

2011-001084

Klamath County, Oregon



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01/28/2011 03:42:20 PM

Fee: \$82.00

After Recording Return to:

Housing and Community Services
Attn: Multifamily Housing Section
725 Summer Street, Suite B
Salem, OR 97301-1266

1628957

SPACE ABOVE FOR RECORDERS USE

**HOUSING AND COMMUNITY SERVICES DEPARTMENT
STATE OF OREGON**

**HOUSING DEVELOPMENT GRANT PROGRAM
ASSIGNMENT AND ASSUMPTION AGREEMENT,
DECLARATION OF RESTRICTIVE COVENANTS AND EQUITABLE SERVITUDES**

This Housing Development Grant Program Assignment and Assumption Agreement, Declaration of Restrictive Covenants and Equitable Servitudes (this "Agreement") is made this 28 day of January, 2011, by and among:

PARTIES:

Grantee: Klamath Housing Authority, together with its successors and assigns,
Owner: Iris Glen Townhomes, LLC, together with its successors and assigns, and
Department: STATE OF OREGON, acting by and through its
Housing and Community Services Department,
together with its successors and assigns.

RECITALS

A. Grantee, as Recipient, received a Housing Development Grant Program Grant (the "Grant") from the Department as described in a Grant Agreement, Declaration of Restrictive Covenants and Equitable Servitudes executed between itself and the Department dated July 20, 2009 (the "Grant Agreement"), for the purpose of partially reimbursing the financing and construction costs of a Thirty-Seven (37) unit low-income housing project in Klamath County, Oregon, known as Iris Glen Townhomes (the "Project"). The real property for said Project is more particularly described in Exhibit A attached hereto.

B. The Grant Agreement was executed by Recipient and dated July 20, 2009, and recorded on July 22, 2009, in the real property records of Klamath County, Oregon, as Instrument No. 2009-009979. Names and terms in this Agreement will have the meanings given them in this Agreement or in the Grant Agreement.

C. The parties desire to execute this Agreement to evidence and confirm the terms by which the Department hereby consents to Grantee loaning the funds received from the Grant to the Owner for the purposes described in the Grant Agreement.

D. The parties also desire that this Agreement will be recorded in the relevant county records and that certain terms herein will constitute restrictive covenants and equitable servitudes that shall run with the land and govern the maintenance and operation of the Project.

ASSIGNMENT AND ASSUMPTION AGREEMENT – Housing Development Grant Program

Iris Glen Townhomes, Project No. 2871

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Rev. 03/2010

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AGREEMENT

NOW, THEREFORE, for good and sufficient consideration, including the terms and conditions of this Agreement, the parties hereto agree as follows:

1. Incorporation; Definitions.

(a) The foregoing Recitals, Exhibit A, and the identified documents are incorporated herein by reference.

(b) Capitalized terms in this Agreement shall have the meaning provided herein or in the incorporated documents, unless the context clearly requires otherwise.

2. Provision of Grant to Owner; Assumption of Grant Agreement Obligations; Consent.

(a) Grantee has loaned or is loaning the Grant to Owner, pursuant to documented terms, copies of which have been delivered to the Department. The Department hereby approves of the loan of the Grant to Owner.

(b) Owner hereby unconditionally assumes, jointly and severally with Grantee, all obligations owed to the Department under the Grant Agreement. Owner also hereby agrees to perform all obligations to the Department described herein. Owner will, at its own expense, record and deliver this Agreement to the Department. Grantee and Owner also will execute and deliver to the Department such other documents reasonably requested by the Department to effect and maintain its restrictive covenants and equitable servitude interests in and rights against the Project.

(c) Department hereby consents to and approves of Grantee loaning the Grant to Owner without undertaking any obligations thereby to Owner and without affecting in any manner the restrictions and requirements of the Grant Agreement with respect to any further or additional transfers or third-party beneficiaries. Additionally, nothing in this Agreement or in the Grant Agreement shall be construed as restricting or impairing any right of the Department to resort to, proceed against, or otherwise exercise its rights with respect to any property in accordance with the rights granted to the Department by this Agreement or by any other agreement.

3. Representations, Warranties and Covenants of Owner. Owner, jointly and severally with Grantee, hereby adopts, assumes and ratifies the representations, warranties and covenants with respect to responsibility to the Department for proper use of the Grant, with respect to the maintenance, use, and operation of the Project, reporting with respect to same and compliance with Grant program requirements as contained in the Grant Agreement.

4. Restrictive Covenants and Equitable Servitudes to Run with the Land.

(a) **Inducement.** The Owner represents and warrants that consent by the Department to Grantee loaning it the Grant is an inducement to the Owner to construct and operate the Project in accordance with this Agreement. In consideration of such consent, the Owner has entered into this Agreement and has agreed to restrict the uses to which the Project can be put on the terms and conditions set forth herein. Therefore, the Owner covenants, agrees and acknowledges that the Department has relied on this Agreement in determining to consent to Grantee loaning the Grant to Owner.

(b) **Covenants; Equitable Servitudes.** The parties hereby declare their express intent that, during the term of this Agreement, the covenants, restrictions, charges and easements set forth herein shall be deemed covenants running with the land and shall be deemed equitable servitudes running with the land, and shall

pass to and be binding upon the Department's and the Owner's successors in title including any purchaser, grantee or lessee of any portion of the Project and any other person or entity having any right, title or interest therein and upon the respective heirs, executors, administrators, devisees, successors and assigns of any purchaser, grantee or lessee of any portion of the Project and any other person or entity having any right, title or interest therein. Each and every contract, deed or other instrument hereafter executed covering or conveying the Project or any portion thereof or interest therein (other than a rental agreement or lease for a dwelling unit) shall contain an express provision making such conveyance subject to the covenants, restrictions, charges and easements contained herein; provided, however, that any such contract, deed or other instrument shall conclusively be held to have been executed, delivered and accepted subject to such covenants, regardless of whether or not such covenants are set forth or incorporated by reference in such contract, deed or other instrument.

(c) **Burden and Benefit.** The Owner hereby declares its understanding and intent that the burdens of the covenants and equitable servitudes set forth herein touch and concern the land in that the Owner's legal interest in the Project is rendered less valuable thereby. The Owner hereby further declares its understanding and intent that the benefits of such covenants and equitable servitudes touch and concern the land by enhancing and increasing the enjoyment and use of the Project by tenants, the intended beneficiaries of such covenants, reservations and restrictions, and by furthering the public purposes for which the Grant was issued.

5. **Foreclosure.** Except with respect to government lenders, in the event the construction and/or permanent lender, its successors or assigns, lawfully acquire title to the Project through foreclosure or deed in lieu of foreclosure, neither the lender nor any subsequent purchaser of the Project following such a foreclosure or deed in lieu of foreclosure shall be deemed a "successor or assign" of the Owner, and neither the lender nor such subsequent purchaser shall have any obligation to repay the Grant to the Department and all conditions and restrictions contained herein shall terminate on the date, if any, that the Project is so acquired by foreclosure or deed in lieu of foreclosure.
6. **Indemnity.** Owner and Grantee shall save, hold harmless, indemnify and (subject to ORS chapter 180 and the Oregon Tort Claims Act) defend the State of Oregon, Department and their officers, agents, employees, members and assigns, from all suits, actions, claims, losses or damages of whatsoever nature, kind or description related to the Project or resulting from or arising out of their acts, omissions, neglect or misconduct or the acts, omissions, neglect or misconduct of their subcontractors, agents, or employees under this Agreement or related to the Project.
7. **Time of the Essence.** Time is of the essence in the performance by Grantee and Owner of the terms of this Agreement.
8. **Remedies.**

(a) If this Agreement terminates prior to the term of the Restrictive Covenants, Grantee and Owner shall, within 120 days of written demand for repayment, repay to Department all Grant funds disbursed under this Agreement on the Project together with any earnings on such funds.

(b) Upon any breach of this Agreement by Grantee or Owner, Department, at its option, after notice and a thirty-day cure period (or such shorter period as the Department may provide in its notice), also may exercise any one or more of the following remedies:

(A) By mandamus or other suit, action or proceeding at law or in equity, require Owner or Grantee to perform its obligations and covenants under this Agreement or enjoin any acts or things that may be unlawful or in violation of the rights of Department under this Agreement;

(B) Have access to, and inspect, examine and make copies of, all of the books and records of Owner or Grantee pertaining to the Project;

(C) Withhold from Grantee or Owner, suspend or terminate, all or part of any un-disbursed Grant funding under this Agreement;

(D) Demand repayment of all Grant funding provided by Department to Grantee or Owner for the Project, and such amount shall be immediately due and payable by both of them, jointly and severally, to Department;

(E) Declare Grantee or Owner ineligible to receive further Low Income Weatherization Program funds or other Department financial assistance; or

(F) Take such other action at law, in equity or otherwise as may appear necessary or desirable to the Department to enforce the obligations, covenants and agreements of Grantee or Owner under this Agreement.

(c) The rights and remedies of Department provided for in this Agreement shall not be exclusive and are in addition to any other rights and remedies available at law, in equity or otherwise. No failure of or delay by Department to enforce any provision of this Agreement shall constitute a waiver by Department of that or any other provision, nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege.

9. **No Third Party Beneficiaries.** Department, Grantee and Owner are the only parties to this Agreement and are the only parties entitled to rely on and enforce the terms of this Agreement. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right not held by or made generally available to the public, whether directly indirectly or otherwise, to third persons unless such third persons are individually identified by name in this Agreement and expressly described as intended beneficiaries of the terms of this Agreement.

10. **Assignment; Successors and Assigns.** Neither Owner nor Grantee shall assign or transfer any interest in this Agreement (other than leases for the residential units in the Project) without the prior express written consent of Department. Any attempted assignment or transfer in violation of this provision shall be null and void. The provisions of this Agreement shall be binding upon and shall run to the benefit of the parties to this Agreement and their respective successors and permitted assigns.

11. **Severability.** If any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular term or provisions held to be invalid.

12. **Term of Agreement; Survival of Obligations.** The term of this Agreement shall extend for the longest term of the incorporated documents. The obligations of Grantee (and of Owner by assumption herein) as set forth in this Agreement and any underlying documents, shall survive the reservation of any Grant funds and shall not be deemed to terminate or merge with the awarding of the funds. Provisions of this Agreement which by their nature are intended to survive termination of this Agreement shall survive.

13. **Attorney Fees.** In the event a lawsuit is instituted regarding this Agreement, the prevailing party in any dispute arising under this Agreement shall, to the extent permitted by law, be entitled to recover from the other its reasonable attorney fees and all costs and disbursements incurred at trial and on appeal. Reasonable attorney fees shall not exceed the rate charged to the Department by its attorneys.

14. **Governing Law; Venue: Consent to Jurisdiction.** This Agreement shall be governed by the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") among two or more of the parties related to this Agreement shall be conducted exclusively within the Circuit Court of Marion County, Oregon (unless Oregon law requires that it be brought and conducted where the Project is located) or, if necessary, the United States District Court for the District of Oregon. In no event shall this provision be construed as a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. GRANTEE AND OWNER, BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENT TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

15. **Merger Clause.** This Agreement, including incorporations and exhibits, constitutes the entire agreement between the parties on the subject matter hereof. No modification or amendment of this Agreement shall bind either party unless in writing and signed by both parties (and the necessary approvals obtained), and no waiver or consent shall be effective unless signed by the party against whom such waiver or consent is asserted. Such waiver or consent, if given, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements or representations, oral or written, not specified herein regarding this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be signed by their duly authorized officers as of the first day written above.

DEPARTMENT:

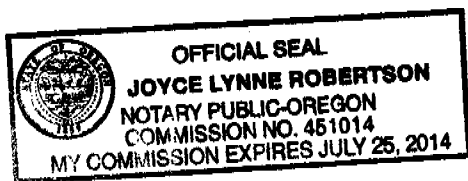
STATE OF OREGON, acting by and through its
Housing and Community Services Department

By: _____

David W. Summers, Manager
Multifamily Housing Section

STATE OF OREGON)
 : ss
County of Marion)

The foregoing instrument was acknowledged before me this 21st day of January 2011, by David W. Summers, who is the Manager of the Multifamily Housing Section, Housing and Community Services Department, on behalf of the Department.



NOTARY PUBLIC FOR OREGON
My Commission Expires: July 25, 2014

GRANTEE:

Klamath Housing Authority,
an Oregon an Oregon Public Body Corporate and Politic

By:

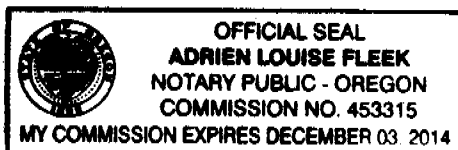


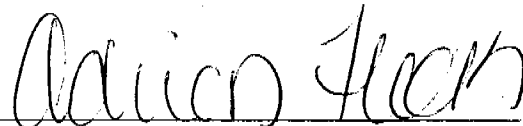
Diana A. Otero, Executive Director

STATE OF OREGON)

County of Klamath ss

The foregoing instrument was acknowledged before me this 25 day of January, 2011, by
Diana A. Otero, Executive Director of Klamath Housing Authority, who executed the foregoing instrument for on
behalf of the Grantee.




NOTARY PUBLIC FOR OREGON
My Commission Expires: 12-3-14

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OWNER:

IRIS GLEN TOWNHOMES, LLC
An Oregon For Profit Limited Liability Company
TIN No.: 26-3814653

By: LDA Klamath Development, LLC,
an Arizona limited Liability company, it Managing Member

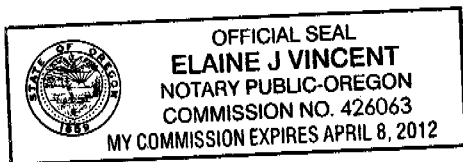
By: Luckenbill-Drayton & Associates, LLC,
an Arizona limited liability company, its Managing
Member

By: Claudette M. Luckenbill
Claudette M. Luckenbill, Manager

STATE OF OREGON)

County of HOOD RIVER : ss

The foregoing instrument was acknowledged before me this 25 day of JANUARY, 2011, by
Claudette M. Luckenbill, Manager of Iris Glen Townhomes, LLC, who executed the foregoing instrument for on
behalf of the Owner.



Elaine Vincent
NOTARY PUBLIC FOR OREGON
My Commission Expires: 04-08-2012

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EXHIBIT A

Real property in the County of Klamath, State of Oregon, described as follows:

PARCEL I

A PORTION OF LOTS 4, 5, 6, BLOCK 11, DIXON ADDITION TO THE CITY OF KLAMATH FALLS, IN THE COUNTY OF KLAMATH, STATE OF OREGON, MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING ON THE EAST SIDE OF HILLSIDE AVENUE AT A POINT 36 FEET SOUTH OF THE NORTHWEST CORNER OF LOT 6, BLOCK 11, DIXON ADDITION TO THE CITY OF KLAMATH FALLS, OREGON; RUNNING THENCE SOUTH ALONG THE EAST SIDE OF SAID HILLSIDE AVENUE A DISTANCE OF 37 FEET; THENCE EAST AND PARALLEL WITH THE NORTH LINE OF SAID LOT 6 TO THE NORTHWESTERLY LINE OF FORT KLAMATH ROAD TO A POINT WHERE SAID LINE INTERSECTS WITH A LINE DRAWN EAST FROM SAID POINT OF BEGINNING AND PARALLEL WITH THE NORTH LINE OF SAID LOT 6; THENCE WEST TO THE POINT OF BEGINNING, BEING A TRACT OF LAND FRONTING 37 FEET ON SAID HILLSIDE AVENUE AND EXTENDING ACROSS LOTS 6, 5 AND 4 OF SAID BLOCK 11 TO FORT KLAMATH ROAD, SITUATE IN SOUTHWEST QUARTER OF SOUTHEAST QUARTER OF SECTION 28, TOWNSHIP 38 SOUTH, RANGE 9 EAST OF THE WILLAMETTE MERIDIAN, TOGETHER WITH AN EASEMENT FOR A DRIVEWAY ACROSS THE SOUTHERLY AND EASTERLY SIDE OF SAID LOT 4, BLOCK 11, CONVENIENTLY WIDE FOR A DRIVE FROM THE ALLEY IN THE REAR OF SAID LOT 4.

PARCEL II

LOT 3 BLOCK 11, DIXON ADDITION TO KLAMATH FALLS, OREGON, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE COUNTY CLERK OF KLAMATH COUNTY, OREGON.

PARCEL III

LOTS 4, 6 AND 7 IN BLOCK 12 OF DIXON ADDITION TO THE CITY OF KLAMATH FALLS, OREGON, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE COUNTY CLERK OF KLAMATH COUNTY, OREGON.

PARCEL IV

LOTS 8 AND 9 IN BLOCK 12 OF DIXON ADDITION TO THE CITY OF KLAMATH FALLS, OREGON, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE COUNTY CLERK OF KLAMATH COUNTY, OREGON. EXCEPTING THEREFROM PORTIONS CONVEYED TO STATE OF OREGON BY AND THROUGH ITS STATE HIGHWAY COMMISSION; PORTION LOT 8 BY DEED RECORD SEPTEMBER 22, 1944 IN VOLUME 169, PAGE 194; AND PORTION OF LOT 9 BY DEED RECORDED OCTOBER 04, 1944 IN VOLUME 169, PAGE 458, DEED RECORDS OF KLAMATH COUNTY, OREGON.

PARCEL V

LOTS 10 AND 11 IN BLOCK 12 OF DIXON ADDITION TO THE CITY OF KLAMATH FALLS, OREGON, ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE IN THE RECORDS OF KLAMATH COUNTY, OREGON.

NOTE: This legal description was created prior to Januray 1, 2008.

APN: R375356 and R375338 and R375436 and R375463 and R375472 and R375481 and R375490 and R375506 and R375515