

FHA Project No.: _____

**PARTIAL PAYMENT OF CLAIM
 USE AGREEMENT**

THIS USE AGREEMENT (this "Agreement") is made, as of _____, 2011 by and between _____, a _____ whose address is _____ (the "Owner"), and **SECRETARY OF HOUSING AND URBAN DEVELOPMENT, Washington, D.C.** (the "Secretary" or "HUD").

RECITALS

WHEREAS, the Owner is the owner of that certain real property located at _____, as more particularly described in Exhibit A attached hereto and made a part hereof (the "Real Property"), on which is constructed that certain rental project known as _____ known as FHA Project No. _____ (the "Project") and, together with the Real Property, (the "Property").

WHEREAS, the Property is encumbered by that certain [Mortgage][Deed of Trust] Note dated _____ in the original principal amount of _____ and 00/100ths Dollars (\$_____) (the "Loan") made to the Owner, or a predecessor in interest, which Loan is evidenced and/or secured by that certain [Mortgage][Deed of Trust] of even date therewith.

WHEREAS, the [Mortgage][Deed of Trust] Note and the indebtedness evidenced thereby (the "Loan") were originally insured by the Secretary, acting by and through the Federal Housing Commissioner under Section _____ of the National Housing Act, as amended, which contract of insurance is evidenced by the initial/final endorsement of the [Mortgage][Deed of Trust] Note by HUD;

WHEREAS, the Secretary has made the findings required under 24 CFR §207.258b to offer debt relief under the Partial Payment of Claim ("PPC") Program; and as a condition of the Secretary's offer, the Owner has agreed that the Project shall be subject to certain affordable housing rental restrictions and other requirements, as set forth herein.

WHEREAS, as a condition of the Secretary's offer under the PPC Program of even date herewith, the Owner has executed a Second [Mortgage][Deed of Trust] Note of even date herewith in favor of the Secretary (the "Second Note") which is to be secured by a Second [Mortgage][Deed of Trust] of even date herewith against the Project (the "Second [Mortgage][Deed of Trust]") and a Second Regulatory Agreement for Multifamily Housing

Projects of even date herewith (the "Second Regulatory Agreement"). The Second [Mortgage][Deed of Trust] and the Second Regulatory Agreement shall be subordinated to this Agreement;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises set forth herein, the parties hereto, for themselves and for their respective successors and assigns, hereby agree as follows:

1. Incorporation of Recitals. The foregoing recitals are hereby incorporated by reference as if fully set forth herein.

2. Definitions.

a. "Area Median Income" ("AMI") shall mean the median gross income for a person or a family, as applicable, as from time to time calculated and released by the Secretary, based on the median income for the _____ Metropolitan Statistical Area (hereinafter called the "MSA") and shall not ever be required to be an amount which is less than the initial AMI applicable hereunder. If the Area Median Income for the MSA is no longer released at least annually by the Secretary, then the median income calculation which most closely approximates the aforesaid calculation, based on available data, as if it had been recalculated annually, shall be substituted as the Area Median Income for all purposes under this Agreement, and in such event, the parties hereto shall acknowledge in writing the utilization of such substitute median income calculation.

b. "Current Tenants" shall mean those Tenants who are lawfully in residence at the Project on the date of this Agreement.

c. "Initial Rent" shall mean the monthly rents for Moderate Income Families which must not exceed 30% of 80% of AMI.

d. "New Tenants" shall mean those Tenants who lawfully begin residence at the Project after the date of this Agreement.

e. "Moderate Income Families" are persons or families whose annual incomes do not exceed 80% of AMI .

f. "Affordable Unit" are Units where the initial rents are set at 30% of 80% of AMI or Units in which rents are at 30% of 80% of AMI and are occupied by Current Tenants that are willing to document their eligibility as Moderate Income Families as of the date of this Agreement or at a subsequent renewal.

g. "Tenant" shall mean the person(s) with a valid lease for any Unit(s) in the Project.

3. Term. This Agreement shall remain in effect until _____.

4. Use Restriction. Throughout the Term, 100% of the Units in the Project shall be used as rental housing Units; 30% of the Units in the Project shall be used as Affordable Units

for Moderate Income Families; and no Current Tenant shall be required to relocate solely on the basis of his or her income.

a. Affordable Units shall be rented to Moderate Income Families. The Owner shall obtain from each prospective New Tenant for an Affordable Unit, prior to admission to the Project, a certification of income signed by such New Tenant. The Owner will make a reasonable effort to certify the accuracy of the income certification made by the New Tenant.

b. For Affordable Units only, the Owner may not charge a rent for the Unit type that is in excess of 30% of 80% of the AMI. Any rent increases resulting from such an increase in the AMI are herein authorized and accepted, without necessity of any further approval or application, and may be implemented by the Owner at any time after such increase in the AMI is released by HUD, subject to applicable requirements of any lease, and to any requirements of State or local law not superseded by Federal law.

c. Notwithstanding the foregoing, in recognition of the necessity to phase in the obligations set forth in this Agreement all vacant Units as of _____ are designated as Affordable Units for Moderate Income families. After such date, as additional Units become vacant, such additional Units will be added to the pool of Affordable Units until Units that are occupied with families that meet the affordable test at occupancy (i.e. Moderate Income Families), together with vacant Units, equal the 30% requirement.

d. Notwithstanding the foregoing, to ensure this Agreement does not adversely affect the economic viability of the project, the parties agree that the project may request a waiver from the local HUD Hub allowing the renting of vacant Units to families that do not meet the definition of Moderate Income Families. The waiver may only be requested when the overall vacancy for the previous month exceeds __% and the Project has documented their efforts to attract Moderate Income Families. In considering the waiver request, the HUD Hub Director may grant the request, deny the request, or attach additional requirements to the request and grant a modified waiver within 10 business days, or the waiver will be considered approved as submitted. The waiver (as modified, if applicable) will be valid for 90 calendar days.

5. Displacement Prohibition. No Current Tenant shall be displaced, except for good cause. The Owner agrees not to refuse to lease a dwelling Unit offered for rent, or otherwise discriminate in the terms of tenancy, solely because any Tenant or prospective tenant is the holder of a Certificate or a Voucher under Section 8 of the United States Housing Act of 1937 (42 U.S.C. §1437f), or any successor legislation (hereinafter referred to as "Section 8").

6. Tenant Selection. Unless designed primarily for occupancy by elderly persons, Owners shall not in selecting tenants discriminate against any person or persons by reason of the fact that there are children in the family.

7. Civil Rights Requirements. The Owner will comply with the provisions of any applicable federal, state or local law prohibiting discrimination in housing on the basis of race,

color, religion, creed, sex, national origin, handicap, or familial status, including but not limited to: Title VI of the Civil Rights Act of 1964 (P.L. 90-284, 82 Stat. 73), the Fair Housing Act of 1968, as amended (42 U.S.C. §3601 et seq.; 24 CFR 100 et seq.), Executive Order 11063, and all requirements imposed by or pursuant to the regulations of the HUD implementing these authorities, including, but not limited to, 24 CFR Parts 1, 100, 107 and 110, and Subparts I and M of Part 200.

8. Housing Standards. The Owner agrees that throughout the Term, it shall (a) maintain the Project in good repair and condition in accordance with applicable local codes, and the Uniform Physical Condition Standards set forth in 24 CFR Part 5, Subpart G as amended; (b) maintain and operate the Affordable Units and related facilities to provide decent, safe and sanitary housing, including the provision of all services, maintenance and utilities; and (c) comply with the lead-based paint regulations set forth in 24 CFR Part 35, as amended.

9. Management and Maintenance of the Project.

a. The Owner shall provide for satisfactory management of the Project.

b. The Owner shall not, without the prior written approval of the Secretary, demolish any part of the Project or subtract from, without replacing, any real or personal property of the Project. In the event all or any of the buildings constituting the Project are destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms of the Mortgage.

c. The books and records, documents and other papers relating to the financial condition of the Project, shall at all times be maintained in accordance with Generally Accepted Accounting Principles which are subject to an audit performed in accordance with Generally Accepted Auditing Standards and shall be subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents. The Owner shall keep copies of all written contracts or other instruments that affect the Project, all or any of which may be subject to inspection and examination by the Secretary or his agents.

10. Reports.

a. The Owner shall provide the Secretary an annual financial statement in compliance with 24 CFR Part 5, Subpart H, Uniform Financial Reporting Standards.

b. The Owner will provide the Secretary with an annual certification that

- (1) All Units meet HUD's physical inspection standards contained in 24 CFR Part 5, Subpart G, Physical Condition Standards and Inspection Requirements, as may be amended from time to time,
- (2) Moderate Income Families income at the time of move-in was certified by the Moderate Income Families to meet the income restrictions as set out in this Agreement, and,

- (3) Occupants of Affordable Units are paying Rent for the Units that is no more than 30% of 80% of AMI.

- c. The Owner shall maintain on file, for a period of not less than three (3) years, an executed original of each New Tenant's Income Certification. The Owner shall, following receipt of a written request, provide to the Secretary (or to such third party as the Secretary may, in his sole discretion, determine to give the monitoring function under this Agreement) copies of all New Tenant income certifications, and such other documents as may be reasonably required to evaluate the Owner's compliance with the terms of this Agreement.

11. Violations and Secretary's Remedies.

- a. **Violations:** If the Secretary determines that the Owner has violated any of the terms of this Agreement, the Secretary shall notify the Owner of its determination and the Owner shall have thirty (30) calendar days after receipt of such notification in which to cure the violation. Promptly following the expiration of the foregoing thirty (30) day period, the Secretary shall take such steps as he or she deems necessary in order to ensure compliance. Failure to cure the violation shall deem the Owner in default. The parties further agree that upon any default under this Agreement, the Secretary may apply to any court, state or federal, for specific performance of this Agreement, or for such other equitable relief as may be appropriate, since the injury to the Secretary arising from a violation under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

- b. **Secretary's remedies:** Notwithstanding section 11(a) above, upon an event of default and the Owner's failure to take corrective action to the Secretary's satisfaction the Owner agrees to provide the Secretary with liquidated damages. The liquidated damages shall be in the amount no less than \$1,000 per violation per Unit. Such liquidated damages shall be levied every three months commencing with the end of the corrective period until compliance is achieved. In the event of a default under section 10(b)(3) the liquidated damages will be calculated monthly and will be equal to the amount by which the rent actually charged in any month for any Affordable Unit exceeds the monthly Rent for that Unit.

The Secretary may seek any other equitable remedy, including but not limited to, specific performance, in addition to liquidated damages.

12. Covenants to Run with Land. The Owner hereby subjects the Property to the covenants, reservations and restrictions set forth in this Agreement. The Owner hereby declares its express intent that the covenants, reservations and restrictions set forth herein shall be deemed covenants running with the land to the extent permitted by law and shall pass to and be binding upon the successors in title to the Property throughout the Term. Each and every contract, deed, mortgage or other instrument hereafter executed covering or conveying the Property or any portion thereof shall conclusively be held to have been executed, delivered and accepted subject to such covenants, reservations and restrictions, regardless of whether such covenants, reservations and restrictions are set forth in such contract, deed or other instrument. The

Secretary hereby agrees that, upon the request of the Owner made on or after the expiration of the Term, the Secretary shall execute a recordable instrument approved by the Secretary for purposes of releasing this Agreement of record. All costs and expenses relating to the preparation and recording of such release shall be paid by the Owner.

13. Superiority. The parties hereto understand and agree that, notwithstanding any provisions contained in this Agreement, or any other instrument or agreement affecting the Property, the restrictions and covenants hereunder are not intended by the parties hereto to either create a lien upon the Property, or grant any right of foreclosure, under the laws of the jurisdiction where the Project is located, to any party hereto or third party beneficiary hereof upon a default of any provision herein, rather they are intended by the parties hereto to constitute a restrictive covenant that is filed of record prior in time to any instrument or agreement granting a security interest in the Project and that, notwithstanding a foreclosure or transfer of title pursuant to any other instrument or agreement, the restrictive covenants and provisions hereunder shall remain in full force and effect.

14. Other Agreements. The Owner represents and warrants that it has not and will not execute any other agreements with provisions contradictory or in opposition to the provisions of this Agreement and that, in any event, the provisions of this Agreement are paramount and controlling as to the rights and obligations set forth herein and supersede any other conflicting requirements.

15. Binding Effect. Upon conveyance of the Property during the Term, the Owner shall require its successor or assignee to assume its obligations under this Agreement. In any event, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and/or assigns.

16. Amendment. This Agreement may not be modified except by an instrument in writing executed by each of the parties that are signatories hereto.

17. Severability. Notwithstanding anything herein contained, if any one or more of the provisions of this Agreement shall for any reason whatsoever be held to be illegal, invalid or unenforceable in any respect, such illegality, invalidity or unenforceability shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such illegal, invalid or unenforceable provision had never been contained herein.

18. Recording. The Owner, for itself, its successors and assigns, hereby agrees and acknowledges that this Agreement shall immediately be recorded by Owner, at no expense to HUD, in the appropriate land records office and returned to HUD as soon as possible following recordation and prior to prepayment.

19. Notice to Tenants upon Expiration of Use Agreement. The Owner shall notify each Tenant at least 90 days prior to the expiration of the Term of this Agreement that after the expiration of the Term of this Agreement, the Owner will be free to alter Unit rents without the Secretary's approval, and that the Tenant will be required to bear the entire cost of the rent, subject to any applicable requirements or restrictions under the lease or under State or local law. The notice to each Tenant shall also state: (a) The actual (if known) or the estimated Unit rent

that each Tenant will be charged for the Unit that Tenant occupies following the expiration of the Term of this Agreement; (b) the difference between the actual (if known) or estimated Unit rent that each Tenant will be charged for the Unit that Tenant occupies, and the current Unit rent paid by each Tenant under the Terms of this Agreement. The Owner shall provide the Secretary a certification that each Tenant has been notified in accordance with this provision with a copy of the text of the notice attached.

20. Headings. The headings and titles to the sections of this Agreement are inserted for convenience only and shall not be deemed a part hereof nor affect the construction or interpretation of any provisions hereof.

21. Governing Law. This Agreement shall be governed by all applicable federal laws and the laws of the state in which the Project is located.

22. Counterparts. This Agreement may be executed in any number of counterparts, all of which counterparts shall be construed together and shall constitute but one agreement.

23. Signatory Authority. Any person signing this Agreement on behalf of a party (e.g., the General Partner signing for an owner) represents that he or she has the authority to bind the party for whom he or she is signing.

[Signatures and acknowledgments are contained on the following pages.]

Exhibit A

Legal Description