

E 2109453 B 3881 P 98-110  
RICHARD T. MAUGHAN  
DAVIS COUNTY, UTAH RECORDER  
09/29/2005 08:00 AM  
FEE \$34.00 Pgs: 13  
DEP RT REC'D FOR POOLE & ASSOC L C

When Recorded Return to:

President  
Utah Housing Corporation  
2479 S. Lake Park Boulevard  
West Valley City, Utah 84120

Tax Parcel I.D. No.: 01-305-0107 ✓

LOW-INCOME HOUSING CREDIT COMMITMENT AGREEMENT

AND DECLARATION OF RESTRICTIVE COVENANTS

(AND SUBORDINATION AGREEMENT AND RELEASE)

This Low-Income Housing Credit Commitment Agreement and Declaration of Restrictive Covenants (and Subordination Agreement and Release) (the "Agreement") is made effective as of the 14th day of September, 2005, by and between Foxboro Terrace Associates, L.C., a Utah limited liability company, its successors and assigns (the "Project Owner"), and Utah Housing Corporation, a public corporation of the State of Utah (the "UHC").

RECITALS:

WHEREAS, Section 42 of the Internal Revenue Code of 1986, as amended ("IRC § 42"), provides for the allocation of low-income housing credits for the construction, acquisition and/or rehabilitation of qualified low-income housing buildings;

WHEREAS, UHC is the housing credit agency which has been designated as the agency responsible for the allocation of low-income housing credits for the State of Utah pursuant to IRC § 42;

WHEREAS, the Project Owner has made application, which application is on file with UHC and is hereby incorporated herein by this reference, to UHC for the allocation of low-income housing credits with respect to the construction, acquisition and/or rehabilitation of that certain qualified low-income building or buildings located upon and being a part of the real property described in Exhibit "A" attached hereto and incorporated herein by this reference and known as Foxboro Terrace Apartments (the "Project");

WHEREAS, the Project Owner represents that the Project satisfies the requirements of IRC § 42, as a qualified low-income housing project, and the Project Owner represents that it will maintain the Project in conformity and continuous compliance with IRC § 42 and applicable regulations thereunder, as the same may hereafter be amended, any other federal or state requirements applicable thereto and this Agreement;

WHEREAS, UHC has relied on the information submitted by the Project Owner in its application, as supplemented, with respect to the Project in reserving low-income housing credits to the Project Owner;

WHEREAS, UHC is unwilling to allocate any low-income housing credits to the Project Owner for the Project unless the Project Owner shall, by entering into and pursuant to this Agreement, consent and agree to the conditions and restrictions set forth herein and make a declaration of restrictive covenants with respect to the Project as set forth herein; and

WHEREAS, the Project Owner, under this Agreement, intends, declares and covenants that the regulatory and restrictive covenants set forth herein governing the use, occupancy and transfer of the Project shall be and are covenants running with the land for the term stated herein and binding upon all subsequent owners of the Project for such term set forth herein, and are not merely personal covenants of the Project Owner.

NOW THEREFORE, in consideration of the mutual premises set forth above, and based upon the mutual covenants and promises hereinafter set forth, and such other valuable consideration the receipt and sufficiency of which is hereby acknowledged, the Project Owner and UHC agree as follows:

1. Applicable Fraction. The Project Owner agrees that the applicable fraction, as defined in IRC § 42(c)(1), for each taxable year in the extended use period, as defined in IRC § 42, for the following qualified low-income buildings of the Project will not be less than 94%:

<u>Building Id. No.</u>	<u>Address</u>
UT-2005-01001	882 W. Foxboro Drive, Bldg. A, North Salt Lake, UT 84054
UT-2005-01002	882 W. Foxboro Drive, Bldg. B, North Salt Lake, UT 84054
UT-2005-01003	882 W. Foxboro Drive, Bldg. C, North Salt Lake, UT 84054
UT-2005-01004	882 W. Foxboro Drive, Bldg. D, North Salt Lake, UT 84054
UT-2005-01005	882 W. Foxboro Drive, Bldg. E, North Salt Lake, UT 84054
UT-2005-01006	882 W. Foxboro Drive, Bldg. F, North Salt Lake, UT 84054
UT-2005-01007	882 W. Foxboro Drive, Bldg. G, North Salt Lake, UT 84054
UT-2005-01008	882 W. Foxboro Drive, Bldg. H, North Salt Lake, UT 84054

2. Set-Aside Election. The Project Owner agrees that 170 of the 180 units of the Project shall be restricted as provided herein and in paragraph 13. The Project Owner agrees that for each taxable year in the extended use period, as defined in IRC § 42, the restricted residential units in the Project shall be both rent restricted, as defined in IRC § 42, and occupied by individuals (hereinafter “low-income tenants”) whose income is 60% or less of the area median gross income, as more specifically provided in paragraph 13, with respect to the county in which the Project is located, as annually determined and published by H.U.D.

3. Notification of Non-Compliance. The Project Owner agrees to not take or permit to be taken any action which would have the effect or result, directly or indirectly, of subjecting the

Project to non-compliance with IRC § 42, as the same may be amended from time to time, the regulations issued thereunder, any other state or federal requirements or any provisions of this Agreement. If the Project Owner becomes aware of any incidence or manner in which the Project does not comply with IRC § 42 or this Agreement, the Project Owner shall notify UHC of such non-compliance within 30 days after the date Project Owner becomes aware of such non-compliance. As required by Income Tax Regulation § 1.42-5(e)(3), UHC shall notify the Internal Revenue Service ("IRS") of any non-compliance of which UHC becomes aware.

4. Consistency and Nondiscrimination. The Project Owner agrees that the residential rental units of the Project occupied by low-income tenants will be of comparable quality to all other units in the Project. The Project Owner will not discriminate against any tenant or prospective tenant because of race, color, religion, age, sex, sexual preference, national origin, familial status, source of income or disability. The Project Owner will comply in all respects with all applicable federal, state and local laws, rules, regulations and Executive Orders relating to housing and employment.

5. Ownership. The Project Owner represents and warrants, upon execution and delivery of this Agreement, that it has good and marketable title to the Project, free and clear of liens and encumbrances, except for those liens and encumbrances which secure financing for the acquisition, construction or rehabilitation of the Project, property taxes, and customary non-monetary liens and encumbrances relating to easements, utilities, and similar matters.

6. Release and Indemnification. The Project Owner represents that it has independently reviewed the applicable allocation documents providing for the allocation of low-income housing tax credits for the Project to ensure the correctness and validity of the same, and has not relied on any representations or statements from UHC with respect to the Project Owner's entitlement to the allocation of low-income housing tax credits for the Project. The Project Owner agrees to release and hold UHC, its officers, trustees, employees and agents harmless from any claim, loss, liability, demand or judgment incurred by or asserted against the Project Owner resulting from or relating to the allocation of low-income housing credits, or the recapture thereof by the Internal Revenue Service, or the monitoring of the Project's compliance with IRC § 42 and this Agreement. Further, the Project Owner agrees to defend, indemnify and hold UHC, its officers, trustees, employees and agents harmless from any claim, loss, liability, demand, judgment or cost (including without limitation reasonable attorneys' fees) arising out of the negligence, intentional misconduct, misrepresentations of the Project Owner or breach of this Agreement by the Project Owner.

7. Compliance Monitoring. The Project Owner acknowledges that UHC, or its delegate, is required to monitor the Project's compliance with the requirements of IRC § 42 and the covenants of this Agreement. Accordingly, the Project Owner agrees to comply with the obligations, terms and conditions of UHC's Compliance Monitoring Plan, as the same may be amended from time to time. As a condition to leasing a low-income unit, a low-income tenant shall be required to provide sufficient documentation to substantiate income levels of all individuals residing therein.

8. Inspection. The Project Owner shall permit, during normal business hours, upon reasonable notice, any duly authorized representative of UHC to inspect any books and records of the Project Owner relating to the Project and the incomes of low-income tenants. Specifically, the

Project Owner shall make available to UHC the documentation substantiating incomes of low-income tenants. As required by Income Tax Regulation § 1.42-5(e)(3), UHC shall notify the IRS of any non-compliance with the provisions of IRC § 42, or of this Agreement, with which it becomes aware.

9. Extended Use Period. The Project Owner and UHC agree that the extended use period, as used in IRC § 42(h)(6)(D) and this Agreement, for each low-income building of the Project, means the period beginning on the first day in the 15-year compliance period, as defined in IRC § 42(i)(1), on which a qualified low-income building is a part of a qualified low-income housing project and ending on the date which is 36 years after the close of the compliance period (for a total of 51 years from the beginning date of the compliance period for a qualified low-income building); however, notwithstanding the foregoing to the contrary, the extended use period shall terminate on the date a qualified low-income building is acquired by foreclosure (or instrument in lieu of foreclosure), unless the IRS or UHC determines that such acquisition is part of an arrangement of the Project Owner a purpose of which is to terminate the extended use period. The Project Owner agrees that IRC § 42(h)(6)(E)(i)(II) shall not apply to, and shall not cause the termination of, the extended use period applicable to any building of the Project.

10. Eviction Following Extended Use Period. Notwithstanding the termination of the extended use period pursuant to the provisions of paragraph 9 above, the Project Owner shall not evict or terminate the tenancy (other than for good cause) of an existing low-income tenant of any low-income unit in the Project or increase the gross rent with respect to a low-income unit, not otherwise permitted under IRC § 42, before the close of the three year period following the termination of the extended use period under the provisions of paragraph 9.

11. Subordination. Except as provided in paragraph 15 below and the Subordination Agreement attached hereto, the Project Owner shall obtain the agreement of any prior recorded lienholder (excluding customary nonmonetary liens and encumbrances relating to easements, utilities and similar matters) of any building in the Project whereby the prior recorded lienholder, and its assigns or successors in interest, agrees to not evict an existing low-income tenant (other than for cause) and not increase gross rent with respect to a low-income unit, not otherwise permitted under IRC § 42, for a period of three years from the date of any foreclosure with respect to any qualified low-income building in the Project. The foregoing agreement shall be placed of record in the real property records of the county in which the Project is located.

12. Sale of Building. Pursuant to IRC § 42(h)(6)(B)(iii), no portion of a qualified low-income building to which this Agreement applies, may be sold, transferred or conveyed to any person unless all of the low-income building to which this Agreement applies is sold, transferred or conveyed to such person.

13. Rent and Income Limits. The Project Owner agrees that 170 units of the Project will be leased, throughout the extended use period as set forth in paragraph 9 above, (i) for a maximum monthly rental fee which is affordable to the tenants residing therein (as calculated below), and (ii) to individuals whose annual income (as defined under Section 8 of the United States Housing Act of

1937), aggregated for all individuals residing in a given unit, does not exceed the percentages set forth below of area median income for the county in which the unit is located:

<u>Units</u>	<u>Type</u>	<u>Income Limits</u>
36	2 bedroom units	60% of area median income
96	2 bedroom units	60% of area median income
38	3 bedroom units	60% of area median income

For purposes of determining the affordability of monthly rental payments, the maximum monthly rental fee is calculated as follows:

- a. First, multiply the monthly rent limit applicable to the unit as calculated by UHC for the applicable year, based on bedroom size, based on 50% of area median income for the county in which the unit is located, by 2 (to arrive at a rental amount based on 100% of area median income);
- b. Second, multiply the product derived in paragraph a. above by the percentages set forth below.

<u>Units</u>	<u>Type</u>	<u>Rent Limits</u>
36	2 bedroom units	57% of area median income
96	2 bedroom units	60% of area median income
38	3 bedroom units	60% of area median income

For purposes of determining the maximum monthly rental fee pursuant to this paragraph, the maximum monthly rental fee amount shall include an allowance for tenant-paid utilities as provided in IRC § 42 or notices, regulations or revenue rulings issued or promulgated thereunder. Notwithstanding the foregoing, upon written approval from UHC, the Project Owner may increase the maximum monthly rental fee or income limit applicable to tenants for any unit of the Project in an amount agreed to by UHC, as UHC shall decide in its sole discretion; however, under no circumstances may the maximum monthly rental fee or income limit applicable to tenants for any given unit of the Project exceed the rent or income limits established under IRC § 42.

14. Restrictive Covenants. The Project Owner intends, declares and covenants that the covenants, terms, provisions and restrictions set forth in this Agreement shall run with the land and shall bind, and the benefits and burdens shall inure to, the Project Owner and UHC, and their respective successors and assigns, and all subsequent owners of the Project or any interest therein, for the duration of the extended use period set forth in paragraph 9 above. Upon the termination of the extended use period, except as provided in paragraph 10 above, this Agreement shall be deemed terminated and of no further force and effect, and UHC shall execute a release for recordation purposes if so requested by the then owner of the Project.

15. HUD Subordination. Notwithstanding anything in this Agreement to the contrary:

a. As used in this paragraph 15, the following terms shall have the definitions ascribed thereto:

(i) "Mortgage Loan" means that certain loan to the Project Owner made by Midland Loan Services, Inc., a Delaware Corporation ("Lender"), in the original amount of \$13,150,000.00.

(ii) "Mortgage Note" means collectively those two (2) Mortgage Notes each dated as of May 1, 2004 executed by the Project Owner to the order of the Lender (the "Mortgage Note") to evidence the Mortgage Loan.

(iii) "Mortgage" means that certain Mortgage dated as of May 1, 2004 from the Project Owner, as mortgagor, to the Lender, as mortgagee, and recorded with the Davis County Recorder's Office on May 3, 2004 as Entry No. 1983522 in Book 3531 at Page 1239 that secures the Mortgage Note.

(iv) "FHA Regulatory Agreement" means that certain Regulatory Agreement for Multifamily Housing Projects, Project No. 105-35131-PM, between the Project Owner and the Secretary of Housing and Urban Development dated as of May 1, 2004, which was recorded with the Davis County Recorder's Office on May 3, 2004 as Entry No. 1983523 in Book 3531 at Page 1250.

(v) "FHA Loan Documents" means the Mortgage Note, the Mortgage, the FHA Regulatory Agreement and all other documents required in connection with the endorsement of the Mortgage Loan by FHA for Mortgage Insurance.

(vi) "HUD" means the Secretary of Housing and Urban Development.

(vii) "Applicable HUD Requirements" means all provisions of the HUD mortgage insurance regulations and related administrative requirements, the National Housing Act, Section 8 of the U.S. Housing Act of 1937 and regulations promulgated thereunder, HUD regulations and HUD administrative requirements that are applicable to the FHA Loan Documents.

b. Notwithstanding anything in this Agreement to the contrary, except for the requirements in 26 U.S.C. § 42(h)(6)(E)(ii) as set forth in paragraph 10 above, the provisions of this Agreement are expressly subordinate to the FHA Loan Documents and the Applicable HUD Requirements, and in the event of any conflict between the provisions of this Agreement and the provisions of FHA Loan Documents and the Applicable HUD Requirements, the FHA Loan Documents and the Applicable HUD Requirements shall be controlling in all respects.

c. Except for the requirements of 26 U.S.C. § 42(h)(6)(E)(ii) as set forth in paragraph 10 above, in the event of foreclosure or deed in lieu of foreclosure, this Agreement and the restrictions hereunder will automatically and immediately terminate and shall thereafter be of no further force and effect.

d. No failure on the part of the Project Owner to comply with the provisions of this Agreement shall serve as a basis for a default on the Mortgage Loan.

e. Enforcement of the provisions of this Agreement shall not result in any claim under the Mortgage Loan or any claim against the Project, the proceeds of the Mortgage Loan, any reserve or deposit required by HUD in connection with the Mortgage Loan or against the rents or other income from the Project other than available "surplus cash" (as defined in the FHA Regulatory Agreement).

f. No action shall be taken in accordance with the rights granted herein to preserve the tax credits, or prohibiting the Project Owner from taking any action that might jeopardize the tax credits, except in strict accord with the Applicable HUD Requirements and the FHA Loan Documents.

g. The foregoing subparagraphs 15(a) through 15(f) shall not be amended without the prior written approval of HUD.

h. The Project Owner acknowledges that it requested UHC to include this paragraph 15 in order to satisfy certain obligations of the Project Owner under the FHA Loan Documents, and that UHC has not made any representations or statements with respect to the Project Owner's entitlement to the allocation of low-income housing tax credits for the Project as a result of this paragraph 15. The Project Owner represents that it has independently reviewed the FHA Loan Documents and the Applicable HUD Requirements to ensure their consistency with this Agreement. The Project Owner agrees to release UHC, its officers, trustees, employees and agents from any claim, loss, liability, demand or judgment incurred by or asserted against the Project Owner resulting from or relating to the allocation of low-income housing tax credits, or the recapture thereof by the Internal Revenue Service, including without limitation as a result of the inclusion of this paragraph 15 in this Agreement. Further, the Project Owner agrees, subject to the provisions of paragraph 15(e) above, to defend, indemnify and hold UHC, its officers, trustees, employees and agents harmless from any claim, loss, liability, demand, judgment or cost (including without limitation reasonable attorneys' fees) arising out of the inclusion of this paragraph 15 in this Agreement.

16. Recordation. This Agreement shall be placed of record in the real property records of the county in which the Project is located.

17. Enforcement. All of the terms, provisions and restrictions of the Agreement may be enforced by UHC. In addition, UHC and the Project Owner acknowledge and agree that any individual who meets the income limitations applicable to the Project under IRC § 42(g) (whether a





UHC hereby warrants and represents to the Project Owner as follows:

d. UHC has the authority and power to execute, deliver and have recorded this Agreement;

e. The individuals signing on behalf of UHC are duly authorized, empowered and have the authority to bind UHC to the terms and conditions of this Agreement.

23. Attorneys' Fees. In any action or defense associated with this Agreement, the prevailing party shall be reimbursed by the non-prevailing party for the costs, including attorneys' fees, incurred by the prevailing party in that action or defense.

24. Recitals. The recitals are hereby incorporated into this Agreement.

25. Waiver. No action or failure to act by the parties shall constitute a waiver of any right or duty afforded any party under this Agreement, nor shall any such action or failure to act constitute approval of or acquiescence in any breach hereunder, except as may be specifically agreed to in writing. A waiver by a party of a breach hereunder by the other party shall not be construed as a waiver of any succeeding breach of the same or other provisions.

26. Modifications and Integration. This Agreement may only be modified by a writing signed by all of the parties hereto. This Agreement constitutes the entire agreement of the parties with respect to the subject matter addressed herein. No other agreements, oral or written, pertaining to the matters herein exist between the parties. This Agreement hereby supersedes any other agreement between the parties respecting the subject matter addressed herein.

27. Annual Certification. The Project Owner shall, in a form designed by UHC, annually certify to UHC its compliance with all the provisions of this Agreement and IRC § 42 and regulations issued thereunder.

28. Definitions. All words, definitions and terms used in this Agreement that are defined or set forth in IRC § 42 shall have the meanings given in IRC § 42.

29. Counterparts. This Agreement may be executed by the different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original, and all of which taken together shall constitute one and the same agreement.

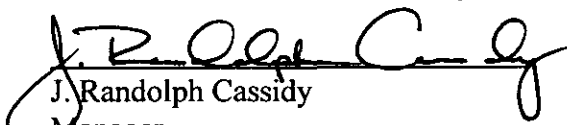
30. Severability. If any provision of this Agreement or the application thereof to any party or circumstance shall be invalid or unenforceable to any extent, the remainder of the Agreement and the application of such provisions to any other party or circumstance shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

31. Headings. Titles or headings to the sections of this Agreement are for convenience only, and neither limit nor amplify the provisions of this Agreement.

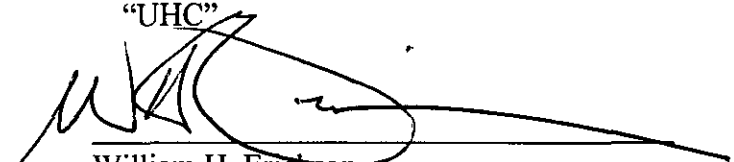
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective duly authorized representatives.

FOXBORO TERRACE ASSOCIATES, L.C.,  
a Utah limited liability company  
"Project Owner"

By: Foxboro Terrace Management, L.C.,  
a Utah limited liability company  
Its: Manager

  
J. Randolph Cassidy  
Manager

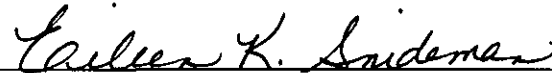
UTAH HOUSING CORPORATION  
"UHC"

  
William H. Erickson  
President

STATE OF UTAH                     )  
   : ss.  
COUNTY OF SALT LAKE         )

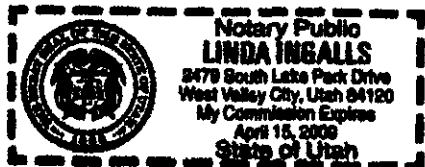
On the 6<sup>TH</sup> day of ~~June~~ <sup>DECEMBER</sup>, 2004, personally appeared before me J. Randolph Cassidy, the signer of the foregoing instrument, who duly acknowledged to me that he is the Manager of Foxboro Terrace Management, L.C., which is the Manager of Foxboro Terrace Associates, L.C., and that he executed the same.



  
NOTARY PUBLIC

STATE OF UTAH                     )  
   : ss.  
COUNTY OF SALT LAKE         )

On the 14<sup>TH</sup> day of ~~June~~ <sup>September</sup>, 2004, personally appeared before me William H. Erickson, the signer of the foregoing instrument, who duly acknowledged to me that he is the President of Utah Housing Corporation and that he executed the same.



  
NOTARY PUBLIC

EXHIBIT A

Legal Description

That certain parcel of real property, situated in Davis County, State of Utah, and more particularly described as follows:

Lot 107A, Foxboro Plat 1A Amended, according to the Official Plat thereof on file and of record in the Davis County Recorder's Office.



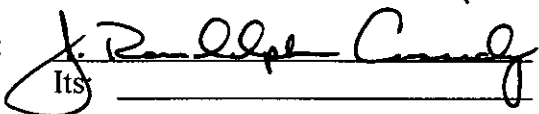
**RELEASE**

Reference is made to that certain Low-Income Housing Credit Commitment Agreement and Declaration of Restrictive Covenants (and Subordination Agreement and Release), dated as of June \_\_\_\_, 2004 between Utah Housing Corporation, a public corporation of the State of Utah ("UHC"), and Foxboro Terrace Associates, L.C., a Utah limited liability company (the "Project Owner"), a copy of which is attached hereto (the "Agreement"). The undersigned hereby: (1) represent and warrant that they are the sole Members of the Project Owner, (2) acknowledge that the Project Owner requested UHC to execute the Agreement, (3) confirm that they have consented to the Project Owner's execution of the Agreement, and (4) release UHC and its officers, trustees, employees and agents from any claim, loss, liability, demand or judgment incurred by or asserted against the Project Owner (or the [Members] thereof) resulting from or relating to the allocation of low-income housing tax credits or the recapture thereof by the Internal Revenue Service that is a result of the execution of the Agreement.

IN WITNESS WHEREOF, the undersigned has caused this Release to be duly executed as of June \_\_\_\_, 2004.

MANAGING MEMBER:

FOXBORO TERRACE MANAGEMENT,  
L.C., a Utah limited liability company

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

BUILDER MEMBER:

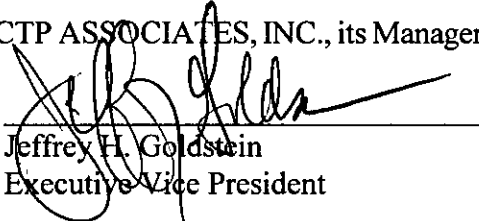
MILLER DEVELOPMENT COMPANY, a  
Utah corporation

By:   
Gary S. Miller, President

INVESTMENT MEMBER:

BCP/FOXBORO TERRACE, LLC, a  
Delaware limited liability company

By BCCTP ASSOCIATES, INC., its Manager

By:   
Jeffrey H. Goldstein  
Executive Vice President