Partnership Agreement"), is engaged in the ownership and operation of a(n) [____]-unit low-income housing tax credit apartment project located in [town/city], New Mexico and commonly known as [Project Name] (the "Project"). The real property comprising the Project is legally defined on **Exhibit A**.
- B. The Grantee is a member of the Managing General Partner of the Owner and is instrumental to the development and operation of the Project; and
- C. The Owner desires to give, grant, bargain, sell and convey to the Grantee certain rights of first refusal to purchase the Project on the terms and conditions set forth herein;
- D. Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Partnership Agreement.
- E. Notwithstanding the foregoing, there are no other agreements, including the Partnership Agreement and any other side agreements, that supersede the terms of this Agreement, as it pertains to the rights of the Grantee under Section 42(i)(7) of the Internal Revenue Code (the "Code").

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises of the parties hereto and of other good and valuable consideration, the receipt and sufficiency of which the parties hereto acknowledge, the parties hereby agree as follows:

Section 1. Right of First Refusal

The Owner hereby grants to the Grantee a right of first refusal (the "Refusal Right") to purchase the real estate, fixtures, and personal property comprising the Project or associated with the physical operation thereof and owned by the Company at the time (the "Property"), for the price and subject to the other terms and conditions set forth below. The Property will include any reserves of the Owner that are required by the New Mexico Mortgage Finance Authority ("Credit Agency") or any lender of a loan being assumed in connection with the exercise of the Refusal Right to remain with the Project.

Section 2. Exercise of Refusal Right; Purchase Price

- A. After the end of the Compliance Period, as such term is defined in the Code at 26 USCS § 42(i)(1), the Company agrees that it will not sell the Property or any portion thereof to any Person, as such term is defined in the Code, without first offering the Property to the Grantee (the "Refusal Right"), for the Purchase Price (as defined in Section 3); *provided, however*, that such Refusal Right shall be conditioned upon the receipt by the Company of a "bona fide offer" (the acceptance or rejection of which shall not require the Consent of the Partners). The Company shall give notice of its receipt of such offer (the "Offer Notice") and shall deliver a copy of the Offer Notice to the Grantee. Upon receipt by the Grantee of the Offer Notice, the Grantee shall have 90 calendar days to deliver to Company a written notice of its intent to exercise the Refusal Right (the "Election Notice"). An offer made with the purchase price and basic terms of the proposed sale from a third party shall constitute a "bona fide offer" for purposes of this Agreement. Such offer (i) may be solicited by the Grantee or the Managing General Partner (with such solicitation permitted to begin any time following the end of the fourteenth (14th) year of the Compliance Period) and (ii) may contain customary due diligence, financing, and other contingencies. Notwithstanding anything to the contrary herein, a sale of the Project pursuant to the Refusal Right shall not require the Consent of the Non-Managing Partners or of the Credit Agency.
- B. If the Grantee fails to deliver the Election Notice within ninety (90) calendar days of receipt of the Offer Notice, or if such Election Notice is delivered but the Grantee does not consummate the purchase of the Project within 270 calendar days from the date of delivery of the Election Notice (each, individually, a "Terminating Event"), then its Refusal right shall terminate and the Company shall be permitted to sell the Property free of the Refusal Right.

Section 3. Purchase Price; Closing

- A. The purchase price for the Property pursuant to the Refusal Right (the "Purchase Price") shall equal the sum of (i) the principal amount of all outstanding indebtedness secured by the Project, and any accrued interest on any of such debts and (ii) all federal, state, and local taxes attributable to such sale, including those incurred or to be incurred by the partners or members of the Non-Managing Partners. Notwithstanding the foregoing, however, the Purchase Price shall never be less than the amount of the "minimum purchase price" as defined in Section 42(i)(7)(B) of the Code. The Refusal Right granted hereunder is intended to satisfy the requirements of Section 42(i)(7) of the Code and shall be interpreted consistently therewith. In

computing such price, it shall be assumed that each of the Non-Managing Partners of the Owner (or their constituent partners or members) has an effective combined federal, state and local income tax rate equal to the maximum of such rates in effect on the date of Closing.

- B. Except as otherwise provided herein, all costs of the Grantee's purchase of the Property pursuant to the Refusal Right, including any filing fees, shall be paid by Grantee.
- C. The Purchase Price shall be paid at Closing in one of the following methods:
 - (i) the payment of all cash or immediately available funds at Closing, or
 - (ii) the assumption of any assumable loans if Grantee has obtained the consent of the lenders to the assumption of such loans, which consent shall be secured at the sole cost and expense of Grantee; provided, however, that any Purchase Price balance remaining after the assumption of the loans shall be paid by Grantee in immediately available funds.

Section 4. Conditions Precedent; Termination

- A. Notwithstanding anything in this Agreement to the contrary, the right of the Grantee to exercise the Refusal Right and consummate any purchase pursuant thereto is contingent on each of the following being true and correct at the time of exercise of the Refusal Right and any purchase pursuant thereto:
 - (i) the Grantee or its assignee shall be a "qualified nonprofit organization" as defined in Section 42(h)(5)(C) of the Code or another qualified purchaser described in Section 42(i)(7)(A) of the Code (collectively, each, a "Qualified Beneficiary"); and
 - (ii) the Project continues to be a "qualified low-income housing project" within the meaning of Section 42 of the Code.
- B. This Agreement shall automatically terminate upon the occurrence of any of the following events and, if terminated, shall not be reinstated unless such reinstatement is agreed to in writing and signed by the Grantee and each of the Consenting Partners:
 - (i) the transfer of the Property to a lender in total or partial satisfaction of any loan; or
 - (ii) any transfer or attempted transfer of all or any part of the Refusal Right by the Grantee, whether by operation of law or otherwise, except as otherwise permitted under Section 7 of this Agreement; or
 - (iii) the Project ceases to be "qualified low-income housing project" within the meaning of Section 42 of the Code, or

- (iv) the Grantee fails to deliver its Election Notice or consummate the purchase of the Property within the timeframes set forth in Section 2 above.

Section 5. Contract and Closing

Upon determination of the Purchase Price, the Owner and the Grantee shall enter into a written contract for the purchase and sale of the Property in accordance with the terms of this Agreement and containing such other terms and conditions as are standard and customary for similar commercial transactions in the geographic area where the Property is located, providing for a closing (the "Closing") to occur in [County in which Property is located], New Mexico not later than the timeframes set forth in Section 2. In the absence of any such contract, this Agreement shall be specifically enforceable upon the exercise of the Refusal Right.

Section 6. Conveyance and Condition of the Property

The Owner's right, title and interest in the Property shall be conveyed by quitclaim deed, subject to such liens, encumbrances and parties in possession as shall exist as of the date of Closing. The Grantee shall accept the Property "**AS-IS, WHERE IS**" and "**WITH ALL FAULTS AND DEFECTS,**" latent or otherwise, without any warranty or representation as to the condition thereof whatsoever, including without limitation, without any warranty as to fitness for a particular purpose, habitability, or otherwise and no indemnity for hazardous waste or other conditions with respect to the Property will be provided. It is a condition to Closing that all amounts due to the Owner and the Investor Partner from the Grantee or its Affiliates be paid in full. The Grantee shall pay all closing costs, including, without limitation, the Owner's attorney's fees. Upon closing, the Owner shall deliver to the Grantee, along with the deed to the property, an ALTA owner's title insurance policy dated as of the close of escrow in the amount of the purchase price, subject to the liens, encumbrances and other exceptions then affecting the title.

Section 7. Transfer

The Refusal Right shall not be transferred to any Person without the Consent of the Investor Partner and the Credit Agency, except that the Grantee may assign all or any of its rights under this Agreement to an Affiliate of Grantee (a "Permitted Assignee") at the election and direction of the Grantee or to any assignee that shall be a "qualified nonprofit organization" as defined in Section 42(h)(5)(C) of the Code or another qualified purchaser described in Section 42(i)(7)(A) of the Code (collectively, each, a "Qualified Beneficiary").

In the case of any transfer of the Refusal Right (i) all conditions and restrictions applicable to the exercise of the Refusal Right or the purchase of the Property pursuant thereto shall also apply to such transferee, and (ii) such transferee shall be disqualified from the exercise of any rights hereunder at all times during which Grantee would have been ineligible to exercise such rights hereunder had it not effected such transfer.

Section 8. Rights Subordinate; Priority of Requirements of Section 42 of the Code

This Agreement is subordinate in all respects to any regulatory agreements and to the terms and conditions of the Mortgage Loans encumbering the Property. In addition, it is the intention of the

parties that nothing in this Agreement be construed to affect the Owner's status as owner of the Property for federal income tax purposes prior to the exercise of the Refusal Right granted hereunder. Accordingly, notwithstanding anything to the contrary contained herein, both the grant and exercise of the Refusal Right shall be subject in all respects to all applicable provisions of Section 42 of the Code, including, in particular, Section 42(i)(7). In the event of a conflict between the provisions contained in this Agreement and Section 42 of the Code, the provisions of Section 42 shall control.

Section 9. Option to Purchase

The parties hereto agree that if the Internal Revenue Service hereafter issues public authority to permit the owner of a low-income housing tax credit project to grant an "option to purchase" pursuant to Section 42(i)(7) of the Code as opposed to a "right of first refusal" without adversely affecting the status of such owner as owner of its project for federal income tax purposes, then the parties shall amend this Agreement and the Owner shall grant the Grantee an option to purchase the Property at the Purchase Price provided in Section 3 hereof and that meets the requirements of Code Section 42(i)(7).

Section 10. Notice

Except as otherwise specifically provide herein, all notices, demands or other communications hereunder shall be in writing and shall be deemed to have been given and received (i) two (2) business days after being deposited in the United States mail and sent by certified or registered mail, postage prepaid, (ii) one (1) business day after being delivered to a nationally recognized overnight delivery service, or (iii) on the day delivered personally, in each case, to the parties at the addresses set forth below or at such other addresses as such parties may designate by notice to the other party:

- (i) If to the Owner, at the principal office of the Company set forth in [specify article, paragraph, schedule or exhibit] of the Partnership Agreement;
- (ii) If to a Consenting Partner, at their respective addresses set forth in [specify article, paragraph, schedule or exhibit] of the Partnership Agreement; and
- (iii) If to the Grantee, [address], New Mexico; and

Section 11. Severability of Provisions

Each provision of this Agreement shall be considered severable, and if for any reason any provision that is not essential to the effectuation of the basic purposes of the Agreement is determined to be invalid and contrary to any existing or future law, such invalidity shall not impair the operation of or affect those provisions of this Agreement that are valid.

Section 12. Binding Provisions

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

Section 13. Counterparts

This Agreement may be executed in several counterparts and all so executed shall constitute one agreement binding on all parties hereto, notwithstanding that all the parties have not signed the original or the same counterpart.

Section 14. Governing Law

This Agreement shall be construed and enforced in accordance with the laws of the State of New Mexico without regard to principles of conflicts of law. Notwithstanding the foregoing, Company, Investor Partner and Grantee do not intend the Refusal Right in this Agreement to be a common law right of first refusal but rather intend it to be understood and interpreted as a mechanism authorized by Section 42 of the Code to allow non-profit entities to preserve affordable housing for low-income households in accordance with Grantee's charitable objectives.

Section 15. Headings

All headings in this Agreement are for convenience of reference only. Masculine, feminine or neuter gender shall include all other genders, the singular shall include the plural, and vice versa as the context may require.

Section 16. Amendments

This Agreement shall not be amended except by written agreement between Grantee and the Owner with the consent of each of the Consenting Partners and the Credit Agency.

Section 17. Time

Time is of the essence with respect to this Agreement, and all provisions relating thereto shall be so construed.

Section 18. Legal Fees

Except as otherwise provided herein, in the event that legal proceedings are commenced by any party hereto, including Grantee, Owner, and the Consenting Partners in connection with this Agreement or the transactions contemplated hereby, the prevailing party shall be entitled to recover all reasonable attorney's fees and expenses.

Section 19. Subordination

This Agreement is and shall remain automatically subject and subordinate to any bona fide mortgage to (or assigned to) an institutional or governmental lender with respect to the Project and, in the event of a foreclosure of any such mortgage, or of the giving of a deed in lieu of foreclosure to any such mortgagee, this Agreement shall become void and shall be of no further force or effect.

Section 20. Rule Against Perpetuities Savings Clause NM Stat § 45-2-901 NMSA 1978

The term of this Agreement will be ninety years commencing on the date first written above unless sooner terminated pursuant to the provisions hereof. If any provision of this Agreement is construed as violating an applicable "Rule Against Perpetuities" by statute or common law, such provision will be deemed to remain in effect only until the death of the last survivor of the now living descendants of any member of the Congress of the United States that is in session when this Agreement is signed, plus twenty-one (21) years thereafter. This Agreement and the Refusal Right herein granted are covenants running with the land and the terms and provisions hereof will be binding upon, inure to the benefits of and be enforceable by the parties hereto and their respective successors and assigns.

Section 21. Third Party Beneficiary; New Mexico Mortgage Finance Authority Rights and Powers

New Mexico Mortgage Finance Authority, a body politic and corporate, separate and apart from, but constituting a governmental instrumentality of the State of new Mexico, (the "Credit Agency") shall be a third party beneficiary to this Agreement, and the benefits of all of the covenants and restrictions hereof shall inure to the benefit of the Credit Agency, including the right, in addition to all other remedies provided by law or in equity, to apply to any court of competent jurisdiction within the State of New Mexico to enforce specific performance by the parties or to obtain an injunction against any violations hereof, or to obtain such other relief as may be appropriate. The Credit Agency and its agents shall have those rights and powers with respect to the Project as set forth in the Mortgage Finance Authority Act 58-18-1, *et.seq.* NMSA 1978 and the New Mexico Mortgage Finance Authority Rules and Regulations promulgated thereunder, as amended.

IN WITNESS WHEREOF, the parties hereto have executed this Right of First Refusal Agreement as of the date first stated above.

OWNER:

SIGNATURE BLOCK

NOTARY

GRANTEE:

SIGNATURE BLOCK

NOTARY

The undersigned hereby consents and agrees to be bound by the terms of the foregoing Right of First Refusal Agreement, including without limitation the provisions of Section 18, as of the date first set forth hereinabove.

MANAGING GENERAL PARTNER

SIGNATURE BLOCK

NOTARY

The undersigned hereby consent and agree to be bound by the terms of the foregoing Right of First Refusal Agreement, including without limitation the provisions of Section 18, as of the date first set forth hereinabove.

INVESTOR PARTNER

Signature block

notary

SPECIAL MEMBER:

Signature block

Notary

Exhibit A

LEGAL DESCRIPTION

[insert legal]