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**MEMORANDUM**

**TO:** Jo Sesodia, Director  
Planning and Development Management Division

**FROM:** Alexis Marrero Koratich, Assistant County Attorney /s/ Alexis Marrero Koratich

**DATE:** April 21, 2022

**RE:** **HUD Amendment to Restrictive Covenants; Dixie Court Associates, Ltd.**

Dixie Court Associates, Ltd., a Florida limited partnership ("Lessee") has requested the Board of County Commissioners ("Board") to consider entering into a HUD Amendment to Restrictive Covenants ("Subordination") to subordinate an existing Declaration of Restrictive Covenants related to the waiver of impact fees for the construction of affordable housing. The proposed Subordination subordinates the following:

- Declaration of Restrictive Covenants (Affordable Housing) dated February 6, 2008, recorded on February 22, 2008, at Instrument #107717231, in the Public Records of Broward County, securing Two Hundred Nine Thousand Three Hundred Twenty-one and 00/100 Dollars (\$209,321.00) in fees waived by Broward County for the construction of thirty-two (32) very low and one hundred twenty-two (122) low income affordable housing units (the "Declaration"). The Declaration requires that the units constructed on the property be sold and rented to persons meeting the low or very low income limitations for twenty (20) years. There are approximately six (6) years remaining on the restriction period.

Lessee has indicated that they are in the process of refinancing the senior permanent loan from PNC Bank, N.A. using a Section 223(f) refinance mortgage insured through the Federal Housing Administration ("FHA") an agency of the U.S. Department of Housing and Urban Development ("Lender").

As a condition of the loan, Lender is requiring Lessee to enter an Owner's Certification and Acknowledgement of Program Obligation for Broadly Affordable, Affordable and Green/Energy Efficient Multifamily Housing Mortgage Insurance Premiums ("MIPs") and the Acceptance of Housing Choice Vouchers (Form HUD-92013-D) ("Owner's Certification and Acknowledgement"). For the avoidance of doubt, the Owner's Certification and Acknowledgement is still in draft form and is not binding on Lender and Lessee until it is fully executed.

Lessee and Lender propose to incorporate the Declaration by reference in the Subordination and have provided the County Attorney's office with a draft of the Owner's Certification and

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Acknowledgement for review. The Subordination states that "nothing herein limits County's ability to enforce the terms of the [Declaration], provided such terms do not conflict with statutory provisions of the National Housing Act or the regulations related thereto."

Notwithstanding the foregoing, it is critical to note that the Subordination explicitly states that "In the event of foreclosure (or deed in lieu of foreclosure) the [Declaration] (including without limitation, any and all land use covenants/or restrictions contained herein) shall automatically terminate, to the extent applicable, or as otherwise provided by HUD."

Moreover, the Owner's Certification and Acknowledgement contains a "Broadly Affordable Housing" provision requiring Lessee to either:

- Certify that the project has at least ninety percent (90%) of units covered by a Section 8 Project Based Rental Assistance (PBRA) contract or other state or federal rental assistance program contract serving very low income residents, with a remaining term of at least fifteen (15) years; or
- Have at least ninety percent (90%) of its units covered by an affordability use restriction under the Low Income Housing Tax Credit program or similar state or locally sponsored program, with rents sized at no greater than thirty percent (30%) of the income eligibility requirement for occupancy under the Low Income Housing Tax Credit program, with achievable and underwritten tax credit rents at least ten percent (10) below comparable market rents, with a recorded regulatory agreement in effect for at least fifteen (15) years after final endorsement and monitored by a public entity.

In sum, the neither the Subordination or the Owner's Certification and Acknowledgement would adequately substitute for the Declaration in the event of refinancing, foreclosure, or if Lessee voluntarily prepays the loan. The County's interests in the Declarations are not preserved by the Subordination or the Owner's Certification and Acknowledgement as written.

The Board should be made aware of the following nonstandard provisions:

- In the event of foreclosure (or deed in lieu of foreclosure) the Declaration (including without limitation, any and all land use covenants/or restrictions contained herein) shall automatically terminate, to the extent applicable, or as otherwise provided by HUD.
- Prohibits the County from filing any claim against the project, mortgage loan proceeds, reserve or deposit required by HUD in connection with the mortgage or HUD regulatory agreement.
- Limits County's indemnity provision to available surplus cash and/or residual receipts of the Borrower.
- Provide that County shall not be permitted to modify, amend, change, or alter the Declaration.