



Arizona Department of Housing 2020 Information Bulletin

REGARDING PROGRAMS: Rental Development

REGARDING FUNDING SOURCES: State Housing Fund

INFORMATION BULLETIN No. 10-20

ISSUED: February 24, 2020

RE: Form of Subordination Agreement

To standardize its lending practices, the Arizona Department of Housing has added the attached form of subordination agreement to its loan documents. With the exception of agreements that have already been negotiated for pending transactions, the Department will use this form of subordination agreement. The document lays out the terms and conditions under which the Department will subordinate to any senior lender. Thus, the Department is sharing it, so that you may review and share it with your proposed lender as soon as possible to facilitate a smooth closing and avoid any adverse impact to your closing.



1110 W. Washington, Suite 280 | Phoenix, AZ 85007
Telephone (602) 771-1000 | Facsimile (602) 771-1002 | TDY (602) 771-1001

<https://housing.az.gov>

Recording Requested By,
And After Recording, Return to:

[Name]
[Street Address]
[City, State Zip]

SUBORDINATION AGREEMENT

DATE: _____, 20__

BORROWER: [Name of Borrower],
a [Domicile State] [type of legal entity]
[Street Address]
[City, State Zip]

SENIOR LENDER: [Name of Senior Lender],
a [Domicile State] [type of legal entity]
[Street Address]
[City, State Zip]

SUBORDINATE LENDER: State of Arizona, Arizona Department of Housing,
a constituent department and an agency of the State of Arizona
1110 West Washington Street, Suite 280
Phoenix, AZ 85007

BACKGROUND

A. Senior Lender has made or agreed to make a construction loan to Borrower in the original principal amount of \$ [redacted] (the "Senior Loan"), made pursuant to that certain [Title of Senior Lender's Loan Agreement] by and between Senior Lender and Borrower (the "Senior Loan Agreement"). The Senior Loan is evidenced by, among other things, a [Title of Senior Lender's Promissory Note] ("Senior Note"), and is secured by, among other things, a [Title of Senior Lender's Deed of Trust] (the "Senior Deed of Trust"), executed by Borrower in favor of Senior Lender, and recorded in the Official Records of [redacted] County, Arizona concurrently herewith as an encumbrance upon the real property described on Exhibit A attached ("Property"). The Senior Loan Agreement, Senior Note, Senior Deed of Trust, and other documents evidencing, securing, or otherwise relating to the Senior Loan, including without any limitation UCC-1 financing statement(s), are collectively referred to as the "Senior Loan Documents".

B. Subordinate Lender has made or agreed to make a construction loan to Borrower in the original principal amount of \$ [REDACTED] (the "Subordinate Loan"), made pursuant to that certain Funding Agreement No. [REDACTED], with an effective date of [REDACTED], 20 [REDACTED] (the "Funding Agreement"). The Subordinate Loan is evidenced by, among other things, a [Title of Subordinate Lender's Promissory Note] (the "Subordinate Note") and a [Title of Subordinate Lender's Declaration of Covenants, Conditions and Restrictions] (the "Subordinate Declaration"), and is secured by, among other things, a Deed of Trust With Assignment of Rents, Fixture Filing and Security Agreement, executed by Borrower in favor of Subordinate Lender (the "Subordinate Deed of Trust"), and a UCC-1 Financing Statement, all of which will be recorded in the Official Records of [REDACTED] County, Arizona concurrently herewith, and a UCC-1 Financing Statement, filed with the Secretary of State, State of [REDACTED] concurrently herewith, all as encumbrances upon the Property. The Funding Agreement, Subordinate Note, Subordinate Declaration, Subordinate Deed of Trust, and other documents evidencing, securing, or otherwise relating to the Subordinate Loan, including without limitation any UCC-1 Financing Statement(s), are collectively referred to as the "Subordinate Loan Documents".

C. As of the Effective Date, the Subordinate Loan is not in default.

D. As a condition precedent to the making of the Senior Loan, Senior Lender has required Subordinate Lender to subordinate the lien of the Subordinate Deed of Trust to the lien of the Senior Deed of Trust on the terms and conditions, and to the extent, set forth below.

E. Senior Lender and Subordinate Lender (collectively, "Lenders" or either of them, a "Lender") have entered into this Subordination Agreement ("Agreement") to establish the priorities of their real and personal property interests described in the Senior Loan Documents and the Subordinate Loan Documents ("Collateral") and to set forth certain other agreements between them regarding their relative rights against Borrower and the Collateral, and Borrower has also entered this Agreement to acknowledge its agreement with, and approval of, such terms.

AGREEMENTS

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties represent, warrant and agree as follows:

1. **Lien Subordination.** Without waiving Subordinate Lender's right to enforce the Subordinate Loan Documents in the event of a default, Subordinate Lender hereby unconditionally and irrevocably subordinates the lien of the Subordinate Deed of Trust, any other liens in personal property securing the Subordinate Loan and evidenced by the Subordinate Loan Documents or any UCC-1 financing statement(s), and all of Subordinate Lender's rights, remedies and privileges thereunder to the lien of the Senior Deed of Trust, any other liens in real and personal property securing the Senior Loan and evidenced by the Senior Loan Documents or any UCC-1 financing statement(s), and all of Senior Lender's rights, remedies, and privileges thereunder and to all advances or charges made or accruing under the Senior Loan Documents. This agreement of subordination extends to and includes, without limitation, the unconditional

and irrevocable subordination of the liens of the Subordinate Loan Documents to: (i) the Senior Loan, the liens of the Senior Loan Documents and any and all advances under the Senior Loan Documents; (ii) all terms, provisions, covenants, agreements and conditions of, and all claims under or relating to, the Senior Deed of Trust (including those relating to the determination and disposition of insurance proceeds, condemnation awards, sales proceeds and similar amounts and the obligations of any Guarantor), subject to Section 5 below; (iii) all fees, expenses, indemnities and other amounts payable to Senior Lender under the Senior Loan Documents; (iv) any and all amendments, modifications, extensions, renewals, increases or consolidations of the Senior Loan Documents so long as such amendments, modifications, increases or consolidations do not increase the original principal amount of the Senior Loan, the applicable interest rate, or the term, except for amounts expended by Senior Lender to preserve the Property.

2. **Consent to Senior Loan.** Subject to the terms of this Agreement, and without waiving any rights it may have under the Subordinate Loan Documents that may prohibit any further senior or subordinate financing, Subordinate Lender hereby consents to the Senior Loan, Borrower's execution and acknowledgment of the Senior Loan Agreement, Senior Note, Senior Deed of Trust and any other Senior Loan Document, and the existence of Senior Lender's senior lien against the Collateral pursuant to the Senior Loan Documents. Subordinate Lender acknowledges and agrees that Senior Lender would not make the Senior Loan without this Agreement. Senior Lender may rely upon the agreements, acknowledgements, and information set forth herein in connection with the Senior Loan to Borrower.

3. **Payments.** Senior Lender hereby consents to the Subordinate Lender collecting payments from Borrower under and pursuant to the Subordinate Loan Documents.

4. **Defeasance of Payments.** If and to the extent that any payment under the Senior Loan Documents or Subordinate Loan Documents (whether by or on behalf of the Borrower, any guarantor, as proceeds of collateral, or enforcement of any right of setoff or otherwise) is declared by any court of competent jurisdiction to be a fraudulent conveyance or a preference, set aside, or required to be paid to a trustee, receiver or other similar person under any bankruptcy, insolvency, receivership or similar law, then if such payment is recovered by, or paid over to, such trustee, receiver or other similar person, the Senior Loan or Subordinate Loan, or such part thereof originally intended to be satisfied, shall be deemed to be reinstated and outstanding as if such payment had not occurred. Similarly, if and to the extent that any payment under the Subordinate Loan Documents (whether by or on behalf of the Borrower, any guarantor, as proceeds of collateral, or enforcement of any right of setoff or otherwise) is required to be paid to Senior Lender under the terms of this Agreement, or otherwise, then if such payment is actually recovered by, or paid over to, Senior Lender, the Subordinate Loan(s), or such part thereof originally intended to be satisfied, shall be deemed to be reinstated and outstanding as if such payment had not occurred; however, nothing herein requires Subordinate Lender to pay over to Senior Lender any payment that is claimed and/or declared to be a fraudulent conveyance or a preference, set aside or required to be paid to a trustee, receiver or other similar person under any bankruptcy, insolvency, receivership or similar law. If and to the extent that any payment under the Subordinate Loan Documents (whether by or on behalf of the Borrower, any guarantor,

as proceeds of collateral, or enforcement of any right of setoff or otherwise) is required to be paid to Senior Lender under the terms of this Agreement, or otherwise, and then if such payment is actually required to be paid to a trustee, receiver or other similar person under any bankruptcy, insolvency, receivership or similar law, and such payment is recovered by, or paid over to such trustee, receiver or other similar person, then the Senior Loan and Subordinate Loan, and such parts thereof originally intended to be satisfied, shall be deemed to be reinstated and outstanding as if such payment had not occurred.

5. **Insurance and Condemnation Provisions.**

5.1. Subordinate Lender hereby subordinates all of its right, title, interest or claim in and to: (i) all proceeds of all policies of insurance covering all or any portion of the Property or a building in which Subordinate Lender's interest has been subordinated pursuant to the terms hereof or insuring the Borrower, and (ii) all awards or other compensation made for any taking of all or any portion of the Property or a building in which Subordinate Lender's interest has been subordinated pursuant to the terms hereof, to the rights of Senior Lender in and to such insurance proceeds and condemnation awards.

5.2. So long as any indebtedness remains outstanding under the Senior Loan Documents, Senior Lender shall be entitled to receive any and all insurance or condemnation awards or proceeds for all or any portion of the Property or a building in which Subordinate Lender's interest has been subordinated pursuant to the terms hereof, either for application to such indebtedness or for such repair, reconstruction, or renewal of the Property as Senior Lender shall direct in its sole discretion. If, following any such application or disposition of the insurance proceeds or condemnation awards and other compensation, any balance remains, then such excess shall be made payable to Subordinate Lender, or if Subordinate Lender's rights to receive such proceeds are disputed by the Borrower or other parties, then Senior Lender may either make such excess payable to the joint order of Borrower and Subordinate Lender as their interests may appear under the Subordinate Loan Documents, or Senior Lender may interplead such excess into court for further disposition.

5.3. Subordinate Lender agrees at any time, and from time to time, to execute such documents as Senior Lender or an insurer may reasonably require to confirm that any rights that Subordinate Lender may have as a loss payee or additional insured are expressly subject and subordinate to the rights of Senior Lender as an additional insured or loss payee. If any insurance or condemnation awards or proceeds are tendered or paid to Subordinate Lender in violation of this Section 5, Subordinate Lender shall immediately tender such awards or proceeds to Senior Lender.

6. **Waivers.** Except expressly provided herein, neither Lender has made any representations to the other Lender about Borrower's creditworthiness or the Property, nor is either Lender relying on the underwriting or due diligence investigation of the other Lender.

7. **Notices.**

7.1. Any notices given to any party hereunder shall be (i) hand-delivered, effective upon receipt, (ii) sent by United States Express Mail or by private overnight courier, effective upon receipt, or (iii) served by certified mail, postage prepaid, return receipt requested and addressed to such party at the following addresses, or to such other address(es) or addressee(s) as the party to be served with notice may have furnished in writing to the other party, effective three (3) days after mailing.

Senior Lender: [Name of Senior Lender]
[Street Address]
[City, State Zip]
Attention: [Contact Name], [Contact's Title]

Subordinate Lender: Arizona Department of Housing
1110 West Washington Street, Suite 280
Phoenix, Arizona 85007
Attention: Asset Manager

8. **Construction.** This Agreement shall be construed as a whole, in accordance with the fair meaning of its language, and as each party has been represented by legal counsel of its choice in the negotiation and drafting of this Agreement, neither this Agreement nor any provision thereof shall be construed for or against either party by reason of the identity of the party drafting this, or any portion of the Agreement.

9. **Other Provisions.**

9.1. Subordinate Lender may assign Subordinate Lender's interest in the Subordinate Loan without Senior Lender's consent to another constituent department and/or agency of the State of Arizona.

9.2. Senior Lender shall provide Subordinate Lender with notice of Senior Lender's intent to assign its interest in the Senior Loan to another party. Senior Lender shall not assign Senior Lender's interest in the Senior Loan without the prior written consent of Subordinate Lender, and such consent shall not be unreasonably withheld.

9.3. Subordinate Lender acknowledges and agrees that Senior Lender would not make the Senior Lender loan without this Agreement.

9.4. Subordinate Lender acknowledges having received and reviewed, or an opportunity to receive and review copies of the Senior Note and the Senior Deed of Trust and consents to and approves all of the provisions thereof.

9.5. This Agreement constitutes the entire agreement between the parties, and as long as all or any part of the Senior Note remains unsatisfied, shall supersede and render unenforceable any inconsistent prior agreements regarding the subordination of the Subordinate Loan and any liens or rights created thereunder.

9.6. If any provision of this Agreement is invalid, illegal, or unenforceable, such provision shall be considered severed from the rest of this Agreement and the remaining provisions shall continue in full force and effect as if the invalid provision had not been included.

9.7. This Agreement inures to the benefit of and is binding upon the parties hereto and their respective heirs, successors and assigns.

9.8. This Agreement is construed by and governed in accordance with the laws of the state of Arizona.

9.9. This Agreement may be signed in multiple counterparts with the same effect as if all signatories had executed the same instrument. If counterpart originals are deposited into escrow for recording, the escrow agent may insert and substitute signature and notary pages, as needed, to create a single recordable original agreement.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]

**Signature/Acknowledgment Page
to Subordination Agreement**

IN WITNESS WHEREOF, Senior Lender has duly executed and delivered this Subordination Agreement as of the date of this Agreement.

SENIOR LENDER:

[NAME OF SENIOR LENDER],
a [Domicile State] [type of legal entity]

By: _____
Name: _____
Title: _____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 20____, by _____, the _____ of [Name of Senior Lender], a [Domicile State] [type of legal entity], on behalf of the [type of legal entity].

My commission expires: _____
Notary Public _____

[STAMP/SEAL]

**Signature/Acknowledgment Page
to Subordination Agreement**

IN WITNESS WHEREOF, Subordinate Lender has duly executed and delivered this Subordination Agreement as of the date of this Agreement.

SUBORDINATE LENDER:

STATE OF ARIZONA,
ARIZONA DEPARTMENT OF HOUSING,
a constituent department and an agency of the State of Arizona

By: _____
Name: Carol L. Ditmore, Director
or Reginald H. Givens, Deputy Director
or Ruby Dhillon-Williams, Assistant Deputy Director/Housing & Community
Development

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____,
20__ by _____ as _____ of **State of Arizona,
Arizona Department of Housing**, a constituent department and an agency of the State of
Arizona, on behalf of said constituent department and an agency.

My commission expires: _____
Notary Public

[STAMP/SEAL]

Exhibit A

Legal Description of Real Property

[Insert Legal Description]

TEMPLATE