**DO NOT INCLUDE THIS COVER PAGE IN THE USE OF THIS NOTE AND RETENTION AGREEMENT.**

Affordable Housing Program – Rental Projects Promissory Note and Retention Agreement

This form document has been prepared to address the minimum retention requirements of the AHP Regulations for projects located on tribal trust or allotted land. The Federal Home Loan Bank of San Francisco makes no representation or warranty that a court will enforce these form documents in accordance with applicable federal, state, or tribal law. We strongly recommend that each member have its legal counsel review the documents to address any federal, state, or tribal requirements, including but not limited to consumer credit laws, notary requirements, usury laws, and recording procedures and requirements. The final note and retention agreement and any security documents must meet the requirements of your jurisdiction. In the event that the Lender elects to record a leasehold deed of trust, collateral assignment of lease, or other security instrument in connection with project, this promissory note and retention agreement shall be attached to, or incorporated by reference into, such security instrument and/or recorded separately as a deed restriction. In such case, the promissory note and retention agreement may require the approval of the Secretary of the Interior pursuant to Secretary of the Interior under either 25 USC § 415 or 25 USC § 81.

Notes to Sections

Section 4: Repayment. The text in Section 4 may raise tax issues in projects utilizing low-income housing tax credits. The parties should consult their tax advisers concerning appropriate revisions to address such issues. The Bank will not object to modifications or deletions intended to preserve the benefit of low-income housing tax credits so long as the Income and Affordability Restrictions remain in place for the Retention Period and repayment is required under the circumstances prescribed in the AHP Regulations, which are generally those circumstances set forth in Sections 6 and 7.

Delete Section 4 if not applicable and state “This section left intentionally blank.”

Section 8: Cure Rights. The Bank understands that notice and cure rights of the kind described in this section may be requested for tax credit projects, but they are not required by AHP Regulations and the Bank has no objection to modification or deletion of this section.

Delete Section 8 if not applicable and state “This section left intentionally blank.”

Section 15: Governing Laws. Delete the following text in this section if not applicable: [FOR FEDERALLY CHARTERED INSTITUTIONS: or to the extent such law restricts activities otherwise permitted to federally chartered savings banks in which event the laws, rules and regulations of the United States shall govern].

Section 19. Add the provided provision or a similar provision that complies with tribal law to any AHP document that has a federally recognized tribe, its agency, authority or business entity as a Project Sponsor or Borrower. Please consult tribal law for specific requirements regarding authority and requirements for waiving sovereign immunity. Please add a signature block for any party that waives sovereign immunity.

PROMISSORY NOTE AND RETENTION AGREEMENT

(AHP RENTAL PROJECT ON TRIBAL TRUST OR ALLOTTED LAND)

$[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] [\_\_\_\_\_\_\_\_\_\_\_\_\_, 202\_\_]

[State]

FOR VALUE RECEIVED, [borrower], a [form of entity] (the “**Borrower**”), promises to pay to [lender], a [form of entity] or its successor as holder of this Promissory Note and Retention Agreement (the “**Lender**”), or order, the principal sum of \_\_\_\_\_\_\_\_\_\_\_ Dollars $[\_\_\_\_\_\_\_\_\_\_\_\_], or so much thereof as may be advanced hereunder as provided below. The funds disbursed by the Lender to the Borrower under this Promissory Note and Retention Agreement (this “**Note and Agreement**”) were advanced to Lender by the Bank pursuant to the AHP Regulations. By signing this Note and Agreement, the Borrower hereby agrees as follows:

**RECITALS**:

1. **Whereas**, pursuant to Section 721 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“**FIRREA**”), the Federal Housing Finance Agency (the “**Finance Agency**”) is required to cause each Federal Home Loan Bank to establish an affordable housing program to assist members of each Federal Home Loan Bank to finance affordable housing for very low-, low-, or moderate-income households.
2. **Whereas**, the Bank has also established an Affordable Housing Program Implementation Plan, and policies, procedures, guidelines, and instructions covering, among other things, feasibility, disbursement, monitoring and modifying affordable housing projects participating in the AHP (as amended from time to time, the “**AHP Policies and Procedures**”).
3. **Whereas**, the Lender, a member of the Bank, and the Project Sponsor have obtained a commitment for funds from the Bank pursuant to an application to the Bank (the “**AHP Application**”) to obtain AHP Subsidy (defined below) in connection with the real property identified in the AHP Application and the improvements and tangible and intangible personal property associated or connected therewith (the "**Project**").
4. **Whereas**, pursuant to regulations (including, without limitation, those contained in 12 CFR Part 1291) promulgated by the Finance Agency pursuant to FIRREA (the “**AHP Regulation**”), members of each Federal Home Loan Bank are required to provide for the repayment of any AHP Subsidy should said AHP Subsidy be unused or improperly used.
5. **Whereas**, in connection with the Project, the Project Sponsor entered into an Affordable Housing Program Direct Subsidy Agreement Rental Project (“**AHP Agreement**”) with the Bank and Lender, pursuant to which the Project Sponsor and Lender agreed to be bound by the AHP Regulations, and perform certain monitoring functions with respect to the Project and related AHP Subsidies.
6. **Whereas**, the Lender has disbursed or agreed to disburse the AHP Subsidy to the Borrower in connection with the Borrower’s acquisition, construction or rehabilitation of real property described in the AHP Application, and in connection with the AHP Subsidy, the Borrower has executed this Note and Agreement to set forth those circumstances under which the Lender shall be entitled to the repayment by the Borrower of the AHP Subsidy.

# **Definitions**. As used in this Note and Agreement, the following capitalized terms have the following meanings:

# “**AHP**” means the Federal Home Loan Bank Affordable Housing Program.

“**AHP Application**” means the AHP application submitted to the Bank for Project No. [\_\_\_\_\_\_\_\_\_\_\_\_\_], Project Name: [\_\_\_\_\_\_\_\_\_\_\_\_\_\_].

“**AHP Policies and Procedures**” means the Bank’s policies, procedures, guidelines and instructions covering, among other things, feasibility, disbursement, monitoring and modifying affordable housing projects participating in the AHP, all as amended from time to time.

“**AHP Regulations**” means the regulations set forth at 12 C.F.R. Part 1291, as amended from time to time, of the FHFA governing the AHP.

“**Borrower**” is the maker of this Note and Agreement and the owner of the Project.

“**FHFA**” means the Federal Housing Finance Agency.

“**Bank**” means the Federal Home Loan Bank of San Francisco.

“**Implementation Plan**” means the Affordable Housing Program Implementation Plan established by the Bank, as amended from time to time.

“**Income-Eligibility and Affordability Restrictions**” means income limitations as amended or modified or adjusted annually according to the current applicable median income data from time to time with the approval of the Bank and rent limitations such that the Project units are affordable for households with incomes at or below the levels committed to be served in the AHP Application.

“**Loan**” means the advance of funds evidenced by this Note and Agreement.

“**Loan Documents**” means this Note and Agreement, the Subsidy Agreement, and all other documents relating to or securing this Note and Agreement (as renewed, amended, modified, restated and extended from time to time).

“**Maturity Date**” means the later of the end of the Retention Period or the following date: [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_].

“**Project**” means the real property identified in the AHP Application and the improvements and tangible and intangible personal property associated or connected therewith, all of which is subject to this Note and Agreement.

“**Retention Period**” means the period commencing on the date of completion of the Project as determined by the Bank in its discretion and ending fifteen (15) years after the same date.

“**Project Sponsor**” means an organization or governmental or other public entity that has an ownership interest in the Project (including any leasehold, partnership or control of a nonprofit affiliate, agency, or authority that has a direct ownership interest in the Project), and is a party to the Subsidy Agreement. A Project Sponsor may be the Borrower.

“**Subsidy Agreement**” means the Affordable Housing Program Direct Subsidy Agreement Rental Project, executed by and among the Project Sponsor, the Lender and the Bank.

# **Covenants.**

## The Project's rental units, or applicable portion thereof, must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the AHP Application for the duration of the Retention Period.

## Each of the Bank and the Lender is to be given notice by the Borrower of any proposed sale, transfer, assignment of leasehold interest, assignment of allotment, assignment of title or deed, or refinancing of the Project occurring prior to the end of the Retention Period.

## In the case of sale, transfer, assignment of leasehold interest, assignment of allotment, assignment of title or deed, or refinancing of the Project during the Retention Period the full amount of the Loan shall be repaid to the Bank, unless one of the following exceptions applies: (i) The Project continues to be subject to this Note and Agreement, a new retention agreement in substantially the form of this Note and Agreement, a deed restriction or other legally enforceable mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP Application for the duration of the Retention Period; or (ii) If authorized by the Bank, in its discretion, the households are relocated, due to the exercise of eminent domain, or for expansion of housing or services, to another property that is made subject to a new retention agreement in substantially the form of this Note and Agreement, a deed restriction or other legally enforceable mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP Application for the remainder of the Retention Period.

## The income-eligibility and affordability restrictions applicable to the Project shall terminate if leasehold or legal title to the Project is transferred by foreclosure or deed-in-lieu of foreclosure, if the first leasehold mortgage on the Project is assigned to the Department of Housing and Urban Development (HUD). Any obligation to repay the Loan for any period of noncompliance arising prior to the transfer, foreclosure, deed in lieu, or assignment to HUD shall not be extinguished by such actions. The obligation to repay the Loan to the Bank shall not terminate after any foreclosure, deed in lieu of foreclosure, or assignment to HUD and is subject to reasonable collection efforts; provided, however, that if the Project is located on land held in trust by the United States government for a Native American tribe or individual tribal member or is otherwise held in restricted status, is located on Native land in the State of Alaska conveyed by the Alaska Native Claims Settlement Act, or is located on Hawaiian Home Lands created under the Hawaiian Homes Commission Act of 1920, then neither the Lender nor the Bank shall have the right to sell, foreclose or occupy the Project.

## In the event that the Loan is disbursed to the Borrower prior to completion of construction of the Project, then at all times prior to completion, (i) any sale, transfer, or assignment of the property (or any portion thereof) to any person or entity shall be prohibited without the prior written consent of the Lender; and (ii) any failure to develop the property in accordance with the AHP Agreement for the Project, or any other failure by the Borrower or the Project Sponsor to comply with said AHP Agreement, the Subsidy Agreement, or any AHP Regulation, shall result in a default requiring repayment of the Loan to the Bank.

## The Project may not receive funds from multiple AHP competitive or set-aside product(s) offered by the Bank during the Retention Period.

# **Interest**. The indebtedness evidenced by this Note and Agreement shall not bear any interest except as provided below.

# **Repayment**. The Loan will not amortize. Except as provided below, payment of the principal balance of and any accrued interest under this Note and Agreement will be due and payable in full on the Maturity Date; provided, however, that no payment shall be required under this Section 4 on the Maturity Date if no default or breach has occurred and is continuing under this Note and Agreement, the Subsidy Agreement, the other Loan Documents, the AHP Application, the AHP Regulations or the AHP Policies and Procedures as of the end of the Retention Period, or on such earlier date as provided herein or the terms and conditions of the Subsidy Agreement.

# **Optional Prepayment**. The Borrower shall have the right to prepay all or a portion of the principal due under this Note and Agreement without any charge or penalty being made therefor.

# **Acceleration**. Subject to the nonrecourse provisions in the section below entitled “Security; Nonrecourse Provision and Exceptions,” the Loan (or any portion of the Loan determined by the Lender) plus interest in an amount determined by the Bank, will become immediately due and payable in full, at the option of the Lender, if:

## any portion of the Loan proceeds was not used in compliance with:

### the commitments made in the AHP Application, or

### the requirements of the AHP Regulations, or

### the AHP Policies and Procedures or the Implementation Plan; or

### the Subsidy Agreement; or

## the Borrower or the Project Sponsor fails to perform or keep any obligation or agreement of the Borrower or the Project Sponsor provided in the AHP Application, the AHP Regulations, the AHP Policies and Procedures, the Implementation Plan, Subsidy Agreement, the Loan Documents or any certification, report or other agreement now or hereafter provided by the Borrower or the Project Sponsor to the Lender or the Bank in connection with the AHP Application or the Loan; or

## any representations and warranties made by the Borrower or the Project Sponsor to the Lender or the Bank are untrue in any material respect.

The Lender’s right to accelerate payment of this Note and Agreement on account of the above provisions is subject to the notice and cure provisions, if any, set forth below. If any of the events enumerated in the preceding subparagraphs occurs and if the Lender consents to the same or fails to exercise its right to declare all sums secured hereby due and payable, such consent or failure shall not be deemed or construed as a waiver, and the express consent of the Lender shall be required on all successive occurrences.

# **Other Repayment Events**. Subject to the nonrecourse provisions of the section below entitled “Security; Nonrecourse Provision and Exceptions,” the Loan will become immediately due and payable in full, at the option of the Lender, in the following cases:

## If, during the Retention Period, the Project is sold, transferred, assigned, or refinanced and the Project ceases to be subject to a retention agreement, deed restriction, or similar instrument imposing the Income-Eligibility and Affordability Restrictions on the Project,

## If during the Retention Period, the Project Sponsor or the Borrower sells, assigns, subleases, or transfers its leasehold interest or ownership interest in the real property associated with the Project to any entity other than as specified in the representations made by the Borrower or the Project Sponsor in the approved AHP Application,

## To the extent provided in Section 15 of the Subsidy Agreement entitled “Repayment and Recovery Provisions” and any successor section or provision, which provides for liability of the Project Sponsor to the Lender for amounts, including interest, that the Lender is required to repay to the Bank if, as a result of the actions or omissions of the Project Sponsor or the Borrower, the Project is not used in compliance with the terms of the AHP Application or the AHP Regulations.

# **Cure Rights**. Notwithstanding anything herein to the contrary:

## The Borrower shall have the right to cure, or cause the Project Sponsor to cure, any defaults and the Lender agrees to accept cures tendered by the Borrower or the Project Sponsor within thirty (30) days of written notice to the Borrower or the Project Sponsor of such default, plus such additional time as is reasonably necessary to cure the default provided the Borrower or the Project Sponsor, as the case may be, has commenced the cure within such thirty (30) day period and is diligently prosecuting the cure.

## If a default is eliminated by an approved modification of the AHP Application consistent with Section 11 of the Subsidy Agreement (or any successor provision) and the AHP Regulations, the default shall be deemed cured.

## The Lender shall give the Project Sponsor and the Borrower’s tax credit investor, if any (the “**Investor**”), the same written notice of default given to the Borrower as required herein; provided, that the Lender’s failure to give separate written notice to the Project Sponsor or the Investor shall not impair or invalidate any notice of default given to the Borrower or give rise to any liability on the part of the Lender to the Project Sponsor or the Investor or any other third party. The Investor shall have the right to cure defaults within the time periods provided to the Borrower herein, and performance of a cure by the Investor or an affiliate of the Investor shall have the same effect as would like performance by the Borrower. The Investor’s address for notice purposes is:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

or such other address provided the Lender by the Investor from time to time.

# **No Offset**. The Borrower hereby waives any rights of offset it now has or may hereafter have against the Lender, its successors and assigns, and agrees to make the payments called for herein in accordance with the terms of this Note and Agreement.

# **Expenses of the Bank**. The Borrower hereby agrees that if the Borrower or the Project Sponsor brings any action or proceeding against the Bank seeking to obtain any legal or equitable relief under or arising out of this Note and Agreement, the Subsidy Agreement between the Lender and the Bank pertaining to this Note and Agreement, the subsidy represented by this Note and Agreement or any transaction contemplated in connection therewith, and such relief is not granted by a final decision, after any and all appeals of court of competent jurisdiction, the Borrower will pay the attorneys’ fees and other costs incurred by the Bank in connection therewith. The Bank shall be a third party beneficiary of the terms and provisions of this paragraph and shall be entitled to take any and all remedies available under applicable law to enforce this provision against the Borrower.

# **Waiver, Attorneys’ Fees**. The Borrower waives diligence, presentment, protest, and demand, and notice of protest, dishonor and non-payment of this Note and Agreement, and waives the right to plead any and all statutes of limitations as a defense to any demand on this Note and Agreement or agreement to pay the same. If an action is instituted on this Note and Agreement, the undersigned promises to pay, in addition to the costs and disbursements allowed by law, such sum as a court may adjudge reasonable as attorneys’ fees in such action.

# **Security; Nonrecourse Provision and Exceptions**.

## This Note and Agreement is unsecured. The Borrower and the Project Sponsor acknowledge and agree that this Note and Agreement does not attach a claim, lien, charge, right of entry or liability to real property (i.e., encumber) tribal land and therefore does not require approval by the Secretary of the Interior pursuant to 25 U.S.C. § 81.

## Subject to the exceptions set forth below, repayment of amounts due under this Note and Agreement shall be nonrecourse to the Borrower and its partners, and the Lender shall look solely to this Note and Agreement for repayment in the event of default hereunder. The foregoing provision shall not relieve the Project Sponsor or the Borrower and, if the Borrower is a partnership, any general partner of the Borrower of liability, subject to applicable antideficiency laws, for:

### repayment of amounts due under this Note and Agreement in case of misuse of Loan proceeds as described in Section 6 or as otherwise repayable in accordance with Section 15 of the Subsidy Agreement;

### repayment of amounts due under this Note and Agreement if the Borrower sells, transfers or refinances the Project and causes the Project to be released from the burden of the instrument imposing the Income and Affordability Restrictions on the Project, except for release by reason of a foreclosure against the Project;

### fraud or willful misrepresentation;

### failure to pay taxes, assessments or similar charges that are, or are secured by, a prior lien on the Project, except to the extent this provision would result in all or any portion of the indebtedness evidenced by this Note and Agreement being treated as a recourse liability under applicable Treasury Regulations;

### the retention of any rental income or other income arising with respect to the Project collected by the Project Sponsor or the Borrower after the holder hereof has given any notice that the Borrower is in default and not applied such income to indebtedness secured by a prior lien on the Project or to expenses of ordinary operation or maintenance of the Project, to the full extent of the rental income or other income so collected and retained by the Project Sponsor or the Borrower;

### the misapplication of any proceeds under any insurance policies or awards resulting from condemnation or the exercise of the power of eminent domain or by reason of damage, loss or destruction to any portion of the Project;

### commission of waste with respect to the Project; and

### breach of any environmental covenant or representation made by the Project Sponsor or the Borrower relating to the Project.

# **Assignment**. The Lender may assign this Note and Agreement without the consent of the Borrower or the Project Sponsor.

# **Modifications and Waivers**. No provision of this Note and Agreement may be waived, modified, discharged or canceled orally, but only in writing and signed by the party against whom enforcement of any waiver, modification, discharge or cancellation is sought. In case any one or more of the provisions contained in this Note and Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions hereof, and this Note and Agreement shall be construed as if such invalid, illegal or unenforceable provision(s) had never been included. No provision herein shall impair any obligation of the Project Sponsor under the Subsidy Agreement.

# **Governing Law**. The provisions of this Note and Agreement shall be governed by the laws of the jurisdiction in which the Project located except to the extent such law is contrary to or inconsistent with the laws, rules or regulations of the United States [FOR FEDERALLY CHARTERED INSTITUTIONS ADD or delete if not applicable):] or to the extent such law restricts activities otherwise permitted to federally chartered savings banks in which event the laws, rules and regulations of the United States shall govern.

# **Counterparts**. This Note and Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute and be one and the same instrument.

# **Recording this Note and Agreement**. In the event that the Lender elects to record a leasehold deed of trust, collateral assignment of lease, or other security instrument in connection with financing the Project, this Note and Agreement shall be attached to, or incorporated by reference in, and made a part of such security instrument to be recorded in the official records of the county where the Project is located and in the Bureau of Indian Affairs Land Titles and Records Office.

# **Attorneys' Fees**. If an action is instituted on this Note and Agreement, the Borrower promises to pay, in addition to the costs and disbursements allowed by law, such sum as a court may adjudge reasonable as attorneys' fees in such action.

# **Limited Waiver of Sovereign Immunity; Exhaustion.** The [Borrower/Project Sponsor/Tribal Council of the [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (the “Tribe”)], in conformity with the laws of the Tribe, hereby expressly, unequivocally and irrevocably waives its sovereign immunity (and any defense based thereon) from any suit, action, arbitration, or other legal proceedings or from any legal process, in each case of any nature whether such action be brought in or arise under law or equity, arising in contract, tort or statute (inclusive of claims and counterclaims, actions for equitable or provisional relief and to compel arbitration, and whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution, exercise of contempt powers, or otherwise) (an “Action”) and, further, waives any sovereign immunity from any judgment or order related thereto, provided that:

# The Action (A) arises against the [Borrower/Project Sponsor] under this Note and Agreement or any related AHP document (collectively with the Loan Documents, the “Program Documents”) to which it is a party, including, without limitation, any action to interpret or enforce or otherwise seek or obtain relief with respect to the provisions of the Program Documents in connection therewith, in connection with the obligations of the [Borrower/Project Sponsor] thereunder or in connection with the transactions contemplated thereby, whether such rights arise in law or equity; or (B) is to enforce and execute any order, judgment or ruling resulting from such an action or arbitration award; and

# Any Action will be brought in the courts of the State of [\_\_\_\_\_\_\_\_\_\_\_\_]. The [Borrower/Project Sponsor] hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdictions of the courts of the State of [\_\_\_\_\_\_\_\_\_\_\_], and any appellate court to which any appeals therefrom are available. Solely in the event that such courts decline jurisdiction, then, at the option of the Lender or the Bank, any Action shall be resolved by binding arbitration in [\_\_\_\_\_\_\_\_\_\_\_\_\_]. The arbitration shall be conducted in accordance with the procedural rules of the Federal Arbitration Act (Title 9, U.S. Code) and the regulations promulgated thereunder, notwithstanding any choice of law provision in this Note and Agreement or any other Program Document and under the Commercial Rules of the American Arbitration Association or any successor thereof.

# The [Borrower/Sponsor] agrees to use the governing law set forth in Section 15 to interpret and enforce the rights of the parties to the Program Documents.

# The limited waiver of sovereign immunity and dispute resolution provisions set forth herein and in the Program Documents are for the benefit of the parties to the Program Documents only, and do not authorize claims by any third parties or for relief beyond the remedies specifically authorized in the Program Documents.

# The [Borrower/Project Sponsor] hereby expressly, unconditionally and irrevocably waives, to the fullest extent it may legally and effectively do so, any right the [Borrower/Project Sponsor] may otherwise have to require that any Action be considered or heard in any court, including without limitation considered or heard first in any tribal court, whether because of the doctrine of exhaustion of tribal remedies or as a matter of comity or abstention, and will not commence any such action in any tribal court or forum of the district without the written consent of the other parties to such Action.

[Signature page follows.]

Dated as of the date first above written.

**BORROWER:**

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], a [\_\_\_\_\_\_\_\_\_\_\_\_\_] [form of entity]

By:

Name:

Its:

|  |  |  |
| --- | --- | --- |
| STATE OF  COUNTY OF |  | ss. |

**[INSERT APPROPRIATE NOTARY LANGUAGE FOR APPLICABLE STATE]**