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TCAP WRITTEN AGREEMENT

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BETWEEN

[OWNER]

AND

Housing Trust Fund Corporation

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The Property affected by this written instrument lies within the:

County:

Section:

Block:

Lot(s):

Address:

Record and Return to:

**Housing Trust Fund Corporation**  
**ATTN: Counsel's Office**  
**38-40 State Street, 5<sup>th</sup> Floor**  
**Albany, NY 12207**

## TCAP WRITTEN AGREEMENT

**AGREEMENT** made as of this \_\_ day of \_\_\_\_\_, 2009 between \_\_\_\_\_, a New York [limited partnership or /limited liability company] with an office at \_\_\_\_\_ (“Owner”) and the Housing Trust Fund Corporation (“Agency”), a public benefit corporation, having its principal place of business at 38-40 State Street, Albany, NY 12207.

### W I T N E S S E T H:

**WHEREAS**, the Owner holds legal title to certain real property as more fully described in Schedule A attached hereto (“Premises”); and

**WHEREAS**, the Owner intends to develop low-income housing as more fully described in Schedule B attached hereto (“Project”); and

**WHEREAS**, the Owner received an award of low-income housing tax credits (“LIHTC”) under Section 42(h) of the Internal Revenue Code of 1986, 26 U.S.C. 42 (“Section 42”) for the Project on \_\_\_\_\_ [**NOTE: THIS DATE SHOULD BE THE DATE OF AWARD LETTER**] and, in connection therewith, has entered into, or will be entering into, a regulatory agreement setting forth the requirements of Section 42 and serving as the “extended low-income housing commitment” required thereunder (“LIHTC Regulatory Agreement”); and

**WHEREAS**, the Agency has received funding provided by the United States Department of Housing and Urban Development (“HUD”) under the Tax Credit Assistance Program created pursuant to Title XII of the American Recovery and Reinvestment Act of 2009 and the implementing regulations therefor (“TCAP”; such funds being “TCAP Funds”) for the assistance of certain projects receiving an award of LIHTC under Section 42; and

**WHEREAS**, the Owner has requested that the Agency provide financial assistance for construction of the Project and the Agency is willing to lend TCAP Funds to the Owner for eligible costs (as hereinafter defined) of the Project provided that the Owner shall (i) enter into this written agreement (“Agreement”), which shall be recorded as a restrictive covenant against the Premises, ensuring compliance with the requirements of TCAP and agree to repay the TCAP Funds upon a violation of any of the terms or conditions thereof and (ii) grant to the Agency a mortgage on the Premises as security therefor as hereinafter described; and

**WHEREAS**, environmental clearance for the use of federal funds for the Project has been obtained, a copy of which is attached hereto as Schedule C, and the HUD Request for Release of Funds has been approved.

**NOW THEREFORE**, in consideration of the premises and other good and valuable consideration, the parties do hereby agree as follows:

1. Binding Nature of Restrictions.

This Agreement shall be recorded against the Premises in the Office of the County Clerk for the County in which the Premises is located. The restrictions and covenants contained in this Agreement shall run with the land and be binding upon the Owner and all of the Owner's successors, assigns, heirs, grantees, or lessees for the term of this Agreement. All references to "Owner" in this Agreement shall include Owner's successors, assigns, heirs, grantees, or lessees.

2. TCAP Project.

(a) The Owner shall develop the Project described in Schedule B, including designating the (i) total number of LIHTC qualified units in the Project as "TCAP Units"; (ii) total number of Section 504 accessible units; and (iii) total number of Energy Star qualified units, in accordance with the distribution set forth in Schedule B.

(b) TCAP Funds are to be provided in the form of a loan evidenced by a note and secured by a mortgage on the Premises. The general terms of the loan are described in Schedule D attached hereto.

3. TCAP Compliance.

(a) The following are incorporated by reference into this Agreement as if fully set out herein: all applicable federal, State and local laws, rules, and regulations as may be amended from time to time, including, but not limited to, the provisions under the HOME Investment Partnerships Program heading and sections 1512, 1515, 1553 and 1606 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, 123 Stat. 115 (February 17, 2009), as amended ("Act"), and CPD Notice 09-03 -REV "Implementation of the Tax Credit Assistance Program (TCAP)" issued May 4, 2009 and revised July 27, 2009. In the event of a conflict between the terms and conditions of this Agreement and the Act, the Act shall govern.

(b) The Owner shall (i) utilize TCAP Funds only as permitted or required under TCAP, (ii) use the Premises only as permitted or required for projects assisted by TCAP Funds, (iii) otherwise comply with the terms, covenants and restrictions of TCAP and (iv) not perform or fail to perform any act the performance or non-performance of which would result in noncompliance with TCAP requirements, including, without limitation, the requirements contained in this Agreement. The Owner acknowledges that HUD has not promulgated final rules and regulations for TCAP and may adopt additional guidelines, rules or regulations, including additional requirements with respect to this Agreement. The Owner shall comply with all applicable federal, State, and local laws, rules and regulations, including, without limitation, the rules and regulations hereafter adopted or modified by

HUD with respect to TCAP and shall, upon request of the Agency, execute an amendment to this Agreement to comply with any such TCAP rules or regulations.

4. Regulatory Period.

The term of this Agreement shall commence on the date hereof and shall continue so long as the LIHTC Regulatory Agreement shall remain in effect.

5. Expenditure of TCAP Funds; Completion Date and Project Budget.

(a) The Owner shall use the TCAP Funds only for capital investment in the Project. For the purposes hereof, capital investment is defined as costs that are included in the "eligible basis" of the Project as defined in Section 42 (excluding the cost of any swimming pools), costs of land acquisition, on-site demolition costs, and hazardous material remediation costs, and as more specifically set forth in the Project Budget attached hereto as Schedule E ("Eligible Costs"). The TCAP Funds shall not be disbursed until needed to pay for Eligible Costs and only in the amount of actual costs incurred.

(b) The Owner shall submit to the Agency, or its designee, requests for disbursements in such form and manner and at such times as the Agency may require. Each request for disbursement of TCAP Funds shall (i) state the amount requested to be disbursed (ii) be certified by a designated officer, partner or member of the Owner and the Architect as to the matters stated therein including payments and percentage of completion (iii) affirm that the representations and warranties previously made to the Agency, or its designee, remain true and correct on the date thereof. If TCAP Funds are being provided during construction, disbursements shall be made in accordance with the applicable terms and conditions of the construction loan documents. The Owner agrees that the Agency, or its designee, shall not disburse TCAP Funds for items other than the Eligible Costs shown in the Project Budget, as more fully set forth in Schedule E, or in amounts greater than those set forth in the Project Budget.

(c) The Owner shall expend (i) not less than seventy-five percent (75%) of the TCAP Funds for Eligible Costs on or before February 16, 2011 and (ii) one hundred percent (100%) of the TCAP Funds for Eligible Costs on or before February 16, 2012 (unless such dates shall be extended by HUD) ("Statutory Expenditure Requirements"). Failure to satisfy the Statutory Expenditure Requirements constitutes an Event of Default as defined in paragraph 11 herein.

(d) The Owner shall comply with the Construction and Expenditure Schedule attached hereto as Schedule F.

(e) The Owner may not voluntarily prepay any portion of the TCAP Funds prior to February 16, 2012, without the written consent of the Agency.

6. Affirmative Marketing.

The Owner shall comply with the Affirmative Marketing Plan attached hereto as Schedule G. The Owner shall promptly notify in writing any rejected applicant of the grounds for such rejection.

7. Other Federal Requirements.

The Owner shall develop and manage the Project in accordance with the following Federal requirements:

(a) Equal Opportunity.

No person in the United States shall on the grounds of race, color, national origin, religion, sex, or disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination in the Premises. In addition, the Owner shall comply with the following:

(i) Fair Housing Act (42 U.S.C. 3601-19) and implementing regulations at 24 C.F.R. Part 100 and the regulations at 24 C.F.R. Part 107;

(ii) 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 C.F.R. Part 1;

(iii) The Age Discrimination Act of 1975 (42 U.S.C. 6101-07) and implementing regulations at 24 C.F.R. Part 146, "Nondiscrimination on the Basis of Age in HUD Programs or Activities Receiving Federal Financial Assistance"; and

(iv) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at 24 C.F.R. Part 8, "Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development".

(b) Environmental.

(i) Notwithstanding anything to the contrary contained herein, the Owner shall have no legal claim to any TCAP Funds unless the "Authority to Use Grant Funds (HUD 7015.16)" or equivalent letter has been executed by HUD.

(ii) The Project shall comply with the National Environmental Policy Act ("NEPA") (42 U.S.C. 4321 et seq.) and implementing regulations at 24 C.F.R. Part 58, including "related Acts" (see 24 C.F.R. Part 58.6). This shall include any ongoing requirements related to any required mitigation resulting from the NEPA

review and clearance and flood insurance as required by the National Flood Insurance Reform Act of 1994, if same is applicable to the Project.

(c) Prevailing Wages.

Construction of the Project shall be subject to the requirements of the Davis-Bacon Act (40 U.S.C. 3141 and 42 U.S.C. 5310), the Contract Work Hours and Safety Hours and Safety Standards Act (40 U.S.C. 3701), the regulations promulgated in connection thereto, and with other federal laws and regulations pertaining to labor standards and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs), as described in form HUD-4010 attached hereto as Schedule H.

(d) Debarred, Suspended, or Ineligible Contractors.

The Owner shall comply with subpart C of 2 C.F.R. Part 180 as required by 2 C.F.R. Part 2424 and, in accordance therewith, cannot award a contract to a contractor who is debarred, suspended or otherwise excluded from, or ineligible for, participation in federal assistance programs.

(e) Anti-Lobbying Restriction; Certification Regarding Lobbying.

The Owner shall comply with the restrictions on lobbying in 31 U.S.C. 1352 and implementing regulations at 24 C.F.R. Part 87. The Owner certifies, to the best of its knowledge, that:

(i) No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress 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, and the extension, continuation, renewal, amendment or modification of any federal contract, grant, loan or cooperative agreement.

(ii) If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting 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 TCAP Funds or the Project, the Owner shall complete and submit Standard Form - LLL, "Disclosure of Lobbying Activities," in accordance with its instructions.

In addition, each person who requests or receives a subgrant, contract, or subcontract exceeding \$100,000 at any tier under a TCAP grant must submit a certification, and a Standard Form - LLL, "Disclosure of Lobbying Activities" (if required), at the time that person requests or receives TCAP Funds.

(f) Lead-Based Paint Requirements.

The Owner shall comply with the Lead-Based Paint Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act of 1992 and implementing regulations at 24 C.F.R. Part 35, as applicable.

8. Environmental Approval.

The Owner shall comply with, and satisfy the terms and conditions contained in, the environmental approval attached hereto as Schedule C.

9. Records and Reports.

The Owner shall maintain records and shall submit any information and reports, as directed by the Agency, in order to assist the Agency in meeting its recordkeeping and reporting requirements under TCAP, including, without limitation, information related to the numbers of people employed in connection with the Project, the numbers of jobs created or retained by reason thereof, and demographic information about the occupants of the units of the Project. The Owner shall provide the Agency, DHCR, HUD and the HUD Inspector General with access to the Project and all Project records at all reasonable times in order to evaluate the Owner's compliance with the terms of this Agreement. All Project records shall be maintained by the Owner throughout the term of the Agreement.

10. Indemnification.

The Owner shall, to the fullest extent permitted by law, defend, indemnify and hold harmless the Agency and the New York State Division of Housing and Community Renewal ("DHCR"), their agents and employees, from and against any and all claims, actions, damages, losses, expenses and costs of every nature and kind, including reasonable attorneys' fees, incurred by or asserted or imposed against them, as a result of the Owner's performance in connection with the Project or this Agreement. All money expended by the Agency or DHCR as a result of such claims, actions, damages, losses, expenses and costs, together with interest at a rate not to exceed the maximum interest rate permitted by law, shall be immediately and without notice due and payable.

11. Default.

Any of the following shall constitute an Event of Default hereunder:

(a) if the Owner fails, in the opinion of the Agency, to comply with or perform any of the conditions, requirements or covenants contained in this Agreement, or the policies and procedures promulgated by the Agency, including, but not limited to, the Owner's failure to:

- (i) expend TCAP Funds for Eligible Costs;
  - (ii) complete the Project in accordance with the timeframes set forth in Schedule F;
  - (iii) satisfy the Statutory Expenditure Requirements or if, at any time, the Agency has determined, in its sole discretion, that the Owner will not be able to satisfy the Statutory Expenditure Requirements in a timely manner;
  - (iv) timely execute an amendment in such form as determined by the Agency as required under paragraph 3 (b) of this Agreement.
- (b) if at any time the Agency becomes aware that a representation or warranty made by the Owner with regard to its TCAP application or the Project is or was false or materially misleading;
- (c) if the Owner shall fail to comply with any of the terms of any mortgage, deed of trust, security agreement, loan agreement, credit agreement, the LIHTC Regulatory Agreement, or other instrument relating to the Project and executed in favor of the Agency or any other party.

12. Remedies.

- (a) Upon the occurrence of an Event of Default, the Agency shall have the right to exercise one or more of the following remedies, in addition to any and all other remedies available to it under this Agreement or at law or in equity:
- (i) Institute and prosecute any proceeding for an injunction or for specific performance of the Owner's obligations hereunder.
  - (ii) Extend the term of this Agreement by the period of such noncompliance upon the recording of an appropriate document, executed solely by the Agency, against the Premises. The period of noncompliance shall be presumed to be the period running from the date of this Agreement to the date that the Agency notifies the Owner of such noncompliance, which presumption may be rebutted by the Owner.
  - (iii) Upon written notice of the Agency, prohibit the Owner and/or any of its principals from doing business with the Agency for a period of not less than three (3) years from the date of such breach or violation. Such prohibition shall not extend to as-of-right benefits the Owner and/or any of its principals may receive from the Agency.
  - (iv) Terminate any obligation or commitment to provide additional TCAP Funds for the Project and/or demand immediate repayment of all TCAP Funds theretofore provided by the Agency for the Project.

(b) In the event of a threatened breach or violation of any of the covenants and agreements contained herein, the Agency shall have the right to the remedy described in subparagraph (a)(i) above.

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

13. Amendments.

This Agreement may not be amended except in writing by the Agency and the Owner by an instrument in recordable form executed by both parties.

14. Notices.

All notices shall be delivered by certified or registered mail, return receipt requested, to the respective parties hereto, at the addresses first above written, unless such addresses are otherwise modified in writing.

15. Expiration.

Except as otherwise provided in this Agreement or pursuant to applicable laws, all the requirements contained in this Agreement shall become null and void and of no further force or effect upon the expiration of the Regulatory Period. The Agency shall, at its sole cost and expense, execute and deliver to the Owner any document in recordable form requested by the Owner to reflect the expiration of the Regulatory Period without prejudice to the Agency's rights to enforce this Agreement with respect to any defaults or violations which occurred prior to the expiration of the Regulatory Period.

16. LIHTC Regulatory Agreement.

The Project shall be subject to the same LIHTC requirements, including, but not limited to, rent, income, use restrictions and compliance monitoring, as required under Section 42 and as set forth in the LIHTC Regulatory Agreement. The Owner shall comply in all respects with the requirements of the LIHTC Regulatory Agreement. All requirements contained in this Agreement shall be in addition to all requirements contained in the LIHTC Regulatory Agreement.

17. Equal Opportunity Requirements.

The Owner shall be required to comply with the provisions set forth in Article 15-A of the New York State Executive Law, as may be amended from time to time, and any regulations promulgated thereunder by the Division of Minority and Women's Business Development of the New York State Department of Economic Development, as may be amended from time to time. In connection therewith, the Owner shall be required to execute an Equal Opportunity Agreement and Minority and Women's Utilization Plan with the Agency and shall include such agreements in each construction contract entered into for the Project and shall further require each contractor, subcontractor and material man to comply with such agreements and provide any and all necessary documents as may be required by the Agency.

18. Enforcement.

This Agreement is enforceable by HUD, DHCR, the Agency, and the residents of the Project.

19. Whistleblower Protections.

If applicable, the Owner shall comply with the posting requirement regarding the protection of whistleblowers provided under section 1553 of the Act, and shall include the substance of this provision in all contracts and subcontracts utilizing TCAP Funds.

20. Signage.

The Owner shall, at its own cost and expense, erect and maintain a sign on the Premises consistent with criteria established by HUD, DHCR and the Agency.

21. Asset Management.

The Owner shall provide such reports and take such management actions, including financial restructuring, that may be required as determined in the sole discretion of the Agency, to ensure the long-term viability of the Project and the Agency's compliance with its asset management obligations under TCAP.

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

**Housing Trust Fund Corporation**

By: \_\_\_\_\_

Name:

Title:

**[OWNER]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

(Please Print)

Title: \_\_\_\_\_

UNIFORM ACKNOWLEDGEMENTS

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF ALBANY)

On the \_\_ day of \_\_\_\_\_ in the year 2009 before me, the undersigned, a Notary Public in and for said State, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF \_\_\_\_\_)

On the \_\_ day of \_\_\_\_\_ in the year 20\_\_ before me, the undersigned, a Notary Public in and for said State, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
Notary Public

**SCHEDULE A**

PROPERTY DESCRIPTION

*Metes and Bounds legal description as found in Schedule A of the most recent Title Report.*

**SCHEDULE B**

**TCAP PROJECT DESCRIPTION**

**Project Address:**

**Name and Contact Information of Project Owner:**

**Total Number of Units:**

**Total Number of LIHTC-Qualified Units:**

**Total Number of Section 504 Accessible Units:**

**Total Number of Energy Star Qualified Units:**

**Amount and Form of TCAP Assistance: \$\_\_\_\_\_;**loan

**Amount and Source of LIHTC: (4 %, 9 %)**

**Type of Project: (new construction, rehabilitation)**

| <b>Size</b>  | <b>TCAP Units</b> | <b>50% AMI Units</b> | <b>60% AMI Units</b> |
|--------------|-------------------|----------------------|----------------------|
| SRO          |                   |                      |                      |
| 0 Bedroom    |                   |                      |                      |
| 1 Bedroom    |                   |                      |                      |
| 2 Bedroom    |                   |                      |                      |
| 3 Bedroom    |                   |                      |                      |
| 4 Bedroom    |                   |                      |                      |
| <b>Total</b> |                   |                      |                      |

[If applicable: In addition, there will be 1 superintendent's unit which will not be a TCAP Unit.]

**SCHEDULE C**

ENVIRONMENTAL APPROVAL  
*NEPA Environmental Clearance letter*

**SCHEDULE D**

TERMS OF TCAP FUNDING

**Type of Funding:** Loan

**Interest Rate:**

**Term:**

**Repayment Schedule:**

**SCHEDULE E**

PROJECT  
BUDGET

*[Sources and Uses from Commitment Letter Exhibit 3.]*

**SCHEDULE F**

CONSTRUCTION AND EXPENDITURE SCHEDULE

*[Attach Cash Flow Schedules and Progress and Payment Schedule (for each trade item, to be provided by Owner).]*



**SCHEDULE G**

AFFIRMATIVE MARKETING PLAN

*(Final version after approval by Fair Housing and Legal.)*

**SCHEDULE H**

FORM HUD-4010

*[Note that per A.1. (i) wage determination must be attached to form.]*