

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

[Docket No. FR-4883-N-02] HUD-2004-0003

**HUD Multifamily Rental Project and  
Health Care Facility Closing  
Documents: Revisions and Updates  
and Notice of Information Collection**

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** Consistent with the Paperwork Reduction Act of 1995, HUD is publishing for public comment a comprehensive set of closing forms and documents for use in the Federal Housing Administration (FHA) multifamily rental project and health care facility (excluding hospitals) programs. In addition to meeting the requirements of the Paperwork Reduction Act, this notice seeks public comment for the purpose of enlisting input from the lending industry and other interested parties in the development and adoption of a set of instruments that offer the requisite protection to all parties in these FHA-insured mortgage programs, consistent with modern real estate and mortgage lending laws and procedures. The development of these forms identified outdated language and policies in HUD regulations that needed to be changed. These forms are also posted on HUD's website at [www.HUD.gov](http://www.HUD.gov). Accordingly, elsewhere in today's **Federal Register**, HUD is publishing a proposed rule that solicits comments on changes to certain FHA regulations as described in the preamble to that rule.

**DATES:** *Comment Due Date:* October 1, 2004.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Gains E. Hopkins, Jr., Office of the General Counsel, Room 9230, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone

(202) 708-4090 (this is not a toll-free number). Persons with hearing or speech disabilities may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. General Summary of Changes to HUD Multifamily Rental and Health Care Facility Closing Documents*

In 1999, HUD developed the Multifamily Accelerated Processing (MAP) initiative. It was during the MAP development process that HUD noted that the multifamily rental project and health care facility closing forms had not been amended or revised in any significant fashion since the 1960s. It became clear during the development of MAP that all of HUD's multifamily closing forms required thorough review and comparison to modern day instruments to offer the requisite protection to all parties to the transaction, consistent with modern real estate and mortgage lending laws and procedures. Consequently, five committees consisting of experienced HUD closing attorneys were assembled to review the closing documents and to advise HUD's Office of Housing about improvements and recommendations. With input from HUD attorneys, FHA multifamily lenders, and counsel to parties to HUD-insured transactions, HUD determined how the forms could be revised to reflect current departmental policy and current real estate and mortgage financing practice. First drafts of revised closing documents were posted on a HUD Web site at the end of March 2000, and comments were solicited from the public and industry representatives. In response to the many comments received, significant changes were made to several of the draft documents and those changes are incorporated in the drafts being published with this notice.

The revised documents being published for public comment as part of this notice do not include the forms for HUD's Section 202 Housing for the Elderly (Section 202) program and Section 811 Housing for Persons with Disabilities (Section 811) program. Documents for the Section 202 and Section 811 programs will be revised in the near future.

The major changes to the appended closing documents are discussed in this notice. Terms that appear in this notice that begin with an initial capitalization refer to the titles of closing documents are defined terms in the closing documents. Though major changes were

made to several of the documents, HUD strived to keep all changes consistent within current HUD policy and the FHA regulatory framework except where otherwise identified in this notice. The requirements for commitment and endorsement of a mortgage note are provided in 24 CFR part 200, subpart A. Generally, the regulations in this part and subpart provide that where specific closing documents are referenced in the regulations the regulations provide that the documents shall be in a form as prescribed by HUD. The subpart also specifies other closing requirements that are reflected in the closing documents. There are numerous instances where the existing documents have been clarified, expanded, or otherwise modified to reflect current HUD policy and regulations, which have changed since the documents were originally adopted. One example of such change pertains to the policy that FHA regulation of lessees of health care facilities will be to the same extent to which owners of health care facilities are regulated. This policy is set forth in the new health care facility regulatory agreement. Although HUD has always taken the position that any lessee or sublessee would be subject to the same regulatory controls to which the owner is subjected under a regulatory agreement, this is the first time that this policy has been clearly stated in writing. Comment is specifically invited on the proposed change in the closing documents. A change to HUD regulations to also reflect this policy is included in HUD's proposed rule, published elsewhere in today's **Federal Register**.

In addition to specific changes to individual documents, HUD advises that there are two separate Regulatory Agreement (RA) formats published with this notice. When the closing documents were published on the HUD Web site in March 2000, only one RA format was published at that time, and the single RA format covered both rental housing projects and health care facilities. The single RA format was developed as a result of public comment that the multiple RA formats, currently in use, are confusing, antiquated, and often misapplied. Since publication on HUD's Web site, separate formats were developed for (1) rental housing programs, and (2) health care facilities under Section 232 of the National Housing Act (NHA). Certain "rental" type modifications may be necessary to the health care facilities RA on a case-by-case basis to cover assisted living facilities (ALFs) and board and care homes (B & C homes) under Section 232. Certain provisions relating to

admission, occupancy and security deposits, among others may need to be added depending on state law. The Section 232 RA also briefly mentions an Admission Agreement, which is a type of lease between a resident of an ALF, B & C home, or Nursing Home. The description of this type of admissions agreement may need to be expanded further in certain documents depending on state law.

A major revision that HUD is considering and which is not reflected in the closing documents published with this notice is a consolidation of the various escrow forms. A consolidation would eliminate several forms which are very similar and for which the differences could be identified in a set of boxes to be checked. A frequent complaint of lenders and other users of the multifamily rental and health care facility mortgage insurance programs has been the confusing nature of too many similar forms.

The FHA Form 2446, Escrow Agreement for Off-Site Facilities, is not included in the attached documents. When the consolidated escrow forms are published the FHA Form 2446 will be included in the that publication and, if it is not appropriate for a consolidated escrow, or if a consolidated escrow form is not developed, the FHA Form 2446 will be updated since it was last revised in April, 1962. A consolidated escrow form would contain an escrow for minor moveables and the 12-month debt service escrow for Section 232 projects with independent units. If these provisions are not included in a consolidated escrow form, another separate escrow form will have to be developed. HUD invites public comment on this proposal. HUD is considering publishing a consolidated escrow form. A consolidated escrow form would represent a major change from the policy articulated in the current Section 232 lessee regulatory agreement.

An additional change made in the RAs and other relevant documents pertains to the definition of "principal." The term "tenants in common" is being removed from the definition of "principal" because HUD intends, as a matter of policy, to eliminate tenancies in common as eligible mortgagor entities, except for tenancies in common comprised of one or more natural persons. No tenancies in common comprised of entities such as partnerships and limited liability companies, etc. would be eligible as mortgagors.

Two minor changes will be apparent in reviewing all the published forms but the reason for the changes may not be

apparent. First, a decision was made to adopt a universal numbering system for the closing documents, *e.g.* HUD Form 9XXXXM, for the multifamily rental project and health care facility closing documents. A universal numbering system should reduce confusion because the documents will appear in the same group wherever HUD publishes the documents, *e.g.* HUDCLIPS. The second change is that the terms "lender" and "borrower" are used consistently throughout all the documents, except with respect to the title for the document "Mortgagee's Certificate". The terms "lender" and "borrower" are defined to mean "mortgagee" and "mortgagor" as those terms are used in the NHA. Formerly, the documents contained a variety of terms to refer to these parties; therefore, consistency more in line with modern real estate practice is anticipated to make the documents more easily understood.

Form HUD-3259, Latent Defects Bond, has not been included in the closing documents published with this notice and, like FHA Form 2446, HUD 3259 does not have the 90000M series number. Similarly, the Borrower's Cost Breakdown, HUD-2328, does not have a 90000M series number since this form was recently revised. When these forms are renewed, HUD will consider including the 3259 and the 2328 forms in the 90000M series. The FHA Form 2446 will be assigned a 90000M series number if it is not consolidated into a master escrow agreement as discussed above.

The description of the significant changes made to the individual closing documents follows. The documents are divided into two categories: major documents and miscellaneous documents. Most of the major documents have been revised in some significant fashion. The miscellaneous documents generally have not been revised. Three new documents appear in the miscellaneous category, namely, the Escrow Agreement for Working Capital, the Sinking Fund Agreement, and the Escrow Agreement for Latent Defects (For Use with Completion Assurance Agreement).

The legal authority of HUD to implement these changes to documents is found in Titles II and IX of the NHA and in 24 CFR part 200 and the separate parts pertaining to each individual multifamily rental and health care program, including but not limited to 24 CFR parts 207, 220, 221, 232, 241, and 244.

## B. Major Documents

### 1. Security Instrument (HUD 94000M)

The Security Instrument has been changed considerably from the numerous state-specific forms currently in use by FHA. The forms currently in use were developed in the early days of FHA and have not been changed in any significant fashion since the 1960s. Certain commenters have questioned the value of instruments that are not consistent with documents used by other agencies and the commercial real estate market. Perhaps the most significant criticism was that the current FHA form Security Instruments do not provide lenders with the necessary protection that a modern instrument would offer. In developing the new multistate format, HUD made every effort to carefully examine the provisions of the security instruments currently and compare them with those used in the commercial real estate lending market today. Particularly, HUD looked carefully at the Freddie Mac multistate format (which differs little from that used by Fannie Mae) as well as at recent developments in the law. Consequently, HUD developed a multistate format which is consistent with existing HUD administrative policy and which is also consistent with modern lending and credit enhancement practices. In most areas, the multistate Security Instrument uses concepts in the existing FHA form documents and expands and clarifies them, as in the case of condemnation, property and liability insurance, single-asset borrower, books, records and financial reporting. The revised Security Instrument also clarifies for the parties to the Security Instrument which actions of the borrower and lender require HUD approval. The borrower and lender, however, remain the only parties to the Security Instrument, and HUD continues to have no direct contractual relationship with the owner with respect to the Security Instrument or to the Note. Further, the Security Instrument is organized along the same lines as the Freddie Mac instrument. State-specific addenda are being developed by HUD field counsel for the various jurisdictions and will need to be appended to the multistate format comparable to the approach taken by the Freddie Mac. The HUD state-specific addenda will differ significantly from the Freddie Mac addenda only in that there will be a provision governing construction advances in the HUD addenda since HUD insures construction advances, unlike Freddie Mac. This construction advances provision varies from state to state.

Also, the HUD instrument is designed to cover health care facilities as well as rental housing projects unlike the Freddie Mac instrument, which is restricted to rental housing. The following provides a description of the major substantive changes that have been made and the section numbers cited in the following discussion refer to sections in the Security Instrument:

**Personal Liability** (Section 6). HUD has decided to hold key principals personally liable for the indebtedness, but only if they commit the following actions: the borrower ceases to be a single-purpose, single-asset entity without prior HUD approval; the borrower transfers the property without prior HUD approval; the borrower creates or permits to be created a lien or encumbrance without prior HUD approval; the borrower commits fraud or makes a material misrepresentation to HUD or the lender; loss or damage suffered by the lender caused by the borrower's failure to pay Rents and security deposits it is obligated to pay; the borrower fails to apply insurance or condemnation proceeds as specified in the Security Instrument or to comply with requirements on the delivery of books, records and reports to the mortgagee. *See also* Sections 1(m), 1(p), 18, 23, 24, 45 and Section 8 of the Security Instrument.

**Default** (Sections 24 and 45). HUD has developed a new two-tiered default scheme: Class A for financial defaults, giving the lender an immediate right to an insurance fund claim, and Class B for all other bases for default, requiring the prior written approval of HUD for the lender to make an insurance fund claim. Class B defaults contains several new bases for default and are derived, in part, from the Freddie Mac model. The new bases include fraud or material misrepresentation or omission by the borrower, its officers, directors, trustees, general partners, members, managers or guarantors: (1) In the application for the HUD-insured loan; (2) in the application for financial assistance other than the HUD-insured loan that is included in the definition of "Indebtedness"; (3) in any financial statement, rent roll, or other report or information provided by the borrower during the term of the Indebtedness; and (4) in any request for lender's consent to any proposed action. Other new bases for default include the commencement of a forfeiture action or proceeding, which in the lender's reasonable judgment could result in the loss of the property or impairment of the lien.

**Mandatory Acceleration** (Section 10). HUD has decided to require the lender, when directed by HUD, to declare the

entire Indebtedness due and payable following a declaration of default by HUD under the terms of the Regulatory Agreement.

**Waste** (Sections 1(y) and 47). HUD has augmented the common law and state law definitions of "Waste" with an expanded contractual definition of and corresponding remedies for its commission. The definition of Waste includes the unauthorized modification of the property affecting value, failure to maintain the property, violation of covenants in the loan documents which require compliance with federal regulations regarding physical conditions standards, failure to pay certain taxes, and the wrongful retention of rents. This new definition is derived from The American Law Institute (ALI) in ALI's Restatement of the Law Third, Property (Mortgages)© 1997, and portions of that work are used with ALI's kind permission.

**Assignment of Leases** (Section 4). HUD has included an Assignment of Leases provision to the Security Instrument. In addition to the absolute assignment by the borrower to the lender of all leases on the subject property, this section sets forth the mandatory lease provisions for non-residential use of the property, including new requirements for all leases for telecommunication uses on the mortgaged property.

**Health Care Facilities** (Sections 1(g) and 1(q)(16)). HUD has revised the form of Security Instrument to include health care facilities. The changes are:

a. The title of the revised form is now known as the *HUD Multifamily/Health Care Facility (Mortgage, Deed of Trust, or other designation as appropriate in jurisdiction), Assignment of Rents and Security Agreement*.

b. The definition of Health Care Facilities at Section 1(g) has been expanded to include a comprehensive list of health care facilities authorized under the NHA or other applicable federal law.

c. The definition of "Mortgaged Property" at Section 1(q)(16) has been written to include all licenses, Bed Authority, and Certificates of Need required that are necessary to operate a facility and receive benefits and reimbursement from health care assistance providers that were relied upon by HUD to insure the Security Instrument.

**Termination** (Section 49). HUD added a provision to clarify that, at such time as HUD no longer insures the loan or holds the Security Instrument, all obligations of the parties to the Security Instrument terminate with respect to HUD, provided that the borrower is in

compliance with the Regulatory Agreement, and the lender is in compliance with the Contract of Insurance.

**Management Contracts** (Section 20). HUD has decided to require any management contract to contain a provision that the contract shall be subject to termination without penalty and without cause upon written request of the lender.

**Environmental Hazards** (Section 51). HUD has decided to include a provision similar to the Freddie Mac model to provide protections to the lender with respect to environmental hazards.

## 2. Multifamily/Multistate Note (HUD 94001M)

The current version of the HUD Multifamily/Multistate Note is, for some states, approximately 30 years old. The HUD Multifamily/Multistate Note in some states, such as Pennsylvania, was modeled on a Fannie Mae note form from the late 1960's or early 1970's. The proposed new version of the mortgage loan HUD Multifamily/Multistate Note is based, in part, on the 1999 Freddie Mac multifamily note. The proposed HUD Multifamily/Multistate Note is essentially a new form of note. The text has been rewritten. Discussion of issues has been expanded. Topics have been better organized. The essential concepts remain the same. Substantively, there are no major changes except for the issue of personal liability. The proposed HUD Multifamily/Multistate Note is now directly linked to the proposed Security Instrument and cannot be read independent of that document. The HUD Multifamily/Multistate Note is to be used for multifamily and healthcare programs. Some consideration was given to a revision, which would be consistent with the Government National Mortgage Association (Ginnie Mae) electronic payment; however, the decision was that such a provision would be confusing and that HUD could issue administrative policy directives permitting such changes for Ginnie Mae transactions. HUD invites public comment or suggested alternatives with respect to that issue. The major changes to the HUD Multifamily/Multistate Note follow and the section numbers cited below refer to sections in that note.

**Personal Liability** (Section 8). The HUD Multifamily/Multistate Note limits personal liability. It is a non-recourse Note. The version currently in use does not have a non-recourse provision in the printed form, though personal liability language was permitted by a HUD Handbook. The revised HUD Multifamily/Multistate Note identifies exceptions to the limit on personal

liability in the Security Instrument, Regulatory Agreement, and the Note. The HUD Multifamily/Multistate Note identifies six exceptions to the limit on personal liability. A Borrower will be personally liable if the Borrower commits any of the six so-called "bad boy" acts identified in the exceptions. The "bad boy" acts concern the failure to pay the Lender rents after an event of default, failure to apply insurance or condemnation proceeds as required by the Security Instrument, the failure to deliver books and records, acquisition of property or operation of a business in violation of the Security Instrument, transfer or granting of a lien or encumbrance, and fraud or misrepresentation.

*Key Principal* (Section 1). The revised HUD Multifamily/Multistate Note adds a new defined term for "Key Principal" which will be discussed in an Office of Housing directive. The forthcoming Office of Housing directive will explain how to determine who will be a Key Principal. The Key Principal will be personally liable for "bad boy" acts.

*Attachment to the Note*. The HUD Multifamily/Multistate Note includes the attachment entitled Acknowledgment and Agreement of Key Principal to Personal Liability for Exceptions to Non-Recourse Liability. This document will make the Key Principal financially liable for "bad boy" acts.

### 3. Regulatory Agreement (HUD 92466M)

HUD extensively modified the Regulatory Agreement with the main change being a consolidation of all the various rental housing projects currently in use into one document. HUD drafted a separate Regulatory Agreement for its health care facilities. Lenders, Borrowers, and project managers often complained about the number of forms and the duplication of information required by the various forms. Therefore, an effort was made to evaluate all of the various Regulatory Agreements currently being used, as well as other forms executed by Borrowers in an effort to determine which forms could be consolidated without unnecessary complication. Additionally, none of the current forms had been amended for many years, and some did not fully reflect current administrative policy requirements. HUD reorganized the Regulatory Agreement by topics for ease of use, included current policy and administrative requirements and incorporated the Mortgagor's Certificate into the proposed Regulatory Agreement.

HUD spent considerable time analyzing the issue of whether to develop a separate format to cover the Section 232 Health Care Facilities program (nursing homes, intermediate care facilities, assisted living facilities and board and care homes). The final decision was to develop a separate Regulatory Agreement for health care facilities. In developing a Regulatory Agreement that will work for the various rental housing programs (excluding the FHA subsidy programs under which projects are not being initially insured any longer), great care was taken to be certain that all provisions are consistent with current administrative policy of HUD.

The proposed Regulatory Agreement is not designed to be used in all cases where there is a Transfer of Physical Assets, if the transfer involves a project which was initially insured under one of the FHA subsidy programs (Section 236 Interest Reduction Program (IRP), Rental Assistance Program (RAP), 221(d)(3) Below Market Interest Rate (BMIR), Rent Supplement, etc.) In these cases it will be necessary to develop a transactional specific Regulatory Agreement based on a combination of as much of the new format as will be compatible with those provisions of the existing Regulatory Agreement, such as those pertaining to occupancy and rental and which are mandated by the subsidy program statutes or regulations. On the other hand, the proposed format can be used for a transfer of an unsubsidized rental project and with few, if any, changes.

*Article I—Definitions*. The definitions are found in Article I at the beginning of the proposed Regulatory Agreement. In the existing Regulatory Agreement, the definitions are found near the end of the Regulatory Agreement. Most of the definitions in the Regulatory Agreement are the same as the definitions in the proposed Security Instrument, and many are similar to definitions found in the Freddie Mac closing documents.

Section 1(a): "Affiliate" is a new term. The definition is taken from 24 CFR 24.105.

Section 1(b): HUD decided to use the term "Borrower" instead of "Owner" or "Mortgagor" so that the same terms would be used in the Regulatory Agreement and the Security Instrument. HUD finds this term to be more universal than the term "Mortgagor". The definition of Borrower is expanded to make it clear that the definition includes a purchaser of the development that does not assume the Security Instrument.

Section 1(d): "Directives" is a new term and includes prospective issuances of HUD as well as ones effective on the date the HUD Multifamily/Multistate Note was first insured.

Section 1(p): HUD added an expanded definition of "Mortgaged Property" including other defined terms, such as "Fixtures" (Section 1(g)) and "Personalty" (Section 1(s)), which are not defined in the current Regulatory Agreements.

Section 1(x): HUD added a definition for "Reasonable operating expenses" to clarify current policy.

Section 1(aa): HUD chose to use the term "Security Instrument" instead of "Mortgage." HUD finds this term to be more universally understood and used in multifamily project closing transactions than the term "Mortgage."

Section 1(z) and Section 1(bb): The proposed Regulatory Agreement collectively covers more programs and types of developments than each of the current agreements. For this reason, the proposed Regulatory Agreement defines both "Surplus Cash" (Section 1(bb)) and "Residual Receipts" (Section 1(z)).

Section 1(ee): "Waste" is a new definition and is the same as the definition of "Waste" in Section 1(cc) of the proposed Security Instrument. Section 21 of the proposed Regulatory Agreement prohibits the Borrower from committing Waste.

#### *Article II—Construction*

Sections 2–9: HUD decided to merge the Mortgagor's Certificate (FHA Form No. 2433) into the proposed Regulatory Agreement.

#### *Article III—Financial Management*

Section 11(b): HUD added a provision providing for periodic review of the amount to be deposited in the reserve for replacement fund.

Section 11(c): HUD added a provision requiring that interest earned on the reserve for replacement fund be deposited into that fund.

Section 11(d): HUD added a provision permitting HUD to direct the application of the reserve for replacement fund at any time.

Section 15(b): HUD added additional conditions under which the Borrower may take Distributions.

Section 15(e): HUD clarified when the Borrower may be reimbursed for equity or capital contributions.

Section 19: HUD added a provision concerning the maintenance and inspection of books and records of management agents and Affiliates.

*Article IV Project Management*. Most of the provisions of this Article represent an elaboration of provisions currently found in the HUD Regulatory Agreement, HUD–92466.

Section 21: This provision derives from the current paragraphs 7 and 9 and expresses the requirement that the Borrower maintain the property and the books in satisfactory condition and that this obligation is independent of any obligation of any other entity or person.

Section 22: This provision requiring flood insurance in flood hazard areas is new to the Regulatory Agreement, but is not a new requirement for Borrowers.

Sections 23, 24, 25, 26 and 27: These provisions derive from paragraph 9 of the current Regulatory Agreement. Section 23 requires execution of a Management Agreement and Management Certification. Section 25 requires that the Management Agreement and any third party vendor contract entered into by the Borrower be terminable at the request of HUD. Section 26 provides expanded guidance for contract acquisition and management by the Borrower. Section 27 continues the existing requirement that the Borrower be responsive to inquiries from HUD regarding the operation and management of the Project.

Section 28: This provision derives from the regulations at 24 CFR part 245, as amended by the regulations published on June 7, 2000, at 65 FR 36272. This provision explains rights of tenants to organize and gives tenants remedies against Borrowers who unreasonably interfere with these rights.

Section 29: This provision derives from the current paragraph 10 and provides a remedy for HUD in the event that the Borrower fails to comply with a law that is relevant to the management of the Project.

#### *Article V—Admissions and Occupancy.*

Section 40: HUD clarified that the Borrower may not charge a resident or applicant an admission fee, founders fee, continuing care retirement community fee, life-care fee or similar payment.

*Article VI—Actions Requiring the Prior Written Approval of HUD.* This Article prohibits certain actions without the prior written approval of HUD.

Section 42(a): This provision maintains provisions in the Regulatory Agreement currently in use that restricts the alienation of real and personal property of the Project. However, unlike the Regulatory Agreements currently in use, this section of the revised Regulatory Agreement establishes exceptions permitting disposal of obsolete or deteriorated equipment and conveyance of property by operation of law.

Sections 42(b), (c), (d), (e), (g), (h): These sections contain provisions

substantially equivalent provisions to those in the Regulatory Agreements currently in use. Clarification and improved wording is the primary purpose of any variations from prior instruments.

Section 42(f): The Regulatory Agreements currently in use restrict the right of the Borrower from conveying its general partnership interests; this provision extends that restriction to other interests, in recognition of other forms of Borrower entities being utilized.

Section 42(i): This provision is not contained in Regulatory Agreements currently in use. The provision is designed to avoid a claim by the Borrower that certain of its money is an endowment which is not permitted to be used to pay Project debt or expenses. The provision will permit such a claim only if the money is clearly part of such a restricted endowment.

Section 42(j): This provision, restricting the Borrower's right to change provisions of its organizational documents, is not found in the Regulatory Agreements currently in use. However, this provision is compatible with provisions that HUD has traditionally required to be contained in the Borrower's organizational documents themselves.

Section 42(k): This provision, regulating the institution and settling of litigation by the Borrower above \$25,000, is not found in Regulatory Agreements currently in use. The inclusion of this provision by HUD represents a decision by HUD to apply a consistent policy to all programs and to clearly state that policy in the Regulatory Agreement.

Section 42(l): This provision, prohibiting reimbursement without the prior written approval of HUD, is not found in Regulatory Agreements currently in use. However, the provision is consistent with existing HUD policy that prefers that the Borrower or project manager pay the expenses of the project directly rather than by reimbursing another for these expenses.

Section 42(m): This provision, prohibiting receipt of various fees or payments, is not found in Regulatory Agreements currently in use.

#### *Article VII—Enforcement.*

Section 43(b) and (c): HUD added additional items which shall constitute a violation of the Regulatory Agreement. These include fraud or material misrepresentations by the Borrower, its officers, directors, trustees, general partners, members, managers or managing agent in connection with certain documents submitted to HUD or

requests for HUD's consent to any proposed action.

Section 44: In this section, HUD clarified the circumstances under which it may declare a default following the existence of a violation.

Section 44(b): This section provides that instead of being merely able to request the holder of the HUD Multifamily/Multistate Note, when the note is not held by HUD, to accelerate the HUD Multifamily/Multistate Note following a declaration of default, HUD will have the discretion to require the holder of the HUD Multifamily/Multistate Note to accelerate the Note following the declaration of default. There is a corresponding provision in the Security Instrument at Section 10.

Section 44(g): HUD added a new provision to provide for the removal of certain persons from a role in ownership of the Mortgaged Property with respect to violations of the Regulatory Agreement related to felony criminal convictions or civil judgments concerning the operation or management of the Mortgaged Property.

Section 45: HUD added a new provision to provide a measure of damages for failure to maintain the Mortgaged Property as required by the Regulatory Agreement.

#### *Article VIII—Miscellaneous.*

Sections 47, 48, 49, 51: These sections contain provisions substantially equivalent to provisions found in Regulatory Agreements currently in use. Clarification and improved wording is the primary purpose of any variation from prior instruments.

Section 50: This provision, concerning the effect of section headings and titles, is not found in Regulatory Agreements currently in use. However, it is a standard contractual provision.

Section 52: This provision for parties' addresses for purposes of providing notice is not found in Regulatory Agreements currently in use. However, it is a standard contractual provision.

Section 53: This provision, pertaining to the Regulatory Agreement as a Uniform Commercial Code (UCC) security agreement, a fixture financing statement and the granting to HUD of a security interest, and related matters, is not contained in current Regulatory Agreements.

*Article IX—Section 8 Housing Assistance Payments Contracts.* Currently HUD has a different form of Regulatory Agreement (HUD-92465) for developments with project-based Section 8 assistance. HUD includes Article IX in order to make a uniform Regulatory Agreement applicable to

insured projects with Section 8 rental assistance.

In Sections 54(a), the definition of "Section 8 units" expands the current definition in Section 16(j) of HUD-92465 to clarify that "Section 8 units" does not include Section 8 certificates, vouchers or housing choice vouchers. The other sections in Article IX were in HUD-92465. Section 54(b) corresponds to Section 16(k) of HUD-92465. Sections 55, 56, and 57 correspond to Sections 5(a), (b) and (c) of HUD-92465. Sections 58, 59 and 60 correspond to Sections 9(a), (b) and (c) of HUD-92465.

#### 4. Regulatory Agreement for Health Care Facilities (92466M-HCF)

HUD extensively modified the Regulatory Agreement formats that are currently in use. The main change is consolidation of all the various rental housing project and Health Care Facility (excluding hospitals) Regulatory Agreements currently in use into two new documents (one for rental projects [92466M] and one for health care facilities [92466M-HCF]). Aside from containing numerous provisions pertaining exclusively to health care facilities insured under Section 232 of the National Housing Act and the elimination of provisions which apply exclusively to rental housing (mainly admission and occupancy, Section 8 assistance, *etc.*), the 92466M-HCF is much the same as the 92466. The discussion of the 92466M includes a discussion of the provisions used in both documents.

In virtually all instances the 92466M-HCF is consistent with current HUD policy. However, there is one area of current HUD policy that requires clarification and therefore, HUD is specifically bringing this clarification to the attention of the public. That policy is that health care lessees are regulated to the same extent that mortgagors are regulated in the Section 232 program. Clarification is needed because the existing lessee regulatory agreement (Form 2466-NHL) contains few regulatory requirements and, consequently has created numerous questions and conflicts with lessees or operators or both.

In view of increasing conflicts and defaults in the Section 232 program, HUD's Office of Inspector General undertook an investigation, which resulted in a report with recommendations that are incorporated in the Health Care Facility Regulatory Agreement. Attention is called to the formatting of 92466M-HCF. The initial formatting of the 92466M-HCF on pages one and two differs from the "rental project" 92466M in that there are check

boxes for the various types of facilities eligible under the Section 232 program, *e.g.* nursing homes, intermediate care facilities, board and care facilities, assisted living facilities and combinations. The 92466M-HCF also requires the insertion of data pertaining to the number of beds and/or units. In the opening paragraphs of the 92466M-NHL, HUD clarifies that the instrument covers Borrowers, Lessees and/or Operators. This terminology appears throughout the instrument.

*Article I—Definitions.* The definitions are found in Article I at the beginning of the proposed 92466M-HCF. Definitions are found near the end of the current forms of Regulatory Agreement. Most of the definitions in the 92466M-HCF are precisely the same as the definitions in the rental housing Regulatory Agreement and the proposed Security Instrument. Many definitions are similar to definitions found in the Freddie Mac closing documents. However, a few definitions are unique to the 92466M-HCF. For example, please see in Section 1, b, c, d, i, j, l, q, s, u.(15), x, y, z, bb, dd, gg, and jj. Specifically, the definition of "Leases," in the 92466-HCF, includes the Admission Agreement, which is a form of lease used between a resident and an ALF, B & C home or Nursing Home. The definitions of Operator and Lessee are particularly significant and the use of these terms in the 92466-HCF is important in understanding the expanded controls over Lessees and Operators. Some common definitions have been altered to fit the concept of a health care facility.

*Article II—Construction.* See 92466M discussion of these provisions.

*Article III—Financial Management.* See 92466M discussion of these provisions and, in addition, see Sections 12 pertaining to the Sinking Fund, 18 pertaining to books of management agents, Lessees, Operators, managers and Affiliates, and 19 pertaining to the Annual Financial Audit. These sections contain additional provisions related to the coverage of Lessees and Operators in health care facilities.

*Article IV Project Management.* Some of the provisions of this Article are consistent with the 92466M. However see: Section 20. Equipment; Section 21. Licensure; Section 22. Bed Capacity; Section 23.b. pertaining to coverage of Lessees and Operators; Section 24. Prohibition of Additional Fees (*e.g.* fees for life-care, *etc.*); Section 25. Coverage; Section 26. Residency of ALF's; and Sections 28-34. pertaining to coverage of Lessees and Operators. One significant change is in Section 34, Compliance with Laws, which requires

maintenance of the requisite level of professional liability insurance as determined by HUD.

*Article V—Lease of Health Care Facility.* Section 35 is most explicit in describing additional regulatory controls applicable when a Health Care Facility is leased and in articulating fully the concept that a Lessee and Borrower together are generally subject to the same regulatory controls as a Borrower where no lease is involved. Significantly, Lessees are responsible for the same level of financial reporting, securitization of all Personalty, and agreeing that the Certificate of Need and license cannot be transferred from the Project.

*Article VI—Actions Requiring the Prior Written Approval of HUD, Article VII—Enforcement and Article VIII, Miscellaneous.* These Articles are virtually the same as those in the 92466M. See the discussion there of the Sections in Articles VI, VII and VIII. In addition, please note that Section 46, pertaining to Notices, specifically covers Lessees and Operators.

#### 5. Mortgagee's Certificate (HUD 92434M)

The Mortgagee's Certificate is substantially the same as the current form. Several minor changes were made from the current form for clarity and ease of comprehension relating to organization and word choice. Also, in the interest of uniformity, the definition of any capitalized term used in the Mortgagee's Certificate can be found in the Regulatory Agreement and/or the Security Instrument. The following substantive changes were made:

*Paragraph 1:* HUD added a provision stating that the Lender agrees to be bound by all directives of HUD. Although Lender cannot be adversely affected by changes in regulation, HUD should be able to freely interpret its statutes and regulations. It would be problematic to apply the mortgagee letters and handbooks exactly as they existed at firm commitment for each Project. In order to participate in the program, the Lender must agree to comply with current mortgagee letters and handbooks throughout the life of the mortgage loan so long as they do not conflict with the regulations from the time of the firm commitment.

*Paragraph 5:* HUD changed the requirement for "clear title" to the language that mirrors the requirements for title at 24 CFR 207.258(b)(2)(ii) and (iii).

*Paragraph 7:* HUD removed the specific contractual provisions with respect to the creation and handling of the Working Capital Deposit and created

a separate Working Capital Escrow Agreement that will be referenced in and attached to the Mortgagee's Certificate.

*Paragraph 8:* HUD removed the specific contractual provisions with respect to the creation and handling of the Sinking Fund and created a separate Sinking Fund Agreement that will be referenced in and attached to the Mortgagee's Certificate.

*Paragraph 13:* HUD added the requirement that the Lender is responsible for timely filing of the appropriate Financing Statements under the UCC on behalf of HUD pursuant to HUD's rights under the Regulatory Agreement.

*Paragraph 19:* HUD amended this provision to require that HUD be included as a named insured in hazard insurance policies for the Project consistent with the new form of mortgage.

*Paragraph 20:* HUD amended the current Mortgagee's Certificate that previously included items which are to be paid (such as extension fees) in clauses (b), (c), (d) and (e) of paragraph (2) to include only items to be paid at or before initial closing. Deferred fees and charges of all kinds are now addressed only in paragraph 20(f). Further, the HUD added clause (g) of paragraph 20, which allows the Lender to collect servicing and administrative fees. HUD also added clauses (h) and (i) to paragraph 20 to advise HUD if the construction and/or permanent loan is being funded by GNMA mortgage-backed securities or participation certificates in order to address the concern that HUD offices are inconsistent with their requirements to disclose information regarding the underlying financing arrangements of the transaction.

*Paragraph 25:* HUD included a certification that the Lender has no identity of interest with the Mortgagor.

*Paragraph 26:* HUD included a certification that the Lender has no identity of interest with the Borrower's attorney to mirror the requirement from the Borrower's attorney opinion.

*Paragraph 29:* HUD added a certification that all of the closing documents (indicated on the closing checklist and with the exception of the Opinion by Counsel to the Borrower) are in accord with the HUD format documents except as revised and approved by HUD Field Counsel. The Lender will draft a memorandum listing any and all changes to the HUD-approved forms. HUD's approval of the changes will occur by acceptance of the documents and the memorandum listing the changes at the closing. In order to

clarify what documents were accepted at the closing, a list of all documents accepted at the closing will be signed by the HUD closing attorney, the Lender and the Borrower. HUD also added the following language "[i]t is understood that changes and modifications do not include filling in blanks, attaching exhibits or riders, deleting inapplicable provisions or making changes authorized by applicable HUD regulation, handbooks and/or directives."

*Paragraph 30:* HUD added a requirement that the Lender immediately notify HUD in writing upon learning of any violation of the Regulatory Agreement.

*Paragraph 31:* HUD added a requirement that the Lender promptly review any Borrower's request to transfer the Project and not unreasonably withhold approval of the transfer. If HUD approves the transfer, the Lender will execute a Release and Assumption Agreement or a Mortgage Modification Agreement incorporating the Regulatory Agreement in the Mortgage. HUD also prohibited the Lender from collecting any fee in connection with reviewing the transfer except for reimbursement of actual expenses incurred in connection with reviewing the transfer.

#### 6. Building Loan Agreement (HUD-92441M)

The Building Loan Agreement, HUD 92441 (5-84), remains largely unchanged. There were minor grammatical and style changes made to the text. The substantive changes were as follows:

The first factual recital was revised to reflect all forms of approved mortgagors, including partnerships and limited liability companies.

*Paragraph 1* was revised to require submission of closing documents and completion of the initial closing before mortgage proceeds may be advanced.

*Paragraph 3* was revised to require approval of all construction changes by the lender and HUD. This reflects existing HUD policy and procedure.

*Paragraph 5* was revised to include the permanent loan fee, legal, organizational and audit in the itemized list of charges.

*Paragraph 12* was revised to remove the words "upon completion," which would change the text to require the security agreement and financing statements to be submitted with all other documents at the time of the initial closing.

*Paragraph 14* was revised to follow the text of Section 212(a) of the National Housing Act.

*Paragraph 19* was added to acknowledge the personal liability of the borrower if mortgage advances are not applied in accord with the requisitions and the Building Loan Agreement. This is a clarification of HUD's policy and reflects HUD's interpretation of the form currently in use.

*Paragraph 20* was added to clarify that HUD is not a party to the Building Loan Agreement.

#### 7. Supplement to Building Loan Agreement (HUD 92441M-SUPP)

The Supplement to the Building Loan Agreement, form HUD 92441, is to be used when the Borrower acts as its own general contractor and there is no construction contract. This form is used infrequently. The revised Supplement does not have any substantive changes. Some editorial changes were made, and the references to forms have been updated to refer to the new form numbers.

#### 8. Construction Contract (HUD 92442M)

The existing HUD construction contracts, HUD Forms 92442-Lump Sum, and 92442-A-Cost Plus, were consolidated into a single HUD Construction Contract. The consolidation of the two contract formats was based upon a determination that the HUD construction contracts currently in use are more similar than different, and, the identical and distinct provisions of the construction contracts could efficiently be adapted to a consolidated format. HUD also determined that a separate form was not necessary to take advantage of the Incentive Payment for Early Completion. Note that the Incentive Payment Computation Form, page 2 of HUD-92443, has not been removed and it is referenced as a contract document in Article 2, Section A.7, of the consolidated construction contract.

HUD gave consideration to including the full text of the Labor Requirements, currently set forth in the Form HUD-2554, within the body of the contract. HUD determined not to include those requirements, because to do so would unnecessarily lengthen the construction contract.

HUD considered the possibility of adhering to a construction schedule culminating with payment upon Substantial Completion, rather than payment upon Final Completion. HUD's Office of Housing determined that the best interests of the Department are served by retaining the Final Completion requirement, to preserve rights attendant to warranty items and liquidated damages. The terms "Final

Completion” and “Final Completion Deadline” are clarified in Article 3, Section A.

Significant changes to the HUD consolidated construction contract include the following:

a. The format, page one, provides for designation as either a Lump Sum or Cost Plus contract, insertion of the Project Number, and identification of the parties to the contract.

b. The contract documents recited in Article 2, Section A expressly includes the project manual, the Incentive Payment Computation form (if applicable), and the Prevailing Wage Determination.

c. The mandatory arbitration provisions contained in the AIA A201-1997 General Conditions are expressly excepted from the HUD contract, in Article 2.A.2.

d. The provisions for the payment of incentives for the early completion of construction have been set forth explicitly in the body of the contract, as explained in Article 3. F. For Cost Plus contracts, where there is no Identity of interest between the Owner and the Contractor, the incentive provision is stated in Article 4. D. Where there exists such an Identity of Interest, the incentive provision is stated in Article 4.E. For Lump Sum contracts, the incentive provision is stated in Article 4A. B. The contract language is based upon the provisions currently found in Form HUD-92443 (3/94) and in paragraph 1-15. B. 2. of Handbook 4430.1.

e. Payment Procedures found in Article 5 require the contractor to execute and submit all final advance documents required by HUD as a condition precedent to payment of final balance due to the contractor.

f. The Contractor, pursuant to Article 6, is expressly authorized to withhold payment from the subcontractor(s) in an amount reflecting percentages actually retained from payments to the contractor on account of such subcontractor's portion of the work.

g. References to “HUD requirements” in Article 7, Section E. include “HUD Administrative Requirements” with the intent of reaching all forms of relevant issuance such as Handbooks, Guidebooks, Program Notices, Mortgage letters, and other written directives issued by HUD relating to the HUD Multifamily or Health Care Facility insurance programs under the National Housing Act, as amended, and any successive legislation.

h. The relationship between state law considerations and lien waiver requirements is addressed in Article 9.B. Article 9.B. states: “In jurisdictions

where permitted by law, the Owner may require the Contractor to execute a Waiver of Liens which shall be recorded prior to the commencement of construction.”

i. A new Article 12 clarifies the roles of Lender and HUD, disclaiming imputed liability to HUD or the Lender as a result of action or inaction of the Owner, Contractor or any third parties.

j. A new Article 14 provides for designation of the Owner and Contractor representatives responsible for communications involving the contract.

9. Supplementary Conditions of the Contract for Construction (HUD-92554M)

This revision to the form Supplementary Conditions of the Contract for Construction is substantially the same as the current Form HUD-2554. However, this draft is designed explicitly for use in the FHA program and not for use in the Section 202, Section 811 or in other HUD programs. This draft form is subject to further internal review by HUD to adapt this form for use in transactions under Section 202 and Section 811. It was originally included within the body of the Merged Construction Contract posted on HUD's Web site on March 31, 2000, with other draft forms for use in multifamily project and facility closings. Upon further consideration and based on several comments received by this office, the decision was made to retain the form of the Supplementary Conditions for use as a separate instrument rather than include it within the body of the construction contract form.

In the interest of clarity and ease of comprehension, several changes were made to current Form HUD-2554 including punctuation, citations and cross-references, and a few subsection numbers were changed. The following additional changes were also made to the form:

a. The instructions contained at the beginning of Article I (the paragraph headed “Instructions”) were removed, and appropriate language with respect to the applicability of paragraphs B, C and D (formerly A, B, and C) was added at the beginning of each appropriate paragraph itself. See the discussion for paragraphs 1.B, 1.C and 1.D that immediately follows.

b. Paragraph 1.B (Minimum Wages) now opens with a statement describing projects exempt from the minimum wage provisions contained therein.

c. Subparagraph 4 (i) of paragraph 1.B is updated to reference the current name for the office within the Department of

Labor responsible for apprentice and trainee programs. The current name of the office is “Office of Apprenticeship Training, Employer and Labor Services” which was formerly known as the “Bureau of Apprenticeship and Training.”

d. Subparagraph 6 of paragraph 1.B now refers to the clauses in subparagraphs 1 through 10 of paragraph B in lieu of referring to the comparable clauses of 29 CFR 5.5(a), in identifying minimum wage provisions to be inserted in subcontracts.

e. Paragraph 1.C (Contract Work Hours and Safety Standards Act) now starts with a subparagraph numbered 1 that states: “This paragraph C of Article 1 is applicable only if a direct form of federal assistance is involved, such as Section 8, Section 202/811 Capital Advance, grants *etc.*, and is applicable only where the prime contract is in an amount greater than \$100,000. As used in this paragraph C, the terms ‘laborers’ and ‘mechanics’ include watchmen and guards.”

f. Subsection 1.D (Certification) now starts with the following phrase that identifies the scope of the certification: “For projects with mortgages insured under the National Housing Act that are subject to paragraph B of this Article 1.”

g. Article 2 (Equal Employment Opportunity) was revised to remove the language provided in the beginning of the Article that states that an obligation on the part of an “applicant” to incorporate certain provisions in construction contracts. HUD determined that language is not appropriate for inclusion within the body of the form, since the form itself is designed to be included in construction contracts (as an attachment) and not to be included in grant agreements or application forms.

h. Article 2, subsections B and C (formerly A and B), were revised to include reference to persons with disabilities as a protected class.

i. Article 2, subsections H, I and J, were removed because it was determined that these provisions relative to the agreements and obligations of “the applicant” were not appropriate for inclusion in this construction contract document. Rather, these provisions should be included in other, more appropriate instruments.

j. Article 3 (Equal Opportunity for Businesses and Lower Income Persons Located Within the Project Area), commences with a revised statement (now labeled subsection A) that describes the applicability of Article 3 by simply referring to the regulation at 24 CFR part 135.

k. Article 4 (Health and Safety) now starts with an "applicability" paragraph (labeled paragraph A) that clarifies the scope of applicability of this article and states: "This Article 4 is applicable only where the prime contract is in an amount greater than \$100,000." This new language reflects the fact that Article 4 derives from the Contract Work Hours and Safety Standards Act, which contains such limitation.

#### 10. Opinion by Counsel to the Borrower and Instructions and Certification (HUD 91725M)

The guide format for the opinion required by HUD in multifamily rental project and health care facility closings was originally prepared in 1994 in response to changes in opinion practice as reflected by the ABA Accord and various State law bar reports on opinion letters. The proposed revision to the guide format reflects approximately seven years experience with the 1994 version and, as would be expected, contains numerous technical changes and corrections such as the striking of the requirement that HUD be shown in Financing Statements "as its interest appears." The principal purpose of the guide format remains, which is to achieve a uniform format which can be utilized throughout the nation and which will be familiar to HUD counsel, Lenders and other parties to the mortgage insurance transactions in all jurisdictions. The major substantive changes being proposed are as follows:

*Instructions to the Guide Format on the Opinion by Counsel to the Borrower.* The Instructions have been updated and contain numerous clarifications that should facilitate use of the guide format in preparing the Opinion by Counsel to the Borrower (Opinion). The Instructions describe and explain the rationale for the major changes to the guide format, e.g. the section pertaining to the UCC, reliance by successors and assigns of the Lender, certification as to the guide following the format provided by HUD, stronger certification/warning language in the Opinion and virtually all other closing documents being reviewed by Counsel to the Borrower, etc. Note specifically the discussion of acceptability of counsel, signatures, certification of the mortgagor, identity of interest, liens, certifications as to Regulatory Agreement and side-deals, reliance on other opinions and reliance by subsequent holders. Further, the Instructions contain considerably greater guidance and numerous clarifications as to when and how the guide format is to be utilized, e.g. as to which programs and which closings the guide form is applicable, as to how the

guide format can or should be modified, etc.

*Section 13.* This section and several related provisions pertaining to securitization of the Lender and HUD under the UCC have been revised to reflect the fact that the Lender now has to also prepare an appropriate Security Agreement and Financing Statements to securitize HUD as well as the lender. It is also likely that the Opinion will have to be updated at final endorsement to properly cover the UCC securitization, particularly for health care facilities where the proper documentation under the UCC cannot be prepared until completion of the project or facility.

*Certification by Mortgagor.* See Section 8 related to identities of interest and side-deals.

#### C. Miscellaneous Documents

1. *Residual Receipts Notes (HUD-91710M and 91712M).* Each proposed Residual Receipts Note format has been revised to incorporate directive requirements into the text of the notes.

2. *Escrow Agreement for Incomplete Construction (HUD-92456M).* HUD revised the Escrow Agreement by adding 'incomplete construction' to the title of the form. The recital provision has been changed with respect to statement that the Lender is to advance the entire amount of the loan provided for in the Building Loan Agreement. This statement is misleading since the amount of the loan can and often does change at final endorsement. The provision now reads: 'to insure the Mortgage Loan in its maximum approved amount.' The form was corrected to remove the Labor Standards Procedures and substitute the Form HUD-92554M, Supplementary Conditions of the Contract for Construction, as the labor standards. Finally, the term 'cash' was added to the deposit.

3. *Request for Final Endorsement of Credit Instrument (HUD 92023M).* No substantive changes were made to this form.

4. *Leasehold Instructions with Lease Addendum (HUD 92070M).* The revision made to this form clarifies that the instructions and addendum are to be used in connection with a ground lease. The procedures for leasehold termination by reason of tenant defaults and the right to cure defaults are revised to give greater protection to the insured mortgagee and to HUD. Upon premature termination of the leasehold by reason of tenant defaults, the revision specifically provides that the insured mortgage remains an encumbrance on the improvements.

5. *Surplus Cash Note (HUD-92223M).* Each proposed Surplus Cash Note format has been revised to incorporate directive requirements into the text of the notes.

6. *Completion Assurance Agreement (HUD-92450M).* There were no substantive changes made to this form.

7. *Payment Bond (HUD-92452M-A).* This form includes several revisions. New provisions added to the form include a provision that amounts paid to the Owner without the written consent of the Lender do not reduce the Surety's liability. The cost of equipment was added as an additional item that may be claimed under the bond. An Additional Obligor Rider was attached for cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for cases in which HUD allows more than one surety. The form was revised to reflect that the one-year time period to bring an action under the bond runs from the date the last labor or service was performed or last materials or equipment were furnished, rather than from the date the Contractor ceased work. Another revision provides that the Surety waives notice of any changes to the construction contract, including changes of time.

8. *Performance Bond-Dual Obligor (HUD 92452M).* New provisions added to the form include a provision that amounts paid to the Owner without the written consent of the Lender do not reduce the Surety's liability. Also, the Surety must notify Obligees of its failure to make payments or perform obligations and provide time to cure before the Surety can assert Obligor's failure to perform as cause for Surety not to perform. An Additional Obligor Rider was attached for cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for cases in which HUD allows more than one surety. The form was revised to reflect that the two-year time period to bring an action under the bond runs from the date the Owner declares the Contractor in default of the contract rather than from the date on which the final payment under the contract was due. Another revision provides that the Surety waives notice of any changes to the construction contract, including changes of time.

9. *Request for Endorsement of Credit Instrument Insurance Upon Completion (HUD-92455M).* HUD made substantial revisions to the current version of this form that is dated February 1973. Many of the paragraph numbers of the current document have changed and the references that follow are to the paragraph numbers in the proposed

document unless otherwise indicated. A space has been provided for inspection fees in the third paragraph. In the Certificate of Mortgagee, paragraph 4 has been expanded to include Section 223 projects. A statement has been added to paragraph 5 to cover Section 223 delayed repairs and latent defect protection. Paragraph 6 has been revised so that it is no longer restricted to Section 232 projects. Paragraph 7 has been added to include the amount deposited into the Reserve for Replacements for Section 223 projects. In paragraph 8, the language has been updated by adding a statement regarding fees and charges. In paragraph 9.b., language has been added that requires Lenders to certify that, in addition to the initial service charge, the Lender receives a servicing fee, which is included in the mortgage rate, an administrative fee for investing the cash held in the Reserve for Replacements and any other interest-bearing escrows required by the Department. Paragraph 9.d has been amended to set out the dollar amount of the permanent placement fee collected by the Lender, in addition to the initial service charge. Paragraph 9.f has been added for bond-financed projects, to disclose the amount collected to cover the cost of issuance. Also, a statement must be attached itemizing and explaining the necessity of each cost. Paragraph 10.g of the current form is obsolete. It has been rewritten and replaced with references to GNMA. Paragraph 10 has been added to cover the rights of HUD during the period of lockout or prepayment penalty. Paragraph 11 regarding the letter of credit has been rewritten to follow the current regulation at 24 CFR 200.63. In the Certificate of Mortgagee, the current paragraph 4 is obsolete, is addressed elsewhere in other forms and has been deleted. Paragraph 7.b in the Certificate of Mortgagee has been expanded to provide space for additional obligations. The Certificate of General Contractor (contractor) has been amended extensively. A signature block has been added for the contractor. In signing the document, contractor will be made a party to the document. Further, the contractor certifies that the contractor will pay the obligations and provide receipts except for unfinished work funded by an escrow.

10. *Surveyor's Report (HUD-92457M) and Survey Instructions and Report (HUD-92457A-M)*. The only change to the Surveyor's Report (HUD-92457M) and Survey Instructions and Report (HUD-92457A-M) was to require surveyors to apply the Minimum Standard Detail Requirements and

Classifications for ALTA/ACSM Land Title surveys that were adopted in 1999, rather than the 1992 standards to which the March 1998 version of the form referred.

11. *Request for Approval of Advance of Escrow Funds (HUD 92464M)*. No substantive changes were made to this form.

12. *Escrow Agreement for Noncritical, Deferred Repairs (HUD-92476.1M)*. The Department substantially revised this form. HUD deleted references to Capital Needs Assessments and 241(f) loans and refers in general to Section 223, since repairs can arise under the Section 223(f) and 223 (a)(7) insured loans. As with other escrow forms, if the Depository is the Lender, the term Depository refers to the Lender. The form has been clarified to provide that deposits for the escrows are in cash for both the unpaid construction costs and for delayed repairs and has been made consistent with Housing Notice H99-33. Protective language was added to cover contingencies, such as, failure to complete the Section 223 repairs on time or in the event of default. In paragraph 8, the provisions of the regulation at 24 CFR 200.63 governing the letter of credit were added.

13. *Agreement of Sponsors To Furnish Additional Funds (HUD 92476M)*. This form was revised slightly to clarify that the deposit to be made by a sponsor is to be pursuant to form HUD 92476aM.

14. *Escrow Agreement-Additional Contribution By Sponsors for Operating Deficit (HUD-92476aM)*. This form was revised slightly to clarify certain aspects of it. A reference to "Operating Deficit" was added to the title to assist the reader in determining at a glance whether it is the needed form. The reference to "bearer bonds" as an acceptable form of the deposit was eliminated as obsolete. Paragraph 4, regarding HUD's determination that the project has achieved sustaining occupancy and income, has been clarified to show that this determination is within HUD's sole discretion. At paragraph 5, the essence of the provisions of the regulation at 24 CFR 200.63 governing the letter of credit were added.

15. *Bond Guaranteeing Sponsor's Performance (HUD-92477M)*. There were no substantive changes made to this form.

16. *Mortgagor's Oath (HUD-92478M)*. This form was edited for clarification and to more fully comply with the relevant statutes. Specifically, HUD has made reference in each of the first two paragraphs to the section of the NHA upon which the respective requirements are based and, at the same time, has

eliminated the recitation of the statutory provisions as unnecessary. In paragraph (1), reference to a prohibition on offering hotel services to tenants was removed. This prohibition is not included in the statute and leads to confusion as to whether a particular project is in compliance with the statute. In paragraph (2), reference was added to exceptions to occupancy requirements that are permitted by the statutes. The need for the document to be executed as an oath before a notary public has been highlighted, the notary block has been edited to accommodate varying types of entities as signatories, and a second notary block has been added for convenience.

17. *Off-Site Bond (HUD 92479M)*. An Additional Oblige Rider was attached for use in cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for use in cases in which HUD allows more than one surety. As revised, the bond is a dual obligee bond, with the lender and owner as obligees. The cost of equipment was added as an additional item that may be claimed under the bond. Also, the two-year time period to bring an action under the bond was revised to run from date the Owner declared the Contractor in default, rather than date the off-site improvements were to be installed. Another change is that the Surety waives notice of any changes, including changes of time, to the construction contract.

18. *Escrow Agreement for Latent Defects (HUD-92414M)*. HUD acknowledges that there is no closing document that covers an escrow for latent defects even though current policy requires such an escrow. In most cases, closings are conducted in different offices with the lenders preparing different versions of escrow agreements for the borrower's signature. In order to be consistent HUD has developed the Escrow Agreement for Latent Defects, in which the Depository agrees to hold a fund in a separate account for a stated period of time. The form describes how the Lender shall maintain the fund and how the fund should be administered in the event of assignment or default by the Borrower.

19. *Escrow Agreement for Working Capital (HUD 92412M)*. HUD is proposing a new closing document in response to lenders' requests for a Department-approved form of Escrow Agreement for Working Capital. The new form of Escrow Agreement for Working Capital is between the Borrower and Depository and makes provision for the Lender to act as the Depository. Current HUD policy is to

reflect the working capital escrow in the Mortgagee's Certificate. The Mortgagee's Certificate is not legally adequate to establish a contractual relationship between the Borrower and the Lender since it is a certification from the Lender to HUD, and the Borrower is not a party. The new form recites the project name and location and refers to the terms and requirements of the firm commitment for the project.

20. *Sinking Fund Agreement (HUD 92413M)*. The Sinking Fund Agreement is a new document that requires the Borrower of certain Health Care Facilities (where depreciation is a component of the federal Medicaid reimbursement) to deposit, in a trust fund with the Lender, an amount representing the excess depreciation component of the capital reimbursement per a schedule prepared by the Lender. Currently, requirements for this Sinking Fund are found in the Mortgagee's Certificate. The Borrower is not a party to the Mortgagee's Certificate; therefore, the document is not legally adequate to establish a contractual relationship between the Borrower and the Lender. The current arrangement is cumbersome and is inaccurate in places. The proposed document overcomes the current deficiencies and identifies the rights and responsibilities of the parties more clearly and in a legally enforceable manner.

21. *Agreement and Certification (HUD-93305M)*. The most significant change made to this form was to consolidate the 3305 and 3306 forms as well as a third Agreement and Certification format which was developed during the document reform process for use in the Section 223(f) refinancing program. The proposed form, published with this notice, sets forth separate provisions, where necessary, for use in differing programs, and provides boxes that can be checked to indicate the applicability of a particular provision. Where a provision would apply in any program, no box is

necessary. If the final decision of HUD is to consolidate the three forms, the consolidated form has been designated as the 93305; however, HUD can consider a different number if this creates confusion. Further, HUD revised the form to clarify the definition of identity of interest. The definition adds 'business interests' to financial and family relationships and adds 'partners and principals' to officers, directors and stockholders. The term Principals is capitalized for the remainder of the form and the expanded definition of identity of interest is added to the provisions regarding the 50%-75% Rule, Builders and Sponsors Profit And Risk Allowance (BSPRA) and Sponsors Profit and Risk Allowance (SPRA). The beginning of Paragraph 10 is revised to clarify that BSPRA is included when HUD processes the project loan application to include BSPRA, rather than providing that BSPRA is automatically included. Modifications to Paragraph 10(b) clarify that when the identity of interest between the borrower and the contractor is not maintained through final endorsement, the BSPRA identity is lost and the borrower will be allowed a SPRA instead of BSPRA. Paragraph 10(c) is rewritten in plain language to explain the 50-75% rule. Paragraph 11 is revised to clarify that if the 50-75% Rule is violated, both the profit and the overhead to the contractor are lost. This is consistent with HUD's mortgage credit guidelines. Paragraph 14 has been expanded to include collateral agreements or side-deals of any kind in connection with the project, not just the financing or borrowing arrangements that are in the current version of this form.

22. *HUD Amendment to Owner-Architect Agreement AIA B-181 (HUD-92408M)*. This document formerly was required by HUD directives to be attached to the contract between the owner and the project architect, and was found as an appendix to a HUD

Handbook. It has been updated in content, format and references to HUD's outstanding architectural instructions. HUD has clarified that the architect's drawings may be used by a substitute party who takes control of the project in order to complete the work, following failure of the owner to do so, by eliminating paragraph 6 in the prior version and adding a new paragraph 4. HUD further added the element of timing to the requirement that the owner and architect inform HUD of identities of interest within five working days of the first knowledge thereof.

As noted earlier in this preamble, HUD is proposing conforming changes to certain of its regulations to update these regulations where regulatory language was also identified as outdated and to maintain consistency with the new proposed closing documents that are published with this notice. HUD's related proposed rule is published elsewhere in today's **Federal Register**.

**II. Findings and Certifications**

*Paperwork Reduction Act*

The proposed new information collection requirements contained in this notice have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for this new collection of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table:

| Forms              | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Annual cost |
|--------------------|-----------------------|-----------------------|---------------------|--------------------------|---------------------|--------------------------|-------------|
| HUD-91710M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | \$26                     | \$15,600    |
| HUD-91712M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92023M .....   | 1200                  | 1                     | 1200                | 1                        | 1200                | 26                       | 31,200      |
| HUD-92070M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92223M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92408M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92412M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92413M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92414M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92450M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92452A-M ..... | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92452M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |
| HUD-92455M .....   | 1200                  | 1                     | 1200                | 1                        | 1200                | 26                       | 31,200      |
| HUD-92456M .....   | 1200                  | 1                     | 1200                | 0.5                      | 600                 | 26                       | 15,600      |



|    |                                                              |
|----|--------------------------------------------------------------|
| 23 | Transfers of the Mortgaged Property or Interests in Borrower |
| 24 | Events of Default                                            |
| 25 | Remedies Cumulative                                          |
| 26 | Forbearance                                                  |
| 27 | Loan Charges                                                 |
| 28 | Waiver of Statute of Limitations                             |
| 29 | Waiver of Marshalling                                        |
| 30 | Further Assurances                                           |
| 31 | Estoppel Certificate                                         |
| 32 | Governing Law; Consent to Jurisdiction and Venue             |
| 33 | Notice                                                       |
| 34 | Sale of Notice; Change in Servicer                           |
| 35 | Single Asset Borrower                                        |
| 36 | Successors and Assigns Bound                                 |
| 37 | Joint and Several Liability                                  |
| 38 | Relationships of Parties; No Third Party Beneficiary         |
| 39 | Severability; Amendments                                     |
| 40 | Construction                                                 |
| 41 | Loan Servicing                                               |
| 42 | Disclosure of Information                                    |
| 43 | No Change in Facts or Circumstances                          |
| 44 | Estoppel                                                     |
| 45 | Acceleration; Remedies                                       |
| 46 | Federal Remedies                                             |
| 47 | Remedies for Waste                                           |
| 48 | References                                                   |
| 49 | Termination                                                  |
| 50 | Construction Financing                                       |
| 51 | Environmental Hazards                                        |
| 52 | Insert provisions for State Law Requirements                 |
|    | Exhibit A Description of the Land A-1                        |
|    | Exhibit B Modification to the Security Agreement B-1         |

**Multifamily/Health Care (Mortgage, Deed of Trust, or Other Designation as Appropriate in Jurisdiction) Assignment of Rents and Security Agreement**

THIS MULTIFAMILY/HEALTH CARE (MORTGAGE, DEED OF TRUST, OR OTHER DESIGNATION AS APPROPRIATE IN JURISDICTION) ASSIGNMENT OF RENTS AND SECURITY AGREEMENT (the "Security Instrument") is made as of this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, [among][between] \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_, whose address is \_\_\_\_\_, as grantor, trustor, Borrower ("Borrower"), to \_\_\_\_\_, [as trustee ("Trustee")], for the benefit of \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_, whose address is \_\_\_\_\_, as beneficiary or [and] Lender ("Lender"), a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_, whose address is \_\_\_\_\_.

[Borrower, in consideration of the Indebtedness and the trust created by this Security Instrument, irrevocably grants, conveys and assigns to Trustee and Trustee's successors and assigns, in trust, with power of sale, the Mortgaged Property, including the Land located in \_\_\_\_\_ County, State of \_\_\_\_\_ and described in Exhibit A attached to this

Security Instrument, to have and to hold the Mortgaged Property unto Trustee and Trustee's successors and assigns. USE ALTERNATIVE APPROPRIATE GRANTING CLAUSE IF A MORTGAGE TRANSACTION.]

To secure to Lender the repayment of the Indebtedness evidenced by Borrower's Note payable to Lender dated as of the date of this Security Instrument, and maturing on \_\_\_\_\_, \_\_\_\_\_, in the principal amount of \$\_\_\_\_\_, and all renewals, extensions and modifications of the Indebtedness, and the performance of the covenants and agreements of Borrower contained in this Security Instrument and the Note.

Borrower represents and warrants that Borrower is lawfully seized of the Mortgaged Property and has the right, power and authority to mortgage, grant, convey and assign the Mortgaged Property, and that the Mortgaged Property is unencumbered. Borrower covenants that Borrower will warrant and defend generally the title to the Mortgaged Property against all claims and demands, subject to any easements and restrictions listed in a schedule of exceptions to coverage in any title insurance policy issued to Lender contemporaneously with the execution and recordation of this Security Instrument and insuring Lender's interest in the Mortgaged Property.

Covenants. Borrower and Lender covenant and agree as follows:

1. *Definitions.* The following terms, when used in this Security Instrument (including when used in the above recitals), shall have the following meanings:

(a) "Borrower" means all persons or entities identified as "Borrower" in the first paragraph of this Security Instrument, together with any successors and assigns. Whenever the term "Borrower" is used herein, the same shall be deemed to include the Obligor of the debt secured by the Security Instrument and shall also be deemed to be the Mortgagor as defined by the National Housing Act, as amended, implementing regulations and Directives.

(b) "Building Loan Agreement" means HUD-approved form of the agreement between the Borrower and Lender setting forth the terms and conditions for a construction loan.

(c) "Collateral Agreement" means any separate agreement between Borrower and Lender for the purpose of establishing replacement reserves for the Mortgaged Property, establishing a fund to assure the completion of repairs or Improvements specified in that agreement, or any other agreement or

agreements between Borrower and Lender which provide for the establishment of any other fund, reserve or account including but not limited to those reserves and escrows required by HUD in connection with construction activity, if any, and those reserves and escrows required by HUD in connection with Health Care Facilities. These include but are not limited to the Sinking Fund Agreement, which provides for a depreciation reimbursement account to pay future principal payments of the Mortgage, where Medicaid or third-party reimbursement is on a depreciation plus interest basis; the Depreciation Reserve Fund Agreement which provides for an escrow or trust account with an approved custodian or trustee established for replacing equipment and for funding of depreciation in accordance with a schedule approved by HUD, and the Mortgage Reserve Fund, which provides for an escrow or trust account with an approved custodian or trustee established for replacing equipment or protecting the Mortgaged Property or HUD.

(d) "Event of Default" means the occurrence of any event listed in Section 23 or Section 24.

(e) "Fixtures" means all property which is so attached to the Land or the Improvements as to constitute a fixture under applicable law, whether acquired now or in the future, including: machinery, equipment (including medical equipment and systems), engines, boilers, incinerators, installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring and conduits used in connection with radio, television, computers, medical systems, security, fire prevention, or fire detection or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposals, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors; cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants; swimming pools; playground and exercise equipment and classroom furnishings and equipment.

(f) "Governmental Authority" means any board, commission, department or body of any municipal, county, state or federal governmental unit, or any subdivision of any of them, that has or acquires jurisdiction over the Mortgaged Property, including the use, operation or improvement of the Mortgaged Property.

(g) "Health Care Facilities" means, but is not limited to, public or private nonprofit and proprietary hospitals, including major movable equipment, group practice medical facilities, skilled nursing home facilities, intermediate care facilities, board and care homes and assisted living facilities, and supplemental loans to finance Improvements, additions and equipment to these Health Care Facilities as authorized under the National Housing Act or other applicable federal law.

(h) "HUD" means the United States Department of Housing and Urban Development acting by and through the Secretary in the capacity as insurer or holder of the loan secured hereby under the authority of the National Housing Act, as amended, the Department of Housing and Urban Development Act, as amended, or any other federal law or regulation pertaining to the loan (as evidenced by the Note) or the Mortgaged Property.

(i) "Impositions" and "Imposition Deposits" are defined in Section 8(a).

(j) "Improvements" means the buildings, structures, and alterations now constructed or at any time in the future constructed or placed upon the Land, including any future replacements and additions.

(k) "Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note or this Security Instrument, including prepayment premiums, late charges, default interest, and advances as provided in Section 14 to protect the security of this Security Instrument.

(l) "Land" means the estate in realty described in Exhibit A.

(m) "Leases" means all present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property (including proprietary leases, non-residential leases or occupancy agreements if Borrower is a cooperative housing corporation), and all modifications, extensions or renewals. For Health Care Facilities, Lease also means, but is not limited to, the agreements between the Borrower/lessor and the operator/lessee of the facility by which the lessee agrees to operate and

manage the facility, and/or portion thereof, and any agreement between the Health Care Facility and a lessee/provider of medical and related services proper and necessary for the care and treatment of persons who are acutely ill who require medical or health care customarily, or most effectively provided for by Health Care Facilities. (As used herein, operator/lessee, lessee and lessee/provider shall cumulatively be referred to as "Lessee.")

(n) "Lender" means the entity identified as "Lender" in the first paragraph of this Security Instrument, or any subsequent holder of the Note, and whenever the term "Lender" is used herein, the same shall be deemed to include the Obligees, or the Trustee(s) and the Beneficiary of the Security Instrument and shall also be deemed to be the Mortgagee as defined by the National Housing Act, as amended, implementing regulations and Directives.

(o) "Loan Documents" means the Note, this Security Instrument, and the Regulatory Agreement, as such documents may be amended from time to time.

(p) "Loan Servicer" means the entity that from time to time is designated by Lender to collect payments and deposits and receive Notice under the Note or this Security Instrument, and otherwise to service the loan evidenced by the Note for the benefit of Lender. Unless Borrower receives Notice to the contrary, the Loan Servicer is the entity identified as "Lender" in the first paragraph of this Security Instrument.

(q) "Mortgaged Property" means all of Borrower's present and future right, title and interest in and to all of the following:

- (1) The Land;
- (2) The Improvements;
- (3) The Fixtures;
- (4) The Personalty;
- (5) All current and future rights,

including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefiting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated;

(6) All proceeds paid or to be paid by any insurer of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirement;

(7) All awards, payments and other compensation made or to be made by any municipal, state or federal authority with respect to the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof;

(8) All contracts, options and other agreements for the sale of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations;

(9) All proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds;

(10) All Rents and Leases;

(11) All earnings, royalties, instruments, accounts, accounts receivable, supporting obligations, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the loan secured by this Security Instrument and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents;

(12) All Imposition Deposits;

(13) All refunds or rebates of Impositions by any municipal, state or federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which this Security Instrument is dated);

(14) All tenant security deposits which have not been forfeited by any tenant under any Lease;

(15) All names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property; and

(16) For Health Care Facilities, Mortgaged Property also includes, but is not limited to, any and all licenses, Bed Authority, and/or Certificates of Need required to operate the facility and receive the benefits and reimbursements under a provider agreement with Medicaid, Medicare, any state or local programs, health care insurers or other assistance providers relied upon by HUD to insure the Security Instrument,

to the extent allowed by law. Mortgaged Property also includes all receipts, revenues, income and other moneys received by or on behalf of the Health Care Facility, including all accounts receivable, all contributions, donations, gifts, grants, bequests, all revenues derived from the operation of the Health Care Facility and all rights to receive the same, whether in the form of accounts receivable, contract rights, chattel paper, instruments or other rights whether now owned or held or later acquired by the Health Care Facility.

(r) "Note" means the Multifamily/Health Care Facility Note described on page 1 of this Security Instrument, including all schedules, riders, allonges and addenda, as such Multifamily/Health Care Facility Note may be amended from time to time.

(s) "Personalty" means all furniture, furnishings, equipment, machinery, building materials, appliances, goods, supplies, tools, books, records (whether in written or electronic form), computer equipment (hardware and software) and other tangible or electronically stored personal property (other than Fixtures) which are owned or leased by the Borrower or the Lessee now or in the future in connection with the ownership, management or operation of the Land or the Improvements or are located on the Land or in the Improvements, and any operating agreements relating to the Land or the Improvements, and any surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, choses in action and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land. For Health Care Facilities, Personalty also includes all tangible and intangible personal property used for health care (such as major movable equipment and systems), accounts, licenses, bed authorities, certificates of need required to operate the project and to receive benefits and reimbursements under provider agreements with Medicaid, Medicare, state and local programs, payments from health care insurers and any other assistance providers ("Receivables"); all permits, instruments, Rents, lease and contract rights, equipment leases relating to the use, operation, maintenance, repair and improvement of the Health Care Facility. Generally, intangibles shall also include all cash and cash escrow funds, such as but not limited to: sinking fund accounts, depreciation reserve fund accounts,

mortgage reserve fund accounts, reserve for replacement accounts, bank accounts, residual receipt accounts, all contributions, donations, gifts, grants, bequests and endowment funds by donors and all other revenues and accounts receivable from whatever source paid or payable.

(t) "Principals" are the following legal and natural persons having ownership interests in the Borrower: natural persons who are sole owners, joint venturers, joint tenants, tenants by the entirety, trustees or beneficiaries of trusts, and all general partners; in the case of limited partnerships, limited partners having a twenty-five (25) percent or more interest in the partnership; in the case of public or private corporations or governmental entities, the president, vice president, secretary, treasurer, and all other executive officers who are directly responsible to the board of directors, or any equivalent governing body, as well as all directors and each stockholder having a 10 percent or more interest in the corporation; in the case of a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP), all managing members or partners, all managers, and all members or partners with a 10 percent or greater governance interest or a twenty-five (25) percent or greater financial interest.

(u) "Property Jurisdiction" is defined in Section 32(a).

(v) "Regulatory Agreement" means the agreement between the Borrower or certain Lessees of the Borrower and HUD establishing the Borrower's or Lessees' obligations in the operation of the Mortgaged Property and the rights and powers of HUD.

(w) "Rents" means all rents (whether from residential or non-residential space), revenues, issues, profits, (including carrying charges, maintenance fees, and other cooperative revenues) and other income of the Land or the Improvements, including all revenues, gross receipts and receivables in connection with medical services and care, and all pledges, gifts, grants, bequests, contributions and endowments, parking fees, laundry and vending machine income and fees and charges for food, health care and other services provided at the Mortgaged Property, whether now due, past due, or to become due, and deposits forfeited by tenants.

(x) "Taxes" means all taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including all assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any

public authority or quasi-public authority, and which, if not paid, could become a lien on the Land or the Improvements.

(y) "Waste" means a failure to keep the Mortgaged Property in decent, safe and sanitary condition and in good repair. Waste also means the failure to meet certain financial obligations regarding the payment of Taxes and the relinquishment of the possession of Rents. During any period in which HUD insures this loan or holds a security interest on the Mortgaged Property, Waste is committed when, without Lender's and HUD's express written consent, Borrower:

(1) Physically changes the Mortgaged Property, whether negligently or intentionally, in a manner that reduces its value;

(2) Fails to maintain and repair the Mortgaged Property;

(3) Fails to pay before delinquency any Taxes secured by a lien having priority over the Security Instrument;

(4) Fails to comply with covenants in the Note, this Security Instrument or the Regulatory Agreement respecting physical care, maintenance, construction, demolition, or insurance against casualty of the Mortgaged Property or fails to comply with HUD requirements regarding physical condition standards for HUD housing, including those codified at 24 CFR 5.703 and any subsequent amendments thereto; or

(5) Retains possession of Rents to which the Lender or its assigns have the right of possession under the terms of the Loan Documents.

2. *Uniform Commercial Code Security Agreement.* This Security Instrument is also a security agreement under the Uniform Commercial Code for any of the Mortgaged Property which, under applicable law, may be subject to a security interest under the Uniform Commercial Code, whether acquired now or in the future, and all products and cash proceeds and non-cash proceeds thereof (collectively, "UCC Collateral"), and Borrower hereby grants to Lender a security interest in the UCC Collateral. Borrower shall execute and deliver to Lender, upon Lender's request, financing statements, continuation statements and amendments, in such form as Lender may require to perfect or continue the perfection of this security interest. Borrower shall pay all filing costs and all costs and expenses of any record searches for financing statements that Lender may require. Without the prior written consent of Lender and HUD, Borrower shall not create or permit to exist any other lien or security interest

in any of the UCC Collateral. If an Event of Default has occurred and is continuing, Lender shall have the remedies of a secured party under the Uniform Commercial Code, in addition to all remedies provided by this Security Instrument or existing under applicable law. In exercising any remedies, Lender may exercise its remedies against the UCC Collateral separately or together, and in any order, without in any way affecting the availability of Lender's other remedies. This Security Instrument constitutes a financing statement with respect to any part of the Mortgaged Property which is or may become a Fixture.

3. *Assignment of Rents; Appointment of Receiver; Lender in Possession.* (a) As part of the consideration for the Indebtedness, Borrower absolutely and unconditionally assigns and transfers to Lender all Rents. It is the intention of Borrower to establish a present, absolute and irrevocable transfer and assignment to Lender of all Rents and to authorize and empower Lender to collect and receive all Rents without the necessity of further action on the part of Borrower. Promptly upon request by Lender, Borrower agrees to execute and deliver such further assignments as Lender may from time to time require. Borrower and Lender intend this assignment of Rents to be immediately effective and to constitute an absolute present assignment and not an assignment for additional security only. For purposes of giving effect to this absolute assignment of Rents, and for no other purpose, Rents shall not be deemed to be a part of the "Mortgaged Property" as that term is defined in Section 1(q). However, if this present, absolute and unconditional assignment of Rents is not enforceable by its terms under the laws of the Property Jurisdiction, then the Rents shall be included as a part of the Mortgaged Property and it is the intention of the Borrower that in this circumstance this Security Instrument create and perfect a lien on Rents in favor of Lender, which lien shall be effective as of the date of this Security Instrument.

(b) After the occurrence of an Event of Default, Borrower authorizes Lender to collect, sue for and compromise Rents and directs each tenant and/or non-residential Lessee of the Mortgaged Property to pay all Rents to, or as directed by, Lender. However, until the occurrence of an Event of Default, Lender hereby grants to Borrower a revocable license to collect and receive all Rents for use in accordance with the provisions of the Regulatory Agreement, to hold all Rents in trust for the benefit of Lender and to apply all Rents to pay

the installments of interest and principal then due and payable under the Note and the other amounts then due and payable under this Security Instrument, including Imposition Deposits, and to pay the current costs and expenses of managing, operating and maintaining the Mortgaged Property, including utilities, Taxes and insurance premiums (to the extent not included in Imposition Deposits), tenant improvements and other capital expenditures. So long as no Event of Default has occurred and is continuing, the Rents remaining after application pursuant to the preceding sentence may be retained by Borrower free and clear of, and released from, Lender's rights with respect to Rents under this Security Instrument, unless otherwise restricted by the terms of the Regulatory Agreement. From and after the occurrence of an Event of Default, and without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, or by a receiver, Borrower's license to collect Rents shall automatically terminate and Lender shall without Notice be entitled to all Rents as they become due and payable, including Rents then due and unpaid. Borrower shall pay to Lender upon demand all Rents to which Lender is entitled. At any time on or after the date of Lender's demand for Rents, Lender may give, and Borrower hereby irrevocably authorizes Lender to give, Notice to all tenants of the Mortgaged Property instructing them to pay all Rents to Lender. No tenant shall be obligated to inquire further as to the occurrence or continuance of an Event of Default, and no tenant shall be obligated to pay to Borrower any amounts which are actually paid to Lender in response to such a Notice. Any such Notice by Lender shall be delivered to each tenant personally, by mail or by delivering such demand to each rental unit. A copy of such Notice shall be provided promptly to HUD by Lender. Borrower shall not interfere with and shall cooperate with Lender's collection of such Rents.

(c) Borrower represents and warrants to Lender that Borrower has not executed any prior assignment of Rents (other than an assignment of Rents to HUD pursuant to the Regulatory Agreement and an assignment of Rents securing indebtedness that will be paid off and discharged with the proceeds of the loan evidenced by the Note or assignments of Rents in connection with commercial or health care transactions as approved by HUD), that Borrower has not performed, and Borrower covenants

and agrees that it will not perform, any acts and has not executed, and shall not execute, any instrument which would prevent Lender from exercising its rights under Section 3, and that at the time of execution of this Security Instrument there has been no anticipation or prepayment of any Rents for more than two months prior to the due dates of such Rents. Borrower shall not collect or accept payment of any Rents more than two months prior to the due dates of such Rents (other than collections in connection with commercial or health care transactions as approved by HUD).

(d) If an Event of Default has occurred and is continuing, Lender may, regardless of the adequacy of Lender's security or the solvency of Borrower and even in the absence of Waste (but only with the prior written approval of HUD in the event of non-monetary defaults), enter upon and take and maintain full control of the Mortgaged Property in order to perform all acts that Lender in its discretion determines to be necessary or desirable for the operation and maintenance of the Mortgaged Property, including the execution, cancellation or modification of Leases, the collection of all Rents, the making of repairs to the Mortgaged Property and the execution or termination of contracts providing for the management, operation or maintenance of the Mortgaged Property, for the purposes of enforcing the assignment of Rents pursuant to Section 3(a), protecting the Mortgaged Property or the security of this Security Instrument, or for such other purposes as Lender in its discretion may deem necessary or desirable. Alternatively, if an Event of Default has occurred and is continuing, regardless of the adequacy of Lender's security, without regard to Borrower's solvency and without the necessity of giving prior Notice (oral or written) to Borrower, Lender may apply to any court having jurisdiction for the appointment of a receiver for the Mortgaged Property to take any or all of the actions set forth in the preceding sentence. A copy of such request shall be provided promptly to HUD by Lender. If Lender elects to seek the appointment of a receiver for the Mortgaged Property at any time after an Event of Default has occurred and is continuing, Borrower, by its execution of this Security Instrument, expressly consents to the appointment of such receiver, including the appointment of a receiver ex parte if permitted by applicable law. Lender or the receiver, as the case may be, shall be entitled to receive a reasonable fee for managing the Mortgaged Property. Immediately upon appointment of a receiver or

immediately upon the Lender's entering upon and taking possession and control of the Mortgaged Property, Borrower shall surrender possession of the Mortgaged Property to Lender or the receiver, as the case may be, and shall deliver to Lender or the receiver, as the case may be, all documents, records (including records on electronic or magnetic media), accounts, surveys, plans, and specifications relating to the Mortgaged Property and all security deposits and prepaid Rents. In the event Lender takes possession and control of the Mortgaged Property, Lender may exclude Borrower and its representatives from the Mortgaged Property. Borrower acknowledges and agrees that the exercise by Lender of any of the rights conferred under Section 3 shall not be construed to make Lender a Lender-in-possession of the Mortgaged Property so long as Lender, or authorized agent of Lender, has not entered into actual possession of the Land and Improvements.

(e) If Lender enters the Mortgaged Property, Lender shall be liable to account only to Borrower and only for those Rents actually received. Lender shall not be liable to Borrower, anyone claiming under or through Borrower or anyone having an interest in the Mortgaged Property, by reason of any act or omission of Lender under Section 3, and Borrower hereby releases and discharges Lender from any such liability to the fullest extent permitted by law. However, nothing contained in this Security Instrument shall in any fashion discharge Lender from any obligations to HUD or any other party under the Regulatory Agreement, the Contract of Insurance (as set forth in applicable HUD regulations), or the HUD statutes and regulations.

(f) If the Rents are not sufficient to meet the costs of taking control of and managing the Mortgaged Property and collecting the Rents, any funds expended by Lender for such purposes shall become an additional part of the principal of the Indebtedness as provided in Section 14.

(g) Any entering upon and taking of control of the Mortgaged Property by Lender or the receiver, as the case may be, and any application of Rents as provided in this Security Instrument shall not cure or waive any Event of Default or invalidate any other right or remedy of Lender and/or HUD as its interests appear under applicable law or provided for in this Security Instrument.

**4. Assignment of Leases; Leases Affecting the Mortgaged Property.** (a) As part of the consideration for the Indebtedness, Borrower absolutely and unconditionally assigns and transfers to

Lender all of Borrower's right, title and interest in, to and under the Leases, including Borrower's right, power and authority to modify the terms of any such Lease, or extend or terminate any such Lease. It is the intention of Borrower to establish a present, absolute and irrevocable transfer and assignment to Lender of all of Borrower's right, title and interest in, to and under the Leases. Borrower and Lender intend this assignment of the Leases to be immediately effective and to constitute an absolute present assignment and not an assignment for additional security only. For purposes of giving effect to this absolute assignment of the Leases, and for no other purpose, the Leases shall not be deemed to be a part of the "Mortgaged Property" as that term is defined in Section 1(q). However, if this present, absolute and unconditional assignment of the Leases is not enforceable by its terms under the laws of the Property Jurisdiction, then the Leases shall be included as a part of the Mortgaged Property and it is the intention of Borrower that in this circumstance this Security Instrument create and perfect a lien on the Leases in favor of Lender, which lien shall be effective as of the date of this Security Instrument.

(b) Until Lender gives Notice to Borrower of Lender's exercise of its rights under Section 4, Borrower shall have all rights, power and authority granted to Borrower under any Lease (except as otherwise limited by this Section or any other provision of this Security Instrument), including the right, power and authority to modify the terms of any Lease or extend or terminate any Lease. Upon the occurrence of an Event of Default, the permission given to Borrower pursuant to the preceding sentence to exercise all rights, power and authority under Leases shall automatically terminate. Borrower shall comply with and observe Borrower's obligations under all Leases, including Borrower's obligations pertaining to the maintenance and disposition of tenant security deposits.

(c) Borrower acknowledges and agrees that the exercise by Lender, either directly or by a receiver, of any of the rights conferred under Section 4 shall not be construed to make Lender a Lender-in-possession of the Mortgaged Property so long as Lender, or an authorized agent of Lender, has not entered into actual possession of the Land and the Improvements. The acceptance by Lender of the assignment of the Leases pursuant to Section 4(a) shall not at any time or in any event obligate Lender to take any action under this Security Instrument or to expend

any money or to incur any expenses. Lender shall not be liable in any way for any injury or damage to person or property sustained by any person or persons, firm or corporation in or about the Mortgaged Property unless Lender is a Lender-in-possession. Prior to Lender's actual entry into and taking possession of the Mortgaged Property, Lender shall not (1) be obligated to perform any of the terms, covenants and conditions contained in any Lease (or otherwise have any obligation with respect to any Lease); (2) be obligated to appear in or defend any action or proceeding relating to the Lease or the Mortgaged Property; or (3) be responsible for the operation, control, care, management or repair of the Mortgaged Property or any portion of the Mortgaged Property. The execution of this Security Instrument by Borrower shall constitute conclusive evidence that all responsibility for the operation, control, care, management and repair of the Mortgaged Property is and shall be that of Borrower, prior to such actual entry and taking of possession.

(d) Upon delivery of Notice by Lender to Borrower of Lender's exercise of Lender's rights under Section 4 at any time after the occurrence of an Event of Default, and without the necessity of Lender entering upon and taking and maintaining control of the Mortgaged Property directly, by a receiver, or by any other manner or proceeding permitted by the laws of the Property Jurisdiction, Lender immediately shall have all rights, powers and authority granted to Borrower under any Lease, including the right, power and authority to modify the terms of any such Lease, or extend or terminate any such Lease.

(e) Borrower shall, promptly upon Lender's request, deliver to Lender an executed copy of each residential Lease then in effect. All Leases for residential dwelling units shall be acceptable to the Lender and shall comply with HUD requirements.

(f) Borrower shall not lease any portion of the Mortgaged Property for non-residential use except with the prior written consent of Lender and HUD, and Lender's and HUD's prior written approval of the Lease agreement. Borrower shall not modify the terms of, or extend or terminate, any Lease for non-residential use (including any Lease in existence on the date of this Security Instrument) without the prior written consent of Lender and HUD. Borrower shall, without request by Lender, deliver an executed copy of each non-residential Lease to Lender and HUD promptly after such Lease is signed. (1) All non-residential Leases, including renewals or extensions of existing

Leases, shall specifically provide that (i) such Leases are subordinate to the lien of this Security Instrument; (ii) the tenant shall attach to Lender and any purchaser at a foreclosure sale, such attornment to be self-executing and effective upon acquisition of title to the Mortgaged Property by any purchaser at a foreclosure sale or by Lender in any manner; (iii) the tenant agrees to execute such further evidences of attornment as Lender or any purchaser at a foreclosure sale may from time to time request; (iv) the Lease shall not be terminated by foreclosure or any other transfer of the Mortgaged Property; (v) after a foreclosure sale of the Mortgaged Property or after transfer of the Mortgaged Property to the Lender by a deed-in-lieu of foreclosure, Lender or any purchaser at such foreclosure sale may, at Lender's or such purchaser's option, accept or terminate such Lease; and (vi) the tenant shall, upon receipt after the occurrence of an Event of Default of a written request from Lender, pay all Rents payable under the Lease to Lender. (2) In addition to the foregoing requirements, any Lease of the Mortgaged Property for telecommunications uses shall contain: (i) A comprehensive listing of the equipment to be installed; (ii) a legal description of the portion of the Mortgaged Property to be utilized; (iii) a comprehensive listing of any proposed Improvements to the Mortgaged Property; (iv) a provision which conditions the Lease on the tenant obtaining all variances, permits, licenses or approvals required by applicable law; (v) a provision precluding the assignment or sublet of the leased space without the prior written approval of the Lender and HUD, to be granted or withheld by each in its sole discretion; (vi) an acknowledgment by the tenant that it has performed its own investigation of the property and has determined its suitability for use; (vii) a provision granting the Borrower, its successors or assigns, the right to relocate any equipment, wiring or cabling; and (viii) a provision which permits the Borrower, its successors or assigns, the right to terminate the Lease should it be shown that the equipment constitutes a danger to health or safety.

(g) Borrower shall not receive or accept Rent under any Lease (whether residential or non-residential) for more than two months in advance.

5. *Payment of Indebtedness; Performance Under Loan Documents; Prepayment Premium.* Borrower shall pay the Indebtedness when due in accordance with the terms of the Note and this Security Instrument and shall perform, observe and comply with all

other provisions of the Note and this Security Instrument. Borrower shall pay a prepayment premium in connection with certain prepayments of the Indebtedness, including a payment made after Lender's exercise of any right of acceleration of the Indebtedness, as provided in the Note.

6. *Exculpation.* Borrower's personal liability for payment of the Indebtedness and for performance of the other obligations to be performed by it under this Security Instrument is limited in the manner, and to the extent, provided in the Note and attached Acknowledgment except as provided otherwise herein or limited or modified by the Regulatory Agreement and federal law.

7. *Deposits for Taxes, Insurance and Other Charges.* (a) Borrower shall pay to and deposit with Lender, together with and in addition to the monthly payments of interest or of principal and interest payable under the terms of the Note secured hereby, on the first day of each month after the commencement of amortization under the Note, and continuing until the debt secured hereby is paid in full, the following sums:

(1) An amount sufficient to provide Lender with funds to pay the next mortgage insurance premium if this Security Instrument and the Note secured hereby are insured or a monthly service charge, if they are held by HUD, as follows:

(i) If and so long as the Note of even date is insured under the provisions of the National Housing Act, as amended, an amount sufficient to accumulate in the hands of Lender one month prior to its due date the annual mortgage insurance premium, in order to provide Lender with funds to pay such premium to HUD pursuant to the National Housing Act, as amended, and applicable Regulations thereunder, or;

(ii) If and so long as the Note and this Security Instrument are held by HUD, a monthly service charge in an amount equal to one-twelfth of one-half ( $\frac{1}{12}$  of  $\frac{1}{2}$ ) percent of the average outstanding principal balance due on the Note computed for each successive year beginning with the first day of the month following the date of this Security Instrument, or the first day of the month following assignment, if the Note and this Security Instrument are assigned to HUD without taking into account delinquencies or prepayment;

(2) A sum to the ground rents, if any, next due, plus the premiums that will next become due and payable on policies of fire and other property insurance covering the premises covered hereby, plus water rates, Taxes,

municipal/government utility charges and special assessments next due on the premises covered hereby (all as estimated by Lender) less all sums already paid therefor divided by the number of months to the date when such ground rents, premiums, water rates, Taxes, municipal/utility charges and special assessments will become delinquent, such sums to be held by Lender in trust to pay said ground rents, premiums, water rates, Taxes, and special assessments; and

(3) All payments and deposits mentioned in the two preceding subsections of this Section and all payments to be made under the Note shall be added together and the aggregate amount thereof shall be paid each month in a single payment or deposit to be applied by Lender to the following items in the order set forth:

(i) Premium charges under the Contract of Insurance;

(ii) Ground rents, Taxes, special assessments, water rates, municipal/government utility charges, fire and other property insurance premiums;

(iii) Interest on the Note; and

(iv) Amortization of the principal of Note.

(b) Borrower shall pay to and deposit with Lender, at times specified and as required by HUD, all other escrows and deposits, including any reserve for replacements.

8. *Imposition Deposits.* (a) In the event Borrower fails to pay any sums provided for in this Security Instrument, Lender, at its option, may pay the same. Any excess funds accumulated under Section 7(b) remaining after payment of the items therein mentioned, shall be credited to subsequent monthly payments of the same nature required thereunder; but if any such item shall exceed the estimate therefor, or if the Borrower shall fail to pay any other governmental or municipal charge, Borrower shall forthwith make good the deficiency or pay the charge before the same become delinquent or subject to interest or penalties and in default thereof Lender may pay the same. All sums paid by Lender and any sums which Lender may be required to advance to pay mortgage insurance premiums shall be added to the principal of the Note and shall bear interest from the date of payment at the rate specified in the Note and shall be due and payable on demand. In case of termination of the Contract of Insurance by prepayment of the Indebtedness in full, or otherwise (except as hereinafter provided) accumulations under Section 7(a) not required to meet payments due under the Contract of Insurance, shall be credited to Borrower. If the Mortgaged

Property is sold under foreclosure or is otherwise acquired by Lender after Default, any remaining balance of the accumulations under Section 7(b) shall be credited to the principal under the Note as of the date of the commencement of foreclosure proceedings or as of the date the Mortgaged Property is otherwise acquired; and accumulations under (a) thereof shall be likewise credited unless required to pay sums due HUD under the Contract of Insurance. The amounts deposited under Section 7 and Section 8 is collectively referred to in this Security Instrument as the "Imposition Deposits". The obligations of Borrower for which the Imposition Deposits are required are collectively referred to in this Security Instrument as "Impositions". The amount of the Imposition Deposits shall be sufficient to enable Lender to pay applicable Impositions before the last date upon which such payment may be made without any penalty or interest charge being added. Lender shall maintain records indicating how much of the monthly Imposition Deposits and how much of the aggregate Imposition Deposits held by Lender are held for the purpose of paying Taxes, insurance premiums and each other obligation of Borrower for which Imposition Deposits are required. Any waiver by Lender of the requirement that Borrower remit Imposition Deposits to Lender may be revoked by Lender, in Lender's discretion, at any time upon Notice to Borrower.

(b) Imposition Deposits shall be held in an institution (which may be Lender, if Lender is such an institution, and/or if required by HUD under the Regulatory Agreement with respect to all or any portion of said Imposition Deposits) whose deposits or accounts are insured or guaranteed by a federal agency and which meets all applicable HUD requirements. Lender shall not be obligated to open additional accounts or deposit Imposition Deposits in additional institutions when the amount of the Imposition Deposits exceeds the maximum amount of the federal deposit insurance or guaranty. Lender shall apply the Imposition Deposits to pay Impositions so long as no Event of Default has occurred and is continuing. Unless applicable law requires, Lender shall not be required to pay Borrower any interest, earnings or profits on the Imposition Deposits. Borrower hereby pledges and grants to Lender a security interest in the Imposition Deposits as additional security for all of Borrower's obligations under this Security Instrument and the Note. Any amounts

deposited with Lender under Section 8 shall not be trust funds, nor shall they operate to reduce the Indebtedness.

(c) If Lender receives a bill or invoice for an Imposition, Lender shall pay the Imposition from the Imposition Deposits held by Lender. Lender shall have no obligation to pay any Imposition to the extent it exceeds Imposition Deposits then held by Lender. Lender may pay an Imposition according to any bill, statement or estimate from the appropriate public office or insurance company without inquiring into the accuracy of the bill, statement or estimate or into the validity of the Imposition.

(d) If at any time the amount of the Imposition Deposits held by Lender for payment of a specific Imposition exceeds the amount reasonably deemed necessary by Lender plus one-sixth of such estimate, the excess shall be credited against future installments of Imposition Deposits. If at any time the amount of the Imposition Deposits held by Lender for payment of a specific Imposition is less than the amount reasonably estimated by Lender to be necessary plus one-sixth of such estimate, Borrower shall pay to Lender the amount of the deficiency within 15 days after Notice from Lender.

9. *Collateral Agreements.* Borrower shall deposit with Lender such amounts as may be required by any Collateral Agreement and shall perform all other obligations of Borrower under each Collateral Agreement. Collateral Agreement deposits shall be held in an institution (which may be Lender, if Lender is such an institution) whose deposits or accounts are insured or guaranteed by a federal agency. Unless applicable law requires, Lender shall not be required to pay Borrower any interest, earnings or profits on the Imposition Deposits.

10. *Regulatory Agreement Default.* Borrower and HUD have executed a Regulatory Agreement which is being recorded simultaneously with this Security Instrument and is incorporated in and made a part of this Security Instrument. Upon the direction of HUD, following a declaration of default by HUD under the Regulatory Agreement, the Lender shall declare the entire Indebtedness to be due and payable.

11. *Application of Payments.* If at any time Lender receives, from Borrower or otherwise, any amount applicable to the Indebtedness which is less than all amounts due and payable at such time, then Lender must apply that payment to amounts then due and payable in the precise manner and in the precise order set forth in Section 7(a). Neither Lender's acceptance of an amount

which is less than all amounts then due and payable nor Lender's application of such payment in the manner authorized shall constitute or be deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction. Notwithstanding the application of any such amount to the Indebtedness, Borrower's obligations under this Security Instrument and the Note shall remain unchanged.

12. *Compliance with Laws.* Borrower shall comply with all applicable: laws; ordinances; regulations; requirements of any Governmental Authority; lawful covenants and agreements recorded against the Mortgaged Property; the National Housing Act; the Regulatory Agreement; regulations and Directives of HUD; including but not limited to those of the foregoing pertaining to: health and safety; construction of Improvements on the Mortgaged Property; fair housing; civil rights; zoning and land use; leases; lead-based paint maintenance requirements of 24 CFR Part 35, subpart F; and maintenance and disposition of tenant security deposits; and, with respect to all of the foregoing, all subsequent amendments, revisions, promulgations or enactments. Borrower shall at all times maintain records sufficient to demonstrate compliance with the provisions of Section 12. Borrower shall take appropriate measures to prevent, and shall not engage in or knowingly permit, any illegal activities at the Mortgaged Property that could endanger tenants or visitors, result in damage to the Mortgaged Property, result in forfeiture of the Mortgaged Property, or otherwise materially impair the lien created by this Security Instrument or Lender's interest in the Mortgaged Property. Borrower represents and warrants to Lender that no portion of the Mortgaged Property has been or will be purchased with the proceeds of any illegal activity.

13. *Use of Property.* Unless required by applicable law and approved by Lender and HUD, Borrower shall not (a) allow changes in the use for which all or any part of the Mortgaged Property is being used at the time this Security Instrument was executed, (b) convert any individual dwelling units or common areas to commercial use, (c) initiate or acquiesce in a change in the zoning classification of the Mortgaged Property, (d) establish any condominium or cooperative regime with respect to the Mortgaged Property, (e) change any unit configurations or the number of units in the Mortgaged Property or (f) permit the Mortgaged Property to be used as transient housing or as a hotel in violation of Section 513

of the National Housing Act, as amended.

14. *Protection of Lender's Security.* (a) If Borrower fails to perform any of its obligations under this Security Instrument, Note or Regulatory Agreement, or if any action or proceeding is commenced which purports to affect the Mortgaged Property, Lender's security or Lender's rights under this Security Instrument, including eminent domain, insolvency, Waste, code enforcement, civil or criminal forfeiture, enforcement of Hazardous Materials Laws, fraudulent conveyance or reorganizations or proceedings involving a bankrupt or decedent, then Lender at Lender's option may make such appearances, disburse such sums and take such actions as Lender reasonably deems necessary to perform such obligations of Borrower and to protect Lender's interest, including (1) payment of fees and out-of-pocket expenses of attorneys (including fees for litigation at all levels), accountants, inspectors and consultants, (2) entry upon the Mortgaged Property to make repairs or secure the Mortgaged Property, (3) procurement of the insurance required by Section 21, and (4) payment of amounts which Borrower has failed to pay under Section 17 and Section 19.

(b) Any amounts disbursed by Lender under Section 14, or under any other provision of this Security Instrument that treats such disbursement as being made under Section 14, shall be added to, and become part of the principal of the Indebtedness, shall be immediately due and payable and shall bear interest from the date of disbursement until paid at the rate specified by HUD.

(c) Nothing in Section 14 shall require Lender to incur any expense or take any action, and Lender shall not incur any expense or take any action without the prior written approval of HUD.

15. *Inspection.* Lender and/or HUD, their agents, representatives, and designees, may make or cause to be made entries upon and inspections of the Mortgaged Property (including the HUD-required annual inspection and any environmental inspections and tests) during normal business hours, or at any other reasonable time.

16. *Books and Records; Financial Reporting.* (a) Borrower shall keep and maintain at all times at the Mortgaged Property or the management agent's offices, and upon Lender's or HUD's request shall make available at the Mortgaged Property, complete and accurate books of account and records (including copies of supporting bills and invoices) adequate to reflect correctly the operation of the Mortgaged

Property, and copies of all written contracts, Leases, and other instruments which affect the Mortgaged Property. The books, records, contracts, Leases and other instruments shall be subject to examination and inspection at any reasonable time by Lender and/or HUD.

(b) Borrower shall furnish to Lender all of the following:

(1) Within 90 days after the end of each fiscal year of Borrower (or pursuant to HUD requirements, if different), a statement of income and expenses for Borrower's operation of the Mortgaged Property for that fiscal year, a statement of changes in financial position of Borrower relating to the Mortgaged Property for that fiscal year and, when requested by Lender or HUD, a balance sheet showing all assets and liabilities of Borrower relating to the Mortgaged Property as of the end of that fiscal year;

(2) Within 120 days after the end of each fiscal year of Borrower (or pursuant to HUD requirements, if different), and at any other time upon Lender's or HUD's request, a rent schedule for the Mortgaged Property showing the name of each tenant, and for each tenant, the space occupied, the lease expiration date, the rent payable for the current month, the date through which rent has been paid, and any related information requested by Lender;

(3) Within 120 days after the end of each fiscal year of Borrower (or pursuant to HUD requirements, if different), and at any other time upon Lender's or HUD's request, an accounting of all security deposits held pursuant to all Leases, including the name of the institution (if any) and the names and identification numbers of the accounts (if any) in which such security deposits are held and the name of the person to contact at such financial institution, along with any authority or release necessary for Lender to access information regarding such accounts;

(4) Within 120 days after the end of each fiscal year of Borrower (or pursuant to HUD requirements, if different), and at any other time upon Lender's or HUD's request, a statement that identifies all owners with any interest in Borrower, directly or indirectly, or through one or more intermediaries, and the interest held by each. In addition, the Borrower must also submit a list of all officers and directors of any corporations, and all managers who are not members of any limited liability company, identified in this statement;

(5) Upon Lender's or HUD's request at any time when an Event of Default has occurred and is continuing, monthly

income and expense statements for the Mortgaged Property;

(6) Upon Lender's or HUD's request, a monthly property management report for the Mortgaged Property, showing the number of inquiries made and rental applications received from tenants or prospective tenants and deposits received from tenants and any other information requested by Lender; and

(7) Any other records or documents reasonably requested by Lender or HUD.

(c) Each of the statements, schedules and reports required by Section 16(b) shall be certified to be complete and accurate by an individual having authority to bind Borrower, and shall be in such form and contain such detail as Lender and/or HUD may require. Lender or HUD also may require that any statements, schedules or reports be audited at Borrower's expense by independent certified public accountants acceptable to Lender or HUD.

(d) If Borrower fails to provide in a timely manner the statements, schedules and reports required by Section 16(b), Lender or HUD shall have the right to have Borrower's books and records audited, at Borrower's expense, by independent certified public accountants selected by Lender in order to obtain such statements, schedules and reports, and all related costs and expenses of Lender shall become immediately due and payable and shall become an additional part of the Indebtedness as provided in Section 14.

(e) If an Event of Default has occurred and is continuing, Borrower shall, at Borrower's expense, deliver to Lender or HUD upon written demand all books and records relating to the Mortgaged Property or its operation.

(f) Borrower authorizes Lender or HUD to obtain a credit report on Borrower at any time.

17. *Taxes; Operating Expenses.* (a) Subject to the provisions of Section 17(c) and Section 17(d), Borrower shall pay, or cause to be paid, all Taxes when due and before the addition of any interest, fine, penalty or cost for nonpayment.

(b) Subject to the provisions of Section 17(c) and the HUD-approved operating budget, if any, Borrower shall pay the expenses of operating, managing, maintaining and repairing the Mortgaged Property (including insurance premiums, utilities, repairs and replacements) before the last date upon which each such payment may be made without any penalty or interest charge being added.

(c) As long as no Event of Default exists and Borrower has timely delivered to Lender any bills or

premium Notice that it has received, Borrower shall not be obligated to pay Taxes, insurance premiums or any other individual Imposition to the extent that sufficient Imposition Deposits are held by Lender for the purpose of paying that specific Imposition. If an Event of Default exists and subject to outstanding HUD requirements pertaining to claims for mortgage insurance benefits, Lender may exercise any rights Lender may have with respect to Imposition Deposits without regard to whether Impositions are then due and payable. Lender shall have no liability to Borrower for failing to pay any Impositions to the extent that any Event of Default has occurred and is continuing, insufficient Imposition Deposits are held by Lender at the time an Imposition becomes due and payable or Borrower has failed to provide Lender with bills and premium Notice as provided above.

(d) Borrower, at its own expense and with the approval of HUD, may contest by appropriate legal proceedings, conducted diligently and in good faith, the amount or validity of any Imposition other than insurance premiums, if (1) Borrower notifies Lender of the commencement or expected commencement of such proceedings, (2) the Mortgaged Property is not in danger of being sold or forfeited, (3) Borrower deposits with Lender reserves sufficient to pay the contested Imposition, if requested by Lender, and (4) Borrower furnishes whatever additional security is required in the proceedings or is reasonably requested by Lender, which may include the delivery to Lender of the reserves established by Borrower to pay the contested Imposition.

(e) Borrower shall promptly deliver to Lender a copy of all Notices of, and invoices for, Impositions, and if Borrower pays any Imposition directly, Borrower shall promptly furnish to Lender receipts evidencing such payments.

18. *Liens; Encumbrances.* Borrower acknowledges that the grant, creation or existence of any mortgage, deed of trust, deed to secure debt, security interest or other lien or encumbrance (a "Lien") on the Mortgaged Property (other than the lien of this Security Instrument, any tax liens which are imposed before payment is due, or any inferior liens which are approved by HUD and Lender), whether voluntary, involuntary or by operation of law, and whether or not such Lien has priority over the lien of this Security Instrument, is an Event of Default and subjects Borrower to personal liability under the Note.

19. *Preservation, Management and Maintenance of Mortgaged Property.*

Borrower (a) shall not commit Waste or permit impairment or deterioration of the Mortgaged Property, (b) shall not abandon the Mortgaged Property, (c) shall restore or repair promptly, in a good and workmanlike manner, any damaged part of the Mortgaged Property to the equivalent of its original condition, or such other condition as Lender may approve in writing, whether or not litigation or insurance proceeds or condemnation awards are available to cover any costs of such restoration or repair, (d) shall keep the Mortgaged Property in decent, safe, sanitary condition and good repair, including the replacement of Personalty and Fixtures with items of equal or better function and quality, all in accordance with applicable HUD requirements, (e) shall provide for qualified management of the Mortgaged Property by a residential rental property manager satisfactory to Lender and HUD under a contract approved by Lender in writing or for the operation of a Health Care Facility pursuant to any governmental requirements pertaining to operation and licensure, (f) shall give Notice to Lender and HUD of and, unless otherwise directed in writing by Lender and HUD, shall appear in and defend, any action or proceeding purporting to affect the Mortgaged Property, Lender's security or Lender's rights under this Security Instrument, (g) shall not (and shall not permit any tenant or other person to) remove, demolish or alter the Mortgaged Property or any part of the Mortgaged Property without the prior written approval of HUD except that the Borrower may, without the prior written approval of HUD, dispose of obsolete or deteriorated Fixtures or Personalty if the same are replaced with like items of the same or greater quality or value, and (h) shall not expend any project funds in connection with expenses incurred by or for the benefit of the ownership entity. All expenses incurred by Borrower in connection with the Mortgaged Property shall be reasonable and necessary, and incurred in compliance with HUD requirements.

20. *Management Contracts.* Any management contract entered into by Borrower shall contain a provision that it shall be subject to termination without penalty and without cause upon written request of Lender and shall contain a provision which gives no more than a thirty day notice of termination. Upon such request, Borrower shall immediately arrange to terminate the contract, and the Borrower shall also make arrangements satisfactory to Lender for continuing acceptable management of the

Mortgaged Property effective as of the termination date of the contract.

21. *Property and Liability Insurance.*

(a) Borrower shall keep the Improvements insured at all times against such hazards as Lender and HUD may from time to time require, which insurance shall include but not be limited to coverage against loss by fire and allied perils, general boiler and machinery coverage, builders all-risk and business income coverage. Lender's and HUD's insurance requirements may change from time to time throughout the term of the Indebtedness. If Lender or HUD so require, such insurance shall also include sinkhole insurance, mine subsidence insurance, earthquake insurance, and, if the Mortgaged Property does not conform to applicable zoning or land use laws, building ordinance or law coverage. If any of the Improvements is located in an area identified by the Federal Emergency Management Agency (or any successor to that agency) as an area having special flood hazards, and if flood insurance is available in that area, Borrower shall insure such Improvements against loss by flood. If Lender determines that flood insurance has not been obtained in the required amount, Lender must notify Borrower and HUD of Borrower's obligations to obtain the proper flood insurance. If Borrower does not obtain such insurance within 45 days of the date of this notification, Lender shall purchase such flood insurance on behalf of Borrower and may charge Borrower for the cost of premiums and fees incurred by Lender in purchasing the flood insurance.

(b) All premiums on insurance policies required under Section 21(a) shall be paid in the manner provided in Section 7, unless Lender has designated in writing another method of payment. All such policies shall also be in a form approved by Lender. All policies of property damage insurance shall include a non-contributing, non-reporting mortgage clause in a form approved by Lender, and in favor of Lender and HUD, as their interests may appear. Lender shall have the right to hold the original policies or duplicate original policies of all insurance required by Section 21(a). Borrower shall promptly deliver to Lender a copy of all renewal and other Notices received by Borrower with respect to the policies and all receipts for paid premiums. At least 30 days prior to the expiration date of a policy, Borrower shall deliver to Lender the original (or a duplicate original) of a renewal policy in form satisfactory to Lender.

(c) Borrower shall maintain at all times commercial general liability

insurance, workers' compensation insurance and such other liability, errors and omissions and fidelity insurance coverages as Lender and HUD may from time to time require, or shall require any appropriate party, including but not limited to the Operator or Lessee to maintain at all times commercial general liability insurance, workers' compensation insurance and such other liability, errors and omissions and fidelity insurance coverages as Lender and HUD may from time to time require.

(d) All insurance policies and renewals of insurance policies required by Section 21 shall be in such amounts and for such periods as Lender and HUD may from time to time require, and shall be issued by insurance companies satisfactory to Lender. Lender shall have the right to effect insurance in the event Borrower fails to comply with this Section.

(e) Borrower shall comply with all insurance requirements and shall not permit any condition to exist on the Mortgaged Property that would invalidate any part of any insurance coverage that this Security Instrument requires Borrower to maintain.

(f) In the event of loss, Borrower shall give immediate written Notice to the insurance carrier and to Lender. Borrower hereby authorizes and appoints Lender as attorney-in-fact for Borrower to make proof of loss, to adjust and compromise any claims under policies of property damage insurance, to appear in and prosecute any action arising from such property damage insurance policies, to collect and receive the proceeds of property damage insurance, and to deduct from such proceeds Lender's expenses incurred in the collection of such proceeds. This power of attorney is coupled with an interest and therefore is irrevocable. However, nothing contained in Section 21 shall require Lender to incur any expense or take any action. Lender may, at Lender's option and with the prior written approval of HUD, (1) hold the balance of such proceeds to be used to reimburse Borrower for the cost of restoring and repairing the Mortgaged Property to the equivalent of its original condition or to a condition approved by Lender (the "Restoration"), or (2) apply the balance of such proceeds to the payment of the Indebtedness, whether or not then due. To the extent Lender determines to apply insurance proceeds to Restoration, Lender shall do so in accordance with Lender's then-current policies relating to the restoration of casualty damage on similar multifamily properties and in accordance with outstanding HUD policy and regulations.

(g) Lender shall not exercise its option to apply insurance proceeds to the payment of the Indebtedness if all of the following conditions are met: (1) No Event of Default (or any event which, with the giving of Notice or the passage of time, or both, would constitute an Event of Default) has occurred and is continuing; (2) Lender determines, in its discretion, that there will be sufficient funds to complete the Restoration; (3) Lender determines, in its discretion, that the rental income from the Mortgaged Property after completion of the Restoration will be sufficient to meet all operating costs and other expenses, Imposition Deposits, deposits to reserves and loan repayment obligations relating to the Mortgaged Property; and (4) Lender determines, in its discretion, that the Restoration will be completed before the earlier of (A) one year before the maturity date of the Note or (B) one year after the date of the loss or casualty. Further, Lender may not exercise its option to apply insurance proceeds to the payment of the Indebtedness without the prior written approval of HUD. If HUD fails to give its approval to the use or application of such funds within 60 days after the written request by the Lender, the Lender may use or apply such funds for any of the purposes specified herein without the approval of HUD.

(h) If the Mortgaged Property is sold at a foreclosure sale or Lender or HUD acquire title to the Mortgaged Property, Lender and HUD, as their interests may appear, shall automatically succeed to all rights of Borrower in and to any insurance policies and unearned insurance premiums and in and to the proceeds of property damage insurance resulting from any damage to the Mortgaged Property prior to such sale or acquisition.

22. *Condemnation.* (a) Borrower shall promptly notify Lender and HUD of any action or proceeding relating to any condemnation or other taking, or conveyance in lieu thereof, of all or any part of the Mortgaged Property, whether direct or indirect (a "Condemnation"). Borrower shall appear in and prosecute or defend any action or proceeding relating to any Condemnation unless otherwise directed by Lender in writing. Borrower authorizes and appoints Lender as attorney-in-fact for Borrower to commence, appear in and prosecute, in Lender's or Borrower's name, any action or proceeding relating to any Condemnation and to settle or compromise any claim in connection with any Condemnation. This power of attorney is coupled with an interest and therefore is irrevocable. However, nothing contained in Section 22 shall

require Lender to incur any expense or take any action. Borrower hereby transfers and assigns to Lender all right, title and interest of Borrower in and to any award or payment with respect to (1) any Condemnation, or any conveyance in lieu of Condemnation, and (2) any damage to the Mortgaged Property caused by governmental action that does not result in a Condemnation.

(b) All awards of compensation in connection with condemnation for public use of or a taking of any of the Mortgaged Property, shall be paid to Lender to be applied to the amount due under the Note secured hereby in (1) amounts equal to the next maturing installment or installments of principal and (2) with any balance to be credited to the next payment due under the Note. All awards of damages in connection with any condemnation for public use of or damage to the Mortgaged Property, shall be paid to Lender to be applied to a fund held for and on behalf of Borrower which fund shall, at the option of Lender, and with the prior written approval of HUD, either be applied to the amount due under the Note as specified in the preceding sentence, or be disbursed for the restoration or repair of the Mortgaged Property. No amount applied to the reduction of the principal amount due in accordance with Section 22(b)(1) shall be considered an optional prepayment as the term is used in this Security Instrument and the Note secured hereby, nor relieve Borrower from making regular monthly payments commencing in the first day of the first month following the date of receipt of the award. Lender is hereby authorized in the name of Borrower to execute and deliver necessary releases or approvals or to appeal from such awards.

23. *Transfers of the Mortgaged Property or Interests in Borrower.* The Borrower shall not convey, assign, transfer, pledge, hypothecate, encumber or otherwise dispose of the Mortgaged Property or any interest therein or permit the conveyance, assignment or transfer of any interest in the Borrower (if the effect of such conveyance, assignment or transfer is the creation or elimination of a Principal) without the prior written approval of HUD. The Borrower does not need to obtain the prior written approval of HUD for: (a) A conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under this Security Instrument, (b) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code, or (c) an interest acquired by inheritance or by Court decree.

24. *Events of Default.* The occurrence of any one or more of the following shall constitute either a Class A Event of Default or a Class B Event of Default under this Security Instrument:

(a) Class A Event of Default: Any failure by Borrower to pay or deposit when due any amount required by the Note or Section 7(a) or (b) of this Security Instrument for a period of thirty (30) days after the due date thereof.

(b) Class B Events of Default:

(1) Fraud or material misrepresentation or material omission by Borrower, any of its officers, directors, trustees, general partners, members or managers or any guarantor in connection with (i) the application for or creation of the Indebtedness, (ii) any financial statement, rent roll, or other report or information provided to Lender during the term of the Indebtedness, or (iii) any request for Lender's consent to any proposed action under this Security Instrument or the Note;

(2) The commencement of a forfeiture action or proceeding, whether civil or criminal, which, in Lender's reasonable judgment, could result in a forfeiture of the Mortgaged Property or otherwise materially impair the lien created by this Security Instrument or Lender's interest in the Mortgaged Property;

(3) Any failure by Borrower to perform any of its obligations under this Security Instrument (other than those specified in Section 24(a) and Section 24(b)(1) and (b)(2)), as and when required, which continues for a period of 30 days after Notice of such failure by Lender to Borrower. However, no such Notice or grace period shall apply in the case of any such failure which could, in Lender's judgment, absent immediate exercise by Lender of a right or remedy under this Security Instrument, result in harm to Lender or impairment of the Note or this Security Instrument;

(4) Any failure by Borrower to perform any of its obligations as and when required under the Regulatory Agreement which continue beyond the applicable cure period, if any, specified in the Regulatory Agreement; however, violations under the terms of the Regulatory Agreement may only be treated as a default hereunder in cases where HUD requires Lender to do so; and

(5) Borrower voluntarily files for bankruptcy protection under the United States Bankruptcy Code or voluntarily becomes subject to any reorganization, receivership, insolvency proceeding or other similar proceeding pursuant to any other federal or state law affecting

debtor and creditor rights, or an involuntary case is commenced against Borrower by any creditor (other than Lender) of Borrower pursuant to the United States Bankruptcy Code or other federal or state law affecting debtor and creditor rights and is not dismissed or discharged within 60 days after filing.

25. *Remedies Cumulative.* Each right and remedy provided in this Security Instrument is distinct from all other rights or remedies under this Security Instrument, the Note or the Regulatory Agreement or afforded by applicable law, and each shall be cumulative and may be exercised concurrently, independently, or successively, in any order.

26. *Forbearance.* (a) So long as the obligation secured hereby is insured by HUD, Lender shall not without obtaining the prior written consent of HUD, take any of the following actions: extend the time for payment of all or any part of the Indebtedness; reduce the payments due under this Security Instrument or the Note; release anyone liable for the payment of any amounts under this Security Instrument or the Note; accept a renewal of the Note; modify the terms and time of payment of the Indebtedness; join in any extension or subordination agreement; release any Mortgaged Property; take or release other or additional security; modify the rate of interest or period of amortization of the Note or change the amount of the monthly installments payable under the Note; and otherwise modify this Security Instrument, the Note, or the Regulatory Agreement. However, if the Contract of Insurance has been terminated, Lender may (but shall not be obligated to) agree with Borrower to any of the aforementioned actions in this Section and Lender shall not have to give Notice to or obtain the consent of any guarantor or third-party obligor.

(b) Any forbearance by Lender (or HUD as its interests appear) in exercising any right or remedy under the Note, this Security Instrument, or the Regulatory Agreement or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy. The acceptance by Lender of payment of all or any part of the Indebtedness after the due date of such payment, or in an amount which is less than the required payment, shall not be a waiver of Lender's right to require prompt payment when due of all other payments on account of the Indebtedness or to exercise any remedies for any failure to make prompt payment. Enforcement by Lender of any security for the Indebtedness shall not constitute an election by Lender of

remedies so as to preclude the exercise of any other right available to Lender. Lender's receipt of any awards or proceeds under Section 21 and Section 22 shall not operate to cure or waive any Event of Default.

27. *Loan Charges.* If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower is interpreted so that any charge provided for in this Security Instrument or the Note, whether considered separately or together with other charges levied in connection with this Security Instrument or the Note, violates that law, and Borrower is entitled to the benefit of that law, that charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to Lender in excess of the permitted amounts shall be applied by Lender to reduce the principal of the Indebtedness. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness which constitutes interest, as well as all other charges levied in connection with the Indebtedness which constitute interest, shall be deemed to be allocated and spread over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of the Note.

28. *Waiver of Statute of Limitations.* To the extent permitted by law, Borrower hereby waives the right to assert any statute of limitations as a bar to the enforcement of the lien of this Security Instrument or to any action brought to enforce this Security Instrument or the Note.

29. *Waiver of Marshalling.* Notwithstanding the existence of any other security interests in the Mortgaged Property held by Lender or by any other party and subject to the rights and requirements of HUD particularly under but not limited to the Regulatory Agreement, Lender shall have the right to determine the order in which any or all of the Mortgaged Property shall be subjected to the remedies provided in this Security Instrument and the Note or applicable law. Lender shall have the right to determine the order in which any or all portions of the Indebtedness are satisfied from the proceeds realized upon the exercise of such remedies. Borrower and any party who now or in the future acquires a security interest in the Mortgaged Property and who has actual or constructive notice of this Security Instrument waives any and all

right to require the marshalling of assets or to require that any of the Mortgaged Property be sold in the inverse order of alienation or that any of the Mortgaged Property be sold in parcels or as an entirety in connection with the exercise of any of the remedies permitted by applicable law or provided in this Security Instrument.

30. *Further Assurances.* Borrower shall execute, acknowledge, and deliver, at its sole cost and expense, all further acts, deeds, conveyances, assignments, estoppel certificates, financing statements, transfers and assurances as Lender may require from time to time in order to better assure, grant, and convey to Lender the rights intended to be granted, now or in the future, to Lender under this Security Instrument and the Note.

31. *Estoppel Certificate.* Within 10 days after a request from Lender, Borrower shall deliver to Lender a written statement, signed and acknowledged by Borrower, certifying to Lender or any person designated by Lender, as of the date of such statement, (a) that the Note, the Regulatory Agreement and this Security Instrument are unmodified and in full force and effect (or, if there have been modifications, that the Note, the Regulatory Agreement and this Security Instrument are in full force and effect as modified and setting forth such modifications); (b) the unpaid principal balance of the Note; (c) the date to which interest under the Note has been paid; (d) that Borrower is not in default in paying the Indebtedness or in performing or observing any of the covenants or agreements contained in this Security Instrument, the Note and the Regulatory Agreement (or, if Borrower is in default, describing such default in reasonable detail); (e) whether or not there are then existing any setoffs or defenses known to Borrower against the enforcement of any right or remedy of Lender under the Note, the Regulatory Agreement and this Security Instrument; and (f) any additional facts requested by Lender.

32. *Governing Law; Consent to Jurisdiction and Venue.* (a) This Security Instrument and the Note which does not itself expressly identify the law that is to apply to it, shall be governed by the laws of the jurisdiction in which the Land is located (the "Property Jurisdiction") except as such local law may be preempted by federal law.

(b) Borrower agrees that any controversy arising under or in relation to the Note or this Security Instrument shall be litigated exclusively in the Property Jurisdiction except as federal jurisdiction may be appropriate

pursuant to any federal requirements. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies which shall arise under or in relation to the Note, any security for the Indebtedness, or this Security Instrument. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise.

33. *Notice.* (a) All notices, demands and other communications ("Notice") under or concerning this Security Instrument shall be in writing. Each Notice shall be addressed to the intended recipient at its address set forth in this Security Instrument (and notices to HUD shall be addressed to the appropriate HUD field office responsible for servicing the Mortgaged Property), and shall be deemed given on the earliest to occur of (1) the date when the Notice is received by the addressee; (2) the first Business Day after the Notice is delivered to a recognized overnight courier service, with arrangements made for payment of charges for next Business Day delivery; or (3) the third Business Day after the Notice is deposited in the United States mail with postage prepaid, certified mail, return receipt requested. As used in this Section 33, the term "Business Day" means any day other than a Saturday, a Sunday or any other day on which Lender or HUD is not open for business.

(b) Any party to this Security Instrument may change the address to which Notices intended for it are to be directed by means of Notice given to the other party in accordance with Section 33. Each party agrees that it will not refuse or reject delivery of any Notice given in accordance with Section 33, that it will acknowledge, in writing, the receipt of any Notice upon request by the other party and that any Notice rejected or refused by it shall be deemed for purposes of Section 33 to have been received by the rejecting party on the date so refused or rejected, as conclusively established by the records of the U.S. Postal Service or the courier service.

(c) Any Notice under the Note which does not specify how Notice is to be given shall be given in accordance with Section 33.

34. *Sale of Note; Change in Servicer.* The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior Notice to Borrower. A sale may result in a change of the Loan Servicer.

There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a sale or transfer of all or a partial interest in the Note or a change of the Loan Servicer, Borrower will be given Notice of the sale, transfer and/or change.

35. *Single Asset Borrower.* Until the Indebtedness is paid in full or unless otherwise approved in writing by HUD, (a) Borrower is either a single asset entity or a natural person and shall maintain the assets of the Mortgaged Property in segregated accounts and (b) Borrower, if not a natural person, (1) shall not acquire any real or personal property other than the Mortgaged Property and personal property related to the operation and maintenance of the Mortgaged Property except pursuant to the rules and regulations of HUD and with the prior written approval of HUD and (2) shall not own or operate any business other than the management and operation of the Mortgaged Property except pursuant to the rules and regulations of HUD and with the prior written approval of HUD.

36. *Successors and Assigns Bound.* This Security Instrument shall bind, and the rights granted by this Security Instrument shall inure to, the respective successors and assigns of Lender and Borrower.

37. *Joint and Several Liability.* If more than one person or entity signs this Security Instrument as Borrower, the obligations of such persons and entities shall be joint and several.

38. *Relationship of Parties; No Third Party Beneficiary.* (a) The relationship between Lender and Borrower shall be solely that of creditor and debtor, respectively, and nothing contained in this Security Instrument shall create any other relationship between Lender and Borrower.

(b) No creditor of any party to this Security Instrument and no other person shall be a third party beneficiary of this Security Instrument, the Note or the Regulatory Agreement. Without limiting the generality of the preceding sentence, (1) any arrangement (a "Servicing Arrangement") between the Lender and any Loan Servicer for loss sharing or interim advancement of funds shall constitute a contractual obligation of such Loan Servicer that is independent of the obligation of Borrower for the payment of the Indebtedness, (2) Borrower shall not be a third party beneficiary of any Servicing Arrangement, and (3) no payment by the Loan Servicer under any Servicing Arrangement will reduce the amount of the Indebtedness.

39. *Severability; Amendments.* The invalidity or unenforceability of any

provision of this Security Instrument shall not affect the validity or enforceability of any other provision, and all other provisions shall remain in full force and effect. This Security Instrument contains the entire agreement among the parties as to the rights granted and the obligations assumed in this Security Instrument. This Security Instrument may not be amended or modified except by a writing signed by the party against whom enforcement is sought.

40. *Construction.* The captions and headings of the sections of this Security Instrument are for convenience only and shall be disregarded in construing this Security Instrument. Any reference in this Security Instrument to an "Exhibit" or a "Section" shall, unless otherwise explicitly provided, be construed as referring, respectively, to an Exhibit attached to this Security Instrument or to a Section of this Security Instrument. All Exhibits attached to or referred to in this Security Instrument are incorporated by reference into this Security Instrument. Any reference in this Security Instrument to a statute or regulation shall be construed as referring to that statute or regulation as amended from time to time except as to certain HUD regulations and procedures in connection with the Contract of Insurance which initially establish the rights of the Lender and the Borrower. Use of the singular in this Agreement includes the plural and use of the plural includes the singular. As used in this Security Instrument, the term "including" means "including, but not limited to."

41. *Loan Servicing.* All actions regarding the servicing of the Note, including the collection of payments, the giving and receipt of Notice, inspections of the Mortgaged Property, inspections of books and records, and the granting of consents and approvals, may be taken by the Loan Servicer unless Borrower receives Notice to the contrary. If Borrower receives conflicting Notice regarding the identity of the Loan Servicer or any other subject, any such Notice from Lender shall govern unless there is a Notice from HUD and, in all cases, any Notice from HUD governs notwithstanding any Notice from any other party.

42. *Disclosure of Information.* To the extent permitted by law, Lender may furnish information regarding Borrower or the Mortgaged Property to third parties with an existing or prospective interest in the servicing, enforcement, evaluation, performance, purchase or securitization of the Indebtedness, including but not limited to trustees, master servicers, special servicers,

rating agencies, and organizations maintaining databases on the underwriting and performance of multifamily mortgage loans. Borrower irrevocably waives any and all rights it may have under applicable law to prohibit such disclosure, including but not limited to any right of privacy.

43. *No Change In Facts or Circumstances.* Borrower certifies that all information in the application for the loan submitted to Lender (the "Loan Application") and in all financial statements, rent rolls, reports, certificates and other documents submitted in connection with the Loan Application are complete and accurate in all material respects and that there has been no material adverse change in any fact or circumstance that would make any such information incomplete or inaccurate. The submission of false or incomplete information shall be a Class B Event of Default.

44. *Estoppel.* The Lender is not the agent of HUD. Any action by the Lender in exercising any right or remedy under this Security Instrument shall not be a waiver or preclude the exercise by HUD of any right or remedy which HUD might have under the Regulatory Agreement or other HUD requirements.

45. *Acceleration; Remedies.* At any time during the existence of a Class A Event of Default, Lender, at Lender's option, may declare the Indebtedness to be immediately due and payable without further demand, and may invoke the power of sale and any other remedies permitted by applicable law or provided in this Security Instrument or in the Note. At any time during the existence of a Class B Event of Default, Lender, at Lender's option, but only after receipt of the prior written approval of HUD, may declare the Indebtedness to be immediately due and payable without further demand, and may invoke the power of sale and any other remedies permitted by applicable law or provided in this Security Instrument or in the Note.

Notwithstanding any language in Section 45 to the contrary, upon direction of HUD, following a declaration of default by HUD under the Regulatory Agreement, Lender shall declare the entire Indebtedness to be due and payable. Borrower acknowledges that the power of sale granted in this Security Instrument may be exercised by Lender without prior judicial hearing. Borrower has the right to bring an action to assert the non-existence of a Class A or Class B Event of Default or any other defense of Borrower to acceleration and sale; however, applicable Federal law may limit certain rights of the Borrower.

Lender shall be entitled to collect all costs and expenses incurred in pursuing such remedies, including reasonable attorneys' fees (including but not limited to appellate litigation), costs of documentary evidence, abstracts and title reports.

[Insert Provisions Pertaining to Sale as Appropriate Under State Law]

46. *Federal Remedies.* In addition to any rights and remedies set forth in the Regulatory Agreement, HUD has rights and remedies under federal law, including but not limited to the right to foreclose pursuant to the Multifamily Mortgage Foreclosure Act of 1981, 12 U.S.C. 3701 *et seq.* when HUD is the holder of the Note.

47. *Remedies for Waste.* In addition to any other rights and remedies set forth in the Note and this Security Instrument or those available under applicable law, including exemplary damages where permitted, the following remedies for Waste by Borrower are available to Lender as necessary to give complete redress:

(a) the exercise of the remedies available to Lender during the existence of a Class B default, as set forth in Section 45 of this Security Instrument;

(b) an injunction prohibiting future Waste or requiring correction of Waste already committed, but only to the extent that the Waste has impaired or threatens to impair Lender's security; and

(c) recovery of damages, limited by the amount of the Waste, to the extent that the Waste has impaired Lender's security. Any recovery of damages by Lender or HUD for Waste shall be applied, at the sole discretion of HUD, (1) to remedy the Waste of the Mortgaged Property, (2) to the Indebtedness or (3) for any other purpose designated by HUD.

If the mortgage or deed of trust relationship has ended at the time Lender claims Waste has been committed against the Mortgaged Property, an impairment of security exists if the value of the Mortgaged Property is less than the sum of the debt obligation under the Note and this Security Instrument, and the obligations secured by any liens senior to this Security Instrument. If the mortgage or deed of trust relationship continues to exist at the time Lender claims Waste has been committed against the Mortgaged Property, an impairment of security exists if the ratio of the mortgage or deed of trust obligation to the value of the Mortgaged Property is above its scheduled level.

48. *References.* All references to rental housing income and rental payments

shall, in the case of Health Care Facilities be construed to mean all income from whatever source derived from the operation of the facility, so far as the context permits.

49. *Termination.* At such time as HUD no longer insures this loan or holds this Security Instrument, (a) all rights and responsibilities of HUD shall conclude, all mortgage insurance and references to mortgage insurance premiums shall cease and all obligations of the Secretary and HUD shall terminate; (b) all obligations and responsibilities of Borrower to HUD shall likewise terminate provided Borrower is in compliance with the Regulatory Agreement and (c) all obligations and responsibilities of Lender to HUD shall likewise terminate provided Lender is in compliance with the Contract of Insurance.

50. *Construction Financing.* The Indebtedness represents funds to be used in the construction of certain Improvements on the Land, in accordance with the Building Loan Agreement which is incorporated herein by reference to the same extent and effect as if fully set forth and made herein (provided, however, that if and to the extent that the Building Loan Agreement is inconsistent herewith, this Security Instrument shall govern). If the construction of the Improvements to be made pursuant to the Building Loan Agreement shall not be carried on with reasonable diligence, or shall be discontinued at any time for any reason other than strikes or lock-outs, the Lender, after due Notice to the Borrower, or any subsequent owner, is hereby vested with full and complete authority to enter upon the Land to employ watchmen to protect such Improvements from depredation or injury and to preserve and protect the Personalty therein, to continue any and all outstanding contracts for the erection and completion of said Improvements, to make and enter into any contracts and obligations wherever necessary, either in its own name or in the name of the Borrower, or other owner, and to pay and discharge all debts, obligations, and liabilities incurred thereby. All such sums so advanced by the Lender (exclusive of advances of the principal of the Indebtedness) shall be added to the principal of the Indebtedness secured hereby and all shall be secured by this Security Instrument and shall be due and payable on demand with interest at the rate provided in the Note, but no such advances shall be insured unless same are specifically approved by HUD prior to the making thereof. The Indebtedness shall, at the option of the Lender or holder of this Security

Instrument and the Note become due and payable on the failure of the Borrower, or other owner, to keep and perform any of the covenants, conditions and agreements of the Building Loan Agreement. This covenant shall be terminated upon the completion of the Improvements to the satisfaction of the Lender and the making of the final advance as provided in the Building Loan Agreement.

51. *Environmental Hazards* (a) Definitions:

(1) "Hazardous Materials" means petroleum and petroleum products and compounds containing them, including gasoline, diesel fuel and oil; explosives; flammable materials; radioactive materials; polychlorinated biphenyls ("PCBs") and compounds containing them; lead and lead-based paint; asbestos or asbestos-containing materials in any form that is or could become friable; underground or above-ground storage tanks, whether empty or containing any substance; any substance the presence of which on the Mortgaged Property is prohibited by any federal, state or local authority; any substance that requires special handling; and any other material or substance now or in the future defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," "toxic pollutant," "contaminant," or "pollutant" within the meaning of any Hazardous Materials Law.

(2) "Hazardous Materials Laws" means all federal, state, and local laws, ordinances and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees in effect now or in the future and including all amendments, that relate to Hazardous Materials and apply to Borrower or to the Mortgaged Property. Hazardous Materials Laws include, but are not limited to, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*, the Toxic Substance Control Act, 15 U.S.C. 2601, *et seq.*, the Clean Water Act, 33 U.S.C. 1251, *et seq.*, and the Hazardous Materials Transportation Act, 49 U.S.C. 5101, *et seq.*, and their state analogs.

(3) "Environmental Permit" means any permit, license, or other authorization issued under any Hazardous Materials Law with respect to any activities or businesses conducted on or in relation to the Mortgaged Property.

(b) Except for (1) matters covered by a written program of operations and

maintenance approved in writing by Lender (an "O&M Program"), (2) matters described in paragraph (c) of this Section 51; or (3) (for so long as the loan secured hereby is insured by HUD) matters covered by outstanding HUD requirements which may differ from this Section 51, with respect to lead based paint requirements, for example, Borrower shall not cause or permit any of the following:

(i) The presence, use, generation, release, treatment, processing, storage (including storage in above ground and underground storage tanks), handling, or disposal of any Hazardous Materials on or under the Mortgaged Property or any other property of Borrower that is adjacent to the Mortgaged Property;

(ii) The transportation of any Hazardous Materials to, from, or across the Mortgaged Property;

(iii) Any occurrence or condition on the Mortgaged Property or any other property of Borrower that is adjacent to the Mortgaged Property, which occurrence or condition is or may be in violation of Hazardous Materials Laws; or

(iv) Any violation of or noncompliance with the terms of any Environmental Permit with respect to the Mortgaged Property or any property of Borrower that is adjacent to the Mortgaged Property.

The matters described in clauses (i) through (iv) above are referred to collectively in this Section 51 as "Prohibited Activities or Conditions".

(c) Prohibited Activities and Conditions shall not include the safe and lawful use and storage of quantities of (1) pre-packaged supplies, cleaning materials and petroleum products customarily used in the operation and maintenance of comparable multifamily properties, (2) cleaning materials, personal grooming items and other items sold in pre-packaged containers for consumer use and used by tenants and occupants of residential dwelling units in the Mortgaged Property; and (3) petroleum products used in the operation and maintenance of motor vehicles from time to time located on the Mortgaged Property's parking areas, so long as all of the foregoing are used, stored, handled, transported and disposed of in compliance with Hazardous Materials Laws.

(d) Borrower shall take all commercially reasonable actions (including the inclusion of appropriate provisions in any Leases executed after the date of this Security Instrument) to prevent its employees, agents, and contractors, and all tenants and other occupants from causing or permitting

any Prohibited Activities or Conditions. Borrower shall not lease or allow the sublease or use of all or any portion of the Mortgaged Property to any tenant or subtenant for nonresidential use by any user that, in the ordinary course of its business, would cause or permit any Prohibited Activity or Condition.

(e) If an O&M Program has been established with respect to Hazardous Materials, Borrower shall comply in a timely manner with, and cause all employees, agents, and contractors of Borrower and any other persons present on the Mortgaged Property to comply with the O&M Program. All costs of performance of Borrower's obligations under any O&M Program shall be paid by Borrower, and Lender's out-of-pocket costs incurred in connection with the monitoring and review of the O&M Program and Borrower's performance shall be paid by Borrower upon demand by Lender. Any such out-of-pocket costs of Lender which Borrower fails to pay promptly shall become an additional part of the Indebtedness as provided in Section 14.

(f) Borrower represents and warrants to Lender that, except as previously disclosed by Borrower to Lender in writing:

(1) Borrower has not at any time engaged in, caused or permitted any Prohibited Activities or Conditions;

(2) To the best of Borrower's knowledge after reasonable and diligent inquiry, no Prohibited Activities or Conditions exist or have existed;

(3) Except to the extent previously disclosed by Borrower to Lender in writing, the Mortgaged Property does not now contain any underground storage tanks, and, to the best of Borrower's knowledge after reasonable and diligent inquiry, the Mortgaged Property has not contained any underground storage tanks in the past. If there is an underground storage tank located on the Property which has been previously disclosed by Borrower to Lender in writing, that tank complies with all requirements of Hazardous Materials Laws;

(4) Borrower has complied with all Hazardous Materials Laws, including all requirements for notification regarding releases of Hazardous Materials.

Without limiting the generality of the foregoing, Borrower has obtained all Environmental Permits required for the operation of the Mortgaged Property in accordance with Hazardous Materials Laws now in effect and all such Environmental Permits are in full force and effect;

(5) No event has occurred with respect to the Mortgaged Property that constitutes, or with the passing of time

or the giving of Notice would constitute, noncompliance with the terms of any Environmental Permit;

(6) There are no actions, suits, claims or proceedings pending or, to the best of Borrower's knowledge after reasonable and diligent inquiry, threatened that involve the Mortgaged Property and allege, arise out of, or relate to any Prohibited Activity or Condition; and

(7) Borrower has not received any complaint, order, Notice of violation or other communication from any Governmental Authority with regard to air emissions, water discharges, noise emissions or Hazardous Materials, or any other environmental, health or safety matters affecting the Mortgaged Property or any other property of Borrower that is adjacent to the Mortgaged Property.

The representations and warranties in this Section 51 shall be continuing representations and warranties that shall be deemed to be made by Borrower throughout the term of the loan evidenced by the Note, until the Indebtedness has been paid in full.

(g) Borrower shall promptly notify Lender in writing upon the occurrence of any of the following events:

(1) Borrower's discovery of any Prohibited Activity or Condition;

(2) Borrower's receipt of or knowledge of any complaint, order, Notice of violation or other communication from any Governmental Authority or other person with regard to present or future alleged Prohibited Activities or Conditions or any other environmental, health or safety matters affecting the Mortgaged Property or any other property of Borrower that is adjacent to the Mortgaged Property; and

(3) any representation or warranty in this Section 51 becomes untrue after the date of this Agreement.

Any such Notice given by Borrower shall not relieve Borrower of, or result in a waiver of, any obligation under this Security Instrument, the Note, or any other Loan Document.

(h) Borrower shall pay promptly the costs of any environmental inspections, tests or audits ("Environmental Inspections") required by Lender in connection with any foreclosure or deed in lieu of foreclosure, or as a condition of Lender's consent to any Transfer under Section 23, or required by Lender following a reasonable determination by Lender that Prohibited Activities or Conditions may exist. Any such costs incurred by Lender (including the fees and out-of-pocket costs of attorneys and technical consultants whether incurred in connection with any judicial, appellate or otherwise, or administrative

process or otherwise) which Borrower fails to pay promptly shall become an additional part of the Indebtedness as provided in Section 14. The results of all Environmental Inspections made by Lender shall at all times remain the property of Lender and Lender shall have no obligation to disclose or otherwise make available to any party other than Borrower and HUD such results or any other information obtained by Lender in connection with its Environmental Inspections. Lender hereby reserves the right, and Borrower hereby expressly authorizes Lender, to make available to any party, including any prospective bidder at a foreclosure sale of the Mortgaged Property, the results of any Environmental Inspections made by Lender with respect to the Mortgaged Property.

Borrower consents to Lender notifying any party (either as part of a notice of sale or otherwise) of the results of any of Lender's Environmental Inspections. Borrower acknowledges that Lender cannot control or otherwise assure the truthfulness or accuracy of the results of any of its Environmental Inspections and that the release of such results to prospective bidders at a foreclosure sale of the Mortgaged Property may have a material and adverse effect upon the amount which a party may bid at such sale. Borrower agrees that Lender shall have no liability whatsoever as a result of delivering the results of any of its Environmental Inspections to any third party, and Borrower hereby releases and forever discharges Lender from any and all claims, damages, or causes of action, arising out of, connected with or incidental to the results of, the delivery of any of Lender's Environmental Inspections.

(i) If any investigation, site monitoring, containment, clean-up, restoration or other remedial work ("Remedial Work") is necessary to comply with any Hazardous Materials Law or order of any Governmental Authority that has or acquires jurisdiction over the Mortgaged Property or the use, operation or improvement of the Mortgaged Property under any Hazardous Materials Law, Borrower shall, by the earlier of (1) the applicable deadline required by Hazardous Materials Law or (2) 30 days after Notice from Lender demanding such action, begin performing the Remedial Work, and thereafter diligently prosecute it to completion, and shall in any event complete the work by the time required by applicable Hazardous Materials Law. If Borrower fails to begin on a timely basis or diligently prosecute any required Remedial Work, Lender may, at

its option, cause the Remedial Work to be completed, in which case Borrower shall reimburse Lender on demand for the cost of doing so. Any reimbursement due from Borrower to Lender shall become part of the Indebtedness as provided in Section 14.

(j) Borrower shall cooperate with any inquiry by any Governmental Authority and shall comply with any governmental or judicial order which arises from any alleged Prohibited Activity or Condition.

(k) Borrower shall indemnify, hold harmless and defend (1) Lender, (2) any prior owner or holder of the Note, (3) the Loan Servicer, (4) any prior Loan Servicer, (5) the officers, directors, shareholders, partners, employees and trustees of any of the foregoing, and (vi) the heirs, legal representatives, successors and assigns of each of the foregoing (collectively, the "Indemnitees") from and against all proceedings, claims, damages, penalties and costs (whether initiated or sought by Governmental Authorities or private parties), including fees and out of pocket expenses of attorneys and expert witnesses, investigatory fees, and remediation costs, whether incurred in connection with any judicial (including appellate) or administrative process or otherwise, arising directly or indirectly from any of the following:

(i) Any breach of any representation or warranty of Borrower in this Section 51;

(ii) Any failure by Borrower to perform any of its obligations under this Section 51;

(iii) The existence or alleged existence of any Prohibited Activity or Condition;

(iv) The presence or alleged presence of Hazardous Materials on or under the Mortgaged Property or any property of Borrower that is adjacent to the Mortgaged Property; and

(v) The actual or alleged violation of any Hazardous Materials Law.

(l) Counsel selected by Borrower to defend Indemnitees shall be subject to the approval of those Indemnitees. However, any Indemnitee may elect to defend any claim or legal or administrative proceeding at the Borrower's expense.

(m) Borrower shall not, without the prior written consent of those Indemnitees who are named as parties to a claim or legal or administrative proceeding (a "Claim"), settle or compromise the Claim if the settlement (1) results in the entry of any judgment that does not include as an unconditional term the delivery by the claimant or plaintiff to Lender of a written release of those Indemnitees, satisfactory in form and substance to

Lender; or (2) may materially and adversely affect Lender, as determined by Lender in its discretion.

(n) Borrower's obligation to indemnify the Indemnitees shall not be limited or impaired by any of the following, or by any failure of Borrower or any guarantor to receive Notice of or consideration for any of the following:

(1) Any amendment or modification of any Loan Document;

(2) Any extensions of time for performance required by any Loan Document;

(3) Any provision in any of the Loan Documents limiting Lender's recourse to property securing the Indebtedness, or limiting the personal liability of Borrower or any other party for payment of all or any part of the Indebtedness;

(4) The accuracy or inaccuracy of any representations and warranties made by Borrower under this Security Instrument or any other Loan Document;

(5) The release of Borrower or any other person, by Lender or by operation of law, from performance of any obligation under any Loan Document;

(6) The release or substitution in whole or in part of any security for the Indebtedness; and

(7) Lender's failure to properly perfect any lien or security interest given as security for the Indebtedness.

(o) Borrower shall, at its own cost and expense, do all of the following:

(1) Pay or satisfy any judgment or decree that may be entered against any Indemnitee or Indemnitees in any legal or administrative proceeding incident to any matters against which Indemnitees are entitled to be indemnified under this Section 51;

(2) Reimburse Indemnitees for any expenses paid or incurred in connection with any matters against which Indemnitees are entitled to be indemnified under this Section 51; and

(3) Reimburse Indemnitees for any and all expenses, including fees and out-of-pocket expenses of attorneys and expert witnesses, paid or incurred in connection with the enforcement by Indemnitees of their rights under this Section 51, or in monitoring and participating in any legal (including appellate) or administrative proceeding.

(p) In any circumstances in which the indemnity under this Section 51 applies, Lender may employ its own legal counsel and consultants to prosecute, defend or negotiate any claim or legal or administrative proceeding and Lender, with the prior written consent of Borrower (which shall not be unreasonably withheld, delayed or conditioned) may settle or compromise any action or legal or administrative

proceeding. Borrower shall reimburse Lender upon demand for all costs and expenses incurred by Lender, including all costs of settlements entered into in good faith, and the fees and out of pocket expenses of such attorneys (including but not limited to appellate litigation) and consultants.

(q) The provisions of this Section 51 shall be in addition to any and all other obligations and liabilities that Borrower may have under applicable law or under other Loan Documents, and each Indemnitee shall be entitled to indemnification under this Section 51 without regard to whether Lender or that Indemnitee has exercised any rights against the Mortgaged Property or any other security, pursued any rights against any guarantor, or pursued any other rights available under the Loan Documents or applicable law. If Borrower consists of more than one person or entity, the obligation of those persons or entities to indemnify the Indemnitees under this Section 51 shall be joint and several. The obligation of Borrower to indemnify the Indemnitees under this Section 51 shall survive any repayment or discharge of the Indebtedness, any foreclosure proceeding, any foreclosure sale, any delivery of any deed in lieu of foreclosure, and any release of record of the lien of this Security Instrument.

(r) All references to Lender in this Section 51 shall also be construed to refer to HUD as its interests appear (solely as determined by HUD) and all notifications to Lender must also be made to HUD and all Lender approvals and exercises of discretion by Lender under this Section 51 must first have the prior written approval of HUD all so long as the loan secured by this Security Instrument is insured by HUD, provided, that the reference to Lender as an Indemnitee shall be construed to refer to HUD, and Borrower's obligations to indemnify HUD as an Indemnitee shall remain in effect in accordance with this Section 51, notwithstanding the termination or expiration of insurance of the secured loan by HUD.

(s) To the extent any HUD environmental requirements or standards are inconsistent or conflict with the provisions of this Section 51, the HUD requirements or standards shall control so long as the loan secured by this Security Instrument is insured or held by HUD.

52. [Add state requirements for future advances, credit line or open end mortgages]

*ATTACHED EXHIBITS.* The following Exhibits are attached to this Security Instrument:

X Exhibit A Description of the Land (required).

Exhibit B Modifications to Security Instrument

IN WITNESS WHEREOF, Borrower has signed and delivered this Security Instrument or has caused this Security Instrument to be signed and delivered by its duly authorized representative, as a sealed instrument.

[Signatures and Acknowledgments]

**Exhibit A—[Description of the Land]**

A-1

**Exhibit B—Modifications to Security Instrument**

The following modifications are made to the text of the Security Instrument that precedes this Exhibit:

B-1

OMB No. (Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

**Multifamily/Health Care Facility Note—(Multistate)**

Project #

Project Name:

US \$ \_\_\_\_\_, \_\_\_\_\_

FOR VALUE RECEIVED, the undersigned ("Borrower") jointly and severally (if more than one) promises to pay to the order of \_\_\_\_\_, a \_\_\_\_\_, the principal sum of \_\_\_\_\_ Dollars (US \$ \_\_\_\_\_), with interest on the unpaid principal balance at the annual rate of \_\_\_\_\_ percent (\_\_\_\_\_%).

1. *Defined Terms.* As used in this Note, (a) the term "Lender" means the holder of this Note, and (b) the term "Indebtedness" means the principal of, interest on, or any other amounts due at any time under, this Note, the Security Instrument or any other Loan Document, including prepayment premiums, late charges, default interest, and advances to protect the security of the Security Instrument under Section

14 of the Security Instrument. "Event of Default" and other capitalized terms used but not defined in this Note shall have the meanings given to such terms in the Security Instrument. Key Principal shall have the meaning set forth in the attached Acknowledgment and Agreement of Key Principal to Personal Liability for Exceptions to Non-Recourse Liability.

2. *Address for Payment.* All payments due under this Note shall be payable at \_\_\_\_\_, or such other place as may be designated by written notice to Borrower from or on behalf of Lender.

3. *Payment of Principal and Interest.* Principal and interest shall be paid as follows:

(a) Unless disbursement of principal is made by Lender to Borrower on the first day of the month, interest for the period beginning on the date of disbursement and ending on and including the last day of the month in which such disbursement is made shall be payable simultaneously with the execution of this Note.

(b) Interest only at \_\_\_% per annum on such amount of principal as may be advanced from time to time, computed from the date of such advance, shall be payable monthly commencing on the first day of \_\_\_\_\_ [month following closing] and on the first day of each month thereafter up to and including the first day of \_\_\_\_\_ [month before first amortized payment]. Consecutive monthly installments of principal and interest, each in the amount of \_\_\_\_\_ Dollars (US \$ \_\_\_\_\_), shall be payable on the first day of each month beginning on \_\_\_\_\_, \_\_\_\_\_ until the entire unpaid principal balance evidenced by this Note is fully paid. Any remaining principal and interest shall be due and payable on \_\_\_\_\_ or on any earlier date on which the unpaid principal balance of this Note becomes due and payable, by acceleration or otherwise (the "Maturity Date").

(c) Any regularly scheduled monthly installment of principal and interest that is due shall be deemed to have been received on the due date solely for the purpose of calculating interest due.

4. *Security.* The Indebtedness is secured, among other things, by a multifamily or health care facility mortgage, deed to secure debt or deed of trust dated as of the date of this Note (the "Security Instrument"), and reference is made to the Security Instrument for other rights of Lender as to collateral for the Indebtedness.

5. *Application of Payments.* If at any time Lender receives, from Borrower or otherwise, any amount applicable to the

Indebtedness which is less than all amounts due and payable at such time, Lender shall apply that payment to amounts then due and payable in the manner and in the order set forth in Section 11 of the Security Instrument. Borrower agrees that neither Lender's acceptance of a payment from Borrower in an amount that is less than all amounts then due and payable nor Lender's application of such payment shall constitute or be deemed to constitute either a waiver of the unpaid amounts or an accord and satisfaction.

6. *Acceleration.* If a Class A Event of Default (as defined in the Security Instrument) has occurred and is continuing, the entire unpaid principal balance, any accrued interest, the prepayment premium payable under Section 9, if any, and all other amounts payable to Lender under this Note and any other Loan Document shall at once become due and payable, at the option of Lender, without any prior notice to Borrower. If a Class B Event of Default (as defined in the Security Instrument) occurs and the Indebtedness is accelerated as set forth in the Security Instrument, the entire unpaid principal balance, any accrued interest, the prepayment premium payable under Section 9, if any, and all other amounts payable to Lender under this Note and any other Loan Document shall at once become due and payable. Lender may exercise this option to accelerate regardless of any prior forbearance.

7. *Late Charge.* If any monthly amount payable under this Note or under the Security Instrument or any other Loan Document is not received by Lender within \_\_\_ days after the amount is due, Borrower shall pay to Lender, immediately and without demand by Lender, a late charge equal to \_\_\_ percent of such amount. Borrower acknowledges that its failure to make timely payments will cause Lender to incur additional expenses in servicing and processing the loan evidenced by this Note (the "Loan"), and that it is extremely difficult and impractical to determine those additional expenses. Borrower agrees that the late charge payable pursuant to this Section represents a fair and reasonable estimate, taking into account all circumstances existing on the date of this Note, of the additional expenses Lender will incur by reason of such late payment.

8. *Limits on Personal Liability.* (a) Except as otherwise provided in this Section 8, Section 6 of the Security Instrument, Section 19 of the Building Loan Agreement and in Section 46 of the Regulatory Agreement respectively between Borrower and HUD, Borrower and Principals shall have no personal

liability under this Note, the Security Instrument or any other Loan Document for the repayment of the Indebtedness or for the performance of any other obligations of Borrower under the Loan Documents, and Lender's only recourse for the satisfaction of the Indebtedness and the performance of such obligations shall be Lender's exercise of its rights and remedies with respect to the Mortgaged Property and any other collateral held by Lender as security for the Indebtedness.

(b) Borrower and Principals shall be personally liable to Lender for the repayment of a portion of the Indebtedness equal to any loss or damage suffered by Lender as a result of (1) failure of Borrower to pay to Lender upon demand after an Event of Default all Rents to which Lender is entitled under Section 3(a) of the Security Instrument and the amount of all security deposits collected from tenants then in residence; (2) failure of Borrower to apply all insurance proceeds and condemnation proceeds as required by the Security Instrument; or (3) failure of Borrower to comply with Section 16 of the Security Instrument relating to the delivery of books and records, statements, schedules and reports.

(c) Borrower and Principals shall be personally liable to Lender for the repayment of all of the Indebtedness upon the occurrence of any of the following Events of Default: (1) Borrower's acquisition of any property or operation of any business not permitted by Section 35 of the Security Instrument; (2) a transfer or the granting of a lien or encumbrance that is an Event of Default under Sections 18 and 23 of the Security Instrument, other than a transfer consisting solely of the involuntary removal or involuntary withdrawal of a general partner in a limited partnership or a manager in a limited liability company; or (3) fraud or written material misrepresentation by Borrower or any officer, director, partner, member or employee of Borrower in connection with the application for or creation of the Indebtedness or any request for any action or consent by Lender.

9. *Voluntary and Involuntary Prepayments.* (a) A prepayment premium shall be payable in connection with any prepayment made under this Note as provided below:

(1) Privilege is reserved to pay the debt in whole or part in an amount equal to one or more monthly payments on principal due, on the first [or last] day of any month prior to maturity upon at least thirty (30) days prior written notice to the holder. If this debt is paid

in full while insured under the provisions of the National Housing Act, as amended, all parties liable for payment thereof agree to be jointly and severally bound to pay to the holder hereof such adjusted mortgage insurance premium as may be required by the applicable Regulations. Notwithstanding any provision herein for prepayment charge, such charge shall be applicable only to the amount of prepayment in any one calendar year, which is in excess of fifteen per centum (15%) of the original principal sum of this Note. No default shall exist by reason of nonpayment of any required installment of principal so long as the amount of optional additional prepayments of principal already made pursuant to the privilege of prepayment set forth in this Note equals or exceeds the amount of such required installment of principal.

(2) Upon Lender's exercise of any right of acceleration under this Note, Borrower shall pay to Lender, in addition to the entire unpaid principal balance of this Note outstanding at the time of the acceleration, (i) all accrued interest and all other sums due Lender, and (ii) the prepayment premium calculated pursuant to (1) above.

(3) Any application by Lender of any collateral or other security to the repayment of any portion of the unpaid principal balance of this Note prior to the Maturity Date and in the absence of acceleration shall be deemed to be a partial prepayment by Borrower, requiring the payment to Lender by Borrower of a prepayment premium. The amount of any such partial prepayment shall be computed so as to provide to Lender a prepayment premium computed pursuant to Schedule A without Borrower having to pay out-of-pocket any additional amounts.

(b) Notwithstanding the provisions of subsection (a) above, no prepayment premium shall be payable with respect to (1) any prepayment made no more than \_\_ days before the Maturity Date, or (2) any prepayment occurring as a result of the application of any insurance proceeds or condemnation award under the Security Instrument.

(c) Any permitted or required prepayment of less than the unpaid principal balance of this Note shall not extend or postpone the due date of any subsequent monthly installments or change the amount of such installments, unless Lender agrees otherwise in writing.

(d) Borrower further acknowledges that the prepayment premium provisions of this Note are a material part of the consideration for the Loan,

and acknowledges that the terms of this Note are in other respects more favorable to Borrower as a result of the Borrower's voluntary agreement to the prepayment premium provisions.

10. *Costs and Expenses.* Borrower shall pay all expenses and costs, including fees and out-of-pocket expenses of attorneys and expert witnesses and costs of investigation and litigation (including appellate), incurred by Lender as a result of any default under this Note or in connection with efforts to collect any amount due under this Note, or to enforce the provisions of any of the other Loan Documents, including those incurred in post-judgment collection efforts and in any bankruptcy proceeding (including any action for relief from the automatic stay of any bankruptcy proceeding) or judicial or non-judicial foreclosure proceeding.

11. *Forbearance.* Any forbearance by Lender in exercising any right or remedy under this Note, the Security Instrument, or any other Loan Document or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of that or any other right or remedy. The acceptance by Lender of any payment after the due date of such payment, or in an amount which is less than the required payment, shall not be a waiver of Lender's right to require prompt payment when due of all other payments or to exercise any right or remedy with respect to any failure to make prompt payment. Enforcement by Lender of any security for Borrower's obligations under this Note shall not constitute an election by Lender of remedies so as to preclude the exercise of any other right or remedy available to Lender.

12. *Waivers.* Presentment, demand, notice of dishonor, protest, notice of acceleration, notice of intent to demand or accelerate payment or maturity, presentment for payment, notice of nonpayment, grace, and diligence in collecting the Indebtedness are waived by Borrower.

13. *Loan Charges.* If any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower in connection with the Loan is interpreted so that any interest or other charge provided for in any Loan Document, whether considered separately or together with other charges provided for in any other Loan Document, violates that law, and Borrower is entitled to the benefit of that law, that interest or charge is hereby reduced to the extent necessary to eliminate that violation. The amounts, if any, previously paid to

Lender in excess of the permitted amounts shall be applied by Lender to reduce the unpaid principal balance of this Note. For the purpose of determining whether any applicable law limiting the amount of interest or other charges permitted to be collected from Borrower has been violated, all Indebtedness that constitutes interest, as well as all other charges made in connection with the Indebtedness that constitute interest, shall be deemed to be allocated and spread ratably over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected in such a manner that the rate of interest so computed is uniform throughout the stated term of this Note.

14. *Commercial Purpose.* Borrower represents that the Indebtedness is being incurred by Borrower solely for the purpose of carrying on a business or commercial enterprise, and not for personal, family or household purposes.

15. *Counting of Days.* Except where otherwise specifically provided, any reference in this Note to a period of "days" means calendar days, not Business Days.

16. *Governing Law.* This Note shall be governed by the law of the Property Jurisdiction, except as such local law may be preempted by federal law.

17. *Captions.* The captions of the Sections of this Note are for convenience only and shall be disregarded in construing this Note.

18. *Notices.* All notices, demands and other communications required or permitted to be given by Lender to Borrower pursuant to this Note shall be given in accordance with Section 33 of the Security Instrument.

19. *Consent to Jurisdiction and Venue.* Borrower agrees that any controversy arising under or in relation to this Note shall be litigated exclusively in the Property Jurisdiction. The state and federal courts and authorities with jurisdiction in the Property Jurisdiction shall have exclusive jurisdiction over all controversies, which shall arise under or in relation to this Note. Borrower irrevocably consents to service, jurisdiction, and venue of such courts for any such litigation and waives any other venue to which it might be entitled by virtue of domicile, habitual residence or otherwise. In addition to any rights and remedies set forth in the Regulatory Agreement, HUD has rights and remedies under federal law, including but not limited to the right to foreclose pursuant to the Multifamily Mortgage Foreclosure Act of 1981, as amended, 12 U.S.C. § 3701 et seq. when HUD is the holder of the Note.

[INSERT THE FOLLOWING IF APPROPRIATE AND ANY OTHER APPROPRIATE PROVISIONS FOR THE JURISDICTION]

20. WAIVER OF TRIAL BY JURY. BORROWER AND LENDER EACH (a) AGREES NOT TO ELECT A TRIAL BY JURY WITH RESPECT TO ANY ISSUE ARISING OUT OF THIS NOTE OR THE RELATIONSHIP BETWEEN THE PARTIES AS LENDER AND BORROWER THAT IS TRIABLE OF RIGHT BY A JURY AND (b) WAIVES ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO SUCH ISSUE TO THE EXTENT THAT ANY SUCH RIGHT EXISTS NOW OR IN THE FUTURE. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPARATELY GIVEN BY EACH PARTY, KNOWINGLY AND VOLUNTARILY WITH THE BENEFIT OF COMPETENT LEGAL COUNSEL.

[IN THE EVENT THERE ARE MODIFICATIONS TO THE NOTE, INDICATE HERE THAT THERE IS AN ATTACHED RIDER CONTAINING SUCH MODIFICATIONS]

IN WITNESS WHEREOF, Borrower has signed and delivered this Note or has caused this Note to be signed and delivered by its duly authorized representative.

[SIGNATURES]

[Borrower name]

By: \_\_\_\_\_  
[Name & capacity of signatory]

Borrower's Social Security/Employer ID Number.

State [Commonwealth] of \_\_\_\_\_  
Deed of Trust [Mortgage] Note

To: \_\_\_\_\_  
[Borrower]

[Lender]  
Project No.: \_\_\_\_\_ - \_\_\_\_\_

Insured under § \_\_\_\_\_ of the National Housing Act as amended and Regulations published thereunder in effect on \_\_\_\_\_, 20\_\_\_\_. To the extent of advances approved by the Secretary of Housing and Urban Development acting by and through the Assistant Secretary for Housing-Federal Housing Commissioner.

By: \_\_\_\_\_  
[Title]

Date: \_\_\_\_\_, 20\_\_\_\_

A total sum of \$ \_\_\_\_\_ has been approved for insurance hereunder by the Secretary of Housing and Urban Development acting by and through the Assistant Secretary for Housing-Federal Housing Commissioner.

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

[Title]  
Date: \_\_\_\_\_, 20\_\_\_\_

**Acknowledgment and Agreement of Key Principal to Personal Liability for Exceptions to Non-Recourse Liability**

Key Principal, who has an economic interest in Borrower or who will otherwise obtain a material financial benefit from the Loan, hereby absolutely, unconditionally and irrevocably agrees to pay to Lender, or its assigns, on demand, all amounts for which Borrower is personally liable under Section 8 of the Multifamily Note to which this Acknowledgment is attached (the "Note"). The obligations of Key Principal shall survive any foreclosure proceeding, any foreclosure sale, any delivery of any deed in lieu of foreclosure, and any release of record of the Security Instrument. Lender may pursue its remedies against Key Principal without first exhausting its remedies against the Borrower or the Mortgaged Property. All capitalized terms used but not defined in this Acknowledgment shall have the meanings given to such terms in the Security Instrument. As used in this Acknowledgment, the term "Key Principal" (each if more than one) shall mean only those individuals or entities that execute this Acknowledgment.

The obligations of Key Principal shall be performed without demand by Lender and shall be unconditional irrespective of the genuineness, validity, or enforceability of the Note, or any other Loan Document, and without regard to any other circumstance, which might otherwise constitute a legal or equitable discharge of a surety or a guarantor. Key Principal hereby waives the benefit of all principles or provisions of law, which are or might be in conflict with the terms of this Acknowledgment, and agrees that Key Principal's obligations shall not be affected by any circumstances, which might otherwise constitute a legal or equitable discharge of a surety or a guarantor. Key Principal hereby waives the benefits of any right of discharge and all other rights under any and all statutes or other laws relating to guarantors or sureties, to the fullest extent permitted by law, diligence in collecting the Indebtedness, presentment, demand for payment, protest, all notices with respect to the Note including this Acknowledgment, which may be required by statute, rule of law or otherwise to preserve Lender's rights against Key Principal under this Acknowledgment, including notice of acceptance, notice of any amendment of the Loan Documents, notice of the

occurrence of any default or Event of Default, notice of intent to accelerate, notice of acceleration, notice of dishonor, notice of foreclosure, notice of protest, notice of the incurring by Borrower of any obligation or indebtedness and all rights to require Lender to (a) proceed against Borrower, (b) proceed against any general partner or manager of Borrower, (c) proceed against or exhaust any collateral held by Lender to secure the repayment of the Indebtedness, or (d) if Borrower is a partnership or limited liability company, pursue any other remedy it may have against Borrower, or any general partner or any member-manager or manager of Borrower.

At any time without notice to Key Principal, and without affecting the liability of Key Principal hereunder, (a) the time for payment of the principal of or interest on the Indebtedness may be extended or the Indebtedness may be renewed in whole or in part; (b) the time for Borrower's performance of or compliance with any covenant or agreement contained in the Note, or any other Loan Document, whether presently existing or hereinafter entered into, may be extended or such performance or compliance may be waived; (c) the maturity of the Indebtedness may be accelerated as provided in the Note or any other Loan Document; (d) the Note or any other Loan Document may be modified or amended by Lender and Borrower in any respect, including an increase in the principal amount; and (e) any security for the Indebtedness may be modified, exchanged, surrendered or otherwise dealt with or additional security may be pledged or mortgaged for the Indebtedness.

Key Principal acknowledges that Key Principal has received a copy of the Note and all other Loan Documents. Neither this Acknowledgment nor any of its provisions may be waived, modified, amended, discharged, or terminated except by an agreement in writing signed by the party against which the enforcement of the waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in that agreement. Key Principal agrees to notify Lender (in the manner for giving notices provided in Section 33 of the Security Instrument) of any change of Key Principal's address within 10 Business Days after such change of address occurs. Any notices to Key Principal shall be given in the manner provided in Section 33 of the Security Instrument. Key Principal agrees to be bound by Sections 19 and 20 of the Note.

IN WITNESS WHEREOF, Key Principal has signed and delivered this Acknowledgment under seal or has caused this Guaranty to be signed and delivered under seal by its duly authorized representative. Key Principal intends that this Acknowledgment shall be deemed to be signed and delivered as a sealed instrument.

KEY PRINCIPAL(S)

Name: \_\_\_\_\_
Address: \_\_\_\_\_
Social Security/Employer ID No.: \_\_\_\_\_
Name: \_\_\_\_\_
Address: \_\_\_\_\_
Social Security/Employer ID No.: \_\_\_\_\_
Name: \_\_\_\_\_
Address: \_\_\_\_\_
Social Security/Employer ID No.: \_\_\_\_\_
Name: \_\_\_\_\_
Address: \_\_\_\_\_
Social Security/Employer ID No.: \_\_\_\_\_

OMB Approval No. 0000-0000 (Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average .75 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Recording Requested by: \_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

After Recording return to: \_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

U.S. Department of Housing and Urban Development Regulatory Agreement for Multifamily Projects Under Sections 207, 220, 221(d)(3), 221(d)(4), 223(a)(7), 223(f) and 231 of the National Housing Act, as Amended

Replaces Form HUD-92465, 92466, FHA-1730, and 1733

HUD Project No.: \_\_\_\_\_

Elderly \_\_\_ Non-Elderly \_\_\_
Lender \_\_\_:
Processed under: \_\_\_ [ ]MAP
[ ]TAP
Original Principal Amount of Multifamily Note:
Date of Note:
Originally endorsed for insurance under Section .
Security Instrument Recorded:
State
County
Date
Book/Volume
Page
Instrument/Document Number
Borrower:
Profit-Motivated \_\_\_
Limited Dividend \_\_\_
Public Body \_\_\_
Non-Profit \_\_\_

(Failure to check the appropriate space shall not affect the enforceability or application of this Agreement.)

This Agreement is entered into this \_\_\_ day of \_\_\_, 20\_\_\_, between \_\_\_, a \_\_\_ organized and existing under the laws of \_\_\_, whose address is \_\_\_, its successors, heirs, and assigns (jointly and severally) (Borrower) and the Secretary of Housing and Urban Development, his or her successors, assigns or designates (HUD).

In consideration of, and in exchange for an action by HUD, HUD and the Borrower agree to the terms of this Agreement. The HUD action may be one of the following: the endorsement for insurance by HUD of the Note, the consent of HUD to the transfer of the Mortgaged Property, the sale and conveyance of the Mortgaged Property by HUD, or the consent of HUD for other actions related to the Borrower or to the Mortgaged Property.

Further, the Borrower and HUD execute this Agreement in order to comply with the requirements of the National Housing Act, any related legislation, regulations, and administrative requirements adopted by HUD. This Agreement shall continue during such period of time as HUD shall be the owner, holder, or insurer of the Note, or is obligated to protect rights of tenants of the Mortgaged Property.

Violation of this Agreement or of the regulations and Directives of HUD may subject the Borrower and related parties to adverse actions. Refer to Article VII below.

Agreements: The Borrower and HUD covenant and agree as follows:

I. Definitions

1. Definitions. The following terms, when used in this Agreement (including

when used in the above recitals), shall have the following meanings, whether capitalized or not and whether singular or plural, unless, in the context, an incongruity results:

a. "Affiliate" Persons and entities are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person or entity which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person or entity.

b. "Borrower" means all persons or entities identified as "Borrower" in the first paragraph of the Security Instrument, together with any successors and assignees. Borrower shall include any person or entity taking title to the Mortgaged Property whether or not such person or entity assumes the Note. Whenever the term "Borrower" is used herein, the same shall be deemed to include the Obligor of the debt secured by the Security Instrument and shall also be deemed to be the Mortgagor as defined by the National Housing Act, as amended, implementing regulations and Directives.

c. "Displaced Persons or Families" means a family or families, or a person, displaced from an urban renewal area, or as a result of government action, or as a result of a major disaster determined by the President pursuant to the Disaster Relief and Emergency Assistance Act.

d. "Directives (of HUD)" includes written guidance issued by HUD, at the time of origination and subsequently, relating to HUD's multifamily insurance programs under the National Housing Act, as amended, and any successive legislation. Directives include handbooks, guidebooks, Notices, Mortgage Letters and other written directives issued by HUD whether or not published in the **Federal Register**.

e. "Distribution" means any disbursement, conveyance or transfer of cash, any asset of the Borrower, or any portion of the Mortgaged Property, including the segregation of cash or assets for subsequent withdrawal as Surplus Cash, other than in payment of expenses that are determined by HUD to be reasonable and necessary.

f. "Elderly project or Elderly portion of project" means a Project or portion of

a Project which is designed for occupancy by persons, married or single, who are 62 years of age or older.

g. "Fixtures" means all property which is so attached to the Land or the Improvements as to constitute a fixture under applicable law, whether acquired now or in the future, including: machinery, equipment, engines, boilers, incinerators, installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring and conduits used in connection with radio, television, computers, security, fire prevention, or fire detection or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposals, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors; cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants; swimming pools; playground and exercise equipment and classroom furnishings and equipment.

h. "HUD" means the United States Department of Housing and Urban Development acting by and through the Secretary in the capacity as insurer or holder of the loan secured by the Security Instrument under the authority of the National Housing Act, as amended, the Department of Housing and Urban Development Act, as amended, or any other federal law or regulation pertaining to the loan (as evidenced by the Note) or the Mortgaged Property.

i. "Impositions" and "Imposition Deposits" are defined in the Security Instrument.

j. "Improvements" means the buildings, structures, and alterations now constructed or at any time in the future constructed or placed upon the Land, including any future replacements and additions.

k. "Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note or the Security Instrument, including prepayment premiums, late charges, default interest, and advances to protect the security as provided in the Security Instrument.

l. "Land" means the estate in realty described in Exhibit A.

m. "Leases" means all present and future leases, subleases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property (including proprietary leases, non-residential leases or occupancy agreements if Borrower is a cooperative housing corporation), and all modifications, extensions or renewals.

n. "Lender" means the entity identified as "Lender" in the first paragraph of the Security Instrument, or any subsequent holder of the Note, and whenever the term "Lender" is used herein, the same shall be deemed to include the Oblige, or the Trustee(s) and the Beneficiary of the Security Instrument and shall also be deemed to be the Mortgagee as defined by the National Housing Act, as amended, implementing regulations and Directives.

o. "Limited Dividend Borrower" means a limited dividend corporation or other limited dividend entity which is restricted by Federal or State law or by HUD as to rate of return and other aspects of its operation.

p. "Mortgaged Property" means all of the Borrower's present and future right, title and interest in and to all of the following:

- (1) The Land;
- (2) The Improvements;
- (3) The Fixtures;
- (4) The Personality;

(5) All current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefiting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated;

(6) All proceeds paid or to be paid by any insurer of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirement;

(7) All awards, payments and other compensation made or to be made by any municipal, State or Federal authority with respect to the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land, the Improvements, the Fixtures, the

Personalty or any other part of the Mortgaged Property under the power of eminent domain or otherwise and including any conveyance in lieu thereof;

(8) All contracts, options and other agreements for the sale of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations;

(9) All proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds;

(10) All Rents and Leases;

(11) All earnings, royalties, instruments, accounts, accounts receivable, supporting obligations, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the loan secured by the Security Instrument and, if Borrower is a cooperative housing corporation, maintenance charges or assessments payable by shareholders or residents;

(12) All Imposition Deposits;

(13) All refunds or rebates of Impositions by any municipal, State or Federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which the Security Instrument is dated);

(14) All tenant security deposits which have not been forfeited by any tenant under any Lease; and

(15) all names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property.

q. "Non-Profit Borrower" means a Borrower which is a corporation or association organized for purposes other than profit or gain for itself or persons identified therewith and which HUD finds is in no way controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom. Minimally, the entity may not make Distributions to any individual member or shareholder.

r. "Note" means the Multifamily/Health Care Facility Note described in the Security Instrument, including all schedules, riders, allonges and addenda, as such Multifamily/Health Care Facility Note may be amended from time to time.

s. "Personalty" means all furniture, furnishings, equipment, machinery, building materials, appliances, goods, supplies, tools, books, records (whether

in written or electronic form), computer equipment (hardware and software) and other tangible or electronically stored personal property (other than Fixtures) which are owned or leased by the Borrower now or in the future in connection with the ownership, management or operation of the Land or the Improvements or are located on the Land or in the Improvements, and any operating agreements relating to the Land or the Improvements, and any surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, choses in action and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land.

t. "Principals" are the following legal and natural persons having ownership interests in the Borrower: natural persons who are sole owners, joint venturers, joint tenants, tenants by the entirety, trustees or beneficiaries of trusts, and all general partners; in the case of limited partnerships, limited partners having a twenty-five (25%) percent or more interest in the partnership; in the case of public or private corporations or governmental entities, the president, vice president, secretary, treasurer, and all other executive officers who are directly responsible to the board of directors, or any equivalent governing body, as well as all directors and each stockholder having a ten (10%) percent or more interest in the corporation; in the case of a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP), all managing members or partners, all managers, and all members or partners with a ten (10%) percent or greater governance interest or a twenty-five (25%) percent or greater financial interest.

u. "Project" means the Mortgaged Property and all other assets of whatever nature or wherever located, used in, owned by or leased by the Borrower in conducting the business on the Mortgaged Property, which business is providing housing facilities and other related activities.

v. "Property Jurisdiction" is (are) the jurisdiction(s) in which the Land is located.

w. "Public Body Borrower" means a Federal instrumentality, a State or political subdivision thereof, or an instrumentality of a State or a political subdivision thereof, which certifies that it is not receiving financial assistance from the United States exclusively pursuant to the United States Housing

Act of 1937 (with the exception of projects assisted or to be assisted pursuant to Section 8 of such Act) and which is acceptable to HUD.

x. "Reasonable operating expenses" means an expense which arises from the everyday operation and maintenance of the Project and which primarily benefits the Project as opposed to the Borrower.

y. "Rents" means all rents (whether from residential or non-residential space), revenues, issues, profits, (including carrying charges, maintenance fees, and other cooperative revenues) and other income of the Land or the Improvements, including all revenues, gross receipts and all pledges, gifts, grants, bequests, contributions and endowments, parking fees, laundry and vending machine income and fees and charges for food and other services provided at the Mortgaged Property, whether now due, past due, or to become due, and deposits forfeited by tenants.

z. "Residual Receipts" is a term which applies to certain funds held by Non-Profit, Public Body and Limited Dividend Borrowers whose Notes are insured or held by HUD pursuant to Section 220, Section 221(d)(3) and 231 of the National Housing Act. Residual Receipts are calculated by determining an amount of Surplus Cash (defined below).

After the calculation of Surplus Cash, as described below, the Borrower may make any Distributions permitted by this Agreement, HUD regulations and Directives. "Residual Receipts" will be the restrictive cash held by Section 220, Section 221(d)(3) and 231 Non-Profit, Public Body, and Limited Dividend Borrowers remaining after any allowable Distributions. The use of these Residual Receipts is restricted under this Agreement.

aa. "Security Instrument" means the Multifamily/Health Care Mortgage, Deed of Trust Form HUD-94000, or other designation as appropriate by Property Jurisdiction, Assignment of Rents and Security Agreement, and any other security for the Indebtedness, and shall be deemed to be the mortgage as defined by the National Housing Act, as amended, implementing regulations and Directives.

bb. "Surplus Cash" means any cash plus amounts receivable on tenant subsidy payments (earned in the applicable fiscal period) remaining after:

(1) The payment of: (i) All sums immediately due or currently required to be paid under the terms of the Note, the Security Instrument and this Agreement due on the first day of the month following the end of the fiscal period; including without limitation, all

amounts required to be deposited in the Reserve for Replacement or other reserves as may be required by HUD; and (ii) all other obligations of the Project (accounts payable and accrued, unescrowed expenses) unless funds for payment are set aside or deferment of payment has been approved by HUD, and

(2) The segregation and recording of: (i) An amount equal to the aggregate of all special funds required to be maintained by the Borrower; (ii) the greater of the Borrower's total liability or the amount held by the Borrower for tenant security deposits; and (iii) all accounts and accrued items payable within thirty (30) days after the end of the fiscal period.

cc. "State" includes the several States and Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the Virgin Islands.

dd. "Taxes" means all taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including all assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any public authority or quasi-public authority, and which, if not paid, could become a lien on the Land or the Improvements.

## II. Construction

2. *Construction Funds.* The Borrower shall keep construction funds of the Mortgaged Property separate and apart from operating funds of the Mortgaged Property.

3. *Unpaid Obligations.* Upon final endorsement of the Note, Borrower shall have no unpaid obligations in connection with the purchase of the Mortgaged Property, the construction of the Mortgaged Property, or with respect to the Security Instrument insured by HUD except such unpaid obligations, as have the written approval of HUD as to terms, form and amount.

4. *Mortgagee's Certificate.* The Borrower shall be bound by the terms of the Mortgagee's Certificate insofar as it establishes or reflects obligations of the Borrower and the Borrower agrees that the fees and expenses enumerated in that Certificate have been fully paid or payment has been provided for in the Certificate and that all funds deposited with the Lender will be used for the purposes set forth in the Certificate.

5. *Construction Commencement.* The Borrower shall not commence, and has not commenced, construction of the Mortgaged Property prior to HUD endorsement of the Note, except that this Section 5 is not applicable if HUD

has given prior written approval to an early start of construction, or if this Project is an Insurance Upon Completion or a refinance.

6. *Drawings and Specifications.* The Mortgaged Property shall be constructed in accordance with the terms of the Construction Contract, if any, and with the "Drawings and Specifications."

7. *Required Permits.* The Borrower shall obtain all necessary building and other permits and the Mortgaged Property shall not be occupied by any tenant without the prior written approval of HUD and from all other legal authorities having jurisdiction of the Mortgaged Property.

8. *Outstanding Obligations.* The Borrower shall have no obligations as of the date of this Agreement except those approved by HUD and, except for those approved obligations, the Land has been paid for in full and is free from any liens or purchase money obligations.

9. *Accounting Requirements.* The Borrower shall submit an accounting to HUD for all receipts and disbursements during the period starting with the date of first occupancy of the Mortgaged Property and ending, at the option of the Borrower, either on (a) the last day of the month in which the Mortgaged Property is determined by HUD to be acceptably completed; or (b) sixty days from the date the Mortgaged Property is determined by HUD to be acceptably completed. The excess of project income over property disbursements, as determined by HUD, shall be treated as a recovery of construction cost.

## III. Financial Management

10. *Payments.* The Borrower shall make promptly all payments due under the Note and Security Instrument.

11. *Reserve for Replacement Fund.* The Borrower shall establish and maintain a Reserve for Replacement account for defraying certain costs for replacing major structural elements and mechanical equipment of the Project or for any other purpose.

a. The Reserve for Replacement shall be held by the Lender or by a safe and responsible depository designated by the Lender pursuant to the requirements of the contract for mortgage insurance. Such funds shall at all times remain under the control of the Lender, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America or in such other investments as may be allowed by HUD.

b. The Borrower shall deposit at endorsement of the Note an initial amount of \$\_\_\_\_\_, if applicable, and the Borrower shall deposit a monthly

amount of \$\_\_\_\_\_, concurrently with the beginning of payments towards amortization of the Note unless a different date or amount is established by HUD. At least every ten years, starting from the date of endorsement, and more frequently at HUD's discretion, the Borrower shall submit a written analysis of its use of the Reserve for Replacement during the prior ten years and the projected use of the Reserve for Replacement funds during the coming ten years to HUD. The amount of the monthly deposit may be increased or decreased from time to time at the written direction of HUD without a recorded amendment to this Agreement.

c. The Borrower shall carry the balance in this fund on the financial records as a restricted asset. The Reserve for Replacement shall be invested in interest bearing accounts or investments, and any interest earned on the investment shall be deposited in the Reserve for Replacement for use by the Project in accordance with this Section 11.

d. Disbursements from such fund shall only be made after consent, in writing, of HUD. In the event of a Declaration of Default under the terms of the Security Instrument, pursuant to which the Indebtedness has been accelerated, a written notification by HUD to the Borrower of a violation of this Agreement or at such other times as determined solely by HUD, HUD may direct the application of the balance in such fund to the amount due on the Indebtedness as accelerated or for such other purposes as may be determined solely by HUD.

e. Where the Project is already subject to a Security Instrument insured or held by HUD as of the date hereof and this Agreement is now being executed by the Borrower as of the date hereof, the Reserve for Replacement now to be established shall be equal to the amount due to be in such fund under existing Agreements or charter provisions, and payments hereunder shall begin with the first payment due on the Security Instrument after acquisition, unless some other method of establishing and maintaining the fund is approved in writing by HUD.

12. *Residual Receipts.* Section 221(d)(3) and 231 Non-Profit, Public Body, and Limited Dividend Borrowers shall establish and maintain, in addition to the Reserve for Replacement, a Residual Receipts Fund by depositing thereto, with the Lender, the Residual Receipts, as defined herein, within ninety (90) days after the end of the semiannual or annual fiscal period within which such receipts are realized.

Such fund shall be held by the Lender or by a safe and responsible depository designated by the Lender in an interest bearing account. The Residual Receipts shall be under the control of HUD, and shall be disbursed only on the direction of HUD, who shall have the power and authority to direct that the Residual Receipts, or any part thereof, be used for such purpose as it may determine.

13. *Project Property and Operation; Encumbrances.* (a) The Borrower shall deposit all Rents and other receipts of the Project and all Rents and other receipts of the Project in connection with the financing of the Project, including equity or capital contributions, in the name of the Project in a federally insured depository or depositories and in accordance with Directives. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for reasonable and necessary expenses of the Project or for distribution of Surplus Cash or as reimbursement of advances as permitted by Sections 15 and 16 below. Any person or entity receiving Mortgaged Property other than for payment of reasonable and necessary expenses or repairs or authorized Distributions of Surplus Cash shall immediately deliver such Mortgaged Property to the Project and failing so to do shall hold such Mortgaged Property in trust. (b) The Borrower, except for natural person Borrowers, shall not engage in any business or activity, including the operation of any other Project, or incur any liability or obligation not in connection with the Project, nor acquire an Affiliate. (c) The Borrower shall satisfy or obtain a release of any mechanic's lien, attachment, judgment lien, or any other lien which attaches to any real or personal property of the Project or is used in its operation.

14. *Security Deposits.* Any funds collected as security deposits shall be kept (a) separate and apart from all other funds of the Project; (b) in interest bearing trust accounts, to the extent required by State or local law, and (c) the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account. Security deposit account interest shall be paid on a pro rata basis to tenants or applied to sums due under their leases upon the termination of their tenancy in the Project. The use of tenant security deposits for Project operations is prohibited unless the tenant has forfeited the deposit. The Borrower acknowledges that the unauthorized use of tenant security deposits for Project operations may constitute an improper taking or theft,

and such acts may be prosecutable under criminal statutes.

15. *Distributions.* The Borrower shall not make, or receive and retain, nor allow any Affiliate to receive or retain any Distribution of assets or any income of any kind of the Project, except from Surplus Cash. Distributions are governed by the following conditions:

a. No Distribution shall be made from borrowed funds. Distributions shall not be taken prior to the completion of the Project. Distributions shall not be taken after HUD has given notice to the Borrower of a violation under this Agreement or a default has been declared under the Note or Security Instrument. Distributions shall not be taken when a Project is under a forbearance agreement.

b. No Distribution shall be made when either (i) necessary services (utilities, trash removal, security, lawn service or any other services which the Borrower is required to provide) have not been provided, which failure the Borrower should have known about in the exercise of due care; (ii) notices of physical repairs or deficiencies (including but not limited to building code violations) by other Federal, State or local governing bodies and/or by HUD have been issued and remain unresolved to the satisfaction of the issuing public body or (iii) the Borrower has been notified by HUD, the Lender or other Federal, State or local governing body that physical repairs and/or deficiencies exist and the Borrower has not corrected or cured the identified items to HUD's satisfaction. HUD may permit Distributions when there are minor or contested local code violations on a case-by-case basis.

c. Any Distribution of any funds of the Project, which the party receiving such funds is not entitled to retain hereunder, shall be returned to the Project account immediately.

d. All allowable Distributions shall be made only after the end of a semiannual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction. All such Distributions to Section 220 (if so regulated), Section 221(d)(3) and 231 Limited Distribution Borrowers in any one fiscal year shall be limited to 6 percent on the initial equity investment, as determined by HUD, or to such other amounts as may be specified in Directives and the right to such Distributions shall be cumulative. No Distributions may be taken in the case of Section 220 (if so regulated), Section 221(d)(3) and 231 Public Body or Nonprofit Borrowers unless permitted by regulation or Directives. Distributions must be taken out of all Project accounts by all other Borrowers

within the accounting period immediately following the computation of Surplus Cash and, if not taken within the identified period, these funds may only be used for reasonable and necessary Project operating expenses and repairs. The computation of Surplus Cash must be prepared at the end of the semiannual or annual fiscal period.

e. Equity or capital contributions shall not be reimbursed from project accounts without the prior written approval of HUD.

16. *Reimbursement of Advances.* Any advances made by the Borrower, on behalf of the Borrower, or for the Borrower must be deposited into the Project account. The Borrower or any entity which advances funds on behalf of the Borrower or for the Borrower for reasonable and necessary operating expenses or repairs may be reimbursed from Surplus Cash at the end of the annual or semiannual period. Such repayment is not considered a Distribution. Monthly reimbursement of the Borrower or any entity that advances funds on behalf of the Borrower or for the Borrower may be allowed with prior written approval by HUD.

17. *Identity of Interest.* If the Project's application for mortgage loan insurance was processed pursuant to HUD's Multifamily Accelerated Processing ("MAP") procedures, the Borrower's Principals shall not have an identity of interest, as defined by HUD in MAP Directives, between the Borrower and the Lender.

18. *Financial Accounting.* The Borrower shall keep the books and accounts of the operation of the Mortgaged Property in accordance with the requirements of Generally Accepted Accounting Principles (GAAP) and of HUD. The books and accounts must be complete, accurate and current at all times. Posting must be made at least monthly to the ledger accounts, and year-end adjusting entries must be posted promptly in accordance with sound accounting principles. Any undocumented Distribution or expense shall be an ineligible project expense, unless otherwise determined by HUD. Books, accounts and records shall be open and available for inspection by HUD, after reasonable prior notice, during normal office hours, at the Project or other mutually agreeable location.

19. *Books of Management Agents.* The books and records of management agents and Affiliates, as they pertain to the operations of the Project, shall be maintained in accordance with GAAP and shall be open and available to inspection by HUD, after reasonable prior notice, during normal office hours,

at the Project or other mutually agreeable location. Every contract executed on behalf of the Project with any management agent or Affiliate shall include the provision that the books and records of such entities shall be properly maintained and open to inspection during normal business hours by HUD at the Project or other mutually agreeable location.

20. *Annual Financial Audit.* Within ninety (90) days, or such longer or shorter period established in writing by HUD, following the end of each fiscal year, the Borrower shall furnish HUD and the Lender with a complete annual financial report based upon an examination of the books and records of the Borrower prepared in accordance with GAAP, audited in accordance with Generally Accepted Auditing Standards (GAAS) and Government Auditing Standards (GAS) and any additional requirements of HUD unless the report is waived in writing by HUD. If the Borrower fails to submit the annual financial report within ninety (90) days of said due date, HUD may thereafter hire a Certified Public Accountant to prepare the report at the expense of the Borrower. The report shall include a certification in content and form prescribed by HUD and certified by the Borrower. The report shall be prepared and certified by a Certified Public Accountant who is licensed or certified by a regulatory authority of a State or other political subdivision of the United States, which authority makes the Certified Public Accountant subject to regulations, disciplinary measures, or codes of ethics prescribed by law. The Certified Public Accountant must have no business relationship with the Borrower except for the performance of the audit and tax preparation unless HUD expressly authorizes other relationships. Auditing costs and tax preparation costs may be charged as an authorized expense to the Mortgaged Property only to the extent they are required of the Borrower itself by State law, the Internal Revenue Service (IRS), the Securities and Exchange Commission, or HUD. Neither IRS audit costs nor costs of tax preparation for the Borrower's partners, members, shareholders, or other persons receiving Distributions from the Borrower may be charged to the Mortgaged Property as a Project expense. Non-profit Borrowers are to follow audit requirements specified in OMB Circular A-133, as revised.

#### IV. Project Management

21. *Preservation, Management and Maintenance of The Mortgaged Property.* The Borrower (a) shall not

commit Waste under the Security Instrument nor permit impairment or deterioration of the Mortgaged Property, (b) shall not abandon the Mortgaged Property, (c) shall restore or repair promptly, in a good and workmanlike manner, any damaged part of the Mortgaged Property to the equivalent of its original condition, or such other condition as HUD may approve in writing, whether or not litigation or insurance proceeds or condemnation awards are available to cover any costs of such restoration or repair, and (d) shall keep the Mortgaged Property in decent, safe, sanitary condition and good repair, including the replacement of Personalty and Fixtures with items of equal or better function and quality. Obligations (a) through (d) of this Section 21 are absolute and unconditional and are not limited by any conditions precedent and are not contingent on the availability of financial assistance from HUD or on HUD's performance of any administrative or contractual obligations. The Mortgaged Property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers and instruments must also be maintained in reasonable condition for proper audit and subject to examination by HUD at the Project or other mutually agreeable location. In the event all or any of the buildings covered by the Security Instrument shall be destroyed or damaged by fire, by an exercise of the power of eminent domain, by failure of warranty, or other casualty, the money derived from any settlement, judgment, or insurance on the Mortgaged Property shall be applied in accordance with the terms of the Security Instrument or as otherwise may be directed in writing by HUD.

22. *Flood Hazards.* If the Improvements are located in a special flood hazard area, the Borrower shall maintain flood insurance covering the Improvements in an amount at least equal to its development or project cost (less estimated land cost) or to the maximum limit of coverage made available with respect to the particular type of property under the National Flood Insurance Act of 1968, as amended, or its successor legislation, whichever is less, provided that the amount of flood insurance need not exceed the outstanding principal balance of the Note, and flood insurance need not be maintained beyond the term of the Note.

23. *Management Agreement.* The Borrower shall execute a management agreement or other document outlining procedures for operating the Mortgaged

Property. Such agreement or document must be acceptable to HUD. The Borrower and the management agent shall submit and maintain a current Management Certification meeting standards established by HUD.

24. *Acceptability of Management of the Mortgaged Property.* The Borrower shall provide management of the Mortgaged Property in a manner deemed to be acceptable by HUD. At HUD's discretion, HUD may require replacement of the management or require the Borrower to conform the Project to HUD's overall management policies.

25. *Termination of Contracts.* Any management contract entered into by the Borrower or any other third-party vendor contract pertaining to the Mortgaged Property shall contain a provision that the contract shall be subject to termination without penalty and without cause upon written request by HUD and shall contain a provision which gives no more than a thirty day notice of termination. Upon such request, the Borrower shall immediately arrange to terminate the contract, and the Borrower shall also make arrangements satisfactory to HUD for continuing acceptable management of the Mortgaged Property effective as of the termination date of the contract.

26. *Contracts for Goods and Services.* The Borrower shall obtain contracts for goods, materials, supplies, and services (hereinafter referred to as "goods and services") at the lowest possible cost (including contracts for laundry services where laundry services are provided), considering quality, durability, and scope of work, and on terms most advantageous to the Mortgaged Property. Such expenses may not exceed amounts customarily paid in the vicinity of the Land for the goods and services received. Reasonable and necessary expenses do not include amounts paid for betterments or Improvements unless determined by HUD to be prudent and appropriate. When acquiring goods and services whose usual costs are expected to exceed the greater of \$10,000 or 5 percent of the gross annual revenue of the Mortgaged Property, the Borrower shall solicit written cost estimates to ensure that prices paid by the Borrower for goods and services, including the preparation of the annual audit, are competitive with prices paid in the area for goods and services of similar quality. All contracts, including but not limited to, contracts for goods and services purchased from individuals or companies affiliated with the Borrower or its management agent shall be at costs not in excess of those that would be

incurred in making arms-length purchases on the open market. The Borrower shall keep copies of all written contracts or other instruments which affect the Mortgaged Property, all or any of which may be subject to inspection and examination by HUD at the Project or other mutually agreeable location.

27. *Responsiveness to Inquiries.* At the request of HUD, the Borrower shall promptly furnish operating budgets and occupancy, accounting and other reports and give specific answers to questions upon which information is desired relative to income, assets, liabilities, contracts, operation, and conditions of the Mortgaged Property and the status of the Security Instrument.

28. *Tenant Organizations.* If the Project is subject to 24 CFR 245 Subpart B or any successor HUD regulation covering the rights of tenants to organize, the Borrower shall comply with this Section 28. The Borrower shall not (a) impede the reasonable efforts of resident tenant organizations to represent their members or the reasonable efforts of tenants to organize, or (b) unreasonably withhold the use of any community room or other available space appropriate for meetings which is part of the Mortgaged Property when requested by: (i) a resident tenant organization in connection with the representational purposes of the organization; or (ii) tenants seeking to organize or to consider collectively any matter pertaining to their living environment, which includes the terms and conditions of their tenancy as well as activities related to housing and community development. The Borrower may charge for the use of the Mortgaged Property any fees or costs approved by HUD as may normally be imposed for the use of such facilities or may waive any such fees or costs.

The intention of the signatories to this Agreement is that the tenants are third party beneficiaries of this Section 28, but not to other provisions of this Agreement, which are strictly between HUD and the Borrower, and do not create such third party rights. Further, the signatories intend that an aggrieved tenant may commence a civil action against the Borrower in a court of appropriate jurisdiction to enforce the provisions of this Section 28 or to obtain remedy for its breach, but that such third party beneficiary status is not intended to permit, nor shall it permit a suit against HUD under Section 28. The Borrower agrees that if sued by the tenants under this Section, it shall not have any right to join HUD, nor shall it seek to join HUD, to such suit.

29. *Compliance With Laws.* a. The Borrower shall comply with all applicable laws; ordinances; regulations; requirements of any governmental authority; lawful covenants and agreements (including the Security Instrument) recorded against the Mortgaged Property; the National Housing Act; regulations and Directives of HUD; including but not limited to those of the foregoing pertaining to: health and safety; construction of improvements on the Mortgaged Property; fair housing; civil rights; zoning and land use; leases; lead-based paint maintenance requirements of 24 CFR Part 35 and maintenance and disposition of tenant security deposits; and, with respect to all of the foregoing, all subsequent amendments, revisions, promulgations or enactments. The Borrower shall at all times maintain records sufficient to demonstrate compliance with the provisions of this Section 29. The Borrower shall take appropriate measures to prevent, and shall not engage in or knowingly permit, any illegal activities at the Mortgaged Property that could endanger tenants or visitors, result in damage to the Mortgaged Property, result in forfeiture of the Mortgaged Property, or otherwise impair the lien created by the Security Instrument or the Lender's interest in the Mortgaged Property. The Borrower represents and warrants to HUD that no portion of the Mortgaged Property has been or will be purchased with the proceeds of any illegal activity.

b. HUD shall be entitled to invoke any remedies available by law to redress any breach or to compel compliance by the Borrower with these requirements, including any remedies available hereunder.

## V. Admissions and Occupancy

30. *Dwelling Accommodations and Services.* If the Project is subject to regulation of rent by HUD, the Borrower shall make dwelling accommodations and services of the Project available to eligible tenants at charges not exceeding those established in accordance with a rental schedule approved in writing by HUD.

31. *Lease Term.* Residential accommodations shall not be rented for a period of less than thirty (30) days or for more than 3 years and shall not be used for transient or hotel purposes. Rental for transient or hotel purposes shall mean: (a) Rental for a period of less than 30 days or (b) any rental, if the occupants of the housing accommodations are provided customary hotel services such as room service for food and beverages, maid service, furnishings or laundering of

linens, and bellboy service. Residential units in projects with Security Instruments initially endorsed for insurance pursuant to Section 231 of the National Housing Act may be rented for a period of more than 3 years.

32. *Commercial (Non-Residential) Leases.* No portion of the Mortgaged Property shall be leased for any commercial purpose or use without receiving HUD's prior written approval as to terms, form and amount.

33. *Subleases.* All leases of residential units by the Borrower to tenants must prohibit tenants from entering into any subleases which do not run for at least thirty (30) days and must require that all subleases be approved in advance in writing by the Borrower. All leases of residential units by the Borrower to tenants must also prohibit assignment of the leasehold interest by the tenant without the prior written approval of the Borrower. Leases of residential units must prohibit the tenant from granting the right to occupy the premises for a period of less than thirty (30) days or from furnishing hotel services. Assignment and subleasing of units by other than the tenant thereof without the prior written approval of the Borrower shall be prohibited in the lease. Upon discovery of any unapproved assignment, sublease or occupancy, the Borrower shall immediately demand cancellation and/or vacation of the premises, as appropriate, and notify HUD thereof.

34. *Elderly Projects.* For Elderly projects or Elderly portions of projects, the Borrower shall restrict occupancy for elderly units to families where the head of household or spouse is 62 years or older. A single person 62 years of age or older shall constitute a family for the purposes of this Section 34.

35. *Section 231 Projects.* If the Security Instrument is originally endorsed for insurance under Section 231 of the National Housing Act, the Borrower in selecting tenants shall comply with all applicable HUD regulations and Directives.

36. *Families With Children.* The Borrower shall not, in selecting tenants, discriminate against any person or persons by reason of the fact that there are children (individuals who have not attained 18 years of age) in the family. For Elderly projects or Elderly portions of projects, the Borrower shall not discriminate against otherwise eligible applicants for admission to the elderly unit by reason of the fact that there are children in the family.

37. *Displaced Persons or Families.* If the Security Instrument is originally endorsed for insurance under Section 221 of the National Housing Act, the

Borrower, in selecting tenants, shall give to Displaced Persons or Families who are eligible applicants an absolute preference or priority of occupancy at initial occupancy and, on a continuing basis, such preferred applicants shall be given preference over non-preferred applicants in their placement on a waiting list to be maintained by the Borrower and through such further provisions agreed to in writing by the Borrower and HUD.

38. *Rents.* If the Project is subject to regulation of rent by HUD, HUD will at any time entertain a written request for a rent increase that is properly supported by substantiating evidence and HUD shall, within a reasonable time: (a) approve a rental schedule that is necessary to compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than income taxes) and operating and maintenance costs over which the Borrower has no effective control; or (b) deny the increase and state the reasons for its decision.

39. *Charges for Services and Facilities.* If the Project is subject to regulation of rent by HUD, the Borrower shall only charge to and receive from any tenant such amounts as have the prior written approval of HUD and are mutually agreed upon between the Borrower and the tenant for any facilities and/or services not included in the HUD approved rent schedule which may be furnished by, or on behalf of, the Borrower to such tenant upon request.

40. *Prohibition of Additional Fees.* The Borrower shall not charge any Project tenant or prospective Project tenant an admission fee, founders fee, continuing care retirement community fee, life-care fee or similar payment pursuant to any agreement to furnish Project accommodations or services to persons making such payments.

41. *Security Deposits.* The Borrower shall not require as a condition of occupancy or leasing of any unit in the Project, any consideration or deposit other than the prepayment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the lease terms.

#### **VI. Actions Requiring the Prior Written Approval of HUD**

42. The Borrower shall not without the prior written approval of HUD:

a. Convey, assign, transfer, pledge, hypothecate, encumber, or otherwise dispose of any of the Mortgaged Property or any interest therein, or permit such conveyance, assignment, transfer, pledging, hypothecation, or encumbrance or disposition, or take any

action which gives rights in another to establish or maintain a lien or encumbrance against the Mortgaged Property or any interest therein; provided, however, the Borrower may, and this provision shall not operate to require the Borrower to obtain prior written approval of HUD to, dispose of obsolete or deteriorated items of Fixtures or Personalty if the same are replaced with like items of same or greater quality or value and provided further, that this provision shall not operate to require the Borrower to obtain the prior written approval of HUD for (i) a conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under the Security Instrument, (ii) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code and (iii) an interest acquired by inheritance or by Court decree.

b. Enter into any contract, agreement or arrangement to borrow funds or finance any purchase or incur any liability, direct or contingent, other than for current, reasonable and necessary operating expenses and repairs.

c. Pay out any funds except from Surplus Cash, except for reasonable operating expenses and necessary repairs.

d. Pay any compensation, including wages or salaries, or incur any obligation to do so, to any officer, director, stockholder, trustee, beneficiary, partner, member, or Principal of the Borrower, or to any nominee thereof.

e. Enter into, change, or agree to the assignment of, any contract, agreement or arrangement for supervisory or managerial services or leases for operation of the Project in whole or in part.

f. Convey, assign, or transfer, or permit the conveyance, assignment or transfer of any interest in the Borrower, if the effect of that conveyance, assignment, or transfer is the creation or elimination of a Principal; nor convey, assign or transfer any right to receive the Rents of the Mortgaged Property; provided, however, that this provision shall not operate to require the Borrower to obtain the prior written approval of HUD for (i) a conveyance of any interest in the Borrower at a judicial or non-judicial foreclosure sale under the Security Instrument, (ii) any interest in the Borrower becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code and (iii) an interest in the Borrower acquired by inheritance or by Court decree.

g. Remodel, add to, construct, reconstruct or demolish any part of the Mortgaged Property or subtract from any Land, Fixtures, Improvements or Personalty of the Mortgaged Property.

h. Permit the use of the Mortgaged Property for any other purpose except the use for which it was originally intended, or permit commercial use greater than that originally approved by HUD.

i. Receive any endowment which is not pledged as security for its obligations to HUD or the Lender unless the endowment by its terms is restricted to a specific purpose or purposes which do not permit such a pledge.

j. Amend, revise or cancel any provision or portion of the organizational documents of the Borrower, except for amendments or revisions simply to effect changes in interest in the Borrower which are not governed by Section 42f.

k. Institute litigation seeking the recovery of a sum in excess of \$25,000, nor settle or compromise any action for specific performance, damages, or other equitable relief, in excess of \$25,000, nor dispose of or distribute the proceeds thereof.

l. Reimburse any party for payment of expenses or costs of the Project or for any purpose.

m. Receive any fee or payment of any kind from any managing agent, employee of the Project or of the managing agent, or other provider of goods or services of the Project.

#### **VII. Enforcement**

43. *Violation of Agreement.* The occurrence of any one or more of the following shall constitute a Violation under this Agreement:

a. Any failure by the Borrower to comply with any of the provisions of this Agreement;

b. Any fraud or material misrepresentation or material omission by the Borrower, any of its officers, directors, trustees, general partners, members, managers or managing agent in connection with (1) any financial statement, rent roll or other report or information provided to HUD during the term of this Agreement or (2) any request for HUD's consent to any proposed action, including a request for disbursement of funds from any restricted account for which HUD's prior written approval is required; and

c. The commencement of a forfeiture action or proceeding, whether civil or criminal, which, in HUD's reasonable judgment, could result in a forfeiture of the Mortgaged Property or otherwise materially impair HUD's interest in the Mortgaged Property.

44. *Declaration of Default.* At any time during the existence of a violation, HUD may give written notice of the violation to the Borrower, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice to HUD, be designated by the Borrower as its legal business address. If, after receiving written notice of a violation, that violation is not corrected to the satisfaction of HUD either within thirty (30) days after the date such notice is mailed, or within such shorter or longer time set forth in said notice, HUD may declare a default under this Agreement without further notice. Alternatively, in order to protect the health and safety of the tenants, HUD may declare a default at any time during the existence of a violation without providing prior written notice of the violation. Upon any declaration of default HUD may:

a. If HUD holds the Note, declare the whole of said Indebtedness immediately due and payable and then proceed with the foreclosure of the Security Instrument;

b. If said Note is not held by HUD, notify the holder of the Note of such default and require the holder to declare a default under the Note and Security Instrument, and the holder after receiving such notice and demand, shall declare the whole Indebtedness due and payable and thereupon proceed with foreclosure of the Security Instrument or assignment of the Note and Security Instrument to HUD as provided in HUD regulations and Directives. Upon assignment of the Note and Security Instrument to HUD, HUD may then proceed with the foreclosure of the Security Instrument;

c. Collect all Rents and charges in connection with the operation of the Project and use such collections to pay the Borrower's obligations under this Agreement and under the Note and Security Instrument and the necessary expenses of preserving and operating the Mortgaged Property;

d. Take possession of the Mortgaged Property, bring any action necessary to enforce any rights of the Borrower growing out of the Mortgaged Property's operation, and maintain the Mortgaged Property in decent, safe, sanitary condition and good repair;

e. Apply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violations of the Agreement, for the appointment of a receiver to take over and operate the Project in accordance with the terms of the Agreement, or for such other relief as may be appropriate,

since the injury to HUD arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain;

f. Collect reasonable attorney fees related to enforcing the Borrower's compliance with this Agreement, and

g. With respect to Violations related to felony criminal convictions or civil judgments concerning the operation or management of the Mortgaged Property, direct the Borrower to replace any general partner, limited liability company member or non-member manager, limited liability limited partnership member, officer or director of the Borrower corporation, trustee, beneficiary of a trust, joint venturer, joint tenant or tenant in common with a natural person or entity acceptable to HUD pursuant to HUD's Participation and Compliance regulations and Directives.

45. *Measure of Damages.* The damage to HUD as a result of the Borrower's breach of duties and obligations under this Agreement shall be, in the case of failure to maintain the Mortgaged Property as required by this Agreement, the cost of the repairs required to return the Project to decent, safe and sanitary condition and good repair. This contractual provision shall not abrogate or limit any other remedy or measure of damages available to HUD under any civil, criminal or common law.

46. *Nonrecourse Debt.* Except as provided in Section 8 of the Note and Section 6 of the Security Instrument, no person or entity is liable for payments due under the Note and Security Instrument, or for payments to the Reserve for Replacement or for matters not under their control, except, notwithstanding any provision of State law to the contrary, any person or entity is liable:

a. For funds or property of the Project coming into its possession which, by the provisions hereof, the person or entity is not entitled to retain;

b. For its own acts and deeds or acts and deeds of others which it has authorized in violation of the provisions hereof; and

c. As otherwise provided by law.

#### VIII. Miscellaneous

47. *Binding Effect.* This instrument shall bind, and the benefits shall inure to, the respective Borrower, its heirs, legal representative, executors, administrators, successors in office or interest, and assigns, and to HUD and HUD's successors, so long as the contract of mortgage insurance continues in effect, and during such further time as HUD shall be the Lender,

holder, coinsurer, or reinsurer of the Security Instrument, or obligated to reinsure the Security Instrument, or protect the tenants of the Project.

48. *Paramount Rights and Obligations.* The Borrower warrants that it has not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

49. *Severability.* The invalidity of any clause, part, or provision of this Agreement shall not affect the validity or the remaining portions thereof.

50. *Headings and Titles.* Any heading or title of a section, paragraph or part of this Agreement is intended for convenience only, and is not intended, and shall not be construed, to enlarge, restrict, limit or affect in any way the construction, meaning or application of the covenants or provisions thereunder or under any other heading or title.

51. *Present Assignment.* The Borrower irrevocably and unconditionally assigns, pledges, mortgages and transfers to HUD its rights to the Rents, charges, fees, carrying charges, Project accounts, security deposits, and other revenues and receipts of whatsoever sort which it may receive or be entitled to receive from the operation of the Mortgaged Property, subject to the assignment of Rents in the Security Instrument. Until a default is declared under this Agreement, revocable license is granted to the Borrower to collect and retain such Rents, charges, fees, carrying charges, Project accounts, security deposits, and other revenues and receipts, but upon a Declaration of Default under this Agreement or under the Security Instrument, this revocable license is automatically terminated.

52. *Notices.* Any notice or other communication given or made pursuant to this Agreement to the Borrower, if applicable, shall be made to the following addresses:

Borrower

The Borrower may, at any time, by written notice to HUD, designate a different address to which such communications shall thereafter be directed. Said notice, and any other written notice to HUD pursuant to this Agreement, shall be delivered to the HUD field office which has jurisdiction over the Project.

53. *Uniform Commercial Code Security Agreement.* This Regulatory Agreement is also a security agreement

under the Uniform Commercial Code for any of the Mortgaged Property which, under applicable law, may be subject to a security interest under the Uniform Commercial Code, whether acquired now or in the future, and all products and cash proceeds and non-cash proceeds thereof (collectively, "UCC Collateral"), and Borrower hereby grants to HUD a security interest in the UCC Collateral. Borrower shall execute and deliver to HUD (or the Lender acting on behalf of HUD), upon the request of HUD or the Lender, financing statements, continuation statements and amendments, in such form as HUD may require to perfect or continue the perfection of this security interest. Borrower shall pay all filing costs and all costs and expenses of any record searches for financing statements that HUD may require. Without the prior written consent of HUD, Borrower shall not create or permit to exist any other lien or security interest in any of the UCC Collateral except for the first lien and security interest in favor of the Lender. If an Event of Default has occurred and is continuing, HUD shall have the remedies of a secured party under the Uniform Commercial Code, in addition to all remedies provided by this Regulatory Agreement or existing under applicable law. In exercising any remedies, HUD may exercise its remedies against the UCC Collateral separately or together, and in any order, without in any way affecting the availability of HUD's other remedies. This Regulatory Agreement constitutes a financing statement with respect to any part of the Mortgaged Property which is or may become a Fixture.

**IX. Section 8 Housing Assistance Payments Contracts**

The following additional provisions are applicable to Projects for which the Borrower has entered into a Section 8 Housing Assistance Payments Contract:

54. *Definitions.* The following additional definitions are applicable to Projects for which the Borrower has entered into a Section 8 Housing Assistance Payments Contract:

a. "Section 8 units" refers to units assisted under Section 8 of the United States Housing Act of 1937, as amended, pursuant to a Housing Assistance Payments Contract. For purposes of this Agreement, Section 8 units include project-based Section 8 units, but does not include Section 8 certificates, vouchers or housing choice vouchers.

b. "Housing Assistance Payments Contract" refers to a written contract between the Borrower and HUD, or the Borrower and a Public Housing Agency, or the Borrower and a Housing Finance

Agency for the purpose of providing project-based housing assistance payments to the Borrower on behalf of eligible families under Section 8 of the United States Housing Act of 1937.

55. *Admission.* The criteria governing eligibility of tenants for admission to Section 8 units and the conditions of continued occupancy shall be in accordance with the Housing Assistance Payments Contract.

56. *Rents.* The maximum rent for each Section 8 unit is stated in the Housing Assistance Payments Contract and adjustments in such rents shall be made in accordance with the terms of the Housing Assistance Payments Contract.

57. *Contractual Obligations.* Nothing contained herein shall be construed to relieve the Borrower of any obligations under the Housing Assistance Payments Contract.

58. *Incorporation by Reference.* The terms of the Housing Assistance Payments Contract are incorporated by reference into this Agreement. In the case of a conflict between this Agreement and the Housing Assistance Payments Contract, the Housing Assistance Payments Contract shall be controlling.

59. *Violation of Housing Assistance Payments Contract.* A violation of the terms of the Housing Assistance Payments Contract may be construed to constitute a violation hereunder in the sole discretion of HUD.

60. *Expiration and Termination of the Housing Assistance Payments Contract.* In the event said Housing Assistance Payments Contract expires or terminates before the expiration or termination of this Agreement, the provisions of this Agreement that pertain to the Housing Assistance Payments Contract shall automatically terminate and shall no longer be effective as of the date of the expiration or termination of the Housing Assistance Payments Contract.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date first herein above written.

Borrower  
(insert name)

By: \_\_\_\_\_  
Authorized Agent  
Title

\_\_\_\_\_  
Principal  
Title

U.S. Department of Housing and Urban  
Development

By: \_\_\_\_\_  
Authorized Agent

Each signatory below hereby certifies that the statements and representations

contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

\_\_\_\_\_  
Name of Entity:

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

[Add Additional Lines if More Than Two Signatories]

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 12 U.S.C. 1715z-19, 1715z-4a and 1735f-15 and 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30.

Notice: This Document Must Have a Legal Description Attached and Be Executed With All Formalities Required for Recording a Deed to Real Estate (i.e., Notary/Acknowledgement, Seal, Witness or Other Appropriate Formalities).

OMB Approval No. 0000-0000  
(Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average .75 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Recording Requested by:  
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 After Recording return to:  
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**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT REGULATORY AGREEMENT FOR HEALTH CARE FACILITIES UNDER SECTION 232 OF THE NATIONAL HOUSING ACT, AS AMENDED**

Replaces HUD 92466, 92466-NHL, 2466-e,  
 HUD Project No.: \_\_\_\_\_  
 Lender:  
 Original Principal Amount of Multifamily/Health Care Facility Note: \_\_\_\_\_  
 Date of Note: \_\_\_\_\_  
 Security Instrument Recorded: \_\_\_\_\_  
 State \_\_\_\_\_  
 County \_\_\_\_\_  
 Date \_\_\_\_\_  
 Book/Volume \_\_\_\_\_  
 Page \_\_\_\_\_  
 Instrument/Document Number \_\_\_\_\_  
 Borrower:  
 Profit-Motivated \_\_\_\_\_  
 Limited Dividend \_\_\_\_\_  
 Public Body \_\_\_\_\_  
 Non-Profit \_\_\_\_\_

*Type of Facility:* The Borrower and Lessee, if applicable, shall suitably equip and operate the Project as a (check applicable provision.):

- Nursing Home
- Intermediate Care Facility
- Board and Care Facility  Assisted Living Facility
- Combination of above (Specify per commitment) \_\_\_\_\_

Processed under:  
 MAP  
 TAP  
 (Failure to check the appropriate spaces shall not affect the enforceability of this Agreement or its application to the appropriate type of Health Care Facility, as determined by reference to the HUD firm commitment for the Project.)

Indicate number of beds and/or units and deviation in such number from the Certificate of Need or other operating authority, if any: \_\_\_\_\_

This Agreement is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, between or among \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_, whose address is \_\_\_\_\_, its successors, heirs, and assigns (jointly and severally) (Borrower), \_\_\_\_\_, a \_\_\_\_\_ organized and existing under

the laws of \_\_\_\_\_, whose address is \_\_\_\_\_, its successors, heirs, and assigns (jointly and severally)[Lessee and/or Operator of a Health Care Facility, if applicable], and the Secretary of Housing and Urban Development, his or her successors, assigns or designees (HUD).

In consideration of, and in exchange for an action by HUD, HUD, the Borrower and the Lessee and/or Operator of a Health Care Facility, if applicable, agree to the terms of this Agreement. The HUD action may be one of the following: the endorsement for insurance by HUD of the Note, the consent of HUD to the transfer of the Mortgaged Property, the sale and conveyance of the Mortgaged Property by HUD, or the consent of HUD for other actions related to the Borrower and Lessee, and/or Operator or to the Mortgaged Property.

Further, the Borrower, HUD and the Lessee and/or Operator, if applicable, execute this Agreement in order to comply with the requirements of the National Housing Act, any related legislation, regulations, and administrative requirements adopted by HUD. This Agreement shall continue during such period of time as HUD shall be the owner, holder, or insurer of the Note, or is obligated to protect rights of residents of the Mortgaged Property.

Violation of this Agreement or of the regulations and Directives of HUD may subject the Borrower, {and the Lessee and/or Operator,} if applicable, and related parties to adverse actions. See Article VII below.

Agreements: The Borrower, HUD {and the Lessee and/or Operator} covenant and agree as follows:

**I. Definitions**

1. *Definitions.* The following terms, when used in this Agreement (including when used in the above recitals), shall have the following meanings, whether capitalized or not and whether singular or plural, unless, in the context, an incongruity results:

a. "Affiliate" Persons and entities are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person or entity which has the same or similar management, ownership, or principal employees as

the suspended, debarred, ineligible, or voluntarily excluded person or entity.

b. "Assisted Living Facility (ALF)" means a public facility, proprietary facility, or facility of a private non-profit corporation that is licensed and regulated by the State, municipality or other political subdivision where the Project is located. The Borrower must make available to the residents supportive services necessary to carry out activities of daily living, provide separate dwelling units for the residents and provide facilities appropriate for the provision of supportive services. Residency in an ALF is restricted to persons 62 years of age and older and having a need for assistance in three or more activities of daily living.

c. "Bed Authority" means any and all rights and documentation pertaining to the maximum number of beds allowed, including certificates of need (CoN) where issued, required by and granted or to be granted by the State of jurisdiction and its political subdivisions for operation of the project.

d. "Board and Care Home" means a proprietary residential facility or a residential facility owned by a private nonprofit corporation or association that provides room, board and continuous protective oversight and which facility is regulated by a State in accordance with Section 1616(e) of the Social Security Act.

e. "Borrower" means all persons or entities identified as "Borrower" in the first paragraph of the Security Instrument, together with any successors and assignees. Borrower shall include any person or entity taking title to the Mortgaged Property whether or not such person or entity assumes the Note. Whenever the term "Borrower" is used herein, the same shall be deemed to include the Obligor of the debt secured by the Security Instrument and shall also be deemed to be the Mortgagor as defined by the National Housing Act, as amended, implementing regulations and Directives.

f. "Directives (of HUD)" includes written guidance issued by HUD, at the time of origination and subsequently, relating to HUD's Health Care Facility insurance programs under the National Housing Act, as amended, and any successive legislation. Directives include handbooks, guidebooks, Notices, Mortgagee Letters and other written directives issued by HUD whether or not published in the **Federal Register**.

g. "Distribution" means any disbursement, conveyance or transfer of cash, any asset of the Borrower, or any portion of the Mortgaged Property, including the

segregation of cash or assets for subsequent withdrawal as Surplus Cash, other than in payment of expenses that are determined by HUD to be reasonable and necessary.

h. "Fixtures" means all property which is so attached to the Land or the Improvements as to constitute a fixture under applicable law, whether acquired now or in the future, including: machinery, equipment (including medical equipment and systems), engines, boilers, incinerators, installed building materials; systems and equipment for the purpose of supplying or distributing heating, cooling, electricity, gas, water, air, or light; antennas, cable, wiring and conduits used in connection with radio, television, computers, medical systems, security, fire prevention, or fire detection or otherwise used to carry electronic signals; telephone systems and equipment; elevators and related machinery and equipment; fire detection, prevention and extinguishing systems and apparatus; security and access control systems and apparatus; plumbing systems; water heaters, ranges, stoves, microwave ovens, refrigerators, dishwashers, garbage disposals, washers, dryers and other appliances; light fixtures, awnings, storm windows and storm doors; pictures, screens, blinds, shades, curtains and curtain rods; mirrors; cabinets, paneling, rugs and floor and wall coverings; fences, trees and plants.

i. "Governmental Approval" means any license, permit or certificate of need or other approval, necessary and required by the State or the municipality or other political subdivision in which the facility is located in order to operate the Project and to receive benefits under a provider agreement with Medicaid, Medicare or other assistance required by HUD's commitment to insure the Security Instrument.

j. "Health Care Facility" means, but is not limited to, a skilled nursing home facility, intermediate care facility, board and care home and assisted living facility and supplemental loans to finance improvements, additions and equipment to these Health Care Facilities as authorized under the National Housing Act or other applicable federal law.

k. "HUD" means the United States Department of Housing and Urban Development acting by and through the Secretary in the capacity as insurer or holder of the loan secured by the Security Instrument under the authority of the National Housing Act, as amended, the Department of Housing and Urban Development Act, as

amended, or any other federal law or regulation pertaining to the loan (as evidenced by the Note) or the Mortgaged Property.

l. "Intermediate Care Facility" means a proprietary facility or a facility of a private nonprofit corporation or association licensed or regulated by the State, municipality or political subdivision where the facility is located. The facility must provide for the accommodation of persons who, because of incapacitating infirmities, require minimum, but continuous care, and are not in need of continuous medical or nursing services. In addition the term Intermediate Care Facility may include such additional facilities as may be authorized by HUD for the nonresidential care of elderly individuals and others who are able to live independently, but who require care during the day.

m. "Impositions" and "Imposition Deposits" are defined in the Security Instrument.

n. "Improvements" means the buildings, structures, and alterations now constructed or at any time in the future constructed or placed upon the Land, including any future replacements and additions.

o. "Indebtedness" means the principal of, interest on, and all other amounts due at any time under the Note or the Security Instrument, including prepayment premiums, late charges, default interest, and advances to protect the security as provided in the Security Instrument.

p. "Land" means the estate in realty described in Exhibit A.

q. "Lease(s)" means all present and future leases, licenses, concessions or grants or other possessory interests now or hereafter in force, whether oral or written, covering or affecting the Mortgaged Property, or any portion of the Mortgaged Property (including proprietary leases and non-residential leases), and all modifications, extensions or renewals. In particular, Lease may also mean, but is not limited to, (1) the agreements between the Borrower/Lessor and the operator/Lessee of the facility by which the Lessee agrees to operate and manage the facility, and/or portion thereof; (2) any agreement between the Health Care Facility and a Lessee/provider of medical and related services proper and necessary for the care and treatment of persons who are acutely ill who require medical or health care customarily, or most effectively, provided for by Health Care Facilities; and (3) an 'Admission Agreement,' which is a resident's lease arrangement with a Nursing Home, Board and Care Home, or ALF.

r. "Lender" means the entity identified as "Lender" in the first paragraph of the Security Instrument, or any subsequent holder of the Note, and whenever the term "Lender" is used herein, the same shall be deemed to include the Obligee, or the Trustee(s) and the Beneficiary of the Security Instrument and shall also be deemed to be the Mortgagee as defined by the National Housing Act, as amended, implementing regulations and Directives.

s. "Lessee of a Health Care Facility", or "Lessee" means an entity which has a lease or other agreement with the Borrower to operate and manage a Health Care Facility to provide housing, medical and related services that are proper and necessary for the care and treatment of the residents.

t. "Limited Dividend Borrower" means a limited dividend corporation or other limited dividend entity which is restricted by Federal or State law or by HUD as to rate of return and other aspects of its operation.

u. "Mortgaged Property" means all of the Borrower's present and future right, title and interest in and to all of the following:

- (1) The Land;
- (2) The Improvements;
- (3) The Fixtures;
- (4) The Personality;
- (5) All current and future rights, including air rights, development rights, zoning rights and other similar rights or interests, easements, tenements, rights-of-way, strips and gores of land, streets, alleys, roads, sewer rights, waters, watercourses, and appurtenances related to or benefiting the Land or the Improvements, or both, and all rights-of-way, streets, alleys and roads which may have been or may in the future be vacated;

(6) All proceeds paid or to be paid by any insurer of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, whether or not Borrower obtained the insurance pursuant to Lender's requirement;

(7) All awards, payments and other compensation made or to be made by any municipal, State or Federal authority with respect to the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property, including any awards or settlements resulting from condemnation proceedings or the total or partial taking of the Land, the Improvements, the Fixtures, the Personality or any other part of the Mortgaged Property under the power of eminent domain or otherwise and

including any conveyance in lieu thereof;

(8) All contracts, options and other agreements for the sale of the Land, the Improvements, the Fixtures, the Personalty or any other part of the Mortgaged Property entered into by Borrower now or in the future, including cash or securities deposited to secure performance by parties of their obligations;

(9) All proceeds from the conversion, voluntary or involuntary, of any of the above into cash or liquidated claims, and the right to collect such proceeds;

(10) All Receivables and Leases;

(11) All earnings, royalties, instruments, accounts, accounts receivable, supporting obligations, issues and profits from the Land, the Improvements or any other part of the Mortgaged Property, and all undisbursed proceeds of the loan secured by the Security Instrument;

(12) All Imposition Deposits;

(13) All refunds or rebates of Impositions by any municipal, State or Federal authority or insurance company (other than refunds applicable to periods before the real property tax year in which the Security Instrument is dated);

(14) All names under or by which any of the above Mortgaged Property may be operated or known, and all trademarks, trade names, and goodwill relating to any of the Mortgaged Property; and

(15) Mortgaged Property also includes, but is not limited to, any and all licenses, Bed Authority, and/or Certificates of Need required to operate the facility and receive the benefits and reimbursements under a provider agreement with Medicaid, Medicare, any State or local program, health care insurers or other assistance providers relied upon by HUD to insure the Security Instrument, to the extent allowed by law and regardless of whether such rights and contracts are held by the Borrower, Lessee or an Operator. Mortgaged Property also includes all receipts, revenues, income and other moneys received by or on behalf of the Health Care Facility, including all accounts receivable, all contributions, donations, gifts, grants, bequests, all revenues derived from the operation of the Health Care Facility and all rights to receive the same, whether in the form of accounts receivable, contract rights, chattel paper, instruments or other rights whether now owned or held or later acquired by the Health Care Facility.

v. "Non-Profit Borrower" means a Borrower which is a corporation or association organized for purposes other than profit or gain for itself or persons

identified therewith and which HUD finds is in no way controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom. Minimally, the entity may not make Distributions to any individual member or shareholder.

w. "Note" means the Multifamily/Health Care Facility Note described in the Security Instrument, including all schedules, riders, allonges and addenda, as such Multifamily/Health Care Facility Note may be amended from time to time.

x. "Nursing Home" means a public facility, proprietary facility or a facility owned by a private nonprofit corporation or association licensed or regulated by the State, municipality or political subdivision where the facility is located, for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care but who require skilled nursing and related medical services which are prescribed by or under the direction of persons licensed by the laws of the State where the facility is located. In addition the term Nursing Home may include such additional facilities as may be authorized by HUD for the nonresidential care of elderly individuals and others who are able to live independently, but who require care during the day.

y. "Operator" means any party who operates or manages the Health Care Facility under a management agreement, operating agreement or similar contract with either the Borrower or Lessee.

z. "Personalty" means all furniture, furnishings, equipment, machinery, building materials, appliances, goods, supplies, tools, books, records (whether in written or electronic form), computer equipment (hardware and software) and other tangible or electronically stored personal property (other than Fixtures) which are owned or leased by the Borrower or the Lessee now or in the future in connection with the ownership, management or operation of the Land or the Improvements or are located on the Land or in the Improvements, and any operating agreements relating to the Land or the Improvements, and any surveys, plans and specifications and contracts for architectural, engineering and construction services relating to the Land or the Improvements, choses in action and all other intangible property and rights relating to the operation of, or used in connection with, the Land or the Improvements, including all governmental permits relating to any activities on the Land. Personalty also includes all tangible and intangible personal property used for health care

(such as major movable equipment and systems), accounts, licenses, bed authorities, certificates of need required to operate the project and to receive benefits and reimbursements under provider agreements with Medicaid, Medicare, State and local programs, payments from health care insurers and any other assistance providers ("Receivables"); all permits, instruments, rents, lease and contract rights, equipment leases relating to the use, operation, maintenance, repair and improvement of the Health Care Facility. Generally, intangibles shall also include all cash and cash escrow funds, such as but not limited to: sinking fund accounts, depreciation reserve fund accounts, mortgage reserve fund accounts, reserve for replacement accounts, bank accounts, residual receipt accounts, all contributions, donations, gifts, grants, bequests and endowment funds by donors and all other revenues and accounts receivable from whatever source paid or payable.

aa. "Principals" are the following legal and natural persons having ownership interests in the Borrower: natural persons who are sole owners, joint venturers, joint tenants, tenants by the entirety, trustees or beneficiaries of trusts, and all general partners; in the case of limited partnerships, limited partners having a twenty-five (25%) percent or more interest in the partnership; in the case of public or private corporations or governmental entities, the president, vice president, secretary, treasurer, and all other executive officers who are directly responsible to the board of directors, or any equivalent governing body, as well as all directors and each stockholder having a ten (10%) percent or more interest in the corporation; in the case of a Limited Liability Company (LLC) or a Limited Liability Partnership (LLP), all managing members or partners, all managers, and all members or partners with a ten (10%) percent or greater governance interest or a twenty-five (25%) percent or greater financial interest.

bb. "Project" means the Mortgaged Property and all other assets of whatever nature or wherever located, used in, owned by or leased by the Borrower or the Lessee in conducting the business on the Mortgaged Property, which business is providing health care facilities and other related activities.

cc. "Property Jurisdiction" is (are) the jurisdiction(s) in which the Land is located.

dd. "Project Revenue" means all income derived from private pay, benefits and reimbursements under provider agreements with Medicaid,

Medicare, State and local programs, payments from health care insurers and any other assistance providers, all rents, charges and fees received from leasing space on the Mortgaged Property, all contributions, donations, gifts, grants, bequests and endowment funds by donors and all other revenues received from any source paid or unpaid, including but not limited to all accounts receivable, undisbursed funds in Surplus Cash, Residual Receipts, escrow accounts and other assistance available for Project operation.

ee. "Public Body Borrower" means a Federal instrumentality, a State or political subdivision thereof, or an instrumentality of a State or a political subdivision thereof, which certifies that it is not receiving financial assistance from the United States exclusively pursuant to the United States Housing Act of 1937 (with the exception of projects assisted or to be assisted pursuant to Section 8 of such Act) and which is acceptable to HUD.

ff. "Reasonable operating expense" means an expense which arises from the everyday operation and maintenance of the Project and which primarily benefits the Project as opposed to the Borrower.

gg. "Receivables" means all receivables (whether from residential or non-residential space), revenues, issues, profits, and other income of the Land or the Improvements, including all revenues, gross receipts and receivables in connection with medical services and care, and all pledges, gifts, grants, bequests, contributions and endowments, parking fees, laundry and vending machine income and fees and charges for food, health care and other services provided at the Mortgaged Property, whether now due, past due, or to become due.

hh. "Residual Receipts" is a term that applies to certain funds held by Non-Profit, Public Body and Limited Dividend Mortgagors whose Notes are insured or held by HUD pursuant to Section 232 of the National Housing Act. Residual Receipts are calculated by determining an amount of Surplus Cash (defined below).

After the calculation of Surplus Cash, as described below, the Borrower may make any Distributions permitted by this Agreement, HUD regulations and Directives. "Residual Receipts" will be the restrictive cash held by Section 232 Non-Profit, Public Body, and Limited Dividend Mortgagors remaining after any allowable Distributions. The use of these Residual Receipts is restricted under this Agreement.

ii. "Security Instrument" means the Multifamily/Health Care Mortgage, Deed of Trust Form HUD-94000M, or other

designation as appropriate by Property Jurisdiction, Security Agreement, and any other security for the Indebtedness and shall be deemed to be the mortgage as defined by the National Housing Act, as amended, implementing regulations and Directives.

jj. "Sinking Fund Agreement" or "Depreciation Reserve Fund" means an agreement between the Borrower and Lessee, if applicable and the Lender, in which deposits are made into a separate depreciation reimbursement account to pay future principle payments on the Note, where Medicaid or other third-party reimbursement is on a depreciation plus interest basis.

kk. "Surplus Cash" means any cash plus amounts receivable (earned in the applicable fiscal period) remaining after:

(1) The payment of: (i) all sums immediately due or currently required to be paid under the terms of the Note, the Security Instrument and this Agreement due on the first day of the month following the end of the fiscal period; including without limitation, all amounts required to be deposited in the Reserve for Replacement, sinking fund or other reserves as may be required by HUD; and (ii) all other obligations of the Project (accounts payable and accrued, unescrowed expenses) unless funds for payment are set aside or deferment of payment has been approved by HUD, and

(2) The segregation and recording of: (i) an amount equal to the aggregate of all special funds required to be maintained by the Borrower; (ii) the greater of the Borrower's total liability or the amount held by the Borrower for tenant security deposits; and (iii) all accounts and accrued items payable within thirty (30) days after the end of the fiscal period.

ll. "State" includes the several States and Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the Virgin Islands.

mm. "Taxes" means all taxes, assessments, vault rentals and other charges, if any, general, special or otherwise, including all assessments for schools, public betterments and general or local improvements, which are levied, assessed or imposed by any public authority or quasi-public authority, and which, if not paid, could become a lien on the Land or the Improvements.

## II. Construction

2. *Construction Funds.* The Borrower shall keep construction funds of the Mortgaged Property separate and apart from operating funds of the Mortgaged Property.

3. *Unpaid Obligations.* Upon final endorsement of the Note, Borrower shall have no unpaid obligations in connection with the purchase of the Mortgaged Property, the construction of the Mortgaged Property, or with respect to the Security Instrument insured by HUD except such unpaid obligations, as have the written approval of HUD as to terms, form and amount.

4. *Mortgagee's Certificate.* The Borrower shall be bound by the terms of the Mortgagee's Certificate insofar as it establishes or reflects obligations of the Borrower and the Borrower agrees that the fees and expenses enumerated in that Certificate have been fully paid or payment has been provided for in the Certificate and that all funds deposited with the Lender will be used for the purposes set forth in the Certificate.

5. *Construction Commencement.* The Borrower shall not commence, and has not commenced, construction of the Mortgaged Property prior to HUD endorsement of the Note, except that this Section 5 is not applicable if HUD has given prior written approval to an early start of construction, or if this Project is an Insurance Upon Completion or a refinance.

6. *Drawings And Specifications.* The Mortgaged Property shall be constructed in accordance with the terms of the Construction Contract, if any, and with the "Drawings and Specifications."

7. *Required Permits.* The Borrower shall obtain all necessary building and other permits and the Mortgaged Property shall not be occupied or used by any resident or user without the prior written approval of HUD and from all other legal authorities having jurisdiction of the Mortgaged Property.

8. *Outstanding Obligations.* The Borrower shall have no obligations as of the date of this Agreement except those approved by HUD and, except for those approved obligations, the Land has been paid for in full and is free from any liens or purchase money obligations.

9. *Accounting Requirements.* The Borrower shall submit an accounting to HUD for all receipts and disbursements during the period starting with the date of first occupancy of the Mortgaged Property and ending, at the option of the Borrower, either on (a) the last day of the month in which the Mortgaged Property is determined by HUD to be acceptably completed; or (b) sixty days from the date the Mortgaged Property is determined by HUD to be acceptably completed. The excess of project income over property disbursements, as determined by HUD, shall be treated as a recovery of construction cost.

### III. Financial Management

10. *Payments.* The Borrower shall make promptly all payments due under the Note and Security Instrument and, if a lease of the Project is involved, in addition, Lessee shall make all payments required under the Lease consistent with the terms of the Lease.

11. *Reserve for Replacement Fund.* The Borrower shall establish and maintain a Reserve for Replacement account for defraying certain costs for replacing major structural elements and mechanical equipment of the Project or for any other purpose. The Reserve for Replacement shall be bifurcated, as set forth in the Commitment, to cover (1) the costs associated with the replacement of major moveable equipment and (2) the costs associated with major repairs to the physical structure of the Project. The use of a bifurcated fund will ensure that the monies in the Reserve for Replacement are sufficient to pay for the costs associated with not only the replacement of major moveable equipment but also for major repairs to the physical structure of the Project. Separate sub-accounts shall be maintained within the Reserve for Replacement and monies in these two accounts shall not be commingled. Lender shall ensure that amounts are withdrawn from a particular sub-account only for use consistent with that particular sub-account as approved by HUD.

a. The Reserve for Replacement shall be held by the Lender or by a safe and responsible depository designated by the Lender pursuant to the requirements of the contract of mortgage insurance. Such funds shall at all times remain under the control of the Lender, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America or in such other investments as may be allowed by HUD.

b. The Borrower shall deposit at endorsement of the Note, if applicable, (1) an initial amount of \$ \_\_\_\_ in the sub-account designated to cover the costs associated with the replacement of major moveable equipment, and (2) an initial amount of \$ \_\_\_\_ in the sub-account designated to cover the costs associated with major repairs to the physical structure of the Project; and the Borrower shall deposit (1) a monthly amount of \$ \_\_\_\_ to cover the costs associated with the replacement of major moveable equipment, and (2) a monthly amount of \$ \_\_\_\_ to cover the costs associated with major repairs to the physical structure of the Project,

concurrently with the beginning of payments towards amortization of the Note unless a different date or amount is established by HUD. At least every ten years, starting from the date of endorsement, and more frequently at HUD's discretion, the Borrower shall submit a written analysis of its use of the Reserve for Replacement during the prior ten years and the projected use of the Reserve for Replacement funds during the coming ten years to HUD. The amount of the monthly deposit may be increased or decreased from time to time at the written direction of HUD without a recorded amendment to this Agreement.

c. The Borrower shall carry the balance in this fund on the financial records as a restricted asset. The Reserve For Replacement shall be invested in interest bearing accounts or investments, and any interest earned on the investment shall be deposited in the Reserve for Replacement for use by the Project in accordance with this Section 11.

d. Disbursements from such fund shall only be made after consent, in writing, of HUD. In the event of a Declaration of Default under the terms of the Security Instrument, pursuant to which the Indebtedness has been accelerated, a written notification by HUD to the Borrower of a violation of this Agreement or at such other times as determined solely by HUD, HUD may direct the application of the balance in such fund to the amount due on the Indebtedness as accelerated or for such other purposes as may be determined solely by HUD.

e. Where the Project is already subject to a Security Instrument insured or held by HUD as of the date hereof and this Agreement is now being executed by the Borrower as of the date hereof, the Reserve for Replacement now to be established shall be equal to the amount due to be in such fund under existing Agreements or charter provisions, and payments hereunder shall begin with the first payment due on the Security Instrument after acquisition, unless some other method of establishing and maintaining the fund is approved in writing by HUD.

12. *Sinking Fund.* Where Medicaid or other third-party reimbursement is on a depreciation plus interest basis, the Borrower and Lessee, if applicable, shall make deposits to the Lender or a depository satisfactory to the Lender under the terms of a Sinking Fund Agreement. The Borrower and Lessee, if applicable, shall comply with the HUD requirements pertaining to the Sinking Fund Agreement as set forth in the Mortgagee's Certificate. Monies in the

Sinking Fund will be used to make payments of principal on the Note in later years to the extent that such principal payment exceeds the amount of depreciation reimbursement available for payment to principal at that time.

a. The Sinking Fund Agreement shall provide that in the event of a default under the Security Instrument pursuant to which the Note has been accelerated, HUD may apply or authorize the application of the balance of such fund to the amount due on the Note as accelerated.

b. The Borrower and Lessee, if applicable, shall prepare and file with the Lender by October 1 of each year, a depreciation schedule reviewed by the Borrower's Independent Public Accountant showing the total projected reimbursement for depreciation and amount payable for principal payments coming due in each fiscal year including the current fiscal year.

c. The Mortgagee's Certificate requires the Lender to prepare and file with the Borrower by January 1 of each year, a funding schedule reflecting the amount required to be deposited in the Sinking Fund Account in each project fiscal year, and the cumulative balance in the account at the end of each such project fiscal year. Sums shall be deposited monthly into the account within fifteen (15) days of the close of each month, and shall commence upon the earlier of the commencement of amortization, as established in the commitment issued by HUD, or the initial receipt by the Borrower and the Lessee, if applicable, of depreciation reimbursement from any third-party payer. Such fund must at all times be held by or under the control of the Lender, and must be invested in a manner that conforms to the same standards established by HUD for the investment of reserve for replacement funds.

d. In the event of any conflict or inconsistency between the Sinking Fund Agreement and the Security Instrument, Note, Regulatory Agreement, applicable regulations and Directives, the said Security Instrument, Note, Regulatory Agreement, regulations and Directives will control.

e. Nothing in this Agreement shall impair or prejudice any right that HUD may have with respect to the Sinking Fund, particularly relating to the duty of the Lender to hold such funds for and on behalf of the Borrower.

f. Any Lease must contain provisions consistent with these requirements and all Leases and Operating Agreements must be reviewed and approved in writing by HUD.

g. In the event of any financial default by the Borrower, HUD is authorized

hereby to direct the Lender to cure such default with monies from the Sinking Fund.

h. If the State changes the reimbursement system and the Project is negatively affected, HUD may authorize an amended amortization schedule with respect to contributions to the Sinking Fund.

13. *Residual Receipts.* Section 232 Non-Profit, Public Body, and Limited Dividend Mortgages shall establish and maintain, in addition to the Reserve for Replacement, a Residual Receipts Fund by depositing thereto, with the Lender, the Residual Receipts, as defined herein, within ninety (90) days after the end of the semiannual or annual fiscal period within which such receipts are realized. Such fund shall be held by the Lender or by a safe and responsible depository designated by the Lender in an interest bearing account. The Residual Receipts shall be under the control of HUD, and shall be disbursed only on the direction of HUD, who shall have the power and authority to direct that the Residual Receipts, or any part thereof, be used for such purpose as it may determine. Any Lease must contain payment provisions covering these deposits as part of the Lease payments.

14. *Project Property And Operation; Encumbrances.* (a) The Borrower shall deposit all receivables and other receipts of the Project and all receivables and other receipts of the Project in connection with the financing of the Project, including equity or capital contributions, in the name of the Project in a federally insured depository or depositories and in accordance with Directives. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for reasonable and necessary expenses of the Project or for distribution of Surplus Cash or as reimbursement of advances as permitted by Sections 15 and 16 below. Any person or entity receiving Mortgaged Property other than for payment of reasonable and necessary expenses or repairs or authorized Distributions of Surplus Cash shall immediately deliver such Mortgaged Property to the Project and failing so to do shall hold such Mortgaged Property in trust. (b) The Borrower, except for natural person Mortgages, shall not engage in any business or activity, including the operation of any other Project, or incur any liability or obligation not in connection with the Project, nor acquire or contract to enter into any affiliation with any party. (c) The Borrower shall satisfy or obtain a release of any mechanic's lien, attachment, judgment lien, or any other lien which attaches to any real or

personal property of the Project or is used in its operation. (d) Delinquent tax penalties shall not be charged to the Project.

15. *Distributions.* The Borrower shall not make, or receive and retain, nor allow any Affiliate to receive or retain any Distribution of assets or any income of any kind of the Project, except from Surplus Cash. Distributions are governed by the following conditions:

a. No Distribution shall be made from borrowed funds. Distributions shall not be taken prior to the completion of the Project. Distributions shall not be taken after HUD has given notice to the Borrower of a violation under this Agreement or a default has been declared under the Note or Security Instrument. Distributions shall not be taken when a Project is under a forbearance agreement.

b. No Distribution shall be made when either (i) necessary services (utilities, trash removal, security, lawn service or any other services which the Borrower is required to provide) have not been provided, which failure the Borrower should have known about in the exercise of due care; (ii) notices of physical repairs or deficiencies (including but not limited to building code violations) by other Federal, State or local governing bodies and/or by HUD have been issued and remain unresolved to the satisfaction of the issuing public body or (iii) the Borrower has been notified by HUD, the Lender or other Federal, State or local governing body that physical repairs and/or deficiencies exist and the Borrower has not corrected or cured the identified items to HUD's satisfaction. HUD may permit Distributions when there are minor or contested local code violations on a case-by-case basis.

c. Any Distribution of any funds of the Project, which the party receiving such funds is not entitled to retain hereunder, shall be returned to the Project account immediately.

d. All allowable Distributions shall be made only after the end of a semiannual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction. All such Distributions to Section 232 Limited Distribution Mortgages in any one fiscal year shall be limited to 6 percent on the initial equity investment, as determined by HUD, or to such other amounts as may be specified in Directives and the right to such Distributions shall be cumulative. No Distributions may be taken in the case of Section 232 Public Body or Nonprofit Mortgages unless permitted by regulation or Directives. Distributions must be taken out of all Project accounts by all other Borrowers

within the accounting period immediately following the computation of Surplus Cash and, if not taken within the identified period, these funds may only be used for reasonable and necessary Project operating expenses and repairs. The computation of Surplus Cash must be prepared at the end of the semiannual or annual fiscal period.

e. Equity or capital contributions shall not be reimbursed from project accounts without the prior written approval of HUD.

16. *Reimbursement of Advances.* Any advances made by the Borrower, on behalf of the Borrower, or for the Borrower must be deposited into the Project account. The Borrower or any entity which advances funds on behalf of the Borrower or for the Borrower for reasonable and necessary operating expenses or repairs may be reimbursed from Surplus Cash at the end of the annual or semiannual period. Such repayment is not considered a Distribution. Monthly reimbursement of the Borrower or any entity that advances funds on behalf of the Borrower or for the Borrower may be allowed with prior written approval by HUD.

17. *Financial Accounting.* The Borrower shall keep the books and accounts of the operation of the Mortgaged Property in accordance with the requirements of Generally Accepted Accounting Principles (GAAP) and of HUD. The books and accounts must be complete, accurate and current at all times. Posting must be made at least monthly to the ledger accounts, and year-end adjusting entries must be posted promptly in accordance with sound accounting principles. Any undocumented Distribution or expense shall be an ineligible project expense, unless otherwise determined by HUD. Books, accounts and records shall be open and available for inspection by HUD, after reasonable prior notice, during normal office hours, at the Project or other mutually agreeable location.

18. *Books of Management Agents.* The books and records of management agents, Lessees, Operators, managers and Affiliates, as they pertain to the operations of the Project, shall be maintained in accordance with GAAP and shall be open and available to inspection by HUD, after reasonable prior notice, during normal office hours, at the Project or other mutually agreeable location. Every contract executed on behalf of the Project with any of the aforesaid parties shall include the provision that the books and records of such entities shall be properly maintained and open to inspection during normal business hours by HUD

at the Project or other mutually agreeable location.

19. *Annual Financial Audit.* Within ninety (90) days, or such longer or shorter period established in writing by HUD, following the end of each fiscal year, the Borrower shall furnish HUD and the Lender with a complete annual financial report based upon an examination of the books and records of the Borrower prepared in accordance with GAAP, audited in accordance with Generally Accepted Auditing Standards (GAAS) and Government Auditing Standards (GAS) and any additional requirements of HUD unless the report is waived in writing by HUD. If the Borrower fails to submit the annual financial report within ninety (90) days of said due date, HUD may thereafter hire a Certified Public Accountant to prepare the report at the expense of the Borrower. The report shall include a certification in content and form prescribed by HUD and certified by the Borrower. The report shall be prepared and certified by a Certified Public Accountant who is licensed or certified by a regulatory authority of a State or other political subdivision of the United States, which authority makes the Certified Public Accountant subject to regulations, disciplinary measures, or codes of ethics prescribed by law. The Certified Public Accountant must have no business relationship with the Borrower except for the performance of the audit and tax preparation unless HUD expressly authorizes other relationships. Auditing costs and tax preparation costs may be charged as an authorized expense to the Mortgaged Property only to the extent they are required of the Borrower itself by State law, the Internal Revenue Service (IRS), the Securities and Exchange Commission, or HUD. Neither IRS audit costs nor costs of tax preparation for the Borrower's partners, members, shareholders, or other persons receiving Distributions from the Borrower may be charged to the Mortgaged Property as a Project expense. Non-profit Mortgagors are to follow audit requirements specified in OMB Circular A-133, as revised.

#### IV. Project Management

20. *Equipment.* The Borrower and Lessee, if applicable, shall, pursuant to HUD regulations, and State and local law, suitably equip the Project as a Nursing Home, Intermediate Care Facility, Board and Care Home and/or Assisted Living Facility, as designated in the commitment. The Borrower and Lessee, if applicable, shall perform all obligations of any chattel mortgage, conditional sale, lease or lease-purchase

agreement, or other type of financing arrangement designed to acquire equipment for the Project. Any plan for the acquisition of equipment (other than outright purchase) must be approved in writing by the Lender and HUD and shall contain appropriate provision(s) extending to the Lender and its successors or assigns, the option to assume such financing (or leasing) obligation of the Borrower upon default. Further, such financing (or leasing) arrangement shall require the vendor- lessor to furnish written notice of default to the Lender and HUD before exercising any rights or remedies otherwise available to the vendor-lessor. The Borrower shall execute and record a security agreement, chattel mortgage or other appropriate security arrangement (as determined by the Lender and HUD) in favor of the Lender covering the Borrower's interest in all equipment and other Personalty unique to a Health Care Facility except for such equipment and Personalty as HUD may exempt from such coverage, in writing. The security instrument for such Personalty shall provide that a default in the terms of the Note and Security Instrument upon the Land shall also constitute a default thereunder.

21. *Licensure.* Any necessary license, Bed Authority or other Governmental Approval required to operate the Project and to receive benefits under a provider agreement with Medicaid, Medicare or other assistance provider relied upon by HUD in insuring the Note, shall be maintained in full force by the Borrower, and the Borrower shall maintain such provider agreements, except where such licenses, Bed Authority, Governmental Approval or provider agreements are provided and maintained by Lessee or any other party under specific provisions of the Lease or any other agreement. The Lender and HUD shall be provided with the results of any and all licensing inspections. Any problems or violations of State or local requirements must immediately be brought to the attention of the Lender and HUD in writing. All parties hereto recognize and agree that all necessary licenses, Bed Authority and Governmental Approvals are tied to the Project and cannot be separated from the Project without the prior written approval of both the Lender and HUD.

22. *Bed Capacity.* Project bed capacity and Bed Authority shall not be reduced or expanded, nor shall the Borrower and the Lessee, if applicable, cause or allow such capacity or Bed Authority to be reduced or expanded, or converted to any use not originally authorized by HUD at endorsement of the Note for

mortgage insurance, without prior HUD approval.

23. *Mortgaged Property and Revenue.* The Mortgaged Property shall not be pledged, assigned, transferred, conveyed, sold or otherwise obligated without HUD's prior written approval regardless of any approval by the Lender. In addition, in the event HUD declares a default under terms of this Agreement or the Lender declares a default under the Security Instrument:

a. HUD may direct the Lender to take immediate possession and use of such Mortgaged Property upon HUD's Declaration of Default and notification of the Borrower or HUD may, with the approval of the Lender or after an assignment of the Security Instrument to HUD, take immediate possession and use of such Mortgaged Property and expend or dispose of such Mortgaged Property at the discretion of HUD. Such assignment shall be made without compensation from HUD or any other party, and shall include the following collateral:

i. Project Revenue, as that term is defined herein, and

ii. Government Approvals (as that term is defined herein) except as the jurisdiction may prohibit such assignment; and

b. These requirements also apply to any operating agreement, management agent contract, managing agreement or contract or Lease for operation of the Project.

24. *Prohibition of Additional Fees.* The Borrower shall not charge any Health Care Facility resident or prospective Health Care Facility resident an admission fee, founders fee, continuing care retirement community fee, life-care fee or similar payment pursuant to any agreement to furnish Project accommodations or services to persons making such payments.

25. *Notification.* The Borrower, and/or the Lessee, and/or the Operator, as applicable, shall immediately notify in writing the Lender and HUD of any suspension or termination of funding under a provider agreement with Medicaid, Medicare, or any other assistance from any source whatsoever within 7 days of Borrower's notification or knowledge of such suspension or termination. Likewise, Borrower and/or Lessee and/or Operator, as applicable, shall notify the Lender and HUD in writing of any violation of any State or federal requirement pertaining to the operation of the Health Care Facility. Further, Borrower, and/or Lessee, and/or Operator, as applicable, shall notify HUD of any suspension or revocation of the license or of any moratorium on admissions or of any State-imposed

delays in payment. In all cases full documentation must be furnished which includes all correspondence with such federal and State authorities.

26. *Preservation, Management and Maintenance of the Mortgaged Property.* The Borrower (a) shall not commit Waste under the Security Instrument nor permit impairment or deterioration of the Mortgaged Property, (b) shall not abandon the Mortgaged Property, (c) shall restore or repair promptly, in a good and workmanlike manner, any damaged part of the Mortgaged Property to the equivalent of its original condition, or such other condition as HUD may approve in writing, whether or not litigation or insurance proceeds or condemnation awards are available to cover any costs of such restoration or repair, and (d) shall keep the Mortgaged Property in decent, safe, sanitary condition and good repair, including the replacement of Personalty and Fixtures with items of equal or better function and quality. Obligations (a) through (d) of this Section 24 are absolute and unconditional and are not limited by any conditions precedent and are not contingent on the availability of financial assistance from HUD or on HUD's performance of any administrative or contractual obligations. The Mortgaged Property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers and instruments must also be maintained in reasonable condition for proper audit and subject to examination by HUD at the Project or other mutually agreeable location. Full documentation shall be maintained to demonstrate that residency of an ALF is restricted as set forth in the definition above. In the event all or any of the buildings covered by the Security Instrument shall be destroyed or damaged by fire, by an exercise of the power of eminent domain, by failure of warranty, or other casualty, the money derived from any settlement, judgment, or insurance on the Mortgaged Property shall be applied in accordance with the terms of the Security Instrument or as otherwise may be directed in writing by HUD.

27. *Flood Hazards.* If the Improvements are located in a special flood hazard area, the Borrower shall maintain flood insurance covering the Improvements in an amount at least equal to its development or project cost (less estimated land cost) or to the maximum limit of coverage made available with respect to the particular type of property under the National Flood Insurance Act of 1968, as amended, or its successor legislation, whichever is less, provided that the

amount of flood insurance need not exceed the outstanding principal balance of the Note, and flood insurance need not be maintained beyond the term of the Note.

28. *Management Agreement.* The Borrower and/or the Lessee, as applicable, may, with the prior written approval of HUD, execute a management contract, management agent agreement or operating agreement or other document outlining procedures for managing or operating the Mortgaged Property. Such agreement or document must be acceptable to HUD and approved in writing by HUD. The requirements of these provisions will be applicable to any party to a management contract or operating agreement or management agent or operator contract executed in connection with the Project. All Operators shall execute this instrument; however, failure to so execute shall in no way impair or prejudice the powers and rights of HUD with respect to the applicability and enforceability against such parties who fail to execute this instrument. Management agents normally will not be required to execute this instrument.

29. *Acceptability of Management or Operation of the Mortgaged Property.* The Borrower shall provide management or operation of the Mortgaged Property in a manner deemed to be acceptable by HUD. At HUD's discretion, HUD may require replacement of the management or operation or require the Borrower to conform the Project to HUD's overall management and/or operation policies.

30. *Termination of Contracts.* Any management contract, management agent agreement or operating agreement entered into by the Borrower, Lessee or any other third-party vendor contract pertaining to the Mortgaged Property shall contain a provision that the contract shall be subject to termination without penalty and without cause upon written request by HUD and shall contain a provision which gives no more than a thirty day notice of termination. Upon such request, the Borrower shall immediately arrange to terminate the contract, and the Borrower shall also make arrangements satisfactory to HUD for continuing acceptable management of the Mortgaged Property effective as of the termination date of the contract.

31. *Contracts for Goods and Services.* The Borrower and/or Lessee and/or Operator, as applicable, shall obtain contracts for goods, materials, supplies, and services (hereinafter referred to as "goods and services") at the lowest possible cost (including contracts for laundry services where laundry services

are provided), considering quality, durability, and scope of work, and on terms most advantageous to the Mortgaged Property. Such expenses may not exceed amounts customarily paid in the vicinity of the Land for the goods and services received. Reasonable and necessary expenses do not include amounts paid for betterments or Improvements unless determined by HUD to be prudent and appropriate. When acquiring goods and services whose usual costs are expected to exceed the greater of \$10,000 or 5 percent of the gross annual revenue of the Mortgaged Property, the Borrower and/or Lessee and/or Operator, as applicable, shall solicit written cost estimates to ensure that prices paid by the Borrower and/or Lessee and/or Operator, as applicable, for goods and services, including the preparation of the annual audit, are competitive with prices paid in the area for goods and services of similar quality. All contracts, including but not limited to, contracts for goods and services purchased from individuals or companies affiliated with the Borrower and/or Lessee and/or Operator, as applicable, shall be at costs not in excess of those that would be incurred in making arms-length purchases on the open market. The Borrower and/or Lessee and/or Operator, as applicable, shall keep copies of all written contracts or other instruments that affect the Mortgaged Property, all or any of which may be subject to inspection and examination by HUD at the Project or other mutually agreeable location.

32. *Commercial (Non-Residential) Leases.* No portion of the Mortgaged Property shall be leased for any commercial purpose or use without receiving HUD's review of all lease instruments and HUD's prior written approval.

33. *Responsiveness to Inquiries.* At the request of HUD, the Borrower and/or Lessee and/or Operator, as applicable, shall promptly furnish operating budgets and bed use occupancy, accounting and other reports and give specific answers to questions upon which information is desired relative to income, assets, liabilities, contracts, operation, and conditions of the Mortgaged Property and the status of the Security Instrument.

34. *Compliance With Laws.*

a. The Borrower and/or Lessee and/or Operator, as applicable, shall comply with all applicable: Laws; ordinances; regulations; requirements of any governmental authority; lawful covenants and agreements (including the Security Instrument) recorded

against the Mortgaged Property; the National Housing Act; regulations and Directives of HUD; including but not limited to those of the foregoing pertaining to: health and safety; maintenance of the requisite level of professional liability insurance as determined by HUD from time to time; construction of improvements on the Mortgaged Property; fair housing; civil rights; zoning and land use; leases; lead-based paint maintenance requirements of 24 CFR Part 35 and, with respect to all of the foregoing, all subsequent amendments, revisions, promulgations or enactments. The Borrower and/or Lessee and/or Operator, as applicable, shall at all times maintain records sufficient to demonstrate compliance with the provisions of this Section 34. The Borrower and/or Lessee and/or Operator, as applicable, shall take appropriate measures to prevent, and shall not engage in or knowingly permit, any illegal activities at the Mortgaged Property that could endanger the residents or visitors, result in damage to the Mortgaged Property, result in forfeiture of the Mortgaged Property, or otherwise impair the lien created by the Security Instrument or Lender's interest in the Mortgaged Property. The Borrower and/or Lessee and/or Operator, as applicable, represents and warrants to HUD that no portion of the Mortgaged Property has been or will be purchased with the proceeds of any illegal activity.

b. HUD and/or Lessee and/or Operator, as applicable, shall be entitled to invoke any remedies available by law to redress any breach or to compel compliance by the Borrower with these requirements, including any remedies available hereunder.

#### V. Lease of Health Care Facility

35. *Lease of Facility.* In cases where a Health Care Facility is leased to any entity (Lessee), the following additional requirements are applicable:

a. Wherever necessary in order to regulate both the Lessee and the Borrower in the same fashion as the Borrower is obligated where there is no lease, the Lessee and the Borrower are herein regulated where, by virtue of the lease, the Lessee holds rights, powers or authorities to act which are contemplated to be held by the Borrower in the absence of a lease. In instances where such powers are held by the Lessee, the term Borrower shall be read to also include Lessee herein. The intent is, and the construction of this subsection shall be, to obligate both the Lessee and the Borrower under this instrument to the extent of their rights,

powers or authorities to act under the Lease and to make any Lease consistent with the requirements of this instrument.

b. Within ninety (90) days, or such longer or shorter period established in writing by HUD, following the end of each fiscal year, the Lessee shall furnish HUD and the Borrower with a complete annual financial report based upon an examination of the books and records of the Lessee prepared in accordance with GAAP, audited in accordance with Generally Accepted Auditing Standards (GAAS) and Government Auditing Standard (GAS) and any additional requirements of HUD unless the report is waived in writing by HUD. If the Lessee fails to submit the annual financial report within ninety (90) days of said due date, the Borrower may thereafter hire a Certified Public Accountant to prepare the report at the expense of the Lessee or the Borrower. The report shall include a certification in content and form prescribed by HUD and certified by the Lessee. The report shall be prepared and certified by a Certified Public Accountant who is licensed or certified by a regulatory authority of a State or other political subdivision of the United States, which authority make the Certified Public Accountant subject to regulations, disciplinary measures, or codes of ethics prescribed by law. The Certified Public Accountant may have no business relationship with the Lessee except for the performance of the audit and tax preparation unless HUD expressly authorizes other relationships. Both for profit and non-profit Lessees are to follow audit requirements specified in the HUD Consolidated Audit Guide for Audits of HUD Programs prescribed by HUD.

c. The Lessee, any successors, assigns and subsequent Lessees must sign this Agreement; however, any failure to so sign or formally acknowledge this Agreement shall in no way be a bar to this Agreement being fully binding upon and enforceable against the Lessee, any successors, assigns and subsequent Lessees.

d. The lease and any and all extensions, modifications and renewals thereof, and all of the Lessee's rights and interest thereunder, are hereby subjected and subordinated to the Security Instrument securing the Note and to this Agreement between the Lessee of the Project and HUD, and, in the event of a conflict between the Lease and the Security Instrument, Note or Regulatory Agreement, the Security Instrument, Note or Regulatory Agreement shall control.

e. The Lessee shall be the sole user and/or operator of the improvements and equipment that is stipulated in the lease. The Lessee shall not be an Affiliate of, or have any other Identity of Interest (as defined by HUD) with, the Borrower, Lender or any other party to the Security Instrument transaction except with the prior written approval of HUD. Where there is an affiliation between the Borrower and the Lessee, the Lessee shall, at the time of cost certification, submit an audited operating statement in accordance with current requirements and instructions.

f. Any license, Bed Authority or other Governmental Approval required to operate the Project and to receive benefits under a provider agreement with Medicaid, Medicare or other assistance relied upon by HUD to insure the Security Instrument, and such provider agreements, shall be secured and maintained in full force by the Lessee, except to the extent to which the Borrower is specifically made responsible for such license, Bed Authority, Governmental Approval or provider agreements and their maintenance. See Section 25 above with respect to notification to Lender and HUD which shall be read in connection with this provision.

g. Consistent with, and in addition to, the requirements of Section 19, the Lessee shall, within sixty (60) days following the end of each fiscal year, furnish to the Borrower a complete annual audited financial report on the operation of the Health Care Facility, prepared in accordance with GAAP and based upon examinations of the books and records the Lessee has established and maintained for the operation of the facility. The Lessee acknowledges and understands that this annual audited financial report is a part of the consolidated report that the Borrower must submit to HUD. If the Lessee fails to provide the Borrower with the report, Lessee understands that the Borrower may retain a certified public accountant to prepare the report at the expense of the Lessee and Borrower, Lender or HUD may terminate the Lease for continued non-compliance.

h. As security to HUD for approving the lease, the Lessee shall assign to Borrower, the Lender or HUD, as directed by HUD, any Mortgaged Property in which the Lessee has any interest under the lease or otherwise all in accordance with and in addition to the requirements of Section 232. This includes (but is not limited to) major and minor moveables, the CoN, the license, any and all rights to receivables and other income, and other personalty

necessary to the continued operation and value of the Health Care Facility.

i. Lease payments to the Borrower shall be renegotiated within ninety (90) days of HUD's written request at a sufficiently higher amount to permit the Borrower to make all payments due under the Note, including escrow deposits for taxes, insurance, and special assessments; deposits to the Sinking Fund Account, if applicable; deposits to the reserve for replacement fund; and the Residual Receipts Fund, if applicable, and to perform maintenance required by terms of the Security Instrument and this Agreement for which the Lessee is not obligated to perform under terms of the Lease, if at the end of any the Borrower's annual operating period, where the payments under the Lease have not been sufficient for such purposes.

j. Payments under terms of the lease shall be made when due.

k. Any transfer or change in ownership of the Lessee entity exceeding twenty-five (25) percent financial or governance interest and any transfer or change of the management, operation or control of the Project shall have prior written HUD approval.

l. All payments to Borrower by the Lessee shall be made to HUD upon the Lender's Declaration of Default under the terms of the Security Instrument or upon a Declaration of Default by HUD under the terms of this Agreement and at HUD's written request.

m. The lease shall be canceled without penalty after 30 days from HUD's notification to Lessee and Borrower of any violation under this Agreement, if such violation is not corrected to HUD's satisfaction within such 30 day period.

n. A Lessee shall not sublease a Health Care Facility in its entirety under any circumstances, nor can Lessee sublease commercial space to any sublessee without prior written approval by HUD.

o. A nonprofit Borrower may only lease a Health Care Facility to a nonprofit Lessee and may only use a nonprofit Operator.

p. The CoN, license and receivables and any and all other Personalty shall not be transferred, pledged, hypothecated, mortgaged or securitized other than with respect to the securitization running to the Lender and HUD under the terms of the Security Instrument, the UCC Security Agreement and this instrument. The CoN, license and receivables and other Personalty necessary to the operation and value of the Project must remain tied to the Project and the HUD insured loan for the duration of HUD insurance

of the loan. Lessee grants Lender and HUD a power of attorney under the Lease and all related contractual documents to enforce this requirement in the event of default hereunder.

#### **VI. Actions Requiring the Prior Written Approval of HUD**

36. The Borrower, Lessee and/or Operator, if applicable, shall not without the prior written approval of HUD:

a. Convey, assign, transfer, pledge, hypothecate, encumber, or otherwise dispose of any of the Mortgaged Property or any interest therein, or permit such conveyance, assignment, transfer, pledging, hypothecation, or encumbrance or disposition, or take any action which gives rights in another to establish or maintain a lien or encumbrance against the Mortgaged Property or any interest therein; provided, however, the Borrower may, and this provision shall not operate to require the Borrower to obtain prior written approval of HUD to, dispose of obsolete or deteriorated items of Fixtures or Personalty if the same are replaced with like items of same or greater quality or value and provided further, that this provision shall not operate to require the Borrower to obtain the prior written approval of HUD for (i) a conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under the Security Instrument, (ii) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code and (iii) an interest acquired by inheritance or by Court decree.

b. Enter into any contract, agreement or arrangement to borrow funds, pledge receivables to obtain lines of credit, finance any purchase or incur any liability, direct or contingent, other than for current, reasonable and necessary operating expenses and repairs.

c. Pay out any funds except from Surplus Cash, except for reasonable operating expenses and necessary repairs.

d. Pay any compensation, including wages or salaries, or incur any obligation to do so, to any officer, director, stockholder, trustee, beneficiary, partner, member, or Principal, or to any nominee thereof.

e. Enter into, change, or agree to the assignment of, any contract, agreement or arrangement for supervisory or managerial services or leases for operation of the Project in whole or in part.

f. Convey, assign, or transfer, or permit the conveyance, assignment or transfer of any interest in the Borrower,

if the effect of that conveyance, assignment, or transfer is the creation or elimination of a Principal; nor convey, assign or transfer any right to receive the Receivables of the Mortgaged Property; provided, however, that this provision shall not operate to require the Borrower to obtain the prior written approval of HUD for (i) a conveyance of any interest in the Borrower at a judicial or non-judicial foreclosure sale under the Security Instrument, (ii) any interest in the Borrower becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code and (iii) an interest in the Borrower acquired by inheritance or by Court decree.

g. Remodel, add to, construct, reconstruct or demolish any part of the Mortgaged Property or subtract from any Land, Fixtures, Improvements or Personalty of the Mortgaged Property.

h. Permit the use of the Mortgaged Property for any other purpose except the use for which it was originally intended, or permit commercial use greater than that originally approved by HUD.

i. Receive any endowment which is not pledged as security for its obligations to HUD or the Lender unless the endowment by its terms is restricted to a specific purpose or purposes which do not permit such a pledge.

j. Amend, revise or cancel any provision or portion of the organizational documents of the Borrower, except for amendments or revisions simply to effect changes in interest in the Borrower which are not governed by Section 36.f.

k. Institute litigation seeking the recovery of a sum in excess of \$25,000, nor settle or compromise any action for specific performance, damages, or other equitable relief, in excess of \$25,000, nor dispose of or distribute the proceeds thereof.

l. Reimburse any party for payment of expenses or costs of the Project or for any purpose.

m. Receive any fee or payment of any kind from any managing agent, employee of the Project or of the managing agent, or other provider of goods or services of the Project.

#### **VII. Enforcement**

37. *Violation of Agreement.* The occurrence of any one or more of the following shall constitute a Violation under this Agreement:

a. Any failure by the Borrower to comply with any of the provisions of this Agreement;

b. Any fraud or material misrepresentation or material omission by the Borrower, any of its officers,

directors, trustees, general partners, members, managers or managing agent in connection with (1) any financial statement or other report or information provided to HUD during the term of this Agreement or (2) any request for HUD's consent to any proposed action, including a request for disbursement of funds from any restricted account for which HUD's prior written approval is required; and

c. The commencement of a forfeiture action or proceeding, whether civil or criminal, which, in HUD's reasonable judgment, could result in a forfeiture of the Mortgaged Property or otherwise materially impair HUD's interest in the Mortgaged Property.

38. *Declaration of Default.* At any time during the existence of a violation, HUD may give written notice of the violation to the Borrower, the Lessee and/or Operator, if applicable, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice to HUD, be designated by the Borrower as its legal business address. If, after receiving written notice of a violation, that Violation is not corrected to the satisfaction of HUD either within thirty (30) days after the date such notice is mailed, or within such shorter or longer period of time set forth in said notice, HUD may declare a default under this Agreement without further notice. Upon such Declaration of Default, HUD may:

a. If HUD holds the Note, declare the whole of said Indebtedness immediately due and payable and then proceed with the foreclosure of the Security Instrument;

b. If said Note is not held by HUD, notify the holder of the Note of such default and require the holder to declare a default under the Note and Security Instrument, and the holder after receiving such notice and demand, shall declare the whole Indebtedness due and payable and thereupon proceed with foreclosure of the Security Instrument or assignment of the Note and Security Instrument to HUD as provided in HUD regulations and Directives. Upon assignment of the Note and Security Instrument to HUD, HUD may then proceed with the foreclosure of the Security Instrument;

c. Collect all Receivables and charges in connection with the operation of the Project and use such collections to pay the Borrower's obligations under this Agreement and under the Note and Security Instrument and the necessary expenses of preserving and operating the Mortgaged Property;

d. Take possession of the Mortgaged Property, bring any action necessary to enforce any rights of the Borrower growing out of the Mortgaged Property's operation, and maintain the Mortgaged Property in decent, safe, sanitary condition and good repair;

e. Apply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violations of the Agreement, for the appointment of a receiver to take over and operate the Project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to HUD arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain;

f. Collect reasonable attorney fees related to enforcing the Borrower's compliance with this Agreement, and

g. With respect to Violations related to felony criminal convictions or civil judgments concerning the operation or management of the Mortgaged Property, direct the Borrower to replace any general partner, limited liability company member or non-member manager, limited liability limited partnership member, officer or director of the Borrower corporation, trustee, beneficiary of a trust, joint venturer, joint tenant or tenant in common with a natural person or entity acceptable to HUD pursuant to HUD's Participation and Compliance regulations and Directives.

39. *Measure of Damages.* The damage to HUD as a result of the Borrower's breach of duties and obligations under this Agreement shall be, in the case of failure to maintain the Mortgaged Property as required by this Agreement, the cost of the repairs required to return the Project to decent, safe and sanitary condition and good repair. This contractual provision shall not abrogate or limit any other remedy or measure of damages available to HUD under any civil, criminal or common law.

40. *Nonrecourse Debt.* Except as provided in Section 8 of the Note and Section 6 of the Security Instrument, no person or entity is liable for payments due under the Note and Security Instrument, or for payments to the Reserve for Replacement or for matters not under their control, except, notwithstanding any provision of State law to the contrary, any person or entity is liable:

a. For funds or property of the Project coming into its possession which, by the provisions hereof, the person or entity is not entitled to retain;

b. For its own acts and deeds or acts and deeds of others which it has

authorized in violation of the provisions hereof; and

c. As otherwise provided by law.

#### VIII. Miscellaneous

41. *Binding Effect.* This instrument shall bind, and the benefits shall inure to, the respective Borrower and/or Lessee, if applicable, its heirs, legal representative, executors, administrators, successors in office or interest, and assigns, and to HUD and HUD's successors, so long as the contract of mortgage insurance continues in effect, and during such further time as HUD shall be the Lender, holder, coinsurer, or reinsurer of the Security Instrument, or obligated to reinsure the Security Instrument, or protect the residents of the Project.

42. *Paramount Rights and Obligations.* The Borrower and the Lessee and/or Operator, if applicable warrant(s) that it (they) has (have) not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

43. *Severability.* The invalidity of any clause, part, or provision of this Agreement shall not affect the validity or the remaining portions thereof.

44. *Headings and Titles.* Any heading or title of a section, paragraph or part of this Agreement is intended for convenience only, and is not intended, and shall not be construed, to enlarge, restrict, limit or affect in any way the construction, meaning or application of the covenants or provisions thereunder or under any other heading or title.

45. *Present Assignment.* The Borrower and/or Lessee, if applicable irrevocably and unconditionally assigns, pledges, mortgages and transfers to HUD its rights to the Receivables, charges, fees, carrying charges, Project accounts and other revenues and receipts of whatsoever sort which it may receive or be entitled to receive from the operation of the Mortgaged Property. Until a default is declared under this Agreement, revocable license is granted to the Borrower and Lessee, if applicable to collect and retain such Receivables, charges, fees, carrying charges, Project accounts and other revenues and receipts, but upon a Declaration of Default under this Agreement or under the Security Instrument, this revocable license is automatically terminated.

46. *Notices.* Any notice or other communication given or made pursuant

to this Agreement to the Borrower, Lessee, or Operator, if applicable, shall be made to the following addresses:

Borrower:
Lessee (if applicable):
Operator (if applicable):

The Borrower or Lessee may, at any time, by written notice to HUD, designate a different address to which such communications shall thereafter be directed. Said notice, and any other written notice to HUD pursuant to this Agreement, shall be delivered to the HUD field office which has jurisdiction over the Project.

47. Uniform Commercial Code Security Agreement. This Regulatory Agreement is also a security agreement under the Uniform Commercial Code for any of the Mortgaged Property (including all Personalty) which, under applicable law, may be subject to a security interest under the Uniform Commercial Code, whether acquired now or in the future, and all products and cash proceeds and non-cash proceeds thereof (collectively, "UCC Collateral"), and Borrower hereby grants to HUD a security interest in the UCC Collateral. Borrower, and Lessee (if applicable) shall execute and deliver to HUD (or the Lender acting on behalf of HUD), upon the request of HUD or the Lender, financing statements, continuation statements and amendments, in such form as HUD may require to perfect or continue the perfection of this security interest. Borrower and/or Lessee shall pay all filing costs and all costs and expenses of any record searches for financing statements that HUD may require. Without the prior written consent of HUD, Borrower and/or Lessee shall not create or permit to exist any other lien or security interest in any of the UCC Collateral except for the first lien and security interest in favor of the Lender and HUD. If an Event of Default has occurred and is continuing, HUD shall have the remedies of a secured party under the Uniform Commercial Code, in addition to all remedies provided by this Regulatory Agreement or existing under applicable law. In exercising any remedies, HUD may exercise its remedies against the UCC Collateral separately or together, and in any order, without in any way affecting the availability of HUD's other remedies. This Regulatory Agreement constitutes a financing statement with respect to any part of the Mortgaged Property which is or may become a Fixture.

48. Identity of Interest. If the Project's application for mortgage loan insurance was processed pursuant to HUD's Multifamily Accelerated Processing

("MAP") procedures, the Borrower's Principals shall not have an identity of interest, as defined by HUD in MAP Directives, between the Borrower and the Lender.

49. Applicability. Notwithstanding any other provision in this Agreement, depending on the type of facility, there may be specific rental housing provisions (some of which may be found in the Regulatory Agreement for Multifamily Projects) that are applicable to either an Assisted Living Facility or a Board and Care Home. Additionally, other State-imposed laws may be required where the State mandates further regulation over admission, occupancy or any other aspect of the facility. In the event such HUD and/or State mandated provisions need to be added hereto, such provisions shall be placed in an Article IX which shall be headed, "Assisted Living Facility," or "Board and Care Home," as appropriate.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date first herein above written.

Borrower
(insert name)
By:
Name and title

Principal
Name and title

Principal
Name and Title

Lessee
By
Authorized Agent
Name and Title

U.S. Department of Housing and Urban Development

By
Authorized Agent
Each signatory hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.
Name of Entity:

By: /s/
Printed Name, Title:
Dated:
By: /s/

Printed Name, Title:
Dated:

[Add Additional Lines if More Than Two Signatories]

Warning

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

NOTICE: THIS DOCUMENT MUST HAVE A LEGAL DESCRIPTION ATTACHED AND BE EXECUTED WITH ALL FORMALITIES REQUIRED FOR RECORDING A DEED TO REAL ESTATE (i.e., NOTARY/ ACKNOWLEDGEMENT, SEAL, WITNESS OR OTHER APPROPRIATE FORMALITIES).

Mortgagee's Certificate

U.S. Department of Housing and Urban Development

Office of Housing

(Execute Original plus two copies)

OMB Approval No. (Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.75 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (OMB Approval No.), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name:
Project Number:
Lender:
Borrower:
[ ] Multifamily Accelerated Processing (MAP)
[ ] Traditional Application Processing (TAP)

**To the U.S. Department of Housing and Urban Development (HUD):****General**

1. The entity executing this Certificate is the Lender under that certain Security Instrument, \_\_\_\_\_, (the Mortgage) dated \_\_\_\_\_, 20\_\_\_\_, executed by \_\_\_\_\_, the Borrower, securing a Note evidencing a loan by the Lender to the Borrower in the principal sum of \$\_\_\_\_\_ which the Lender has agreed to make on condition that it be insured by HUD pursuant to the Contract of Insurance comprised of Section \_\_\_\_ of the National Housing Act and its implementing regulations. The Lender understands that the Mortgage, the Note, this Certificate, and any documents submitted with this Certificate are considered to be consistent with and shall be interpreted consistently with HUD's regulations as they pertain to the Contract of Insurance. The Lender agrees to be bound by such regulations and by all Directives of HUD.

2. The Lender submits separately a check for \$\_\_\_\_\_ covering the first mortgage insurance premium, together with the other items called for in the HUD commitment dated \_\_\_\_\_, 20\_\_\_\_, and in any extensions or amendments thereof (the Commitment).

The Lender certifies that all conditions of the Commitment have been fulfilled to date.

**Construction Loans**

3. For all cases involving construction advances, the agreement providing for the advancement of said loan is set forth in a Building Loan Agreement dated \_\_\_\_\_, 20\_\_\_\_, of which a duplicate original and two copies are submitted separately.

4. The Lender submits separately a certified survey of the Mortgaged Property and title evidence as specified in the applicable Directives of HUD together with evidence that the Mortgaged Property is not zoned or restricted so as to prevent the construction of the Improvements.

5. Applications for insurance of advances of mortgage proceeds will be submitted to HUD as required under the applicable Directives of HUD at least five days prior to the date the Lender desires to disburse such advance. Applications for advances will be accompanied by all documentation required by HUD. The Lender agrees that the amount approved for disbursement by HUD will not be released unless the current extension of the title policy evidences that (a) the Mortgage is prior to all liens and encumbrances which may have attached or defects which may have arisen

subsequent to the recording of the Mortgage, except such liens or other matters as have been approved by HUD and (b) the Mortgage is prior to all mechanics' and materialmen's liens filed of record subsequent to the recording of the Mortgage, regardless of whether such liens attached prior to the recording date.

**Fees and Charges**

6. The charges enumerated below are included in mortgage proceeds and will be disbursed by the Lender at such time as is approved by HUD:

- (a) HUD application and commitment fee \$\_\_\_\_\_
- (b) Initial service charge, if any \$\_\_\_\_\_ (not exceeding 2%)
- (c) Title and recording expense \$\_\_\_\_\_ (including cost of surveys, recording fees, mortgage and stamp taxes, etc. associated with initial endorsement)
- (d) HUD inspection fee \$\_\_\_\_\_
- (e) Ground rent during construction \$\_\_\_\_\_ (may collect only one year's rent at initial endorsement)
- (f) Third party contractor fees \$\_\_\_\_\_ (applies only to MAP)

**Escrows and Deposits**

7. The Lender has received from the Borrower a working capital deposit in the form of (cash or letter of credit) \_\_\_\_\_ in the sum of \$\_\_\_\_\_ which the Lender agrees to maintain and control. Funds in this deposit may be released or allocated for the purposes indicated in the attached Working Capital Escrow Deposit Agreement and for no other purpose unless the Lender obtains the prior written approval of HUD.

8. The Borrower has deposited with the Lender, or subject to the control and order of the Lender in a depository satisfactory to the Lender, the following sums required by the Commitment: (Check and complete applicable paragraphs.)

- Cash required, if any, over the proceeds of the Mortgage, to complete the project in the amount of \$\_\_\_\_\_. The Lender understands that these funds must be used before any Mortgage proceeds are advanced, except when, with the prior written approval of HUD, the funds will be disbursed on the following pro-rata basis \_\_\_\_\_.
- Cash required, if any, over the proceeds of the Mortgage, for costs to complete the project in the amount of \$\_\_\_\_\_ will be represented by a grant/loan from \_\_\_\_\_, a nongovernmental source. The Lender understands that these funds must be used before any Mortgage proceeds are advanced.
- The amount required, if any, over the proceeds of the Mortgage, for costs to complete the project, is \$\_\_\_\_\_, and

will be represented by a grant/loan from \_\_\_\_\_, a governmental source.

a. This amount is in the form of \_\_\_\_\_ (cash or letter of credit). The Lender understands that these funds must be used before any Mortgage proceeds are advanced, except when, with the prior written approval of HUD, the funds will be disbursed on the following pro-rata basis \_\_\_\_\_; or

b. The Lender has collected an escrow in the amount of \$\_\_\_\_\_. This amount represents 10 percent of the grant/loan proceeds being provided from this source. This escrow is in the form of \_\_\_\_\_ (cash or letter of credit). The agreement providing for the advancement of grant/loan proceeds executed/to be executed among the Lender, HUD, and the governmental agency or instrumentality is attached.

Escrow deposit guaranteeing payment for off-site utilities and streets in the amount of \$\_\_\_\_\_. This deposit is in the form of \_\_\_\_\_ (cash or letter of credit).

Interest rate differential escrow in the amount of \$\_\_\_\_\_ which represents the dollar difference between the interest rate in effect after cut-off for cost certification and the permanent interest rate upon which the mortgage debt service is calculated. The escrow is in the form of \_\_\_\_\_ (cash or letter of credit).

[For certain transactions involving a loan for a Health Care Facility insured under Section 232] The Lender shall require that the Borrower establish and maintain with the Lender, or in a depository satisfactory to the Lender, a Sinking Fund in accordance with the Regulatory Agreement executed by the Borrower (and Lessee, if applicable) and HUD for those Section 232 cases where Medicaid reimbursement is on a depreciation plus interest basis rather than a pass-through of principal and interest on the Mortgage. (Said Sinking Fund will be required in addition to the Reserve for Replacements.) The Lender agrees to administer the Sinking Fund in accordance with the attached Sinking Fund Agreement.

9. The Lender submits separately: (Check applicable paragraphs.)

Off-site bond in the amount of \$\_\_\_\_\_.

Evidence to the effect that required off-site utilities and streets will be provided by the public authorities having jurisdiction or by public utility companies serving the Project.

10. The Lender submits separately a duplicate copy of the following assurance for the completion of the project: (Check applicable paragraph.)

Performance bond and payment bond of a HUD-approved Surety in the penal sum of \$\_\_\_\_\_ for each bond.

Assurance of Completion Agreement reflecting the deposit with \_\_\_\_\_ of a fund in the amount of \$\_\_\_\_\_ in the form of \_\_\_\_\_ (cash or letter of credit) which fund has been deposited and is subject to the Lender's order and will be disbursed with the written approval of HUD in the manner and for the purposes provided for in said agreement.

Personal undertaking in the amount of \$\_\_\_\_\_. It is understood that HUD reserves the right to decide the acceptability of the principals in the personal undertaking.

11. Attached is the sponsor's guarantee to meet an initial operating deficit as required by the Commitment: (if required, check and complete the applicable paragraph.)

Agreement of Sponsors to Furnish Additional Funds in the amount of \$\_\_\_\_\_ and Bond Guaranteeing Sponsor's Performance.

Escrow Agreement evidencing a (U.S. bearer bonds with a market value of at least 115 percent of the required escrow amount, cash, or letter of credit) \_\_\_\_\_ deposit in the amount of \$\_\_\_\_\_.

12. Attached is the sponsor's guarantee to meet the 12-month debt service reserve escrow as required by the Commitment: (Applicable only to certain Section 232 projects. If required, check and complete the applicable paragraph.)

The Lender has accepted a personal note from the Borrower for \$\_\_\_\_\_ which the Lender will hold until final completion along with Bond Guaranteeing Sponsor's Performance. Upon final completion, the note will be converted to cash or a letter of credit. The Lender agrees that HUD will treat the Borrower's note as a cash item and reduce the insurance benefits by the amount of the Borrower's note if there is a Mortgage default and the Lender makes a claim for insurance benefits before the Borrower's note is converted to cash.

An escrow deposit in the amount of \$\_\_\_\_\_. This deposit is in the form of \_\_\_\_\_ (cash or letter of credit).

13. The Lender submits separately the appropriate security agreement(s) executed by the Borrower (or Lessee, if appropriate, in the case of Health Care Facilities) covering all of the Personalty which, under applicable law, may be subject to a security interest under the Uniform Commercial Code (UCC), whether acquired now or in the future, and all products and cash proceeds and non-cash proceeds (UCC Collateral). The Lender will file timely appropriate

Financing Statements under the UCC. The Lender agrees to file timely the appropriate Financing Statements under the UCC on behalf of HUD pursuant to HUD's rights under the Regulatory Agreement.

14. Beginning with the date on which the first payment toward amortization is required to be made by the terms of the insured Mortgage or at such later date as may be agreed to by HUD in writing, the Lender shall require a monthly deposit with the Lender or in a depository satisfactory to the Lender of one-twelfth ( $\frac{1}{12}$ ) of the sum set forth in the Commitment constituting a Reserve for Replacements Fund, which fund will be subject to the Lender's order and from which fund withdrawals may be made only upon the receipt of HUD's written permission. For transactions involving mortgages insured under Section 232 of the National Housing Act, the Reserve for Replacement shall be bifurcated, as set forth in the Commitment and in the Regulatory Agreement for Health Care Facilities, to cover (1) the costs associated with the replacement of major moveable equipment and (2) the costs associated with major repairs to the physical structure of the Project. The use of a bifurcated fund will ensure that the monies in the Reserve for Replacement are sufficient to pay for the costs associated with not only the replacement of major moveable equipment but also for major repairs to the physical structure of the Project. Separate sub-accounts shall be maintained within the Reserve for Replacement and monies in these two accounts shall not be commingled. Lender shall ensure that amounts are withdrawn from a particular sub-account only for use consistent with that particular sub-account as approved by HUD. The amount of the monthly deposit may be increased or decreased from time to time at the direction of HUD. These funds will be deposited with the Lender by the Borrower in cash or in the form of obligations of, or guaranteed as to principal by, the United States of America. The Lender will, upon appropriate request by the Borrower, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. Notice of any failure to receive the required deposits will be forwarded to HUD within 60 days of the date such deposits are due.

15. In cases where a Residual Receipts Fund is required under the Regulatory Agreement, the Lender shall deposit or place in a depository satisfactory to the Lender all funds received from the

Borrower after the end of each semi-annual or annual fiscal period, and will notify HUD if such funds are not received within 90 days of the end of such fiscal period. The Residual Receipts Fund will be subject to the control of the Lender and from which fund withdrawals may be made only upon the receipt of HUD's written permission except for permitted distributions pursuant to the terms of the Regulatory Agreement. These funds will be deposited with the Lender by Borrower in cash or in the form of obligations of or guaranteed as to principal by the United States of America. The Lender will, upon appropriate request by the Borrower, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. The Lender agrees to notify HUD in writing of any irregularity with respect to such Residual Receipts Fund immediately upon such irregularity coming to the attention of the Lender.

16. The Lender agrees to furnish HUD with a complete report of the results of any inspection of the Mortgaged Property that the Lender is required to perform under the applicable regulations or Directives of HUD.

17. The Lender certifies that if the Borrower defaults in its obligation to complete construction of the Improvements on the Mortgaged Property, the Lender has the right, transferable to HUD, to complete the Improvements as provided in the Building Loan Agreement. In the event completion of the Improvements is undertaken by either the Lender or by HUD, the undisbursed balance of the Mortgage may be advanced for this purpose and to discharge any valid liens or claims against the Mortgaged Property. Such advances will be considered as made for the account of the Borrower and will be covered by the terms of the Mortgage and the Contract of Insurance.

18. So long as the Contractor or the Borrower, or, upon default, the Contractor's surety or any other person authorized to act on behalf of or in substitution for them shall be willing and able to complete construction of the Improvements, the Lender, upon HUD's request will advance up to the undisbursed balance of the Mortgage and will authorize release of any grant or loan proceeds or other funds available under Paragraph 8 above for that purpose. The term "Contractor" as used above, means any person, corporation or other entity contracting directly with the Borrower for the

construction of all or any portion of the Improvements.

19. The Lender certifies that all insurance policies on the Project required by the terms of the insured Mortgage will have attached thereto a standard mortgagee clause making the loss payable to the Lender and the Secretary, Department of Housing and Urban Development, as their interests may appear.

20. The Lender certifies and agrees that: (Check and complete the following applicable subparagraphs)

(a) The Lender has not imposed and will not impose a financing charge of any kind directly or indirectly, other than the initial service charge as set forth above.

(b) In addition to the initial service charge, the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ for the amount of \$ \_\_\_\_ as a discount or financing charge for the construction loan. Also, an amount of \$ \_\_\_\_ has been collected in the form of (cash or letter of credit) \_\_\_\_\_ to cover construction loan extension fees. In an attached addendum, the Lender has identified the time frames in which the extension fees must be paid.

(c) The Lender intends to retain the permanent loan and has collected a permanent placement fee of \$ \_\_\_\_\_. In addition to the initial service charge and permanent placement fee, the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ the amount of \$ \_\_\_\_ as a discount or financing charge for the permanent loan.

(d) The Lender has a firm commitment from \_\_\_\_\_ to purchase the loan when fully disbursed and fully insured at a financing charge or discount of \_\_\_\_\_ percent and the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ the amount of \$ \_\_\_\_ to cover said charge or discount.

(e) This project will be financed with (tax-exempt or taxable) \_\_\_\_\_ bonds. Therefore, the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ the amount of \$ \_\_\_\_\_ to cover the costs of issuance. A statement is attached itemizing these costs with an explanation of the necessity of each cost.

(f) Additional financing charges or discount of \$ \_\_\_\_ are to be collected under the attachment hereto for the purpose shown in (b), (c), (d), (e). (Strike inapplicable letters.) The arrangement for the collection of additional financing charges or discount must follow forms and procedures prescribed by HUD.

(g) A servicing fee that is included in the Mortgage rate and an administrative fee for investing the cash

held in the Reserve Fund for Replacements and any other interest-bearing escrows required by HUD.

(h) The Mortgage Loan to be made to the Borrower will be financed through funds being provided by a third-party investor through the issuance to the investor of construction and permanent participation certificates pursuant to a participation agreement between the Lender and the investor, with respect to which agreement the Lender has agreed to repay the investor at a stated interest rate according to a fixed payment schedule.

(i) The Mortgage Loan to be made to the Borrower will be financed through funds being provided by a third-party investor through the issuance to the investor of construction and permanent fully modified, pass-through, mortgage-backed securities, guaranteed as to principal and interest by the Government National Mortgage Association.

No financing charges other than charges disclosed herein have been or will be made. Until final endorsement for insurance by HUD, all funds collected pursuant to items (c), (d), or (e) above and not paid over to the permanent lender, plus any funds returned by the permanent lender, shall be held for the account of the Borrower and shall be subject to HUD's control and direction in the event of a claim under the Contract of Insurance.

21. Except for Mortgage advances approved by HUD or notes executed pursuant to section (20)(f) above, the Lender does not have outstanding and will not make loans or advances to the Borrower, any of the sponsors, the general contractor, or the architect for any purpose connected directly or indirectly with this project without prior written approval of HUD. The Lender has not made or offered, and will not make or offer, any guarantees, pledges, reservations of sums to become due or other inducements to any entity or person to make loans or advances which the Lender would be prohibited from making under the terms of this paragraph.

#### Certifications

22. The Lender certifies that the Lender has not made and will not make payment of any kickback or fee or other consideration, directly or indirectly, to any person who has received payment or other consideration from any other person in connection with this Mortgage transaction, including the purchase or sale of the Mortgaged Property, except for compensation paid or to be paid, if any, for the actual performance of services and approved by HUD.

23. The Lender certifies that in any case where a letter of credit has been accepted instead of cash, (a) such unconditional and irrevocable letter of credit has been issued by (1) another banking institution; (2) the Lender, subject to receiving HUD's written permission prior to initial endorsement; (b) if demand under the letter of credit is not immediately met, the Lender will forthwith provide cash equivalent to the undrawn balance thereunder without recourse to the Borrower, any sponsor, the general contractor or the architect; (c) the Lender has not made and will not make any inducements as described in Section 21 above to procure issuance of letters of credit; and (d) the Lender has made every reasonable effort to satisfy itself that both the Borrower and the institution which issued the letter of credit are aware that demands may be made for cash under the terms of the letter of credit and that no possibility exists that Mortgage proceeds will be available to reimburse the issuing bank for such cash pay-outs.

24. For mortgages funded with the proceeds of State or local bonds, GNMA mortgage-backed securities, other bond obligations as defined by HUD, any of which contain a lock-out and/or penalty provision, the Lender agrees, in the event of a default during the term of the prepayment lock-out and/or penalty (*i.e.*, prior to the date on which prepayments may be made with a penalty of one percent or less), to:

(a) Request a three-month extension of the deadline prescribed by 24 CFR Section 207.258 for filing a notice of the Lender's intention to file an insurance claim and the Lender's election to assign the Mortgage;

(b) assist the Borrower in arranging a refinancing to cure the default and avert an insurance claim, if HUD grants the requested (or a shorter) extension of notice filing deadline;

(c) report to HUD at least monthly on any progress in arranging a refinancing;

(d) otherwise cooperate with HUD in taking reasonable steps in accordance with prudent business practices to avoid an insurance claim;

(e) require any successors or assigns to certify in writing that they agree to be bound by these conditions for the remainder of the term of the prepayment lock-out and/or penalty;

(f) after completion of the Improvements, notify HUD of the delinquency when a payment is not received by the 16th day of the month in which it is due.

25. The Lender certifies to HUD that the following are the only identities of interest, as defined by HUD in MAP Directives, between the Lender and the

Borrower, any Principal of the Borrower, the Contractor, any subcontractor, or the seller of the land:

(must indicate "none" for MAP transactions).

26. The Lender certifies to HUD that no identity of interest, as defined by HUD in MAP Directives, exists between the Lender and the counsel to the Borrower.

27. The Lender certifies to HUD that all funds, escrows, and deposits specified in this Certificate and any and all other funds held in connection with the Mortgage transaction covered by this Certificate shall be funds held for or on behalf of the Borrower pursuant to the Contract of Insurance.

28. For any case involving components stored off-site, the Lender agrees to:

(a) File Financing Statements (UCC-1), in the proper jurisdiction with the proper office;

(b) Make whatever additional filings are necessary to maintain a first lien on the components until they are incorporated into the building(s);

(c) Release the Financing Statement filings as appropriate;

(d) Unconditionally certify by letter to HUD with each disbursement request that the Security Instrument(s) is (are) a "first lien" on the building components covered by the Instrument(s). This certification will be supported by an opinion from the Lender's legal counsel;

(e) In the event of default under the Mortgage, either assign the Lender's security interest to HUD or acquire title through foreclosure to the components intended for use or incorporation into the building(s) and convey title to HUD;

(f) Require a performance bond and payment bond each in an amount equal to 100 percent of the construction contract be used to satisfy the assurance of completion requirements.

29. The Lender certifies that all HUD form closing documents submitted to HUD in connection with this transaction (with the exception of the Opinion by Counsel to the Borrower and the accompanying Certification by the Borrower) conform to those documents the Lender obtained from HUD on \_\_\_\_\_ and such documents have not been changed or modified in any manner except as suitably identified and specifically approved by HUD field counsel as evidenced by the attached memorandum. It is understood that changes and modifications do not include filling in blanks, attaching exhibits or riders, deleting inapplicable provisions or making changes authorized by applicable HUD

regulations and/or Directives. The Lender further certifies that all closing documents submitted to and accepted by HUD in connection with this transaction are listed in the attached memorandum.

30. The Lender agrees to notify HUD in writing immediately upon learning of any violation of the Regulatory Agreement by the Borrower, the Lessee and/or the Operator, as applicable, in certain transactions involving the lease of the Project.

31. The Lender agrees to promptly review any Borrower's request to transfer the Project and not unreasonably withhold the Lender's approval of the transfer. If HUD approves the transfer, the Lender agrees to execute a Release and Assumption Agreement or a Mortgage Modification Agreement incorporating the Regulatory Agreement in the Mortgage. It is understood that the Lender's consent to the transfer will in no way prejudice the Lender's rights under the Contract of Insurance with HUD. The Lender shall not collect any fee in connection with reviewing the transfer except the Borrower may reimburse the Lender for actual expenses incurred by the Lender in connection with reviewing the transfer.

32. The definition of any capitalized term or word used herein can be found in this Mortgagee's Certificate, the Regulatory Agreement between the Borrower and HUD, and/or the Security Instrument by the Borrower. The term "financing charge(s)," as used herein shall mean any charge, direct or indirect, for supplying the loan to or servicing the loan for the Borrower. Whenever used, the singular number shall include the plural, the plural the singular and the use of any gender shall be applicable to all genders.

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Lender

\_\_\_\_\_  
By

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30.

(Exp. 00/00/00)

OMB No.

Public Reporting Burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

**Building Loan Agreement**

**U.S. Department of Housing Development**

Office of Housing

Project #

Project Name:

THIS AGREEMENT, made the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by and between \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_ with an office and place of business in, \_\_\_\_\_ County of \_\_\_\_\_ and State of \_\_\_\_\_ (hereinafter called the "Borrower" which shall mean "Mortgagor" as that term is used in the National Housing Act), and \_\_\_\_\_ a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_, having an office and place of business at \_\_\_\_\_ [City] [County] of \_\_\_\_\_ and State of \_\_\_\_\_ (hereinafter called the "Lender", which shall mean "Mortgagee" as that term is used in the National Housing Act).

WHEREAS, the Borrower, as the owner in fee simple of, or the owner of the leasehold estate in the property (hereinafter called the "Property") described in Exhibit "A" attached to the Deed of Trust, Mortgage or other security instrument (hereinafter called

the "Mortgage"), which Exhibit "A" is attached hereto and incorporated herein by reference, has obtained a commitment from the Lender for a Mortgage Loan of \_\_\_\_\_ Dollars (\$\_\_\_\_.00) to aid the Borrower in the construction or rehabilitation on said property of a Project identified as Project No.\_\_\_\_ (hereinafter in accordance with Drawings and Specifications hereinafter referred to, and

WHEREAS, the Borrower understands that the Lender has received a commitment from the U.S. Department of Housing and Urban Development (hereinafter called "HUD") for insurance of said Mortgage Loan under the provisions of the National Housing Act as amended and intends upon execution of the hereinafter mentioned Note and Mortgage to have the Note endorsed for insurance by HUD. HUD is not making the Mortgage Loan.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set out and of other valuable consideration, the receipt of which is hereby acknowledged, the undersigned agree as follows:

(1) The Lender shall make and the Borrower shall take a Mortgage Loan in the principal sum of \_\_\_\_\_ Dollars (\$\_\_\_\_.00), to be advanced as hereinafter provided, and to bear interest from the date of each advance at the rate of \_\_\_\_\_ percent (\_\_\_\_%) per annum. The Mortgage Loan shall be evidenced by a credit instrument (hereinafter called the "Note") dated \_\_\_\_\_ 20\_\_\_\_, shall be payable in monthly installments, and shall have a maturity date of \_\_\_\_\_, 20\_\_\_\_. The Note shall be executed by the Lender and payable to the Lender, or order, and shall be secured by Mortgage, of even date, on the property described in the Mortgage. The Mortgage shall constitute a valid first lien on said property and the improvements to be erected thereon, and the only lien thereon except for liens for taxes and assessments not yet payable and other liens acceptable to the Lender and HUD. The Lender shall not advance any Mortgage Loan funds until the Borrower and Lender have submitted to HUD documents required by this Agreement and the HUD Commitment to Insure Advances, and have completed the initial loan closing.

(2) The Borrower shall complete on the Property, by \_\_\_\_\_ 20\_\_\_\_, a Project in accordance with Drawings and Specifications filed with HUD and designated HUD Project No. \_\_\_\_\_, dated \_\_\_\_\_, last revised \_\_\_\_\_. Such Drawings and Specifications, which include General Conditions of the Contract for Construction, AIA

Document A201-1997 and the Supplementary Conditions of the Contract for Construction, form HUD 92554, have been initialed by the Borrower, the Design Architect, the Architect administering the Construction Contract (hereinafter called the "Architect"), the Contractor and, if applicable, the Contractor's Surety.

(3) Changes in the Drawings and Specifications, or changes by altering or adding to the work contemplated, or orders for extra work must have the prior written approval of the Architect. In addition, any such change or order may be effected only with the prior written approval of the Lender and HUD and under such conditions as either the Lender or HUD may establish.

(4) (a) The Borrower shall make monthly applications on Form HUD No. 92403 for advances of mortgage proceeds from the Lender. Applications for advances with respect to construction items shall be for amounts equal to (i) the total value of classes of the work acceptably completed; plus (ii) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (iii) 10 percent (holdback) and less prior advances. The "values" of both (i) and (ii) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown", attached to the Construction Contract and made a part hereof. Each application shall be filed at least 15 days before the date the advance is desired, and the Borrower shall be entitled thereon only to such amount as may be approved by the Lender and HUD.

(b) Upon completion of the improvements, including all landscape requirements and off-site utilities and streets, the Borrower shall furnish to the Lender and HUD satisfactory evidence that all work requiring inspection by municipal or other governmental authorities having jurisdiction has been duly inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction; and that all requisite certificates of occupancy and other approvals to own and operate the Project have been issued. The balance due the Borrower hereunder shall be payable at such time after completion as HUD authorizes the release of the holdback. However, the Lender may withhold final payment until after the expiration of any period which mechanics and materialmen may have for filing liens.

(c) The Borrower agrees that funds in the amount of \$\_\_\_\_\_ required for the completion of the Project over and above the proceeds of the Mortgage Loan, which have been deposited with the Lender for that purpose, shall be advanced by the Lender prior to the advance of any proceeds of the Mortgage Loan. In the alternative, Borrower agrees that said funds shall be advanced by the Lender as set forth in the disbursement agreement dated \_\_\_\_\_, 20\_\_\_\_, approved by the Lender and HUD, to accommodate the pro rata disbursement from multiple governmental funding sources or from low income tax credits [or historic tax credits] identified therein.

(d) The Borrower covenants that it will hold in trust each advance hereunder for application to the items for which such advance was requested and approved.

(e) The Borrower agrees that the Mortgage Loan shall at all times remain in balance. The Lender shall, in accordance with the provisions of this Agreement, continue to advance to the Borrower funds out of the proceeds of the Mortgage Loan upon insurance thereof by HUD, as long as the Mortgage Loan remains in balance and the Borrower is not in default hereunder or under the Note or Mortgage. The Mortgage Loan shall be deemed to be in balance only when the undistributed proceeds of the Mortgage Loan (after provision for reserves, fees, expenses and other deposits required by the Lender or HUD) equal or exceed the amount necessary (based on HUD's estimate of the cost of construction) to pay for all work completed and all materials delivered, for which payment has not been made, and the cost of completing construction of the Project in accordance with the Drawings and Specifications.

(5) The Lender shall advance to the Borrower out of the funds referred to in (4)(c) above, or out of the proceeds of the Mortgage Loan, amounts for application to the charges or items enumerated below, but only to the extent that such charges have accrued, or that the Borrower is otherwise entitled to payment on account of such items.

|                                                 |          |
|-------------------------------------------------|----------|
| (a) Interest during construction .....          | \$ _____ |
| (b) Real estate taxes during construction ..... | _____    |
| (c) Insurance during construction .....         | _____    |
| (d) FHA mortgage insurance premium .....        | _____    |
| (e) FHA examination fee .....                   | _____    |
| (f) Initial service charge .....                | _____    |

- (g) Title and recording expense .....
- (h) Inspection fee .....
- (i) Legal .....
- (j) Organizational and audit ....
- (k) Permanent Loan Fee .....

Total Maximum Advance (Line 45 of HUD-2283 Financial Requirements for Closing) \$ \_\_\_\_\_.

(6) The Borrower shall cause either this instrument, waiver of liens or the construction contract under which the improvements are to be erected to be filed in the public records, if the effect thereof will be to relieve the mortgaged property from mechanics' and materialmen's liens. Before any advance hereunder, the Lender may require the Borrower to obtain from the contractor and all subcontractors and materialmen dealing directly with the principal contractor acknowledgments of payment and releases of lien down to the date covered by the last advance, and concurrently with the final payment for the entire Project. Such acknowledgments and releases shall be in the form required by local lien laws and shall cover all work done, labor performed and materials (including equipment and fixtures) furnished for the Project.

(7) The Borrower shall, as a condition precedent to the first advance hereunder, furnish the Lender with a signed, sealed and certified, current survey of the mortgaged property and a Lender's title policy (or other evidence of title) in form, substance and amount satisfactory to the Lender and HUD. Said policy (or other title evidence) shall be extended so as to cover each and every advance of said Mortgage Loan at the time of payment thereof and shall show no mechanics' or materialmen's liens against the mortgaged property. The Borrower shall furnish duplicate originals of said survey and title policy (or title evidence) to HUD.

(8) The Borrower agrees that said Project shall be constructed strictly in accordance with all applicable ordinances and statutes, and in accordance with the requirements of all regulatory authorities, and any rating or inspection organization, bureau, association or office having jurisdiction. The Borrower further agrees that said Project shall be constructed entirely on the aforesaid property and will not encroach upon any easement or right-of-way, or the land of others; and that the buildings when erected shall be wholly within the building restriction lines however established, and will not violate applicable use or other restrictions contained in prior

conveyances, zoning ordinances or regulations. The Borrower shall furnish from time to time such evidence with respect thereto as may be required by the Lender or HUD and, upon completion of construction, shall furnish a survey, signed, sealed and certified by a registered surveyor, which shows the Project to be entirely on said property and to be free from any such violations.

(9) If the Borrower at any time prior to the completion of the Project abandons the same or ceases work thereon for a period of more than 20 days, or fails to complete the erection of the Project substantially in accordance with the Drawings and Specifications, or makes changes in the Drawings and Specifications without first securing the written approval required by paragraph 3 hereof, or otherwise fails to comply with the terms hereof, any such failure shall be a default hereunder, and the Lender, at its option, may terminate this Agreement. If the Lender so elects to terminate this Agreement, it may use and apply any funds deposited with it by the Borrower, regardless of the purpose for which such funds were deposited, in such manner and for such purposes as HUD may prescribe. If the Lender elects not to terminate this Agreement, it may enter into possession of the premises and perform any and all work and labor necessary to complete the improvements substantially according to the Drawings and Specifications, and employ watchmen to protect the premises from injury. All sums so expended by the Lender shall be deemed to have been paid to the Borrower and secured by the Mortgage. For this purpose the Borrower hereby constitutes and appoints the Lender its true and lawful attorney-in-fact, with full power of substitution in the premises, to complete the Project in the name of the Borrower. The Borrower hereby empowers said attorney as follows: (a) To use any funds of the Borrower, including any balance which may be held in escrow and any funds which may remain unadvanced hereunder for the purpose of completing the Project in the manner called for by the Drawings and Specifications; (b) to make such additions, changes and corrections in the Drawings and Specifications as shall be necessary or desirable to complete the Project in substantially the manner contemplated by the Drawings and Specifications; (c) to employ such contractors, subcontractors, agents, architects and inspectors as shall be required for said purposes; (d) to pay, settle or compromise all existing bills and claims

which may be liens against the mortgaged property, or as may be necessary or desirable for the completion of the Project, or for clearance of title; (e) to execute all applications and certificates in the name of the Borrower which may be required by any of the contract documents; (f) to prosecute and defend all actions or proceedings in connection with the mortgaged premises or the construction of the Project and to take such action and require such performance as it deems necessary under the accepted guaranty of completion; and (g) to do any and every act which the Borrower might do in its own behalf. It is further understood and agreed that this power of attorney, which shall be deemed to be a power coupled with an interest, cannot be revoked. The Borrower hereby assigns and quitclaims to the Lender all sums unadvanced under the Mortgage and all sums held by the Lender in escrow conditioned upon the use of said sums for the completion of the Project, such assignment to become effective only in case of a default by the Borrower.

(10) The Borrower shall provide or cause to be provided workers compensation insurance and public liability and other insurance required by applicable law or by the general conditions included in the Specifications. The Borrower further agrees to purchase and maintain fire insurance and extended coverage on the mortgaged property. All such policies shall be issued by companies approved by the Lender and shall be in form and amounts satisfactory to the Lender and HUD. Such policies shall be endorsed with standard mortgagee clauses making loss payable to the Lender or its assigns; and may be endorsed to make loss during construction payable to the Contractor, as interest may appear. The originals of such policies shall be deposited with the Lender.

(11) The Lender and its agents and HUD and its agents shall, at all times during construction, have the right of entry and free access to the Project and the right to inspect all work done, and materials, equipment, building components and fixtures furnished, installed or stored either on or off the Project property, and to inspect all books, subcontracts and records of the Borrower.

(12) The Borrower shall execute and deliver to the Lender, a security agreement and financing statements, or other similar instrument, covering all property of any kind whatsoever purchased with mortgage proceeds and concerning which there may be any doubt as to such property's being

subject to the lien of the Mortgage under the laws of the state in which the Project is situated.

(13) The Borrower shall furnish to the Lender assurance of completion of the Project in the form specified by the Secretary. Such assurance of completion shall run to the Lender as obligee and shall contain a provision granting to the Lender the authority to assign all rights thereunder to HUD.

(14) (a) The Borrower understands that the wages to be paid laborers and mechanics employed in the construction of the Project are required by the provisions of Section 212(a) of the National Housing Act, as amended, to be not less than the wages prevailing in the locality in which the work will be performed for corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act and as published in the applicable prevailing wage determination. The Borrower hereby states that it has read the determination by the Secretary of Labor and is fully familiar with the same.

(b) The Borrower shall, as a condition precedent to any advance hereunder, submit to the Lender (i) with each application for advance prior to the final application, certifications, in form approved by HUD, that all laborers and mechanics employed in the construction of the Project whose work is covered by that or any previous application and who have been paid in whole or in part on account of said employment, have been paid at rates not less than those contained in the applicable prevailing wage determination; and (ii) with the final application for advance, certifications in form satisfactory to HUD, that the Project has been fully constructed in accordance with the provisions of this Agreement and that all laborers and mechanics employed in the construction of the Project have been paid not less than the said prevailing wage rates. The applicable prevailing wage determination shall be construed to include every amendment to or modification of the determination which may be published prior to the beginning of construction or date the Mortgage is initially endorsed for insurance, whichever occurs first; provided, that if construction has not begun within 90 days after initial endorsement, the applicable prevailing determination shall include any modification of the determination which may be published prior to the beginning of construction.

(c) The Borrower agrees that should any advances hereunder be ineligible for insurance under the National Housing

Act by reason of (i) the nonpayment of the said prevailing wage rates, or (ii) violation of any of the applicable labor standards provisions of the Regulations of the Secretary of Labor, the Lender may withhold from the Borrower all payments or advances payable to the Borrower hereunder until the Borrower establishes to the satisfaction of HUD that all laborers and mechanics or other persons employed in the construction of the Project have been paid said prevailing wage rates and that such violation of the said Labor Standards provisions no longer exists. The written statement of any officer of HUD or authorized agent of HUD declining to insure any advance of funds hereunder by reason of such nonpayment or violation shall be deemed conclusive proof that such advances are ineligible for mortgage insurance.

(d) In accordance with Article 1 of the Supplementary Conditions of the Contract for Construction, the Borrower shall insert the labor standards provisions thereof in any contract made for the construction of the Project, or any part thereof, and shall require the Contractor to insert similar provisions in each subcontract relating to the construction of the Project.

(15) The Lender and the Borrower agree that the Mortgage Loan shall be reduced by any amount required by the Agreement and Certification (form HUD No. 93305) between the parties hereto and HUD, which Agreement and Certification is incorporated herein by reference to the same extent as if set forth herein at length.

(16) The Borrower shall furnish such records, papers and documents relating to the Project as the Lender or HUD may reasonably require from time to time.

(17) The Borrower shall not transfer, assign or pledge any right or interest in, or title to, any funds deposited by the Borrower with the Lender, or reserved by the Lender for the Borrower, without the prior written approval of the Lender and HUD.

(18) As used in this instrument, the term "Lender" shall be deemed to include any person to whom the Note and Mortgage referred to above shall be assigned with the knowledge and consent of HUD. This instrument shall be binding upon the parties hereto and their respective successors and assigns.

(19) The Borrower and each of its principals, \_\_\_\_\_, shall be personally liable to the Lender and or HUD for any advances that are not applied or used in accordance with this Agreement.

(20) HUD is not a party to this Agreement and has no obligation to the Borrower or Lender pursuant to this Agreement. HUD, pursuant to the

mortgage insurance contract, has reserved in this Agreement the right to approve or disapprove certain actions to protect the mortgage insurance fund.

[Borrower's Name]

[seal & witness signature if required by law or practice]

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

[title & capacity]

[Lender's Name]

[seal & witness signature if required by law or practice]

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

[title & capacity]

#### Attachment: Exhibit A

#### Supplement to Building Loan Agreement (Add to Building Loan Agreement When Borrower Acts as Its Own General Contractor)

U.S. Department of Housing, and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.75 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

This Supplement To Building Loan Agreement shall be attached to and incorporated into that certain Building Loan Agreement, form HUD 92441, for HUD Project No. \_\_\_\_\_.

(21) In consideration of HUD consenting to authorize Borrower to act as its own General Contractor, the parties agree to the following:

(a) All references herein (and in any other documents except the Payment Bond, relating to the construction of the project) to "Contractor" or "General Contractor" shall mean the Borrower identified above. All references to subcontractors shall mean all persons who contract with the Borrower or others in connection with the construction of the project.

(b) All references to "Contract" or "Construction Contract" shall be interpreted to refer to this Building Loan

Agreement and the Drawings and Specifications identified above, which Specifications include the General Conditions of the Contract for Construction (AIA Document A201 (1997), and the Supplementary Conditions of the Contract for Construction (HUD Form-92554). The provisions of this Supplement to Building Loan Agreement and the HUD Supplementary Conditions take precedence over any inconsistent provisions in the AIA A201 General Conditions.

(c) The Borrower shall execute all agreements and certifications required by HUD to be executed by the General Contractor.

(d) The work, which is to be done in accordance with the Drawings and Specifications, shall be commenced within 30 days from the date of this Agreement.

(e) The borrower shall, at all times during construction, keep posted in a conspicuous place on the project site a legible copy of the applicable wage determination published by the Secretary of Labor with respect to this project. In addition, the Borrower shall incorporate into each subcontract a copy of the Supplementary Conditions of the Contract for Construction (HUD-92554) and the applicable wage determination. Any such contract (i) shall include the agreement of the subcontractor to pay no less than the wages contained in the applicable wage determination; (ii) shall authorize periodic inspections by the Lender and HUD of the subcontractor's books, payroll, and accounts with respect to the contract so that it may be determined whether or not prevailing wages are being paid by such contractor, and (iii) shall require that all tiers of subcontractors subscribe to the same provisions with respect to work to be performed on the project.

(f) Upon request the Borrower shall disclose to the Lender and HUD the names of all persons with whom the Borrower contracted or intends to contract or subsequently contracts with respect to work to be performed or materials to be furnished for construction of the project.

(g) The Borrower shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, protective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Borrower shall comply with provisions of the "Manual of Accident Prevention in Construction" of the Association of General Contractors of America. The Borrower shall immediately notify the Lender and HUD of the delivery of all

permits, licenses, certificates of inspection, certificates of occupancy, and any other certificates and/or instruments required by law, regardless of to whom issued, and shall display same to the Lender or HUD upon request.

(h) HUD and the Lender may inspect work done, materials, equipment and fixtures furnished, installed or stored in and around the project. The Borrower shall furnish an enclosed working space acceptable to the Lender and/or HUD as to location, size, accommodations and furnishings.

(i) HUD shall have the right to interpret the Contract Documents and determine compliance therewith.

(j) The Borrower shall correct any defects due to faulty materials or workmanship which appear within a period of one year from the date of Final Completion. For the purpose of this subparagraph (j), the date of Final Completion shall be the date of the final HUD Representative's Trip Report, provided that the trip report is subsequently endorsed as required by HUD. Final Completion includes all construction requirements, including but not limited to completion of all punch list items, submission of the executed HUD Form 92485, Permission to Occupy—Property Mortgages, As-Built Survey and Surveyor's Report, As-Built Plans and Specifications, warranties, and execution and acceptance of all change orders.

Date \_\_\_\_\_  
Borrower \_\_\_\_\_  
By: \_\_\_\_\_

OMB No. (Exp. 00/00/00)

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**Construction Contract**

Project Name: \_\_\_\_\_  
HUD Project No.: \_\_\_\_\_

U.S. Department of Housing and Urban Development

Cost Plus Contract \_\_\_\_\_  
Lump Sum Contract \_\_\_\_\_

THIS AGREEMENT, made this \_\_\_\_ day of \_\_\_\_, 20, \_\_ between \_\_\_\_\_ (hereinafter called the "Contractor") and \_\_\_\_\_ (hereinafter called the "Owner").

The Contractor and the Owner agree as follows:

**Article 1: Scope of Contract**

A. The Contract between the parties is set forth in the "Contract Documents," which consist of this Agreement and the other documents identified in Article 2 below. Together, these form the entire Contract between the Owner and Contractor, and by this reference these Contract Documents are fully incorporated herein. Any previously existing contract or understanding concerning the work contemplated by the Contract Documents is hereby revoked.

B. Except to the extent specifically indicated in the Contract Documents to be the responsibility of others, the Contractor shall furnish all of the materials and perform all of the work, within the property lines, shown on, and in accordance with, the Drawings and Specifications.

**Article 2: Identification of Contract Documents**

A. The Contract Documents are identified as follows:

(1) This Agreement. If designated above as Cost Plus Contract, Articles 4 and 13 are applicable to this Agreement. If designated above as Lump Sum Contract, Articles 4A and 13A are applicable to this Agreement.

(2) The General Conditions set forth in the General Conditions of the Contract for Construction, AIA Document A201-1997, expressly excepting those provisions mandating binding arbitration. The provisions of this Agreement take precedence over any inconsistent provisions in the General Conditions.

(3) The Supplementary Conditions of the Contract for Construction, Form HUD-92554.

(4) The HUD Special Conditions are set forth in the Project Manual dated \_\_\_\_\_, 20, \_\_\_\_ identified as follows:

Document Title Pages

(5) The Specifications are those contained in the Project Manual dated \_\_\_\_\_, as in subparagraph 4, and are as follows:

Section Title Pages

(6) The Drawings are as follows, and are dated as shown below:

| Number | Title | Pages | Date |
|--------|-------|-------|------|
|--------|-------|-------|------|

(7) The Contractor's and/or Mortgagor's Cost Breakdown, Form HUD-2328, approved by HUD on the date of \_\_\_\_\_, 20 \_\_, attached hereto as Exhibit \_\_\_\_\_.

(8) If this is designated a Cost Plus Contract and there is no Identity of Interest between the Contractor and the Owner, the Incentive Payment Computation form, page 2 of Form HUD-92443, and attached hereto as Exhibit \_\_\_\_\_.

(9) The Prevailing Wage Determination No. \_\_\_\_\_, dated \_\_\_\_\_, 20 \_\_.

(10) Completed and fully-executed Appendix 8 of Handbook 4430.1, identifying Identities of Interest among Owner, Contractor, Subcontractors, Architect.

B. The Drawings and the Specifications were prepared by \_\_\_\_\_ (hereinafter called the "Design Architect"). The architect administering the Construction Contract work is \_\_\_\_\_ (hereinafter called the "Supervisory Architect.").

C. A master set of the Drawings and of the Project Manual, identified by the signatures of the Owner, the Contractor, the Design Architect, the Supervisory Architect, and the Contractor's Surety or Guarantor, have been placed on file with HUD, and shall govern in all matters that arise with respect to the Contract Documents.

D. Changes in the Drawings, Specifications, or any terms of the Contract Documents, including orders for extra work, changes by altering or adding to the work, orders which will change the design concept, or orders extending the Final Completion Deadline (defined in Article 3) may be effected only with the prior written approval of the Owner's Lender (more particularly identified in paragraph D of Article 11 below, and hereinafter referred to as the "Lender") and HUD, and under such conditions as either the Lender or HUD may establish.

### Article 3: Time

A. The Contractor shall commence the work to be performed under this Contract within \_\_\_\_\_ days of this Agreement and shall bring the work to Final Completion by \_\_\_\_\_, 20 \_\_ (hereinafter called the "Final Completion Deadline").

B. The Date of Final Completion shall be the date of the final HUD Representative's Trip Report, provided that the trip report is subsequently endorsed as required by HUD. Final

Completion includes all construction requirements, including but not limited to completion of all punch list items, executed HUD Form 92485, Permission to Occupy—Property Mortgages, As-Built Survey and Surveyor's Report, As-Built Plans and Specifications, warranties, and execution and acceptance of all change orders.

C. The Final Completion Deadline may be extended in accordance with the terms of the said AIA General Conditions only with the prior written approval of HUD.

D. The Contractor shall correct any defects due to faulty materials or workmanship which appear within one year from the Date of Final Completion.

E. If the work is not brought to Final Completion in accordance with the Drawings and Specifications, including any authorized changes, by the Final Completion Deadline, or by such date to which the Final Completion Deadline may be mutually extended by approved change order, the maximum sum stated in Article 4 or 4A below shall be reduced by \$\_\_\_\_, as liquidated damages, for each day of delay until the actual Date of Final Completion. When the Owner submits to HUD its Cost Certification, the actual cost of interest, taxes, insurance, mortgage insurance premiums, and construction and permanent loan extension fees, as approved by HUD, for the period from the Final Completion Deadline through the Date of Final Completion, shall be determined. The lesser of the liquidated or actual damages shall be applied. The applicable amount shall be reduced by the project's net operating income, as determined by HUD, for the delay period.

F. The parties have completed the appropriate blank spaces in Articles 4 or 4A below with respect to "Incentive Payment," providing for the payment of an additional sum to the Contractor as an incentive for completing the project earlier than the Final Completion Deadline, or by such date to which the Final Completion Deadline may be extended by approved change order. If the work is brought to Final Completion before the Final Completion Deadline, the contract sums stated in Articles 4 and 4A below shall be increased, as indicated, by an incentive payment calculated in accordance with HUD requirements. In cases requiring cost certification by the Contractor, the Contractor will not be entitled to any incentive payment resulting from early completion if HUD determines that the Contractor's cost certification is fraudulent or materially misrepresents the Contractor's Actual Cost of Construction.

### Article 4: Contract Sum—Cost Plus Contract

A. Subject to the provisions hereinafter set out, the Owner shall pay to the Contractor for the performance of this Contract the following items in cash:

(1) The Actual Cost of Construction as defined in Article 13 below; plus

(2) Builder's Profit of \$\_\_\_\_\_.

In no event, however, shall the total cash payable pursuant to this paragraph A exceed \$\_\_\_\_\_.

B. In addition to any cash fee provided for in paragraph A, the Owner shall pay to the Contractor by means other than cash, the following:

(1) A promissory note in the form prescribed by HUD in the amount of \$\_\_\_\_\_. (2) \_\_\_\_\_.

C. If, upon completion, the Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction, plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, all such excess shall be refunded to the Owner.

D. Incentive Payment, where there is no Identity of Interest between Owner and Contractor:

(1) If there is no Identity of Interest between the Owner and the Contractor and the work is completed prior to the Final Completion Deadline, the Owner shall make an incentive payment to the Contractor. The amount of the payment shall be determined according to Exhibit \_\_, attached hereto, consisting of page 2 of Form HUD-92443, entitled Incentive Payment Computation. Step 3(b) thereof contains a blank that is to be filled in at the time this Construction Contract is executed.

(2) If, upon completion, the Contractor shall have received cash payments in excess of (a) the Actual Cost of Construction, plus (b) the Builder's Profit, plus any additional amount to be paid under the provisions of paragraph B, plus the incentive payment under the provisions of paragraph 1 above, all such excess shall be refunded to the owner.

(3) No incentive payment will be allowed on savings in costs disallowed by HUD or if the Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.

E. Incentive Payment, where there is an Identity of Interest between Owner and Contractor:

(1) If there is any Identity of Interest between the Owner and the Contractor, the cash upset figure set forth at the end of paragraph A, immediately above, is

hereby increased by the amount by which \$ \_\_\_\_\_ (the estimated sum of mortgage interest, taxes, and property insurance and mortgage insurance premiums applicable to the construction period for this project) exceeds the mortgagor's certified actual cost for these items through the Date of Final Completion, as approved by HUD, provided that construction is completed prior to the Final Completion Deadline, as amended by approved change order, and, further, that in no event shall the total cash payable exceed the actual cost of construction as approved by HUD.

(2) If the aggregate interest rate during the construction period is determined at the time of cost certification to be less than that upon which the mortgage note was endorsed, the estimated amount for interest, line 53 of form HUD-92264, shall be adjusted accordingly and the dollar amount set forth in paragraph E(1) shall be reduced.

#### **Article 4A: Contract Sum—Lump Sum Contract**

A. The Owner shall pay the Contractor for the performance of the contract, hereinafter provided, the sum of \$ \_\_\_\_\_ ( \_\_\_\_\_ and \_\_\_\_\_ /100 dollars).

B. Incentive Payment: If the work is completed prior to the Final Completion Deadline, the Owner shall pay to the Contractor, in addition to the contract sum stated in paragraph A, an amount equal to \_\_\_\_% (not to exceed 50%) of the amount by which the sum of the Owner's certified cost of interest, real estate taxes, insurance premiums and Mortgage Insurance premium during construction, as approved by HUD through the Date of Final Completion, is exceeded by HUD's estimates of these same items, which estimate is \$ \_\_\_\_\_. (Insert that portion of the sum of interest, taxes, insurance, and Mortgage Insurance premium that appears in Section G of Form HUD-92264 attributable to the construction period. If there has been a change in the interest rate charged for the construction period, the dollar amount included in Section G of HUD-92264 must be adjusted. The adjusted amount must be reflected in the savings computation). No incentive payment will be allowed on savings in costs disallowed by HUD or if the Contractor's cost certification is found by HUD to be either fraudulent or to materially misrepresent the Actual Cost of Construction.

#### **Article 5: Requisition and Payment Procedures**

A. Each month after the commencement of work hereunder, the Contractor shall make a monthly request

on Form HUD-92448 for payment by the Owner for work done during the preceding month. Each request for payment shall be filed at least 15 days before the date payment is desired. Subject to the approval of the Lender and HUD, the Contractor shall be entitled to payment thereon in an amount equal to (1) the total value of classes of the work acceptably completed; plus (2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; plus (3) the value of components stored off-site in compliance with applicable HUD requirements; less (4) 10 percent holdback and less prior payments. The "values" of (1), (2) and (3) shall be computed in accordance with the amounts assigned to classes of work in the "Contractor's and/or Mortgagor's Cost Breakdown," attached hereto as Exhibit "A".

B. With its final application for payment by the Owner, the Contractor shall disclose, on a form prescribed by HUD, all unpaid obligations contracted in connection with the work performed under this Contract. The Contractor agrees that within 15 days following receipt of final payment, it will pay such obligations in cash and furnish satisfactory evidence of such payment to the Owner.

C. The balance due the Contractor hereunder shall be payable upon the expiration of 30 days after the work hereunder is fully completed, provided the following have occurred: (1) All work hereunder requiring inspection by municipal or other governmental authorities having jurisdiction has been inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office having jurisdiction; (2) All certificates of occupancy, or other approvals, with respect to all units of the project have been issued by State or local governmental authorities having jurisdiction; and (3) Permission(s) to Occupy (Form HUD-92485) for all units of the project have been issued by HUD; (4) all executed final advance documents required by HUD have been submitted.

#### **Article 6: Receipts, Releases of Liens & Payments for Materials & Equipment**

A. The Contractor agrees that within 15 days following receipt of each monthly payment, it will pay in full and in cash all obligations for work done and materials, equipment and fixtures furnished through the date covered by such monthly payment. The Contractor may withhold retainage from the payment due each subcontractor,

corresponding to, but not exceeding, the 10 percent holdback specified in item (4) of Article 5, paragraph A.

B. The Owner may require the Contractor to attach to each request for payment its acknowledgment of payment and all subcontractors' and material suppliers' acknowledgments of payment for work done and materials, equipment and fixtures furnished through the date covered by the previous payment.

C. The Contractor agrees that no materials or equipment required by the Specifications will be purchased under a conditional sale contract or with the use of any security agreement or other vendor's title or lien retention instrument.

D. Concurrently with the final payment, the Contractor shall execute a waiver or release of lien for all work performed and materials furnished hereunder, and the Owner may require the Contractor to obtain similar waivers or releases from all subcontractors and material suppliers.

#### **Article 7: Obligations of Contractor**

A. The Contractor shall furnish, at its own expense, all building and other permits, licenses, tools, equipment and temporary structures necessary for the construction of the project. The Contractor shall give all required notices and shall comply with all applicable codes, laws, ordinances, rules and regulations, and protective covenants, and with the current regulations of the National Board of Fire Underwriters, wherever applicable. The Contractor shall comply with the provisions of the Occupational Safety and Health Act of 1970. The Contractor shall immediately notify the Owner, the Lender and HUD of the delivery of all permits, licenses, certificates of inspection, certificates of occupancy, and any other such certificates and instruments required by law, regardless of to whom issued, and shall cause them to be displayed to the Owner, the Lender and HUD upon request.

B. If the Contractor observes that the Drawings and Specifications are at variance with any applicable codes, laws, ordinances, rules or regulations, or protective covenants, it shall promptly notify the Supervisory Architect in writing, and any necessary changes shall be made as provided in this Contract for changes in the Drawings and Specifications. If the Contractor performs any work knowing it to be contrary to such codes, laws, ordinances, rules or regulations, or protective covenants, without giving such notice to the Supervisory

Architect, it shall bear all costs arising therefrom.

C. Upon completion of construction, the Contractor shall furnish to the Owner a topographic land survey map showing the location on the site of all improvements constructed thereon, and showing the location of all water, sewer, gas and electric lines and mains, and of all existing utility easements. Such survey map shall be prepared by a licensed surveyor who shall certify that the work is installed and erected entirely upon the land covered by the mortgage and within any building restriction lines on said land, and does not overhang or otherwise encroach upon any easement or right-of-way of others. Such survey shall be accompanied by a Surveyor's Report in the form required by HUD. In addition, the Contractor shall furnish additional surveys when required by the Owner for any improvements, including structures and utilities, not heretofore located on a survey. The Contractor shall furnish copies of such survey required hereunder for the Lender and HUD. The Contractor shall provide progress survey maps from time to time that show the improvements to be entirely within the property and set-back boundaries, and not encroaching upon any easements, as part of applications for payment. The Contractor shall provide updated final survey maps and Reports for Final Closing, in accordance with HUD requirements, including but not limited to Federal regulations, handbooks, and relevant HUD administrative guidance.

D. The Contractor shall assume full responsibility for the maintenance of all landscaping which may be required by the Drawings and Specifications until such time as both parties to this Contract shall receive written notice from HUD that such landscaping has been finally completed. The Owner hereby agrees to make available to the Contractor, for such purpose, without cost to the latter, such facilities as water, hose and sprinkler.

E. The Contractor shall establish an escrow in an amount satisfactory to the Lender and HUD for any work items that are incomplete at the time of Final Closing.

#### **Article 8: Assurance of Completion**

The Contractor shall furnish to the Owner assurance of completion of the work in the form of (specify) \_\_\_\_\_. Such assurance of completion shall run to the Owner and the Lender as obligees and shall contain a provision whereby the surety agrees that any claim or right of action that either the Owner or the Lender might

have thereunder may be assigned to HUD.

#### **Article 9: Waiver of Lien or Claim**

A. The Contractor shall not file a mechanic's or materialman's lien or maintain any claim against the Owner's real estate or improvements for or on account of any work done, labor performed or materials furnished under this Contract, and shall include in each subcontract a clause which shall impose this requirement on the subcontractor.

B. In jurisdictions where permitted by law, the Owner may require the Contractor to execute a Waiver of Liens that shall be recorded prior to the commencement of construction. The Contractor for itself, subcontractors, suppliers, materialmen, and all persons acting through or under it, shall agree not to file or maintain mechanics' lien or claim against the property described herein, on account of work done, labor performed or materials provided by them.

#### **Article 10: Right of Entry and Interpretation of Contract Documents**

A. At all times during construction, HUD, the Lender, and their agents or assigns shall have the right of entry and free access to the project and the right to inspect all work done and materials, equipment and fixtures furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish such enclosed working space as the Lender or HUD may require and find acceptable as to location, size, accommodations and furnishings.

B. HUD shall have the right to interpret the Contract Documents and to determine compliance therewith.

#### **Article 11: Assignments, Subcontracts and Termination**

A. This Contract shall not be assigned by either party without the prior written consent of the other party, the Lender and HUD, except that the Owner may assign the Contract, or any rights hereunder, to the Lender or HUD.

B. The Contractor shall not subcontract all of the work to be performed hereunder without the prior written consent of the Owner, the Lender and HUD.

C. Upon request by the Owner, the Lender or HUD, the Contractor shall disclose the names of all persons with whom it has contracted or will contract with respect to work to be done and materials and equipment to be furnished hereunder.

D. The Contractor understands that the work under this contract is to be financed by a building loan to be

secured by a mortgage and insured by HUD, and that the terms of said loan are set forth in a Building Loan Agreement between the Owner as Borrower and \_\_\_\_\_ as Lender.

E. The Contractor further understands that said Building Loan Agreement provides that, in the event of the failure of the Owner to perform its obligations to the Lender thereunder, the Lender may, as attorney-in-fact for the Owner, undertake the completion of the project in accordance with this Contract. In the event the Lender elects not to undertake such completion, the Contractor's obligations under this contract shall terminate.

#### **Article 12: Roles of HUD and Lender**

HUD is the insurer of the Lender's loan made to finance the construction identified herein, pursuant to the Building Loan Agreement referenced above in Article 11. Nothing provided herein, no action or inaction of the parties to this contract, or actions or inaction by any third parties, shall impute to HUD or the Lender status as a party to this Agreement.

#### **Article 13: Certification of Actual Cost—Cost Plus Contract**

A. The "Actual Cost of Construction" shall include all items of cost and expense incurred by the Contractor in the performance of this Contract and shall include an allowance for general overhead in the amount set forth in the Contractor's and/or Mortgagor's Cost Breakdown. Allowable items of cost and expense incurred by the Contractor in the performance of this Contract shall include costs and expenses of labor, materials for construction, equipment and fixtures, field engineering, sales taxes, workmen's compensation insurance, social security, public liability insurance, general requirements and all other expenses directly connected with construction. The value of any kickbacks, rebates or discounts received or receivable in connection with the construction of the project shall be subtracted from all items of cost and expense. Any cost or expense attributable to maintaining the Contractor's working capital is not to be included within the "Actual Cost of Construction."

B. The Contractor shall keep accurate records of account of the said Actual Cost of Construction, and shall, upon demand, make such records and invoices, receipts, subcontracts and other information pertaining to the construction of the project available for inspection by the Owner, Lender and HUD.

C. With its final application for payment, the Contractor shall furnish to the Owner a completed "Contractor's Certificate of Actual Cost," which shall be accompanied and supported by an independent public accountant's certificate as to actual cost in form acceptable to HUD.

D. The Contractor shall include in all subcontracts, equipment leases and purchase orders a provision requiring the subcontractor, equipment lessor or supplier to certify its costs incurred in connection with the project, in the event HUD determines there is an Identity of Interest between either the Owner or the Contractor and any such subcontractor, equipment lessor or supplier.

#### **Article 13A: Cost Certification—Lump Sum Contract**

In the event HUD determines that there is an Identity of Interest between the Contractor and the Owner, the Contractor shall certify, on a form prescribed by HUD, its cost incurred in the performance of the work under this contract.

#### **Article 14: Designation of Representatives**

A. The Owner hereby designates \_\_\_\_\_ as its representative for all communications involving work performed pursuant to this Agreement.

B. The Contractor hereby designates \_\_\_\_\_ as its representative for all communications involving work to be performed pursuant to this Agreement.

#### **Article 15: Headings and Titles**

Any heading, section title, paragraph or part of this Agreement is intended for convenience only, and is not intended, and shall not be construed, to enlarge, restrict, limit or effect in any way the construction, meaning, or application of the provisions thereunder, or under any other heading or title.

#### **Article 16: Severability**

The invalidity of any provision of this Contract shall not affect the validity of any other provision, and all other provisions shall remain in full force and effect.

IN WITNESS WHEREOF, the parties to these presents have executed this contract in six (6) counterparts, each of which shall be deemed an original, as of the year and day first above mentioned.

(Seal) Attest: Owner

(Seal) Attest: Contractor

**Note:** If Contractor or Owner is a corporation, Secretary should attest.

OMB No. (Exp. 00/00/00)

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hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

#### **SUPPLEMENTARY CONDITIONS OF THE CONTRACT FOR CONSTRUCTION**

U.S. Department of Housing and Urban development

#### **Article 1: Labor Standards**

A. *Applicability.* The Project or Program to which the construction work covered by this contract pertains is being assisted or insured by the United States of America, and the following Federal Labor Standards Provisions are included in this Contract or related instrument pursuant to the provisions applicable to such Federal assistance or insurance.

B. *Minimum Wages.* Pursuant to section 212 of the National Housing Act, 12 U.S.C. 1715c, the minimum wage provisions contained in this paragraph B do not apply to those projects with mortgages insured under section 221(h)(1) designed for less than 9 families and they do not apply to those projects with mortgages insured under either section 220 or 233 designed for less than 12 families.

1. (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project) will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably

anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv); also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs, which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under 29 CFR 5.5(a)(1)(ii)) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii) (a) Any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. HUD shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(b) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and HUD or its designee agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by HUD or its designee to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The

Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary. (Approved by the Office of Management and Budget under OMB control number 1215-0140.)

(c) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and HUD or its designee do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), HUD or its designee shall refer the questions, including the views of all interested parties and the recommendation of HUD or its designee, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary. (Approved by the Office of Management and Budget under OMB Control Number 1215-0140.)

(d) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs B.1.(ii)(b) or (c) of this Article, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program. (Approved by the Office of Management and Budget under OMB Control Number 1215-0140.)

2. Withholding. HUD or its designee shall upon its own action or upon

written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, HUD or its designee may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased. HUD or its designee may, after written notice to the contractor, disburse such amounts withheld for and on account of the contractor or subcontractor to the respective employees to whom they are due. The Comptroller General shall make such disbursements in the case of direct Davis-Bacon Act contracts.

### 3. Payrolls, records, and certifications.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1 (b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1 (b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which

show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs. (Approved by the Office of Management and Budget under OMB Control Numbers 1215-0140 and 1215-0017.)

(ii)(a) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to HUD or its designee if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to HUD or its designee. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i). This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, D.C. 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. (Approved by the Office of Management and Budget under OMB Control Number 1215-0149.)

(b) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under 29 CFR 5.5(a)(3)(i) and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(c) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by subparagraph B.3.(ii)(b) of this Article.

(d) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under subparagraph B.3.(i) of this Article available for inspection, copying, or transcription by authorized representatives of HUD or its designee or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, HUD or its designee may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

#### 4. Apprentices and Trainees.

(i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by such Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job

site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by such Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training

Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman's hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under 29 CFR part 5 shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

5. Compliance with Copeland Act Requirements. The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

6. Subcontracts. The contractor or subcontractor will insert in any subcontracts the clauses set forth in subparagraphs 1 through 10 of this paragraph B and such other clauses as HUD or its designee may by appropriate instructions require, and a copy of the applicable prevailing wage determination, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all contract clauses referenced in this subparagraph.

7. Contract termination and debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor or a subcontractor as provided in 29 CFR 5.12.

8. Compliance with Davis-Bacon and Related Act Requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

9. Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and HUD or its designee, the U.S. Department of Labor, or the employees or their representatives.

10. Certification of Eligibility.

(i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1) or to be awarded HUD contracts or participate in HUD programs pursuant to 24 CFR Part 24.

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1) or to be awarded HUD contracts or participate in HUD programs pursuant to 24 CFR Part 24.

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001. Additionally, U.S. Criminal Code, Section 1010, Title 18, U.S.C., "Federal Housing Administration transactions", provides in part: "Whoever, for the purpose of \* \* \* influencing in any way the action of such Administration \* \* \* makes, utters or publishes any statement, knowing the same to be false \* \* \* shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

C. *Contract Work Hours and Safety Standards Act*. 1. Applicability and Definitions. This paragraph C of Article 1 is applicable only if a direct form of federal assistance is involved, such as Section 8, Section 202/811 Capital Advance, grants etc., and is applicable

only where the prime contract is in an amount greater than \$100,000. As used in this paragraph C, the terms "laborers" and "mechanics" include watchmen and guards.

2. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

3. Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the immediately preceding subparagraph C.2, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of such subparagraph, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in such subparagraph.

4. Withholding for unpaid wages and liquidated damages. HUD or its designee shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from any moneys payable on account of work performed by the contractor or subcontractor under any such contract, or under any other Federal contract with the same prime contractor, or under any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act which is held by the same prime contractor such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph 3 of this paragraph C.

5. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs 1 through 5 of this

paragraph C and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in such subparagraphs 1 through 5.

D. *Section 242 and Title XI Overtime Requirements*. 1. Applicability. This paragraph D of Article 1 is applicable only to projects with mortgages insured or to be insured under Section 242 or Title XI of the National Housing Act.

2. Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or forty hours in such workweek, as the case may be.

3. Violation; liability for unpaid wages. In the event of any violation of the immediately preceding subparagraph, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages.

4. Withholding for unpaid wages and liquidated damages. HUD or its designee shall withhold or cause to be withheld from any moneys payable on account of work performed by the contractor or subcontractor under any such contract, or under any other contract subject to the provisions contained in this paragraph D which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages as provided in the clause set forth in subparagraph 3 of this paragraph.

5. Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs 2 through 5 of this paragraph D and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in such subparagraphs 2 through 5.

E. *Certification*. For projects with mortgages insured under the National Housing Act that are subject to paragraph B of this Article 1, the Contractor is required to execute the

Contractor's Prevailing Wage Certificate on page 2 of form HUD-92448 as a condition precedent to insurance by HUD of that certain mortgage loan, or an advance thereof, made or to be made by the Lender in connection with the construction of the project.

### **Article 2: Equal Employment Opportunity**

A. Applicability. This Article 2 applies to any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee.

B. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, disability, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, disability or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The Contractor agrees to post in conspicuous places available to employees and applicants for employment notices to be provided setting forth the provisions of this nondiscrimination clause.

C. The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, disability, or national origin.

D. The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding a notice to be provided advising the said labor union or workers representatives of the Contractor's commitments hereunder, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

E. The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965 and of the rules,

regulations, and relevant orders of the Secretary of Labor.

F. The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

G. In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulations or order of the Secretary of Labor, or as otherwise provided by law.

H. The Contractor will include the provisions of paragraphs A through H in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Secretary of Housing and Urban Development or the Secretary of Labor may direct as a means of enforcing such provisions, including sanctions for noncompliance. Provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Secretary of Housing and Urban Development or the Secretary of Labor, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

### **Article 3: Equal Opportunity for Businesses and Lower Income Persons Located Within the Project Area**

A. This Article 3 is applicable to projects covered by Section 3, as defined in 24 CFR part 135.

B. The work to be performed under this contract is on a project assisted under a program providing direct Federal financial assistance from the Department of Housing and Urban Development and is subject to the

requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u. Section 3 requires that to the greatest extent feasible opportunities for training and employment be given lower income residents of the unit of local government or the metropolitan area (or non-metropolitan county) as determined by the Secretary of Housing and Urban Development in which the project is located and contracts for work in connection with the project be awarded to business concerns which are located in, or owned in substantial part by persons residing in the same metropolitan area (or non-metropolitan county) as the project.

### **Article 4: Health and Safety**

A. This Article 4 is applicable only where the prime contract is in an amount greater than \$100,000.

B. No laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his or her health and safety as determined under construction safety and health standards promulgated by the Secretary of Labor by regulation.

C. The Contractor shall comply with all regulations issued by the Secretary of Labor pursuant to Title 29 CFR Part 1926, and failure to comply may result in imposition of sanctions pursuant to the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.*

D. The Contractor shall include the provisions of this Article 4 in every subcontract so that such provisions will be binding on each subcontractor. The Contractor shall take such action with respect to any subcontract as the Secretary of Housing and Urban Development or the Secretary of Labor shall direct as a means of enforcing such provisions.

OMB No. (Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Department of Housing and Urban  
Development, Office of Housing

Guide for Opinion of Borrower's  
Counsel {For use in HUD Insured  
Multifamily and Health Care  
Transactions}

{To Be on Firm Letterhead}  
{Insert Date of Endorsement}

Re: Project Name \_\_\_\_\_

FHA Project No. \_\_\_\_\_

Location \_\_\_\_\_

Borrower \_\_\_\_\_

[LENDER]

[ADDRESS]

[LENDER'S ATTORNEY]

[ADDRESS]

DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT

{INSERT APPROPRIATE HUD

ADDRESS}

Ladies and Gentlemen: We are [I am]  
[general/special] counsel to \_\_\_\_\_  
{INSERT NAME OF BORROWER} (the  
"Borrower"), a \_\_\_\_\_, {INSERT TYPE OF  
ENTITY} organized under the laws of  
the State of \_\_\_\_\_ {INSERT STATE} (the  
"Organizational Jurisdiction), in  
connection with a mortgage loan (the  
"Loan") in the [original/increased]  
amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) from  
\_\_\_\_\_ {INSERT NAME AND TYPE  
OF LENDER} (the "Lender") to the  
Borrower. The proceeds of the Loan will  
be used to [construct/rehabilitate/  
purchase/refinance] that certain  
[multifamily housing/hospital/extended  
care facility/nursing home/board and  
care/assisted living facility] project (the  
"Project"), commonly known as  
\_\_\_\_\_ and located in \_\_\_\_\_  
{INSERT COUNTY AND STATE} (said  
State to be referred to hereinafter as the  
"Property Jurisdiction") on the property  
described in Exhibit B {ATTACH  
LEGAL DESCRIPTION} (together with  
all improvements and fixtures thereon)  
(the "Property"). The Loan is being  
insured by the Federal Housing  
Administration (FHA), an organizational  
unit of the United States Department of  
Housing and Urban Development  
("HUD"), pursuant to a commitment for  
insurance [of advances OR upon  
completion OR for refinancing] issued  
to Lender by \_\_\_\_\_, Agent of the  
Federal Housing Commissioner, dated  
\_\_\_\_\_ [as amended by that certain letter  
from \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_]  
("FHA Commitment"). The Loan is  
being funded from \_\_\_\_\_ {DESCRIBE  
FINANCING SOURCE, e.g., tax-exempt  
bonds/mortgage backed securities  
guaranteed by GNMA/ participation  
certificates, etc.} The Borrower has  
requested that we [I] deliver this  
opinion and has consented to reliance

by Lender's counsel in rendering its  
opinion to Lender and to reliance by  
Lender and HUD in making and  
insuring, respectively, the Loan and has  
waived any privity between Borrower  
and us [me] in order to permit said  
reliance by Lender, counsel to Lender  
and HUD. We [I] consent to reliance on  
this opinion by Lender, counsel to  
Lender, and HUD.

In our [my] capacity as [general/  
special] counsel to the Borrower, we [I]  
have prepared or reviewed the  
following:

A. The [{DESCRIBE  
ORGANIZATIONAL DOCUMENTS, e.g.  
for corporations: State certified copies of  
the articles of incorporation, the by-  
laws, the borrowing resolution, the  
incumbency certificate and the good  
standing certificate(s), fictitious Name  
Registration, Foreign Corporation  
Registration; for partnerships: certified  
copies of the partnership agreement and  
any amendments thereto, the certificate  
of limited partnership, and any  
amendments thereto, the good standing  
certificate (or its equivalent) if provided  
in the Organizational Jurisdiction, etc.}]  
of the Borrower (collectively, the  
"Organizational Documents");

B. The FHA Commitment [extensions  
and assignment(s) thereof, if any];

C. The Commitment issued by the  
Lender and accepted by the Borrower,  
dated \_\_\_\_\_, (the "Loan  
Commitment");

D. The Regulatory Agreement (\_\_\_\_\_)   
{INSERT APPROPRIATE FORM NO.}   
by and between HUD and the Borrower,  
dated \_\_\_\_\_, (the "Regulatory  
Agreement");

E. The Note (94001M) in the original  
principal amount of \_\_\_\_\_ Dollars  
(\$ \_\_\_\_\_) OR in the increased principal  
amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) by  
Borrower in favor of Lender, dated  
\_\_\_\_\_, (the "Note");

F. [The Security Instrument (Mortgage  
OR Deed of Trust)] (94000M {WITH  
APPROPRIATE STATE RIDER  
ATTACHED \_\_\_\_\_), executed by  
Borrower for the benefit of Lender,  
granting a security interest in the  
Property, dated \_\_\_\_\_, (the "Security  
Instrument");

G. {INSERT THE NUMBER OF UCC's  
TO BE FILED} Uniform Commercial  
Code Financing Statements executed by  
the Borrower as debtor and naming the  
Lender and HUD as secured parties, to  
be filed in \_\_\_\_\_, {INSERT  
LOCATION(S)} (the Filing Offices),  
upon the {DESCRIBE EVENTS} (the  
"Financing Statements");

H. The Security Agreement by and  
between Borrower and the Lender,  
granting a security interest under the  
Uniform Commercial Code, in those

items of personalty described therein,  
dated \_\_\_\_\_, (the "Security  
Agreement");

[I. {TO BE INSERTED IF THE  
SECURITY INSTRUMENT IS ON A  
LEASEHOLD ESTATE} The Ground  
Lease executed by {INSERT LESSOR} as  
lessor and Borrower as lessee recorded  
in the land records of \_\_\_\_\_, dated  
\_\_\_\_\_, (the "Ground Lease").]

[J. {TO BE INSERTED FOR  
CONSTRUCTION/REHABILITATION  
LOANS} The Building Loan Agreement  
(92441M) executed by Lender and  
Borrower, dated \_\_\_\_\_, (the "Building  
Loan Agreement").]

[K. {TO BE INSERTED FOR  
CONSTRUCTION/REHABILITATION  
LOANS} The Construction Contract  
(92442M) executed by \_\_\_\_\_ (the  
"General Contractor") and Borrower,  
dated \_\_\_\_\_ (the "Construction  
Contract").]

L. The Mortgagee's Certificate  
(92434M), executed by the Lender,  
dated \_\_\_\_\_.

M. The Working Capital Escrow  
(92412M), executed by the Borrower,  
dated \_\_\_\_\_.

N. The Agreement and Certification  
(93305M){INSERT APPROPRIATE  
FORM NO.}, executed by the Borrower,  
dated \_\_\_\_\_.

O. The Mortgagee's Oath (92478M),  
executed by the Borrower, dated \_\_\_\_\_.

P. The Borrower's Opinion  
Certification, pertaining to factual  
matters relied on by us [me] in  
rendering this opinion, executed by the  
Borrower, dated \_\_\_\_\_, a copy of which  
is attached hereto as Exhibit \_\_\_\_ (the  
"Certification of Borrower").

Q. A search conducted by \_\_\_\_\_  
dated \_\_\_\_\_ {no earlier than 30 days  
before this opinion} of the financing  
records of the county and Property  
Jurisdiction [and Organizational  
Jurisdiction] (the "UCC Search").

[R. A receipt from the insurance  
company providing flood insurance  
evidencing payment for the premium,  
dated \_\_\_\_\_, (the "Flood Insurance  
Receipt").]

S. The Title Insurance Policy [or date-  
down if appropriate in a refinancing, for  
example] issued by \_\_\_\_\_ {acceptable  
company under HUD's regulations},  
together with all endorsements, and  
naming HUD and the Lender as insureds  
as their interests may appear, dated  
\_\_\_\_\_, (the "Title Policy").

[T. The following documents  
evidencing zoning compliance, \_\_\_\_\_,  
{DESCRIBE ALL DOCUMENTS FULLY}  
(the "Zoning Certificate").]

[U. The building permit(s) issued on  
\_\_\_\_\_ by \_\_\_\_\_ (the "Building  
Permit").]

[V. The following permits, \_\_\_\_\_, {DESCRIBE PERMITS} which are required for the operation of the project, issued by on \_\_\_\_\_ (“Other Permits”).]

[W. The Surveyor’s Plat OR Survey showing completed project, prepared by \_\_\_\_\_, dated \_\_\_\_\_, (the “Survey”).]

X. The Surveyor’s Report (92457M), executed by \_\_\_\_\_, dated \_\_\_\_\_, (the “Surveyor’s Report”).]

[Y. The deferred note (91710M, 91712M or 92223M) executed by Borrower in favor of \_\_\_\_\_, dated \_\_\_\_\_, (the “Deferred Note”).]

[Z. The Performance Bond (92452M) and the Payment Bond (92452A–M) issued by \_\_\_\_\_ (Surety) to secure payment and performance of \_\_\_\_\_ (General Contractor) and running to \_\_\_\_\_ OR the Completion Assurance Agreement (92450M) executed by the General Contractor, dated \_\_\_\_\_, (the “Assurance of Completion”).]

[AA. The Owner-Architect Agreement (AIA B181 with HUD Supplement) executed by \_\_\_\_\_ {INSERT DESIGN AND/OR CONSTRUCTION ARCHITECT} and Borrower, dated \_\_\_\_\_, (the “Owner-Architect Agreement”).]

[BB. The Off-Site Bond (92479M) issued by \_\_\_\_\_ (Surety) to secure the completion of off-site work by \_\_\_\_\_ (General Contractor) and running to the Lender and HUD OR Escrow Agreement for Off-Site Facilities (92446M) with Schedule “A” executed by \_\_\_\_\_ dated \_\_\_\_\_ (the “Assurance of Completion of Off-Site Facilities”).]

[CC. The following documents assuring water, electricity, sewer, gas, heat or other utility services (the “Assurance of Utility Services”): \_\_\_\_\_ {DESCRIBE FULLY.}

[DD. The Contractor’s and/or Borrower’s Cost Breakdown (92328M) executed by the General Contractor, dated \_\_\_\_\_, (the “Cost Breakdown”).]

[EE. The Latent Defects Bond (93259M) issued by \_\_\_\_\_ and securing the performance of the General Contractor and running to the Lender and HUD OR Escrow executed by \_\_\_\_\_, dated \_\_\_\_\_ (the “Guarantee against Latent Defects”).]

[FF. The Escrow Agreement for Incomplete Construction (92456M) with Schedule A executed by the General Contractor, dated \_\_\_\_\_, (the “On-Site Deposit Escrow”).]

[GG. The Contractor’s Prevailing Wage Certificate (on page 2 of form 92448M) executed by \_\_\_\_\_, dated \_\_\_\_\_, (the “Contractor’s Prevailing Wage Certificate”).]

[HH. The Request for Final Endorsement of Credit Instrument (92023M) and/or Request for Endorsement of Credit Instrument and

Certificate of Mortgagee, Borrower and General Contractor (92455M) executed by the Borrower and the Lender, dated \_\_\_\_\_, (the “Request for Endorsement”). {MODIFY AS APPROPRIATE FOR INSURANCE UPON COMPLETION, REFINANCINGS, ETC.}

[II. The Operating Deficit Escrow (92476a–M) executed by \_\_\_\_\_, dated \_\_\_\_\_, (the “Operating Deficit Escrow”).]

[JJ. The Repair Escrow executed by \_\_\_\_\_, dated \_\_\_\_\_, (the “Repair Escrow”).]

[KK. All documents executed by Borrower and any State or local government entity pertaining to development of the Property (the “Public Entity Agreement”).]

[LL. The following documents executed or delivered in connection with the financing of the loan with the proceeds of bonds [exempt from federal taxation]: \_\_\_\_\_ {LIST DOCUMENTS IN ACCORDANCE WITH INSTRUCTIONS} (the “Bond Documents”).]

[MM. The Good Standing Certificate(s) {SEE “A” ABOVE} issued by [Organizational Jurisdiction OR Property Jurisdiction, if different], dated \_\_\_\_\_ {DATE INSERTED MUST BE WITHIN 30 DAYS OF THE DATE OF ENDORSEMENT}, (the “Good Standing Certificate”).]

[NN. The certificate executed by \_\_\_\_\_ {INSERT ARCHITECT OR OTHER PROFESSIONAL}, dated \_\_\_\_\_, (the “Certificate”).]

[OO. A search conducted by \_\_\_\_\_ dated [no earlier than 30 days before this opinion] of the public records of the federal District Court and State and local courts in: (i) the jurisdiction where the Property is located; (ii) the jurisdiction(s) where the Borrower is located and does business; and (iii) the jurisdiction where the general partner of the Borrower is organized (the “Docket Search”).]

**Note:** Numerical references in parentheses above are to FHA and HUD form numbers.

The documents listed in B through I above are referred to collectively as the “Loan Documents.” The documents listed in J through OO are referred to collectively as the “Supporting Documents.” The documents listed in A through OO are referred to collectively as the “Documents.”

In basing the several opinions set forth in this document on “our [my] knowledge,” the words “our [my] knowledge” signify that, in the course of our [my] representation of the Borrower, no facts have come to our [my] attention that would give us [me] actual knowledge or actual notice that any

such opinions or other matters are not accurate. Except as otherwise stated in this opinion, we [I] have undertaken no investigation or verification of such matters. Further, the words “our [my] knowledge” as used in this opinion are intended to be limited to the actual knowledge of the attorneys within our [my] firm who have been involved in representing the Borrower in any capacity including, but not limited to, in connection with this Loan. We [I] have no reason to believe that any of the documents on which we [I] have relied contain matters which, or the assumptions contained herein, are untrue, contrary to known facts, or unreasonable.

In reaching the opinions set forth below, we [I] have assumed, and to our [my] knowledge there are no facts inconsistent with, the following:

(a) Each of the parties to the Documents, other than the Borrower (and any person executing any of the Documents on behalf of the Borrower), has duly and validly executed and delivered each such instrument, document, and agreement to be executed in connection with the Loan to which such party is a signatory, and such party’s obligations set forth in the Documents are its legal, valid, and binding obligations, enforceable in accordance with their respective terms.

(b) Each person executing any of the Documents, other than the Borrower (and any person executing any of the Documents on behalf of the Borrower), whether individually or on behalf of an entity, is duly authorized to do so.

(c) Each natural person executing any of the Documents is legally competent to do so.

(d) All signatures of parties other than the Borrower (and any person executing any of the Documents on behalf of Borrower) are genuine.

(e) All Documents which were submitted to us [me] as originals are authentic; all Documents which were submitted to us [me] as certified or photostatic copies conform to the original document, and all public records reviewed are accurate and complete.

(f) All applicable Documents have been duly filed, indexed, and recorded among the appropriate official records and all fees, charges, and taxes due and owing as of this date have been paid.

(g) The parties to the Documents and their successors and/or assigns will: (i) act in good faith and in a commercially reasonable manner in the exercise of any rights or enforcement of any remedies under the Documents; (ii) not engage in any conduct in the exercise of such rights or enforcement of such

remedies that would constitute other than fair and impartial dealing; and (iii) comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Documents.

(h) The exercise of any rights or enforcement of any remedies under the Documents would not be unconscionable, result in a breach of the peace, or otherwise be contrary to public policy.

(i) The Borrower has title or other interest in each item of (i) real and (ii) tangible and intangible personal property ("Personalty") comprising the Property in which a security interest is purported to be granted under the Loan Documents [and, where Personalty is to be acquired after the date hereof, a security interest is created under the after-acquired property clause of the Security Agreement].

In rendering this opinion we [I] also have assumed that the Documents accurately reflect the complete understanding of the parties with respect to the transactions contemplated thereby and the rights and the obligations of the parties thereunder. We [I] also have assumed that the terms and the conditions of the Loan as stated in the Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Documents. After reasonable inquiry of the Borrower, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions in this paragraph are not justified.

In rendering our [my] opinion in paragraph 13, we [I] also have assumed that: (i) all Personalty in which a security interest is created under the Documents (other than accounts or goods of a type normally used in more than one jurisdiction) is located at the Property except for the following itemized property: \_\_\_\_\_ [Certain health care receivables, income, bank accounts, etc. and other such property which is not located within the physical description of the realty should be listed here.]. and (ii) Borrower's [Chief Executive Office] [only place of business] [residence] is located in \_\_\_\_\_. After reasonable inquiry of the Borrower, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions and factual exception set forth in this paragraph are not justified.

In rendering this opinion, we [I] have, with your approval, relied as to certain matters of fact set forth in the Certification of Borrower, the Good

Standing Certificate(s) [and certain other specified Documents,] as set forth herein. After reasonable inquiry of the Borrower as to the accuracy and completeness of the Certification of Borrower, the Good Standing Certificate(s), [and such other Documents], we [I] have no knowledge of any facts or information that would lead us [me] to believe that such reliance is not justified.

Based on the foregoing and subject to the assumptions and qualifications set forth in this letter, it is our [my] opinion that:

{TO BE USED IN CASES WHERE ORGANIZATIONAL DOCUMENTS WERE PREPARED BY BORROWER'S ATTORNEY}

1. The Borrower is a \_\_\_\_\_ {INSERT TYPE OF ENTITY} duly organized and validly existing under the laws of the Organizational Jurisdiction. The Borrower is duly qualified to do business and, based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [ ], is in good standing under the laws of the Organizational Jurisdiction, [and is qualified to do business as a foreign \_\_\_\_\_ entity in the Property Jurisdiction based on a review of \_\_\_\_\_.] {OR, IF THE BORROWER IS A TRUST OR LIMITED LIABILITY COMPANY (LLC)}

The Borrower is \_\_\_\_\_ {INSERT NAME OF THE TYPE OF TRUST OR NAME OF LLC} duly formed and validly existing under the laws of the Organizational Jurisdiction [, and is qualified to do business as a foreign \_\_\_\_\_ entity in the Property Jurisdiction]. {AND, IF THE GENERAL PARTNER OF A PARTNERSHIP BORROWER OR MANAGING MEMBER OF AN LLC BORROWER IS AN ENTITY}

The general partner of the Borrower is a \_\_\_\_\_ {INSERT TYPE OF ENTITY}, duly organized, validly existing and, based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [ ], in good standing under the laws of the Organizational Jurisdiction [and is qualified to do business as a foreign \_\_\_\_\_ {INSERT TYPE OF ENTITY} in the Property Jurisdiction]. {TO BE USED IN CASES, PRINCIPALLY REFINANCINGS, WHERE ORGANIZATIONAL DOCUMENTS WERE NOT PREPARED BY BORROWER'S ATTORNEY}

1. Based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [ ], the Borrower is a \_\_\_\_\_ {INSERT TYPE OF ENTITY} validly existing under the laws of the Organizational Jurisdiction and in good standing under the laws of the

Organizational Jurisdiction [and is qualified to do business as a foreign \_\_\_\_\_ entity in the Property Jurisdiction]. {OR, IF THE BORROWER IS A TRUST}

The Borrower is \_\_\_\_\_ {INSERT NAME OF THE TYPE OF TRUST} validly existing under the laws of the Organizational Jurisdiction [and is duly qualified to do business as a foreign \_\_\_\_\_ entity in the Property Jurisdiction]. {AND, IF THE GENERAL PARTNER OF A PARTNERSHIP BORROWER OR THE MANAGING MEMBER OF AN LLC IS AN ENTITY}

Based solely on the Good Standing Certificate(s), copy attached hereto as Exhibit [ ], the general partner of the Borrower is a \_\_\_\_\_ {INSERT TYPE OF ENTITY}, validly existing and in good standing under the laws of \_\_\_\_\_ {INSERT STATE} [and is qualified to do business as a foreign \_\_\_\_\_ {INSERT TYPE OF ENTITY} in the Property Jurisdiction].

2. The Borrower has the [corporate/partnership/trust] power and authority and possesses all necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment. [In transactions involving health care facilities where there is a lease or other contract affecting the license, Certificate of Need (CoN) and/or receivables, this provision and some of the provisions below may have to be modified accordingly to reflect HUD policy. In such cases, approval must be obtained from the Office of General Counsel, Office of Insured Housing.]

3. The execution and delivery of the Loan Documents by or on behalf of the Borrower, and the consummation by the Borrower of the transactions contemplated thereby, and the performance by the Borrower of its obligations thereunder, have been duly and validly authorized by all necessary [corporate/partnership/trust] action by, or on behalf of, the Borrower.

4. All authorizations, consents, approvals, and permits have been obtained from, appropriate actions have been taken by, and necessary filings have been made with all necessary Organizational and Property Jurisdictions or federal courts or governmental authorities, all as disclosed on Exhibit \_\_, attached hereto, and as listed and set forth in Paragraph(s) 2 and \_\_\_\_ of this opinion [i.e. good standing certificate]. To the best of our knowledge, these represent all such authorizations, consents,

approvals, permits, actions and filings that are required in connection with the execution and delivery by the Borrower of the Loan Documents and the ownership [and operation] of the Property.

5. Each of the Loan Documents has been duly executed and delivered by the Borrower and constitute the valid and legally binding promises or obligations of the Borrower, enforceable against the Borrower in accordance with its terms, subject to the following qualifications:

(i) the effect of applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors generally; and

(ii) the effect of the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or of equity); and

(iii) certain remedies, waivers, and other provisions of the Loan Documents may not be enforceable, but, subject to the qualifications set forth in this paragraph at (i) and (ii) above, such unenforceability will not preclude (a) the enforcement of the obligation of the Borrower to make the payments as provided in the Mortgage and Note (and HUD's regulations), and (b) the foreclosure of the Mortgage upon the event of a breach thereunder.

6. {TO BE INSERTED WHEN ANY OR ALL OF THE LOAN DOCUMENTS ARE NOT HUD APPROVED FORMS OR WHEN HUD APPROVED FORMS HAVE BEEN REVISED OR MODIFIED IN CONNECTION WITH THE LOAN} The execution and delivery of, and the performance of the obligations under, the Loan Documents will not violate the Organizational Documents of the Borrower or any applicable provisions of local or State law.

7. {INSERT FOR LOANS INVOLVING CONSTRUCTION OR REHABILITATION} To our [my] knowledge there are no proposed change(s) of law, ordinance, or governmental regulation (proposed in a formal manner by elected or appointed officials) which, if enacted or promulgated after the commencement of construction/rehabilitation, would require a modification to the Project, and/or prevent the Project from being completed in accordance with the plans and specifications, dated \_\_\_\_\_, executed by \_\_\_\_\_ {INSERT BORROWER} and \_\_\_\_\_ {INSERT GENERAL CONTRACTOR}, and \_\_\_\_\_ {INSERT GENERAL CONTRACTOR}, and referred to in the Construction Contract (the "Plans and Specifications").]

8. {INSERT IF THERE IS NO ZONING ENDORSEMENT INCORPORATED INTO THE TITLE

POLICY} The attached Zoning Certificate states that the Property appears on the zoning maps of [Property Jurisdiction] as being located in a \_\_\_\_\_ zone. According to the zoning ordinance of the Property Jurisdiction, the use of the Property as a \_\_\_\_\_ is a permitted use in such zone.

or

Based solely on the Zoning Certificate, the Property may be used for \_\_\_\_\_ as a permitted use.]

[9. {USE FOR NEW CONSTRUCTION OR SUBSTANTIAL REHABILITATION IN CASES WHERE THE DEPARTMENT DOES NOT RECEIVE A CERTIFICATE DIRECTLY FROM THE PROFESSIONAL} Based solely on the

Certificate, construction/rehabilitation of the Project in accordance with the Plans and Specifications will comply with all applicable land use and zoning requirements.

{USE FOR REFINANCINGS} Based solely on the Certificate, the Project complies with all applicable land use and zoning requirements.]

10. Based solely on (a) our [my] knowledge and (b) the Certification of Borrower, the execution and delivery of the Loan Documents will not: (i) cause the Borrower to be in violation of, or constitute a default under the provisions of, any agreement to which the Borrower is a party or by which the Borrower is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which the Borrower is subject, or (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever on any of the property or assets of the Borrower, except as specifically contemplated by the Loan Documents.

11. Based solely on (a) our [my] knowledge, (b) the Certification of Borrower and (c) the Docket Search; there is no litigation or other claim pending before any court or administrative or other governmental body or threatened in writing against the Borrower (or any Principal thereof as defined in the HUD regulations), or the Property, [ {TO BE INSERTED WHEN BORROWER IS NOT A SOLE-ASSET BORROWER} or any other properties of the Borrower (or any Principal)] [, except as identified on Exhibit \_\_\_\_].

12. The Mortgage is in appropriate form for recordation in \_\_\_\_\_ {INSERT PROPER NAME OF LOCAL LAND RECORDS OFFICE} of \_\_\_\_\_ {INSERT COUNTY OR CITY} of the Property Jurisdiction, and is sufficient, as to form, to create the encumbrance and

security interest it purports to create in the Property.

13. Filing of the Financing Statements in the Filing Offices will perfect the security interests of both Lender and HUD in the Personalty of the Borrower located in the Project Jurisdiction and in any Personalty which the Borrower is entitled to receive (such as health care receivables), but only to the extent that, under the Uniform Commercial Code in effect in the Project Jurisdiction, a security interest in each described item of Personalty can be perfected by filing. The Filing Offices are the only offices in which the Financing Statements are required to be filed in order to perfect the Lender's and HUD's security interests in the Personalty.

14. The Loan does not violate the usury laws or laws regulating the use or forbearance of money of the Property Jurisdiction.

15. {FOR USE ONLY IF BORROWER IS A TRUST} The Borrower is an irrevocable trust that has a term consistent with HUD's requirements and the term of the irrevocable trust is not affected by the terms of any of the beneficiaries' interests.] [The laws of the Property Jurisdiction govern the interpretation and the enforcement of the Loan Documents notwithstanding that the Borrower may be formed in a jurisdiction other than the Property Jurisdiction. The Borrower can sue and be sued in the Property Jurisdiction without the necessity of joining any of the beneficiaries of the Borrower, including without limitation, a suit on the Note or a foreclosure proceeding arising under the Mortgage. Venue for any foreclosure proceeding under the Mortgage may be had in [Property Jurisdiction].

16. {USE IN CASES INVOLVING BOND FINANCING} Based solely on the opinion of \_\_\_\_\_ {INSERT BOND COUNSEL}, dated as of the date hereof and attached hereto as Exhibit \_\_, to the extent that any of the provisions of the Bond Documents are inconsistent with any of the provisions of the Loan Documents or Supporting Documents, the provisions of the Loan Documents or Supporting Documents shall govern.]

17. {USE IN CASES WHERE THE DEVELOPMENT OF THE PROPERTY IS GOVERNED BY AN AGREEMENT WITH A PUBLIC ENTITY} Based upon our knowledge and the Certification of Borrower, there is no default under the Public Entity Agreement, and construction in accordance with the Plans and Specifications and within the time frame specified in the Construction Contract will not lead to a default under the Public Entity Agreement.]

In addition to the assumptions set forth above, the opinions set forth above are also subject to the following qualifications:

(i) The Uniform Commercial Code of the Property Jurisdiction requires the periodic filing of continuation statements with \_\_\_\_ [and \_\_\_\_] not more than \_\_\_\_ prior to and not later than the expiration of the \_\_\_\_ year period from the date of filing of the Financing Statements and the expiration of each subsequent \_\_ year period after the original filing, in order to maintain the perfection and priority of security interests and to keep the Financing Statements in effect.

(ii) We express no opinion as to the laws of any jurisdiction other than the laws of the Property Jurisdiction [and the Organizational Jurisdiction, if it is different,] and the laws of the United States of America. The opinions expressed above concern only the effect of the laws (excluding the principles of conflict of laws) of the Property Jurisdiction [and the Organizational Jurisdiction, if it is different] and the United States of America as currently in effect. We assume no obligation to supplement this opinion if any applicable laws change after the date of this opinion, or if we become aware of any facts that might change the opinions expressed above after the date of this opinion.

We [I] confirm that:

(a) Based on the Organizational Documents, the name of the Borrower in each of the Documents and the Title Policy and FHA Commitment is the correct legal name of the Borrower;

(b) The legal description of the Property is consistent in the Documents wherein it appears and in Exhibit B hereto;

(c) We [I] do not have any financial interest in the Project, the Property, or the Loan, other than fees for legal services performed by us, arrangements for the payment of which have been made; and we [I] agree not to assert a claim or lien against the Project, the Property, the Borrower, the Loan proceeds or income of the Project;

(d) Other than as Counsel to the Borrower, we [I] have no interest in the Borrower (or any principal thereof) or the Lender or any other party involved in the Loan transaction and do not serve as [a director, officer or] [an] employee of the Borrower or the Lender. We [I] have no undisclosed interest in the subject matters of this opinion. We [I] do not represent the Lender, any investing lender or investor in the loan transaction, any bridge lender involved in the loan transaction, any lender with a commitment to purchase the loan or

any interest therein or any other party involved in the Project or the loan transaction;

(e) [FOR USE IN MAP TRANSACTIONS ONLY] Based solely upon our [my] knowledge and the Certificate of the Borrower, there is no identity of interest between the Borrower and the Lender;

(f) Based solely on the Surveyor's Report and the Surveyor's Plat, flood insurance [is OR is not] required pursuant to 42 U.S.C. 4012a(a); [INSERT IF FLOOD INSURANCE IS REQUIRED] Based solely on the Flood Insurance Receipt, flood insurance is in effect which satisfies the requirements of 42 U.S.C. 4012a(a);

(g) To our [my] knowledge, there are no liens or encumbrances against the Property which are not reflected as exceptions to coverage in the Title Policy;

(h) We [I] have reviewed and discussed the terms of the Regulatory Agreement with Borrower;

(i) Based upon the Certification of Borrower and to the best of our [my] knowledge, there are no side-deals (transactions outside the parameters of the HUD form closing documents and the commitment) between Borrower and any party to the transaction) other than as disclosed in the aforesaid Documents; and

(j) This document does not deviate from the format approved by OMB and obtained from HUD on \_\_\_\_ except for such changes as have been identified to and specifically approved by HUD counsel.

The foregoing opinions are for the exclusive reliance of HUD, [Lender OR Lender and Lender's counsel] and any subsequent holder of the Note.

Sincerely,

\_\_\_\_\_  
[Authorized Signature]

**Certification/Warning**

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_  
{ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES}

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

(For use in HUD-Insured MULTIFAMILY AND HEALTHCARE Transactions)

**Department of Housing and Urban Development Federal Housing Administration**

**Instructions to Guide for Opinion of Borrower's Counsel**

**Explanatory Comments**

The Guide for this opinion was originally prepared in 1994 in view of changes in opinion practice as reflected by the ABA Accord and various State law bar reports on opinion letters and has been revised to reflect approximately seven years experience in using the Guide. The principal purpose of this Guide remains to achieve a uniform format which can be utilized throughout the Nation and which will be familiar to HUD counsel in all jurisdictions. Such a standardized format is crucial in an era when less resources are available to the Department; however, it should be emphasized that certain limited changes can be authorized by HUD field counsel as required by local law or by the unique or programmatic nature of the transaction (e.g. refinancing transactions under Section 241 of the National Housing Act). An effort has been made in these revised instructions to specify examples in more (but not all) of those areas where such changes can be authorized. Otherwise, the format of the Guide must be followed and is not open to negotiation. In this regard, revisions cannot be justified because of a particular Opinion having been approved by another HUD field office. The exercise of discretion by one HUD field counsel in unique circumstances cannot become the basis for any modification to the Opinion. Any

requested modification must be analyzed on its own merit and in a particular context. In these explanatory comments, the document may be referred to as the "Guide" or the "Opinion," depending upon the context.

The Department regards the Counsel to the Borrower as a crucial, central figure in the process of preparing and executing the legal and administrative documents necessary to achieve a closing in those multifamily rental and health care mortgage insurance programs where a note is endorsed for mortgage insurance by the Department. Please note that pursuant to the overall document reform effort for the multifamily rental and health care closing documents, "Mortgagor" is now referred to as "Borrower" and "Mortgagee" is now referred to as "Lender;" however, those new uses are defined to mean "Mortgagor" and "Mortgagee" as those terms are used in the National Housing Act. Pursuant to 24 CFR Part 24, § 24.105(p), attorneys or others in a business relationship with the Borrower are defined as "principals." Counsel to the Borrower has significant obligations to its client (the Borrower), the Lender and the Department. In part, these responsibilities entail the exercise of due diligence to assure the accurate and timely preparation, completion and submission of the forms required by the Department in connection with the transaction. Further, the Counsel to the Borrower and any other attorneys involved in the transaction should be thoroughly familiar with the regulations, procedures and directives of the Department pertaining to each mortgage insurance transaction in which Counsel participates. The Department takes seriously the preparation and completion of the various documents involved in the mortgage insurance process (most of which are HUD form documents) and cannot overemphasize the importance of the following bolded language which must appear in all documents relied upon by the Department in insuring the mortgage loan:

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon

by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

**[Add Additional Lines if More Than Two Signatories]**

*Warning*

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30.

Please note that this certification/warning also appears in the Opinion and cannot be deleted under any circumstances.

Article IX of the UCC was recently revised in virtually all of the jurisdictions in which HUD insures multifamily rental and health care facility loans. It is imperative that Counsel to the Borrower be aware of these changes in State law and that the UCC documentation be prepared so as to comply with HUD requirements and State law. Furthermore, in connection with health care facility closings, it is imperative that the UCC documentation cover the Certificate of Need (CoN) and the license and that these two documents be tied to the security property covered by the mortgage for the duration of the mortgage. Please note that the Opinion has been amended to cover these points. See G, below, for a more specific discussion of UCC securitization and some major changes by HUD with respect to the legal documentation.

With limited State law related exceptions, HUD anticipates that Borrower's Counsel will be able to follow the Guide in rendering an Opinion in virtually all multifamily rental housing closings involving new construction and substantial rehabilitation and there should be few changes in refinancing and health care transactions. Generally, HUD field counsel should not accept Opinions that otherwise substantially or materially deviate from the Guide. Although we

understand that attorneys and law firms may have evolved particular styles and forms of opinion, HUD field counsel do not have time to negotiate each and every Opinion for stylistic changes and differences in thinking among opinions committees. It is essential that the Guide be followed in both style and substance in order to ensure a timely closing. The Counsel to the Borrower is expected to complete a draft Opinion for submission to HUD field counsel at least fifteen days prior to the closing along with the other closing documents. Any deviations must be specifically identified (redlined or highlighted) and discussed with field counsel at that time so that the deviations can be resolved prior to the closing. Any material deviation not required by State or local law or otherwise authorized by these instructions must be brought to the attention of the Assistant General Counsel, Multifamily Mortgage Division, by field counsel along with an explanation by Counsel to the Borrower as to the necessity for the deviation.

It was anticipated that the Guide could be utilized in connection with all types of closings: insured advances or insurance upon completion (for new construction or substantial rehabilitation); final closings (for refinancings, etc.). This has proved to be the case and, furthermore, the Guide format has been adapted and used in Transfers of Physical Assets (TPAs) and hospital mergers, for example. However, numerous questions have been raised—particularly in cases involving Section 241 supplemental loans and the various refinancing transactions under Section 223. Therefore, it is important that the correct options be selected in instances where choices are provided and that appropriate deletions or modifications be made to accommodate unique circumstances or programs. On the other hand, it should be emphasized that this does not authorize field counsel to approve changes to the Guide in cases other than where the Guide is being adapted for a special use, *e.g.* refinancing or equity loan transaction, TPA, etc. Furthermore, HUD has made an administrative policy decision to not require an opinion by Counsel to the borrower for projects within the "Small Projects Mortgage Insurance Pilot Program (SPP)." A Notice will be issued defining small project and clarifying the parameters of the SPP. The Lender will have the option of requiring an opinion by Counsel to the Borrower if the Lender so elects. It is anticipated that the Certification of the Owner will be expanded slightly for use in the SPP to provide assurances and comfort to HUD

in such cases. Otherwise, the Guide or a variation thereof should be utilized in all FHA-insured multifamily rental project and health care facility closings.

The Guide is not intended to serve as a closing checklist; therefore, HUD field counsel may update or modify existing closing checklists as necessary to meet constantly changing program needs and handbook instructions and directives. For example, many deletions from the list of Guide documents are appropriate for various types of refinancings, operating loans, equity loans, etc. whereas several additional documents are necessary in the case of loans for health care facilities (e.g. certificate of need, license, etc.), supplemental loans, and certain complex refinancings.

Brackets continue to be used in the Guide to indicate alternate language, insertions, documents, or instructions depending on the applicable facts and underlining is used to indicate blanks that must be completed.

The Guide contains some instructions and definitions and is largely self-explanatory; however, the following expanded instructions and clarifications should provide additional assistance to both private counsel and HUD counsel. The numbers and letters used below relate to the paragraph numbers and letters in the Guide unless page numbers are specifically designated.

#### *Page 1 and Introductory Paragraph*

- Letterhead and date: The Opinion must be on the firm letterhead and dated the date of endorsement of the note by HUD.
- Reference: Data regarding the project, name, HUD project number, and location and the name or title of the Borrower must be accurate and inserted in the appropriate blanks.
- Addressees: The Opinion must be delivered to HUD as well as the Lender to establish the explicit right of each to rely on the Opinion. The Lender's counsel may be relying on the Opinion for certain aspects of its opinion. If so, the Opinion must also be addressed to counsel to the Lender. HUD is aware that recent case law has raised issues about the extent to which a Lender can rely upon such an opinion; therefore, the matter of reliance by the Lender could be clarified by the parties at the outset in jurisdictions where the issue has been raised. Regardless of case law, HUD continues to believe that this is a unique transaction where the federal interest as insurer of the Lender is clear from the outset and that it is as a result of the unique federal requirements that Counsel to the Borrower is retained to represent the borrower in such a fashion that the Opinion rendered by Counsel to

the Borrower necessarily must be addressed to, and relied upon by, HUD as the insurer of the Lender and the Lender in order for the loan transaction to go forward. In cases where counsel to the Lender elects not to rely upon the Opinion or Counsel to the Borrower does not wish to permit reliance by counsel to the Lender, the Opinion should not be addressed to and/or delivered to the Lender's counsel. Furthermore, Lender and counsel to the Lender are not permitted to rely upon the Opinion with respect to the certification by the Lender that the closing documents, which are mandated by HUD forms and models, comport with the version of such forms and models provided to the Lender by HUD with the exception of the Opinion itself. Counsel to the Borrower must provide such certification with respect to the Opinion.

- Description of the Loan: The loan amount is the original principal amount of the loan being insured unless a modification is necessitated in connection with the closing.

- Source of funds for the Loan: In the second full sentence on page 2 the source of funds must be accurately identified; however, in certain transactions, such as low-income housing tax credit transactions, the source of the funds may not be known at the time the Opinion is rendered. In such cases, a general statement to that effect will suffice. Furthermore, it is important to note that this identification does not have to reach a level of particularity that identifies all individual investors in any case.

#### *List of Documents*

- In General: If there are no brackets around a particular document, the document is one which is commonly used for initial endorsements for insured advances completion cases; however, it should be emphasized that it is impossible to list every document for every insured loan. Further, no attempt has been made to list all documents utilized in all types of refinancings and certain specialized programs, e.g. certificates of need and licenses for health care programs. Conversely, some documents may not be utilized in a particular transaction and should be deleted from the list in the actual Opinion. Brackets around the name of the document indicate that the document may or may not be used for every loan. If bracketed documents are not used in a particular loan transaction, then delete such documents from the list in the actual Opinion. Each document executed in connection with the loan must be listed by its correct

title, showing each party executing it and its date. If documents are dated "as of" a particular date, then such phrase should be included in the description in the text. It is imperative that care must be taken to compile a list that accurately and completely reflects the transaction in the submission to HUD of the initial draft. After HUD review of the initial draft, the Opinion may have to be modified, as necessary, to satisfy HUD. To the extent documents are later found in the closing docket file which do not comport with HUD requirements and which were not shown on the list, HUD reserves the right to refuse to accept or recognize the documents unless the documents are brought into compliance with HUD requirements. This should be explained to the Borrower when reviewing the Regulatory Agreement with the Borrower.

All documents executed in connection with the loan transaction must be listed regardless of whether the document is required by HUD or whether the Borrower is a party to the document. It should be emphasized that Counsel to the Borrower is not assuming responsibility for the content of documents that Counsel does not prepare and/or that the Borrower does not execute. The review is necessary to provide assurance of consistency from document to document. The appropriate HUD or FHA form number, if applicable, must be indicated in parenthesis after each document.

A. Organizational Documents: All of the Organizational Documents must be reviewed and care should be taken to ensure adherence to the HUD guidelines and directives pertaining to such documents as set forth in the appropriate closing handbooks and instructions.

G. In the original version of the Guide, the requirement that HUD be named in the Financing Statements as a secured party or as its interests may appear was standardized through requiring the insertion of appropriate language in the Security Agreement. The purpose was to clarify that, under certain circumstances, HUD may assert some rights in the personalty arising under the Regulatory Agreement which would precede an assignment of the Security Instrument. Based upon experience to date, a decision has been made that HUD need not be so named in the Financing Statements filed in the name of the Lender-of-Record; however, it should be emphasized that a separate set of Financing Statements must now be filed in the name of HUD placing HUD in a secondary position with respect to all personalty except certain health care receivables in cases where

such receivables cannot be pledged to a private lender. In the case of such receivables, HUD must be placed in a first position. It is the responsibility of the Lender to ensure that such Financing Statements and Security Agreements are properly filed in the name of said Lender and HUD.

The procedures may vary depending upon whether the jurisdiction has enacted the new Article IX of the UCC or not. Counsel to the Borrower must check to ensure that the Lender has properly filed such Financing Statements and has properly structured the Security Agreement(s). Increasing value and volume of major moveable equipment in the health care area and increasing problems with receivables, the Certificate of Need (CoN) and the license make it more imperative that there be specificity in the UCC documentation with respect to the securitization of such personalty. HUD has made an effort to give HUD maximum contractual protection with respect to the personalty under the newly revised Regulatory Agreement for 232 facilities; however, this does not diminish the need to describe the personalty with specificity in the UCC documentation. With respect to health care facilities, the Security Agreement(s) must cover all personalty, including equipment (with major moveables being described with specificity). Further, all receivables must be specifically described as well as the Certificate of Need (CoN) and the license. Please note that the receivables, CoN and license must all be securitized in favor of the Lender-of-Record (and HUD as appropriate) regardless of whether the facility is operated by the Borrower or by a lessee. This is a major departure from prior practice in some offices and its significance cannot be over-emphasized.

J. Building Loan Agreement: This document is a "bracketed document" which should only be used in cases involving new construction or substantial rehabilitation. Hence, the document is not required in equity loan transactions and most refinancing transactions and many supplemental loan transactions.

K. Construction Contract. See J. above.

L. Mortgagee's Certificate: It has been argued that this document is unnecessary in the context of certain insured secondary loan transactions because the form is used to document the first Lender's consent to the second loan. In insured secondary loan transactions, it should be emphasized that a Mortgagee's Certificate is obtained that is like the Mortgagee's Certificate obtained in a new construction closing.

It has nothing to do with the consent of the first lender to the secondary financing transaction. In secondary financing cases (such as under Section 241) where the consent of the first lender is obtained for a second Security Instrument insured by HUD, a separate document (for which there is no specified format) is utilized.

Regardless, the Mortgagee's Certificate is executed by the lender making the loan being insured, which in the cases at issue would be the lender making the second loan, and is one of the most significant closing documents. HUD places great reliance upon the Mortgagee's Certificate and considers it necessary to reveal all fees, side transactions, etc. Furthermore, the document now contains a certification that the closing documents conform to the HUD-approved format except for changes approved by field counsel. In this regard, the document is crucial to HUD's endorsement of the note for insurance. Counsel to the Borrower is not responsible for the execution of the document and only needs to review the document in the capacity as Counsel to the Borrower to be certain that the document conforms to the transaction the Borrower is agreeing to and that the document accurately reflects the fees and escrows, etc. that are required of the Borrower.

It should be noted that the Mortgagor's Certificate has been eliminated and the substantive provisions have been incorporated into the Regulatory Agreement.

P. Certification of Owner: Several persons have questioned whether the references in Paragraph 6 to the Public Entity Agreement and the Regulatory Agreement should be changed so that both refer instead to the Public Entity Agreement. The references should not be changed because HUD wants assurance that there will be no violations of the Regulatory Agreement as a result of events that have occurred with the passage of time; however, the language has been clarified to eliminate several ambiguities. Some types of PEAs may also involve a regulatory agreement and the certification is being clarified to cover both the HUD Regulatory Agreement and the local one.

Q. UCC searches: The UCC Search must be conducted within thirty days of closing and can be conducted by either the title insurance company, a reputable document search firm, the Counsel to the Borrower or any other attorney licensed in the jurisdiction.

R. Flood insurance receipt: Arguments have been made that this document is not necessary in equity loan, supplemental loan and refinancing

transactions. Flood plain maps change. In insuring a first or a second Security Instrument, it is just as significant that HUD know whether the property is located in an area where flood insurance is required and, if so, whether the insurance is in effect regardless of whether a prior HUD-insured first Security Instrument is in effect. HUD would not necessarily have the data on file, and it was determined that this is a matter which Counsel to the Borrower could confirm under item (f) near the end of the Guide. Note that no opinion is required, and the factual determinations necessitated by the Guide are considered within the usual duties of Counsel to the Borrower.

S. Title Insurance Policy: Currently the 1992 ALTA Format (with appropriate endorsements) is required by HUD in most jurisdictions.

T. Evidence of zoning compliance: The evidence of zoning compliance will vary depending on the circumstances. The evidence should establish that the building, if constructed according to plans and circumstances, will comply with all zoning requirements. The evidence may be in the form of a letter or certificate from the appropriate local official stating that, if the building is constructed according to the plans and specifications submitted for review, the building will comply with all zoning requirements. In refinancing cases where no construction is involved, the evidence may be in the form of a letter certifying that the existing building(s) is (are) in compliance with outstanding zoning requirements or, if not, the nonconforming variance, etc., is acceptable. If the locality has no zoning ordinance, a letter should be submitted from the chief executive stating such. In those circumstances, it may be necessary to obtain a letter from the local planning body of the county in which the project is located, that the proposed development is compatible with the county's comprehensive plan. If the zoning approval is based upon a variance or other special action, the closing may have to be delayed until the time for appeals has run. In extremely complex cases, an opinion may need to be obtained from legal counsel specializing in local zoning matters. Such letter must be attached as an exhibit and referenced in the appropriate paragraphs of the Opinion.

In cases involving refinancings, it has been suggested by some attorneys that HUD should have zoning information on hand either as a result of the closing of the first HUD-insured loan or due to periodic site reviews. HUD would not normally maintain data pertaining to local zoning law and the data with

respect to the first loan would only be valid with respect to the closing date of that loan. Paragraphs 7, 8 and 9 of the Opinion contain several options with respect to local zoning law. It is important that HUD be assured that there have been no changes in the land use or zoning which would adversely affect the continued use of the property as a rental housing project. In this context, we reemphasize that the attorney responsible for this matter must be licensed in the property jurisdiction.

U. Building permit(s): If no building permit is required, this document is not applicable and should be deleted from the Opinion. (This would also be true with respect to occupancy permits (under V.) unless new permits are required under local law in connection with "pure" refinancing transactions.)

V. Permits required for the operation of the project: Several practitioners have argued that the documentation is unnecessary in refinancing transactions; however, they have not indicated whether such a position would affect their wording of Paragraph 4 of the Guide. In all cases, HUD is concerned that any permits required for the continued operation of the project be proper and in place such that an opinion can be rendered with respect to Paragraph 4. It is crucial in existing projects that HUD be assured that no new requirements have been imposed which would thwart continued operation of the project. If no such permits are required, Paragraph 4 should be amended accordingly. This is a matter that Counsel to the Borrower, as a specialist in the property jurisdiction, should be able to ascertain.

W. Surveyor's plat or survey: The survey must be signed, sealed and dated within 90 days of the closing. In certain refinancing transactions, a survey would not normally be required because no new construction would have taken place and, presumably, nothing would have changed with respect to the building(s) and the site. In such situations, if there is other satisfactory evidence that no site changes have occurred, an administrative waiver would necessitate the deletion of the item from the Opinion. See X. below. If the borrower's attorney were to become aware of any changes, this would have to be addressed in the Opinion and a survey could be required by HUD depending upon the circumstances.

X. Surveyor's Report: Unless there is a title endorsement protecting against any encroachments, etc., there will have to be a surveyor's certificate indicating that nothing has changed since the last survey with respect to encroachments, lot line violations, construction activity,

etc. HUD should not be incurring the risk of insuring any loan if there has been any action which would impair the lender's and HUD's respective positions. As an alternative to a surveyor's certificate, the borrower's attorney could rely upon an appropriate certificate from a qualified architect and insert appropriate language in the Opinion.

Z. Assurance of completion (bonds or agreement): This documentation (now bracketed) would not be utilized in a pure refinancing or equity loan transaction and, therefore, would only be used in cases involving some construction where the regulation pertaining to assurance of completion is applicable.

AA. Owner-Architect Agreement: This document (now bracketed like Documents J and K) should only be indicated (where the Guide indicates "{INSERT DESIGN AND/OR CONSTRUCTION ARCHITECT}") in cases involving new construction or substantial rehabilitation.

BB. Off-Site Bond or Agreement: This document should only be used in cases where off-site work is involved. As such, the document would not normally be used in pure equity loan transactions or in refinancing transactions involving no construction.

CC. Assurance of utility services: These documents do not pertain to pure Section 241(f) equity loan transactions and certain refinancing transactions and, therefore, should be deleted in those instances.

FF. Escrow Deposit for On-Site Improvements: If any such improvements are required in connection with an equity loan, supplemental loan or refinancing transaction, the form document specified should be tailored to the situation as determined by field counsel. In a situation where such an escrow is necessary, Counsel to the borrower should modify the form as necessary and present it to field counsel for review.

GG. Contractor's Prevailing Wage Certificate: This item is no longer required in the HUD closing checklist; therefore, some attorneys have taken the position that it can be eliminated from the Opinion. HUD's position remains that the item should be reviewed by Counsel to the Borrower for the purpose of assuring consistency between the documents and performance under the Construction Contract to which the Borrower is a party.

KK. Public Entity Agreement: The references to this document and to the Regulatory Agreement in Paragraph 6 of the Certification of Borrower have created some confusion about whether

the reference to the Regulatory Agreement should be changed to Public Entity Agreement. The two separate references were intended; however, a clarification has been made as discussed in P. above.

LL. Bond Documents: This does not include all documents involved in the typical bond financing. It does include those principal documents such as the Prospectus, the Indenture, a sample Bond, etc. All documents executed by the Borrower or which establish or describe any obligations of the Borrower must be included.

NN. Certificate issued by architect or other professional: Normally such a document would not be necessary in the case of a pure Section 241(f) equity loan and certain refinancing transactions and should be deleted unless those circumstances mentioned under the last sentence pertaining to Document X, above, make the certificate appropriate. Note that "Certificate" is a defined term and that the Certificate can come from "an architect or other professional." Consequently, there is no form for the Certificate and HUD field counsel should defer to HUD administrators specializing in architectural and engineering matters in determining the acceptability of the Certificate. It is referenced in Paragraph 9 of the Opinion and should not be confused with the Zoning Certificate that is also a defined term and is referenced in Paragraph 8.

OO. Docket search: The Docket Search can be conducted by either the title insurance company, a reputable document search firm, the Counsel to the Borrower or any other attorney licensed in the jurisdiction. Arguments have been made by private counsel that such a docket search is not necessary in all transactions. One of the main purposes of the new Guide was to clearly define the work to be performed by Counsel to the Borrower. It was determined that such a search was within the scope of the fees permitted as a Security Instrument line item. Such a search is important in the case of an existing subsidized project where matters of public record could reveal circumstances wherein it would be inadvisable for HUD to go forward with insuring another loan.

An argument has also been made that several record searches in separate jurisdictions could be necessitated in some cases and that this would cost a significant amount of money with little benefit. As the Guide was being developed, HUD was cognizant of such a scenario; however, the benefit to HUD of establishing that the public records are clear outweighs the costs to the

borrower of conducting such searches. In the case where a sole-asset borrower is being created, however, a search of the public records in the jurisdiction where the borrower is located (assuming a different location from the others iterated) is unnecessary. The Opinion could be amended in those instances to indicate that particular state of facts; however, all of the other searches would have to be done.

#### Opinions

1. This paragraph contains several options depending upon whether the Borrower's organizational documents were prepared by Counsel rendering the Opinion and the type of borrower entity. Care should be taken to ensure that the correct option is selected and that the requisite information is inserted correctly. It is intended that, where the borrower entity or general partner of the borrower entity is established by Counsel to the Borrower, no reliance on other sources is permitted and Counsel must opine as to the due organization of the Borrower. If a Certificate of Good Standing is not available in the State, but an equivalent document is (*i.e.*, Certificate of Existence), then the bracketed language must be revised to reflect the name/title of the equivalent document so obtained. Any Certificate of Good Standing or equivalent document issued by the applicable governmental authority must be dated no more than 30 days prior to the date of the Opinion of Borrower's Counsel. If the Borrower is a foreign corporation or partnership, the Opinion must recite the review of all government approvals required to do business in the Property jurisdiction. If a Certificate of Good Standing or equivalent document cannot be obtained from the applicable governmental authority (*e.g.*, for general partnerships, then the Borrower's attorney will be required to do the due diligence necessary to give the opinion or may engage other counsel to render such opinion). If the Property jurisdiction is not the State of formation for the borrower entity, Counsel must also opine that the Borrower is qualified to transact business in the Property jurisdiction. Such opinion may be made solely on the basis of a certificate from the applicable governmental authorities of the Property jurisdiction, and if Counsel is relying on such certificate(s), then the opinion must expressly identify those certificate(s) and they must be attached to the Opinion as an exhibit. If the Borrower is an individual, paragraph one should be deleted from the Opinion.

2. This paragraph provides, among other things, that the Borrower

possesses all the necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property. This particular provision has generated considerable controversy—particularly where health care facilities are being constructed or substantially rehabilitated in large, urban jurisdictions having a multitude of regulatory requirements pertaining to ownership and operation. Consequently, field counsel have discretion to permit a modification in which Counsel to the Borrower itemizes those local governmental requirements which have been evaluated and indicates that, after due diligence inquiry and insofar as the attorney is aware, these local requirements comprise the entire universe of such requirements. The Opinion should further state that, based upon such itemized local requirements and compliance therewith (with all permits, certificates, etc. being itemized), the Borrower possesses the power and authority necessary to own and operate the Property and to carry out all of the transactions required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA commitment. In many instances involving new construction, some items such as a certificate of occupancy will not have been obtained by the time of closing. In such instances, field counsel have discretion to permit an appropriate clarification with respect to that particular instrument.

11. If the Borrower or any principal of the Borrower is involved in any litigation or there is any litigation pertaining to the Property, all such litigation matter(s) must be disclosed in writing to HUD field counsel in order that the Department can determine whether the endorsement of the loan is possible. Note that litigation involving a principal of the Borrower must be disclosed. Confusion has developed when there has been litigation involving lower tiers of a partnership. If the issue cannot be resolved through reference to the definition of "principal" in the 2530 regulations, HUD field counsel should consult with HUD program administrators and determine whether the litigation should be disclosed. If the litigation involves compliance with civil rights requirements, it must immediately be brought to the attention of appropriate Fair Housing and Equal Opportunity personnel (regardless of whether a "principal" or some lesser component of the Borrower is the subject of the litigation).

13. If any UCC Financing Statements have been filed on the Personalty in

conjunction with any transaction other than the Loan, they must be identified to the HUD field counsel as well as details with respect to how such Financing Statements will be terminated at the time of closing.

If the property is an elderly housing project or a health care facility or if the loan otherwise is to be secured by significant amounts of personal property, the matter should be discussed with field counsel. In the event further discussion is necessary, field counsel should contact the Assistant General Counsel, Multifamily Mortgage Division. For projects in which the personalty is mostly household appliances (*e.g.*, refrigerators) or a limited quantity of smaller equipment, the Opinion will be limited as shown. In other instances, the Opinion may have to be expanded particularly with respect to ensuring that items such as receivables, income stream, etc. are security property. Some examples of such expansion are indicated in the new format because of omissions in the past with respect to projects insured by HUD under Section 232 and 242. Further it should be noted that Lender is now required to prepare, have HUD properly execute and file UCC financing statements showing HUD as a secured party in a second position to Lender and in a first position as to certain health care receivables in which a private lender cannot hold a first position. Either a separate or Lender's Security Agreement (depending upon the law of the jurisdiction) will have to also reflect this new requirement.

One or more UCC searches performed not more than 30 days prior to the date of the Opinion must be made and attached to the Opinion.

15. If the Borrower is a trust (other than a land trust), then Paragraph 15 must be included in the Opinion. The second sentence need only be included if the trust was formed in a jurisdiction other than the Property jurisdiction.

16. This Section has been modified to clarify that taxable as well as tax-exempt bond financing is covered and that other third-party source of funds financings are also covered.

#### Acceptability of Counsel:

- Counsel to the Borrower must opine as to the law of the Property jurisdiction and must also opine as to the law of the State of Borrower's organization, if different from the Property jurisdiction. HUD requires that Counsel to the Borrower be admitted to practice law in each jurisdiction in which such admission is required by the laws or ethical considerations of the bar to be able to give the opinion. If multiple

jurisdictions are involved, two opinions may be required: one with respect to the organization of the Borrower and another with respect to the real property and loan issues. A combination of the Borrower's regular Counsel and special local counsel may be required to satisfy this requirement. If Counsel's satisfaction of these requirements is not evident from the letterhead of the firm, the field counsel should include a written explanation in the Washington docket. In all events, each provision in the Guide must be addressed whether one or more opinions is required to do so.

#### *Signatures:*

- The Opinion may be signed by an authorized attorney(s) of the law firm, in the name of such attorney(s).

#### *Certification of Borrower:*

- A form of Certification of Borrower is attached. The form represents the minimum amount of information that should be obtained from the Borrower (but additions, revisions and rephrasings are acceptable so long as the Borrower is certifying as to factual matters and not legal conclusions). Please note that one significant addition to the certification is that Counsel to the Borrower has reviewed and discussed the terms of the Regulatory Agreement with the principals (as defined in the HUD regulations) of the Borrower entity. A certification has been added wherein the Borrower either certifies that there are no side-deals, or discloses any side deals in the Certification. The Certification of Borrower must be dated the same date as the Loan Documents.

#### *Identity of Interest:*

- Numerous issues have been raised with respect to the confirmation in (d) of the penultimate paragraph of the Guide. A decision was made that the attorney signing the Opinion could not have an identity of interest with any party to the transaction. No waivers are possible in such instance. In instances where other members of the firm have an interest in the Borrower or another entity involved in the transaction, such interest must be disclosed and such interest must be acceptable to field counsel based upon the ethics rules of the applicable bar. Furthermore, any interest must be administratively acceptable to HUD, and 2530 clearance must be obtained. In addition, there appears to be an increasing trend wherein Lenders are insisting upon using counsel to the Lender to handle many aspects of the transaction even though the Opinion is being signed by a separate attorney. There have been

some instances where counsel to the Lender has asked to represent the borrower in whole or in part and to provide all or a part of the Opinion. Confirmation (d) has been clarified to reflect the intent of HUD from the inception of the Opinion that any such representation of both parties is not permitted notwithstanding State or local ethics rules.

- Please note that a new confirmation has been added to provide comfort to HUD that there is no identity of interest between the Borrower and the Lender in MAP transactions. HUD imposed this new MAP requirement and it is most important that Counsel to the Borrower explain this to the Borrower as well as the necessity of an accurate representation by the Borrower in the Borrower's Certification to Counsel. This requirement is not applicable to transactions processed under traditional processing and the requirement should be deleted in such cases.

#### *Liens:*

- Confirmation (f) contains a statement that there are no liens or encumbrances against the Property. Several attorneys have objected to making the statement because they indicate that, at the time of closing, there may be liens that have actually not been released even though the title company has received funds and/or release documents to do so and intends to process the release after the closing. Except in cases involving the insurance of secondary loans, HUD is only authorized to insure first mortgages; consequently, there cannot be any liens and encumbrances on the property when HUD endorses the note for insurance. As a result, there cannot be any liens outstanding which would prime the insured loan. Hence, Paragraph (f) should not be changed.

*Certification as to Regulatory Agreement:* A new confirmation has been added as (g) wherein the Counsel to the Borrower confirms through a certification to HUD that Counsel to the Borrower has reviewed and discussed the terms of the Regulatory Agreement with the principals (as defined in the HUD regulations) of the Borrower entity. This certification parallels a similar certification by the Borrower and is deemed necessary to avoid certain principals asserting they were unaware of the requirements of the Regulatory Agreement when HUD attempts to enforce the terms of the Regulatory Agreement against them.

*Certification as to Side-Deals:* A new confirmation has been added wherein Counsel to the Borrower confirms that, based upon the Certification by the

Borrower and to the best of Counsel's knowledge, there are no side deals except as indicated in such Certification.

#### *Reliance on Other Opinions:*

The issue of proper wording and format has probably surfaced most often in cases where Counsel to the Borrower is relying on opinions issued by other attorneys. This has occurred most often in cases involving a separate opinion for bond financing documentation, property jurisdiction vs. organizational jurisdiction, zoning, etc. In this area, it is imperative that Counsel to the Borrower specifically reference and attach the additional opinion(s) and that such opinions track the language of the Guide as close as is practical under the circumstances. HUD field counsel should exercise discretion in this area, taking the unique circumstances into account.

#### *Reliance on Opinion by Subsequent Holders of Note:*

In the dialogue with the lending industry pertaining to revision of the various closing forms, the lenders made the suggestion that HUD consider the approaches taken by Freddie Mac and Fannie Mae. After a comparative analysis, HUD was the only one of the three which took a position that the Opinion could not be relied upon by subsequent holders of the Note. The 1994 HUD format merely required that the Opinion be made available for informational purposes to prospective purchasers. HUD determined that it would be desirable to permit reliance by subsequent holders in order to simplify and reduce the cost of certain refinancings, modifications, etc. The last paragraph of the current format of the Opinion has been modified to permit such reliance.

{To be used in HUD-Insured MULTIFAMILY AND HEALTH CARE Transactions}

### **Exhibit A To Opinion of Borrower's Counsel**

#### **CERTIFICATION OF BORROWER**

This Certification of Borrower is made the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, (the "Borrower") for reliance upon by \_\_\_\_\_ (the "Borrower's Counsel") in connection with the issuance of an opinion letter dated of even date herewith (the "Opinion Letter") by ("Borrower's Counsel") as a condition for the provision of mortgage insurance by the Department of Housing and Urban Development ("HUD") of the \$ \_\_\_\_ loan (the "Loan") from \_\_\_\_\_ (the "Lender") to Borrower. In connection with the Opinion Letter, the Borrower hereby

certifies to Borrower's Counsel for its reliance, the truth, accuracy and completeness of the following matters:

1. The Organizational Documents are the only documents creating the Borrower or authorizing the Loan, and the Organizational Documents have not been amended or modified except as represented to Counsel and as represented in the Opinion Letter.

2. The terms and conditions of the Loan as reflected in the Loan Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Loan Documents.

3. All tangible personal property of the Borrower in which a security interest is granted under the Loan Documents [other than off-site construction materials and/or accounts or goods of a type normally used in more than one jurisdiction and/or additional collateral personalty] is located at the Property (as defined in the Opinion Letter) and the Borrower's [Chief Executive Office] [only place of business] [residence] is located in \_\_\_\_\_, except for the following personalty: \_\_\_\_\_ [Include any Bank Accounts, Income, Receivables, Etc.]

4. The execution and delivery of the Loan Documents will not (i) cause the Borrower to be in violation of, or constitute a material default under the provisions of any agreement to which the Borrower is a party or by which the Borrower is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which the Borrower is subject, or (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Borrower, except as specifically contemplated by the Loan Documents.

5. There is no litigation or other claim pending before any court or administrative or other governmental body or threatened against the Borrower or any Principals of the Borrower (as Principal is defined in the HUD regulations in 24 CFR Part 24), the Property, or any other properties of the Borrower [except as identified on Exhibit [ ]], List of Litigation, in the Opinion Letter.]

6. There is no default under the Public Entity Agreement (PEA) (as defined in the Opinion Letter) nor have events occurred which with the passage of time will result in a default under the PEA and/or the Regulatory Agreement between Borrower and HUD.

7. The source(s) of any funds advanced by Borrower for purposes of meeting any equity requirement of HUD or contributing to the feasibility of the Project or for any other Project purpose (Up-front Funds) is (are):

8. There are no transactions outside the terms of the HUD form documents between Borrower and any party involved in the construction or management of the Project, the Lender, any party providing funds to the Lender or any other party to the Loan (Side-Deals) except as here identified (Borrower understands that, in MAP transactions, no identity of interest (as defined by HUD in outstanding MAP directives) between Borrower and Lender is permitted):

**Note:** All capitalized terms not defined herein shall have the meanings set forth in the Opinion Letter.

IN WITNESS WHEREOF, the Borrower has executed this Certification of Borrower effective as of the date set forth above.

BORROWER:

•/s/ \_\_\_\_\_  
•/s/ \_\_\_\_\_

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

**[Add Additional Lines if More Than Two Signatories]**

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties

and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30.

**Residual Receipts Note (Nonprofit Mortgage)**

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name: \_\_\_\_\_

HUD Project No. (the "Project") \_\_\_\_\_

For value received \_\_\_\_\_ ("Maker") promises to pay to \_\_\_\_\_ ("Payee") the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) at \_\_\_\_\_ with interest at the rate of \_\_\_\_\_ % (per centum) per annum, which shall not be compounded, subject to the following:

1. Principal and interest on this Note shall be due and payable on the maturity date (the "Maturity Date") which is hereby defined as the maturity date of the note and mortgage (respectively, the "HUD Note" and the "HUD Mortgage") insured by the Secretary of Housing and Urban Development ("HUD") financing the Project, provided that if the HUD Note is prepaid in full, the holder of this Note, at its option and without notice, may declare the whole principal sum or any balance thereof, together with interest thereon, immediately due and payable.

2. So long as HUD or its successors or assigns, are the insurers or holders of the first mortgage on the Project, payments due under this Note shall be payable only from residual receipts of the Project, as the term residual receipts is defined in the regulatory agreement dated (insert date) \_\_\_\_\_ between HUD and Maker (the "Regulatory Agreement"). The restriction on payment imposed by this paragraph shall not excuse any default caused by

the failure of the Maker to pay the indebtedness evidenced by this Note.

3. Prepayments to principal and interest on this Note may be made only from the Residual Receipts Fund, as that term is defined in the Regulatory Agreement, and only after obtaining the prior written approval of HUD. Such prepayments may be made only after final endorsement of the HUD Note for insurance by HUD and after the end of a semiannual or an annual fiscal period of Maker.

4. Notwithstanding the provisions of paragraphs numbered 2 and 3. above, Maker also may make payments due hereunder from sources other than Project income or assets of the Project.

5. This Note is non-negotiable and may not be sold, transferred, assigned, or pledged by Payee except with the prior written approval of HUD.

6. In the event that the maturity date of the HUD Mortgage is extended and such extension is approved by HUD, then, in such event, the Maturity Date of this Note shall automatically be extended to the extended maturity date of the HUD Mortgage without the consent of Payee.

7. Any unauthorized payments, as determined by HUD, shall be returned to the Project, as the term "Project" is defined in the Regulatory Agreement.

8. This Note is made and delivered in payment of \_\_\_\_\_.

9. Presentation, demand and notice of demand, non-payment and protest of this Note are waived.

10. The terms and provisions of this Note are also for the benefit of and are enforceable by HUD against either party or any other person.

IN WITNESS WHEREOF Maker has signed this Note on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

MAKER:

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

Title: \_\_\_\_\_

[Remainder of this page intentionally left blank.]

Payee hereby certifies that this is a bona fide transaction and that Payee fully understands all the requirements of this Note, and that no prepayment of principal or interest shall be accepted without evidence that HUD has authorized such prepayment. If an unauthorized prepayment is accepted, the funds shall be returned to the Project immediately upon discovery.

PAYEE:

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

Name and Title:

**Residual Receipts Note (Limited Dividend Mortgages)**

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name: \_\_\_\_\_

HUD Project No. (the "Project") \_\_\_\_\_

For value received \_\_\_\_\_ ("Maker") promises to pay to \_\_\_\_\_ ("Payee") the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) at \_\_\_\_\_ with interest at the rate of \_\_\_\_\_% (\_\_\_\_\_ per centum) per annum, which shall not be compounded, subject to the following:

1. Principal and interest on this Note shall be due and payable on the maturity date (the "Maturity Date") which is hereby defined as the maturity date of the note and mortgage (respectively, the "HUD Note" and the "HUD Mortgage") insured by the Secretary of Housing and Urban Development ("HUD") financing the Project, provided that if the HUD Note is prepaid in full, the holder of this Note, at its option and without notice, may declare the whole principal sum or any balance thereof, together with interest thereon, immediately due and payable.

2. So long as HUD or its successors or assigns, are the insurers or holders of the first mortgage on the Project, payments due under this Note shall be payable only from residual receipts of the Project, as the term residual receipts is defined in the regulatory agreement dated (insert date) \_\_\_\_\_ between HUD and Maker (the "Regulatory Agreement"). The restriction on payment imposed by this paragraph shall not excuse any default caused by the failure of the Maker to pay the indebtedness evidenced by this Note.

3. Prepayments to principal on this Note may be made only from the

Residual Receipts Fund, as that term is defined in the Regulatory Agreement, and only after obtaining the prior written approval of HUD. Such prepayments may be made only after final endorsement of the HUD Note for insurance by HUD and after the end of a semiannual or an annual fiscal period of Maker. No payments of interest shall be made prior to maturity of this Note.

4. Notwithstanding the provisions of paragraphs numbered 2 and 3, above, Maker also may make payments due hereunder from sources other than Project income or assets of the Project.

5. This Note is non-negotiable and may not be sold, transferred, assigned, or pledged by Payee except with the prior written approval of HUD.

6. In the event that the maturity date of the HUD Mortgage is extended and such extension is approved by HUD, then, in such event, the Maturity Date of this Note shall automatically be extended to the extended maturity date of the HUD Mortgage without the consent of Payee.

7. Any unauthorized payments, as determined by HUD, shall be returned to the Project, as the term "Project" is defined in the Regulatory Agreement.

8. This Note is made and delivered in payment of \_\_\_\_\_.

9. Presentation, demand and notice of demand, non-payment and protest of this Note are waived.

10. The terms and provisions of this Note are also for the benefit of and are enforceable by HUD against either party or any other person.

IN WITNESS WHEREOF Maker has signed this Note on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

MAKER:

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

Title: \_\_\_\_\_

[Remainder of this page intentionally left blank.]

Payee hereby certifies that this is a bona fide transaction and that Payee fully understands all the requirements of this Note, and that no prepayment of principal or interest shall be accepted without evidence that HUD has authorized such prepayment. If an unauthorized prepayment is accepted, the funds shall be returned to the Project immediately upon discovery.

PAYEE:

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

Name and Title: \_\_\_\_\_

### Escrow Agreement for Incomplete Construction

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

This Agreement is effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and among \_\_\_\_\_ (hereinafter, the Borrower), and \_\_\_\_\_ (hereinafter, the Lender, acting as Depository). The terms Lender and Borrower shall be deemed to have the meanings set forth in the HUD regulatory agreement for this transaction.

The Borrower is constructing or substantially rehabilitating a housing project or health care facility identified as HUD Project No. \_\_\_\_\_ with the proceeds of a loan (hereinafter, the Mortgage Loan) from the Lender. The Mortgage Loan is subject to disbursement under a certain Building Loan Agreement between the Borrower and Lender, dated \_\_\_\_\_, which Building Loan Agreement is by reference incorporated herein and made a part hereof.

Pursuant to a Commitment dated \_\_\_\_\_, the Secretary of Housing and Urban Development (hereinafter, HUD) has insured advances of the Mortgage Loan under Section \_\_\_\_\_ of the National Housing Act, as amended, and regulations and directives issued pursuant thereto.

The Borrower has not yet completed certain improvements (hereinafter, the Improvements) required by the Building Loan Agreement. The Improvements are listed, together with the estimated completion cost, in the attached Exhibit A. The Borrower intends to complete the Improvements.

In order to induce HUD to insure the Mortgage Loan in its maximum approved amount, and in order to induce the Lender to advance the entire

approved amount prior to completion of the Improvements, the Borrower agrees to provide security for their completion, based on the estimate in Exhibit A and whatever additional amount is required by HUD.

In consideration of the premises, the parties acknowledge and agree as follows:

1. The Borrower will complete the Improvements on or before the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (hereinafter, the completion date). The work will be done and completed, free of liens, in accordance with the Drawings and Specifications referred to in the Building Loan Agreement. The Borrower further agrees to pay for all labor and material necessary to complete the Improvements.

2. The Borrower acknowledges that all work performed pursuant to this Agreement is subject to the labor standards contained in Form HUD-92554M, Supplementary Conditions of the Contract for Construction, or its replacement, as acknowledged from time to time by the original General Contractor in executing the Contractor's Prevailing Wage Certificate on the back of Form HUD-92448, Contractor's Requisition, Project Mortgages, or its replacement. The Borrower expressly agrees to be bound by the terms and provisions of the said Conditions and the Certificate. Prior to the release of any funds deposited hereunder, the Borrower will submit a Contractor's Prevailing Wage Certificate duly executed by each and every contractor performing any of the work and dated subsequent to the completion of such work.

3. The Borrower has deposited with the Lender the cash amount of \$ \_\_\_\_\_, receipt of which is acknowledged by the Lender, to be held and disbursed as follows:

a. In the event the Borrower completes the Improvements in accordance with the cited requirements on or before the completion date, and there is no default under the Mortgage Loan, the Lender, upon receipt of written approval from HUD, will return the sum deposited hereunder to the Borrower, without interest.

b. In the event HUD determines that the Borrower has failed to complete the Improvements in the manner or within the time required by this Agreement, the Lender, with the approval of HUD, will have the right, in its discretion, to complete the Improvements, and to pay the cost thereof, including reasonable costs incurred by the Lender as a result of such failure, from the amount deposited under this Agreement. For this purpose, the Borrower irrevocably

appoints the Lender as its attorney-in-fact, with full power of substitution, to do and perform for it, the Borrower, in its name, place and stead, all matters and things which the Lender will deem necessary and proper to be done to effectuate the completion of the Improvements, and to apply the amount deposited under this Agreement to the payment of debts, expenses, costs and charges of any kind contracted or incurred in connection therewith. This power of attorney will provide the Lender with full and sufficient authority, and the orders given by the Lender as attorney-in-fact for the Borrower will be good and sufficient vouchers for all payments made by virtue thereof. In this connection, the Lender will have full authority to enter into and upon the project and take charge thereof, together with all materials, appliances, fixtures and other improvements; and, as attorney-in-fact for the Borrower, to call upon and require contractors to complete the Improvements. To the extent that the Lender and/or its contractors complete the Improvements, such work remains subject to the labor standards referenced in Section 2 of this Agreement, and the Lender shall obtain a Contractor's Prevailing Wage Certificate duly executed by each contractor performing any of the work. In the event the Lender completes the Improvements in accordance with this Agreement, any unexpended balance of the sum deposited with the Lender will be returned to the Borrower, without interest, subject to the rights of the Lender and HUD under the Mortgage Loan documents. The Lender will not be responsible for the completion of the Improvements beyond the expenditure of the amount deposited, and if that amount is insufficient, the Lender will be under no obligation to proceed further with the Improvements or to demand additional sums from the Borrower. The power granted herein is coupled with an interest, and the Borrower acknowledges and agrees that all powers granted herein to the Lender may be assigned to HUD.

c. This Agreement is made for the benefit of the Lender and HUD, either of which shall have the right to enforce the provisions herein.

IN WITNESS WHEREOF, the parties have duly executed this Agreement. Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of

influencing an official action of HUD (acting by and through the Federal Housing Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.  
BORROWER

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

Print name and title  
LENDER, acting as DEPOSITORY

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

Print name and title

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and

(iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

**Request for Final Endorsement of Credit Instrument**

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 1.0 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name: \_\_\_\_\_

Project Number: \_\_\_\_\_  
Project Address: \_\_\_\_\_  
Date of Commitment: \_\_\_\_\_  
Mortgagor: \_\_\_\_\_

**To the Department of Housing and Urban Development**

The undersigned declares that construction of this project is complete\*; and that advances have been made to the above mortgagor in accordance with your Certificate of Insurance on the dates and in the amounts set forth in the schedule below; that the undersigned has paid no kickback and no fee or other consideration, directly or indirectly, to any person who has received payment or other consideration from any other person in connection with this mortgage transaction, including the purchase or sale of the mortgaged property, except for compensation paid, if any, for the actual performance of services and approved by you; and that to the best of the undersigned's knowledge and belief the said loan is now eligible for mortgage insurance and accordingly, the undersigned hereby requests final endorsement of the attached credit instrument for mortgage insurance in the total sum of \$\_\_\_\_\_.

**SCHEDULE OF ADVANCES**

| Date | Amount | Date | Amount |
|------|--------|------|--------|
|      |        |      |        |
|      |        |      |        |
|      |        |      |        |

Subtotal (amount advanced to date): \_\_\_\_\_  
\$ \_\_\_\_\_

A final advance in the following amount will be disbursed immediately upon your final endorsement of the note for insurance when added to the advances previously made. \_\_\_\_\_

\$ \_\_\_\_\_  
Total: \_\_\_\_\_

\$ \_\_\_\_\_  
Mortgagee: \_\_\_\_\_

By: (Signature, Title & Date) \_\_\_\_\_

X \_\_\_\_\_

\*Minor items of construction still to be completed are covered by an Escrow Deposit Agreement (form HUD-92456), three conformed copies whereof are herewith delivered to you. There is held in escrow as a guarantee of the completion thereof the amounts

determined by your office as necessary for such purpose.  
Certificate of Mortgagor

Project Number: \_\_\_\_\_

**To: Department of Housing and Urban Development (HUD)**

In order to induce HUD to finally endorse the credit instrument for mortgage insurance, and with the intent that HUD rely upon the statements hereinafter set forth, the undersigned makes the following certifications:

1. That it has received the sum of \$\_\_\_\_\_ which when added to the final advance will total \$\_\_\_\_\_, constituting the full insurable amount of the mortgage for this project.
2. That construction of the project is complete and is in accordance with the plans and specifications approved by HUD; that said mortgage is a good and

valid first lien on the property therein described; that the property is free and clear of all liens other than that of subject mortgage except for a lien approved by HUD given in favor of government entity or other HUD-approved lien expressly subordinate to HUD's first lien; that all outstanding unpaid obligations and past due interest payments contracted by or on behalf of the mortgagor entity directly or indirectly, in connection with the mortgage transaction, the acquisition of the property, the construction of the project, or the arrearage relative to any project are listed below:

- \* (a) HUD-approved notes (copies attached) \_\_\_\_\_  
\$ \_\_\_\_\_
- (b) Due General Contractor \_\_\_\_\_  
\$ \_\_\_\_\_
- \* (c) Other \_\_\_\_\_  
\$ \_\_\_\_\_

3. That, except for the amounts due on notes listed in item (a) of paragraph 2 above, the undersigned agrees to pay the foregoing obligations in cash and to furnish HUD receipts, or other evidence of payment satisfactory to HUD, within 45 days following receipt of the final advance of mortgage proceeds on its "Certificate of Actual Cost:" (form HUD-92330), supported by the documentation required therein. The Mortgagor further agrees that if HUD accepts estimates for any items, the Mortgagor will, at final endorsement, establish a cash escrow in the amount of \$ \_\_\_\_\_ to pay all the "to be paid in cash items" identified on its Certification of Actual Cost and debts to third parties who made the original disbursements for an item listed as paid on Form 92330, unless documentation, satisfactory to HUD, evidencing that these amounts were paid by the Mortgagor subsequent to the submission of its Certification of Actual Cost. The Mortgagor understands that the items covered by this cash escrow must be paid within 45 days of the date of final endorsement.

Mortgagor:

By: (Signature & Title)  
X

Date:

\*Note: This includes any past due amount under the construction loan. (If the space provided is inadequate to list all unpaid obligations, insert the total in each category and attach itemizations. If there are no outstanding obligations, so state.)

**Certificate of General Contractor**

Project Number:

**To the Department of Housing and Urban Development**

The undersigned, as general contractor of the above project, makes the following certifications:

1. That construction is in accordance with the plans and specifications which were approved by HUD.
2. That all outstanding unpaid obligations contracted by or on behalf of the undersigned in connection with the construction contract are listed below. (If space below is inadequate, continue listing on an attached sheet and so note.)

(a) \_\_\_\_\_  
\$ \_\_\_\_\_

(b) \_\_\_\_\_  
\$ \_\_\_\_\_

(c) \_\_\_\_\_  
\$ \_\_\_\_\_

3. That, except for unfinished work covered by an approved escrow deposit, the undersigned agrees to pay the foregoing obligations in cash, within 15 days following receipt of payment from owner.

General Contractor:

By: (Signature & Title)  
X

Date:

Each signatory below hereby certifies that the statements and representations contained in the part signed by the respective signatory and all supporting documentation thereto are true, accurate, and complete. Each signatory, for its part only, hererby states this instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_  
(MORTGAGEE)

By: \_\_\_\_\_  
Printed Name, Title \_\_\_\_\_  
Dated: \_\_\_\_\_

Name of Entity: \_\_\_\_\_  
(MORTGAGOR)  
By: \_\_\_\_\_  
Printed Name, Title \_\_\_\_\_  
Dated: \_\_\_\_\_

Name of Entity: \_\_\_\_\_  
(GENERAL CONTRACTOR)

By: \_\_\_\_\_  
Printed Name, Title \_\_\_\_\_  
Dated: \_\_\_\_\_

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

**Lease Addendum**

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

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**INSTRUCTIONS FOR LEASEHOLD PROJECTS**

These instructions and the following Lease Addendum have been prepared for use in connection with mortgage insurance for multifamily projects given pursuant to the National Housing Act found at 12 U.S.C. 1701, *et seq.* (the "Act"). The lease term and other provisions must comply with the section of the Act under which the mortgage is insured. The lease provisions must not conflict with any regulations or directives promulgated by the Department of Housing and Urban Development ("HUD") with respect to such mortgage insurance. All rent amounts must have prior written approval by HUD.

These instructions and the following addendum are based on the presumption that the lease will be a *ground lease* and all buildings, improvements and fixtures now or hereafter erected will be owned in fee simple by the Tenant and be deemed real estate under local law. The term "Property" shall be defined in the lease as the legally described land except the buildings and improvements now or hereafter located thereon. If the foregoing presumption is not correct the HUD closing attorney must be contacted for further instructions. The provisions of the following addendum must be set forth in the body of the lease or the addendum attached and incorporated by reference.

**LEASE ADDENDUM**

Notwithstanding any other provisions of this Lease, in the event of any conflict, inconsistency or ambiguity between the provisions of this Lease Addendum ("Addendum") and the provisions of any other part of this Lease, the provisions of this Addendum shall prevail and control. So long as the mortgage insured by the Secretary of the Department of Housing and Urban Development ("HUD"), with respect to

FHA Project No. \_\_\_\_\_ known as (insert project name) \_\_\_\_\_ (hereafter the "Mortgage") is in effect and not released; or there is any mortgage of this leasehold or of the buildings, improvements and fixtures now on or hereafter erected on the Property (hereafter the "Improvements") which mortgage is insured by or held by HUD; or in the event the ownership of the Improvements or this leasehold is acquired by HUD, then in any such event, the following provisions shall be and are in full force and effect:

(a) Tenant is authorized to obtain a loan, the repayment of which is to be insured by HUD and secured by a mortgage on this leasehold estate and the Improvements. Tenant is further authorized to execute all documents necessary as determined by HUD and otherwise to comply with the requirements of HUD for obtaining such an insured mortgage loan.

(b) In the event that HUD acquires title to this leasehold estate or otherwise acquires title to Tenant's interest herein, HUD shall have the option to purchase good and marketable fee simple title to the Property and Landlord's interest, if any, in the Improvements (the "Interest"), free of all liens and encumbrances except such as may be waived or accepted by HUD. Such option shall be exercised within twelve (12) months after HUD so acquires such leasehold estate or Tenant's interest. The purchase price shall be the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) payable in cash, or by Treasury check, provided all rents are paid to date of transfer of title. HUD shall, within said twelve months, give written notice to Landlord of its election to exercise said option to purchase. Landlord shall, within thirty (30) days after HUD gives such notice, execute and deliver to HUD a warranty deed of conveyance to HUD as grantee conveying the said fee and Interest and containing a covenant against the grantor's acts, but excepting therefrom acts of the Tenant and those claiming by, through or under the Tenant. Nothing in this option shall require the Landlord to pay any taxes or assessments that were due and payable by the Tenant.

(c) If approved by HUD, the Tenant may convey, assign, transfer, lease, sublease or sell all or any part of its leasehold interest in the Property and its interest in the Improvements without the need for approval or consent by any other person or entity.

(d)(i) Insurance policies shall be in an amount, and in such company or companies and in such form, and against such risks and hazards, as shall be approved by the Lender of the

Mortgage (hereinafter, "Lender," which term, when used herein, also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction) and HUD.

(ii) The Landlord shall not take out separate insurance concurrent in form or contributing in the event of loss with that specifically required to be furnished by the Tenant to the Lender. The Landlord may at its own expense, however, take out separate insurance which is not concurrent in form or not contributing in the event of loss with that specifically required to be furnished by the Tenant to the Lender.

(e)(i) If all or any part of the Property or the Improvements or the leasehold estate shall be taken or damaged by condemnation, that portion of any award attributable to the Improvements or the Tenant's interest in the leasehold estate or damage to the Improvements or the Tenant's interest in the leasehold estate shall be paid to the Lender or otherwise disposed of as may be provided in the Mortgage. Any portion of the award attributable solely to the taking of the Property shall be paid to the Landlord. After the date of taking, the annual ground rent shall be reduced ratably by the proportion which the award paid to Landlord bears to the total value of the Property as established by the amount HUD is to pay, as set forth in paragraph (b) of this Addendum.

(ii) In the event of a negotiated sale of all or a portion of the Property or the Improvements, in lieu of condemnation, the proceeds shall be distributed and annual ground rent reduced as provided in cases of condemnation, but the approval of HUD and Lender shall be required as to the amount and division of the payments to be received.

(f) Landlord may terminate the Lease prior to the expiration date of the full term of this lease ("Expiration Date") after a Tenant default under this lease ("Event of Default") but only under the following circumstances and procedures. If any Event of Default shall occur, then and in any such event, Landlord shall at any time thereafter during the continuance of such Event of Default and prior to any cure, give a written notice of such default(s) ("Notice of Default") to Tenant, the Lender and HUD, specifying the Event or Events of Default and the methods of cure, or declaring that an Event of Default is incurable. If the Event of Default is a failure to pay money, Landlord shall specify and itemize the amounts of such default. Failure to pay money shall be specified as a separate default and not combined with a non-monetary Event of Default. Within sixty

(60) days from the date of giving the Notice of Default to Tenant, Tenant must cure a monetary default by paying Landlord all amounts specified in the Notice of Default and must cure any specified Event of Default that is capable of being cured within such period. During the period of 180 days commencing upon the date Notice of Default was given to the Lender and HUD, the Lender or HUD may: (a) Cure any Event of Default; and (b) commence foreclosure proceedings or institute other state or federal procedures to enforce Lender's or HUD's rights with respect to the leasehold or Tenant Improvements ("Foreclosure"). If Tenant, Lender or HUD reasonably undertake to cure any Event of Default during the applicable cure period and diligently pursues such cure, Landlord shall grant such further reasonable time as is necessary to complete such cure. If HUD or Lender commences Foreclosure or other enforcement action within such 180 days, then its cure period shall be extended during the period of the Foreclosure or other action and for 90 days after the ownership of Tenant's rights under the Lease is established in or assigned to HUD or such Lender or a Purchaser at any foreclosure sale pursuant to such Foreclosure or other action. The transfer of the Tenant's rights under the Lease to Lender, HUD or Purchaser, pursuant to such Foreclosure or other action shall be deemed a termination of any incurable Event of Default and such terminated Event of Default shall not give Landlord any right to terminate the Lease. Such Purchaser may cure curable Events of Default within said 90 days. If after the expiration of all of the foregoing cure periods, no cure or termination of an existing Event of Default has been achieved as aforesaid, then and in that event, this Lease shall terminate, and on such date the term of this Lease shall expire and terminate and all rights of Tenant under the Lease shall cease and the Improvements, subject to the Mortgage and the rights of Lender thereunder, shall be and become the property of Landlord. All costs and expenses incurred by or on behalf of Landlord (including, without limitation, reasonable attorneys' fees and expenses) occasioned by any default by Tenant under this Lease shall constitute Additional Rent hereunder. Landlord shall have no right to terminate this Lease except as provided in this paragraph (f).

(g) Upon termination of this Lease pursuant to paragraph (f) above, the Landlord shall immediately seek to obtain possession of the Property and

Improvements. Upon acquiring such possession, the Landlord shall notify HUD and the Lender in writing. The Lender and HUD shall each have six (6) months from the date of receipt of such notice of acquisition to elect to take, as tenant, a new lease on the Property and on the Improvements. Such new lease shall have a term equal to the unexpired portion of the term of this Lease immediately prior to such termination and shall, except as otherwise provided herein, be on the same terms and conditions as contained in this lease, including without limitation, the option to purchase set forth under paragraph (b) above, except that Lender's or HUD's liability for ground rent shall not extend beyond their occupancy under such lease. The Landlord shall tender such new lease to the Lender or HUD within thirty (30) days after a request for such lease and shall deliver possession of the Property and Improvements immediately upon execution of the new lease. Upon executing a new lease, the Lender or HUD shall pay to Landlord any unpaid ground rent due or that would have become due under this Lease to the date of the execution of the new lease, including any taxes which were liens on the Property or the Improvements and which were paid by Landlord, less any net rentals or other income which Landlord may have received on account of the Property and Improvements since the date of default under this Lease.

(h) The Landlord agrees that within ten (10) days after receipt of written request from Tenant, it will join in any and all applications for permits, licenses or other authorizations required by any governmental or other body claiming jurisdiction in connection with any work which the Tenant may do hereunder and will also join in any grants for easements for electric, telephone, telecommunications, cable, gas, water, sewer and such other public utilities and facilities as may be reasonably necessary in the operation of the property or of any Improvements and if, at the expiration of such ten (10) day period, the Landlord shall not have joined in any such application, or grants for easements, the Tenant shall have the right to execute such application and grants in the name of the Landlord, and for that purpose, the Landlord hereby irrevocably appoints the Tenant as its Attorney-in-fact to execute such papers on behalf of the Landlord.

(i) Nothing in this Lease contained shall require the Tenant to pay any franchise, estate, inheritance, succession, capital levy or transfer tax of the Landlord or any income excess profits or revenue tax, or any other tax,

assessment charge or levy upon the rent payable by the Tenant under this lease.

(j) All notices, demands and requests which are required to be given by the Landlord, the Tenant, the Lender or HUD shall be in writing and shall be sent by registered or certified mail, postage prepaid, and addressed to the address of the party as given in this instrument unless a request for a change in this address has been sent to the party giving the notice by registered or certified mail prior to the time when such notice is given.

All notices to Lender or HUD shall be as follows:  
If to Lender:

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

If to HUD:

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

(k) This lease shall not be modified without the written consent of HUD and the Lender.

(l) The provisions of this Addendum benefit the Lender and HUD and are specifically declared to be enforceable against the parties to this lease and all other persons by the Lender and HUD.

**Surplus Cash Note**

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name:  
HUD No: \_\_\_\_\_ (the "Project")  
FOR VALUE RECEIVED, \_\_\_\_\_ ("Maker") promises to pay to \_\_\_\_\_ ("Payee") the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), payable at

\_\_\_\_\_ with interest on any remaining balance of principal at \_\_\_\_\_ per cent (\_\_\_\_%) per annum payable annually, commencing \_\_\_\_\_, 20\_\_\_\_, and thereafter on the first day of \_\_\_\_\_ until the entire indebtedness has been paid. Any interest not so paid shall not create any default in the terms of this note but shall accrue and be payable in full on the maturity date hereof. In any event, the balance of principal, if any remaining unpaid, plus accrued interest, shall be due and payable on \_\_\_\_\_, 20\_\_ ("Maturity Date"). [Note: The Maturity Date must be on or after the maturity date of the HUD insured mortgage.]

This Promissory Note ("Note") is made on and is subject to the following terms and conditions:

1. In the event that the maturity date of that certain mortgage (the "HUD Mortgage") dated \_\_\_\_\_ in the principal amount of \$ \_\_\_\_\_ made by Maker to \_\_\_\_\_ ("HUD Lender," which term shall be deemed to have the meaning for "Lender" set forth in the HUD regulatory agreement for this Project) in connection with the HUD Project referenced above is extended and such extension is approved by the Secretary of Housing and Urban Development ("Secretary" or "HUD") then in such event the Maturity Date of this Note shall automatically be extended to the extended maturity date of the HUD Mortgage without the consent of Payee.

2. So long as the Secretary or his/her successors or assigns, are the insurers or holders of the first mortgage on the HUD Project, payments due under this Note shall be payable only from surplus cash of said project, as the term surplus cash is defined in the Regulatory Agreement dated \_\_\_\_\_, 20\_\_ between HUD and Maker. The restriction on payment imposed by this paragraph shall not excuse any default caused by the failure of the maker to pay the indebtedness evidenced by the Note.

3. In the event that the indebtedness secured by the HUD Mortgage is paid in full and the HUD Mortgage released of record, then the holder of this Note may, at its option, declare the whole principal sum or any balance thereof, together with interest thereon, immediately due and payable.

4. Maker may pay any part or all of the principal of this Note on any interest payment date. Provided, however, no such prepayment of principal in any amount or any payment of interest shall be made except from Surplus Cash in accordance with the conditions prescribed, in the Regulatory Agreement.

5. Notwithstanding the provisions of paragraphs numbered 2 and 4 above, the maker may also make payments due hereunder from sources other than project income or assets of the project.

6. Any unauthorized payments, as determined by HUD, shall be returned to the Project as that term "Project" is defined in the Regulatory Agreement.

7. No prepayment shall be made until after final FHA insurance endorsement of the note secured by the HUD Mortgage.

8. This Note is non-negotiable and may not be sold, transferred, assigned or pledged by payee except with the prior written approval of HUD.

9. Interest on this Note shall not and must not be compounded.

10. The Maker hereby waives presentment, demand, protest and notice of demand, protest and nonpayment of this Note.

11. The terms and provisions of this Note are also for the benefit of and are enforceable by HUD against either party or any other person.

IN WITNESS WHEREOF, the Maker has signed this Note on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

MAKER: \_\_\_\_\_

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

Name:

Title:

### Completion Assurance Agreement

U.S. Department of Housing and Urban Development  
Office of Housing  
OMB Approval No. 0000-0000  
(exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

This Agreement made this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, by and between \_\_\_\_\_, Contractor, having an office at \_\_\_\_\_, and \_\_\_\_\_, Borrower (which term also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), having an office at \_\_\_\_\_, and

\_\_\_\_\_, Lender (which term also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), having an office at \_\_\_\_\_.

### WITNESSETH:

Whereas, the Contractor and the Borrower have entered into a Construction Contract dated \_\_\_\_\_, 20\_\_\_\_ (the Construction Contract), providing for the construction of a housing project described in the Construction Contract, said project being known as Project No. \_\_\_\_\_, and a copy of the Construction Contract being on file with the Department of Housing and Urban Development (HUD); and

Whereas, the construction of the Project is to be financed by a mortgage loan made to Borrower by the Lender, which loan is secured by a mortgage/ deed of trust (hereinafter called the mortgage), to be insured by the Federal Housing Commissioner (hereinafter the Commissioner), pursuant to and under the provisions of the National Housing Act, as amended; and

Whereas, the Lender is unwilling to make advances of mortgage proceeds and the Commissioner is unwilling to insure the mortgage unless the Contractor shall first furnish proper assurance to the Borrower and to the Lender for the performance of the obligations of the Contractor under the Construction Contract, including, but not limited to:

(a) The completion of the Project in accordance with drawings and specifications referred to in the Construction Contract;

(b) The completion of the Project free and clear of any liens, claims or encumbrances whatsoever, except for the lien of the mortgage;

(c) The payment of all mechanics and laborers employed in the construction of the Project at wages prevailing in the locality of the project as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended;

(d) The satisfaction of any loss, damage, expense or claim which the Borrower or Lender may suffer or sustain through the failure of the Contractor to fulfill the provisions of (a), (b), or (c) above or through the failure of the Contractor to fulfill all obligations under the Construction Contract.

Now, Therefore, in consideration of the mutual promises and undertakings hereinafter contained, and for the purpose of inducing the commissioner to insure advances of mortgage money during construction, the parties hereto on behalf of themselves, their successors

or assigns respectively, undertake and agree that:

1. The Contractor has deposited with the Lender, or if the Lender so elects, with a depository satisfactory to the Lender, a Completion Assurance Fund; (hereinafter called the Fund), in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) to secure or indemnify the Borrower or Lender, as the case may be, for any expenses, loss, or damage suffered or sustained as the result of any default by the Contractor in the performance of the Construction Contract; it being understood and agreed that the Fund shall at all times be under the control of the Lender or its assigns and is deposited in the form of: / \_\_\_/ Cash; or / \_\_\_/ an unconditional irrevocable letter of credit issued to the Lender by a bank institution;

2. The Lender shall maintain such Fund as a separate trust account to be disbursed in the following order:

(a) To the Contractor or party making such deposit during the course of construction, as may be deemed necessary by the Lender and with prior written approval of the commissioner, or his/her authorized agent.

(b) To the Borrower such portion of the Fund as deemed necessary by the Commissioner to recover any overpayment to the Contractor.

(c) To the Contractor or party making such deposit, the balance of such fund so deposited remaining upon final endorsement of the Mortgage loan for insurance by the Commissioner or his/her authorized agent; except that there shall be withheld from the payment of said balance an amount equal to two and one-half percent (2½%) of the total amount of the Construction Contract, which sum is to be retained in such account for a period of fifteen (15) months from the date of completion as defined in the Construction Contract. Said sum shall be held as a fund to guarantee against defects in construction due to faulty materials or workmanship or damage to the mortgaged premises resulting from such defects, which defects or damage become apparent within one year after the date of the aforesaid completion. Said sum may be used for the correction of such defects or damage in the event the Contractor fails to make such corrections. The Contractor's liability for such corrections is not limited by the amount of such sum.

(d) To the Lender the entire Fund or balance remaining therein in the event of a default by the contractor under the Construction Contract, to be used by the Lender to indemnify it and the Borrower as the case may be, for any loss, damage or expense whatsoever which they may

suffer by reasons of the Contractor's failure to properly perform the Construction Contract.

In any event, any and all disbursements from the Fund shall be made only upon the prior written approval of the Commissioner, or his/her authorized agent.

3. In the event the Lender assigns the mortgage to the Commissioner at any time during which the Fund has a balance remaining therein in the form of an unconditional irrevocable letter of credit, the Contractor authorizes the Lender to draw the remaining balance of said letter of credit in cash, if so required by the Commissioner, and deliver such cash within forty-five (45) days after the assignment is filed for record to the Commissioner to be held in accordance with the terms of this Agreement.

4. Notwithstanding any of the provisions herein contained, it is expressly understood and agreed by all the parties thereto that in the event of a default by the Contractor in any of its obligations under the Construction Contract, the entire Fund or balance remaining therein may, at the option of the Lender and the Commissioner, be paid to the Commissioner together with an assignment of all rights hereunder granted to the Lender and the Borrower. The Contractor and Borrower hereby consent to the transfer of the rights of the Lender hereunder by assignment in case any other Lender or Lenders should become the Borrower or holder of the mortgage.

5. This Agreement shall not alter or limit the obligations and liabilities of the contractor under the Construction Contract, but shall be deemed to be merely additional security for the performance by the Contractor of the obligations thereunder.

6. It is understood and agreed that in the event the Fund is held by a depository other than the Lender, that said depository is not charged with any duty or responsibility to see to the performance of or compliance with any agreements between any of the parties hereto other than that of paying over the Fund as directed in writing by the Lender, nor to see to the application of the Fund after making disbursement as so directed.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

BORROWER

By: \_\_\_\_\_  
Print name and title

LENDER

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

Print name and title  
CONTRACTOR

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

Print name and title  
DEPOSITORY

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

Print name and title

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

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

/s/ \_\_\_\_\_

Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

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

/s/ \_\_\_\_\_

Name, Title: \_\_\_\_\_

(Printed)

Dated: \_\_\_\_\_

Name of Entity: \_\_\_\_\_

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

/s/ \_\_\_\_\_

Name, Title: \_\_\_\_\_

Title: \_\_\_\_\_

(Printed)

Dated: \_\_\_\_\_

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

/s/ \_\_\_\_\_

Name, Title: \_\_\_\_\_

(Printed)

Dated: \_\_\_\_\_

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

**Payment Bond**

**U.S. Department of Housing and Urban Development**

Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

CONTRACTOR/PRINCIPAL (Name and Address):

LENDER (Name and Address):

OWNER (Name and Address):

SURETY (Name and Principal Place of Business):

PROJECT (Name, FHA Number and Location):

CONSTRUCTION CONTRACT:

Date:

Amount:

BOND:

Date:

Amount:

RIDERS TO THIS BOND:  Yes  No

This Payment Bond ("Bond") is issued simultaneously with a Performance Bond-Dual Obligee (the "Performance Bond") issued in connection with the Project. As used herein, "Obligees" shall mean Owner and the additional obligee(s), if any, identified in a Rider to this Bond and "Obligee" shall mean any of the Obligees.

1. Contractor has entered into a construction contract with Owner for the construction of the above-named Project. The construction contract (as the same may now or hereafter be amended by change order or otherwise) is made a part hereof by reference, and is hereinafter referred to as the "Contract."

2. Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns, to Obligees, for the use and benefit of Claimants as hereinafter

defined, in the sum of \_\_\_\_ Dollars (\$\_\_\_), to pay for labor, materials and equipment furnished for use in the performance of the Contract. Any approved increase in the total Contract price would increase the monetary obligation of the Obligors accordingly.

3. This obligation shall be null and void if the Contractor promptly makes payment to all Claimants for all labor, material, or equipment used in the performance of the Contract.

4. Contractor and Surety hereby jointly and severally agree with Obligees that every Claimant, who has not been paid in full before the expiration of a period of ninety (90) days after having last performed labor or last furnished materials or equipment, may sue on this Bond for the use of such Claimant, prosecute the suit to final judgment for such sum or sums as may be justly due Claimant, and have execution thereon. No Obligee shall be liable for the payment of any costs or expenses of any such suit.

5. Surety shall have no obligation to Claimants under this Bond unless:

a. Claimants who do not have a direct contract with the Contractor have given notice to any two (2) of the above-named parties, Contractor, Owner or Surety, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the claim, stating that a claim is being made under this Bond and, with substantial accuracy, the amount claimed and the name of the party to whom the materials or equipment were furnished, or for whom the work or labor was done or performed.

b. Any suit, action or proceeding brought by a Claimant under this Bond shall be instituted within one (1) year from the date (i) on which the Claimant gave the notice required by Paragraph 5a, or (ii) on which the last labor or service was performed by anyone or the last materials or equipment were furnished by anyone under the Contract, whichever occurs later. If this limitation is deemed to be in contravention of any controlling law, this Bond is deemed amended so as to be equal to the minimum period of limitation permitted by such law.

6. The amount of this Bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens that may be filed of record against said Project, whether or not the claim for the amount of such lien is presented under and against this Bond. Notwithstanding the foregoing, no amounts paid to Owner without the written consent of

Lender shall reduce the liability of Surety to Lender under this Bond.

7. Surety hereby waives notice of any change, including changes of time, to the Contract or to related subcontracts, purchase orders and other obligations.

8. Notice to the Surety, Owner, or Contractor shall be served by mailing the same by registered mail or certified mail, postage prepaid, to the address shown on this Bond or to such other address as may have been previously specified by the recipient in a notice given in accordance herewith.

9. A Claimant is defined as one having a direct contract with Contractor or with a subcontractor of Contractor for labor, materials or equipment used in the performance of the Contract, including without limitation in the terms "labor, materials or equipment" that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment was furnished.

SIGNED and SEALED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

By: \_\_\_\_\_  
Name and Title (Printed)

SURETY:

By: \_\_\_\_\_  
Name and Title (Printed)  
Project Name: \_\_\_\_\_  
Project Number: \_\_\_\_\_

**ADDITIONAL OBLIGEE RIDER**

(Additional obligee only allowed with prior HUD approval as indicated below.)

1. This additional Obligee Rider is attached to and made a part of that certain Payment Bond (the "Payment Bond"), dated \_\_\_\_, 20\_\_ executed and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$\_\_\_\_) with respect to the Project referenced above.

2. All of the terms, conditions and provisions of the Payment Bond are hereby incorporated herein by this reference as if fully set forth herein.

3. All defined terms as set forth in the Payment Bond shall have the same meaning herein.

4. \_\_\_\_\_ is hereby added to the Payment Bond as an additional named Obligee.

5. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Payment Bond, including especially but without limitation, the aggregate liability of Surety as described in paragraph 2 of the Payment Bond.

Signed and sealed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

By: \_\_\_\_\_  
Name and Title (Printed)

SURETY:

By: \_\_\_\_\_  
Name and Title (Printed)  
Project Name: \_\_\_\_\_  
Project Number: \_\_\_\_\_

**ADDITIONAL SURETY RIDER**

(Additional surety only allowed with prior HUD approval as indicated below.)

1. This Additional Surety Rider is attached to and made a part of that certain Payment Bond (hereinafter "Payment Bond"), dated \_\_\_\_, 20\_\_ executed and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$\_\_\_\_) with respect to the Project referenced above.

2. All of the terms, conditions and provisions of the Payment Bond are hereby incorporated herein by this reference as if fully set forth herein.

3. All defined terms as set forth in the Payment Bond shall have the same meaning herein.

4. \_\_\_\_\_ (the "Additional Surety") is hereby added to the Payment Bond as an additional named surety.

5. Each surety and additional surety (hereinafter collectively called "Surety") is held and firmly bound, jointly and severally, onto Obligees. Further, each undersigned Surety binds itself in the aforesaid full sum, "jointly and severally," as well as "severally" for the purpose of allowing joint action or singular actions against any or all of them in the full amount of this Payment Bond and for all other purposes each Surety binds itself, jointly and severally with Contractor, for the payment of the full sums above stated. All references in the Payment Bond to "Surety" shall include the Additional Surety.

6. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Payment Bond,

including especially but without limitation, the aggregate liability of the Surety as described in paragraph 2 of the Payment Bond.

SIGNED AND SEALED this \_\_\_ day of \_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

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

Name and Title (Printed)

SURETY:

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

Name and Title (Printed)

Approved by the United States Department of Housing and Urban Development

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

**Performance Bond—Dual Obligee**

**U.S. Department of Housing and Urban Development**

Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

CONTRACTOR/PRINCIPAL (Name and Address):

OWNER (Name and Address):

LENDER (Name and Address):

SURETY (Name and Principal Place of Business):

PROJECT (Name, FHA Number and Location):

CONSTRUCTION CONTRACT:

Date:

Amount:

BOND:

Date:

Amount:

RIDERS TO THIS BOND: \_\_ Yes \_\_ No

This Performance Bond-Dual Obligee ("Bond") is issued simultaneously with a Payment Bond ("Payment Bond") issued with respect to the Project. As used herein, "Obligees" shall mean Owner, Lender and the additional obligee(s), if any, identified in a Rider to this Bond and "Obligee" shall mean any of the Obligees.

1. Contractor has entered into a construction contract with Owner for the construction of the above-named Project. The construction contract (as the same may be now or hereafter amended by change order or otherwise) is made a part hereof by reference, and is hereinafter referred to as the "Contract."

2. Lender has agreed to lend to Owner a sum of money to be secured by a mortgage, deed of trust, or security deed on the Project and to be used in making payments under the Contract, and desires protection as its interests may appear, in event of default by Contractor under the Contract.

3. Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns, unto Owner and unto Lender, its successors and assigns, as their respective interests may appear, as OBLIGEEES, in the sum of \_\_\_ Dollars (\$\_\_\_), for the performance of the Contract. Any approved increase in the total Contract price would increase the obligation of the Obligors accordingly.

4. The condition of this obligation is such that, if Contractor shall perform all the undertakings, covenants, terms, conditions and agreements of the Contract on its part to be performed, and fully indemnify and save harmless Obligees from all costs and damages which they may suffer by reason of failure to do so, and fully reimburse and repay Obligees all expenses which any of the Obligees may incur in making good any such default, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

5. Surety shall not be liable under this Bond to the Obligees, or any of them, unless the said Obligees, or any of them, make payments to the Contractor in accordance with the terms of the Contract as to payments, and perform all the other obligations to be performed under the Contract. However, Surety shall not assert a failure by the Obligees, or any of them, to make payments or perform obligations under the Contract unless each of the Obligees has been given written notice by Surety of any such failure and a reasonable period of time (but in no event less than thirty

(30) days from receipt of said notice), in which to cure such failure.

6. Surety agrees that any right of action that any of Obligees herein may have under this Bond may be assigned, without the consent of Contractor or Surety, to the Secretary of Housing and Urban Development, acting by and through the Federal Housing Commissioner, and that such assignment will in no manner invalidate or qualify this instrument.

7. The aggregate liability of Surety hereunder to the Obligees or their assigns is limited to the penal sum above stated, and Surety, upon making any payment hereunder, shall be subrogated to, and shall be entitled to an assignment of, all rights of the payee, either against Contractor or against any other party liable to the payee in connection with the loss which is the subject of the payment. Notwithstanding the foregoing, no amounts paid to Owner without the written consent of Lender shall reduce the liability of Surety to Lender under this Bond.

8. Any suit, action or proceeding by reason of any default whatever shall be instituted within two years after the date the Owner declares the Contractor in default of the Contract. If this limitation is deemed to be in contravention of any controlling law, this Bond is deemed amended so as to be equal to the minimum period of limitation permitted by such law.

9. Surety hereby waives notice of any change, including changes of time, to the Contract or to related subcontracts, purchase orders and other obligations.

10. Notice to the Surety, Owner, or Contractor shall be served by mailing the same by registered mail or certified mail, postage prepaid, to the address shown on this Bond or to such other address as may have been previously specified by the recipient in a notice given in accordance herewith.

SIGNED AND SEALED THIS \_\_\_ day of \_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

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

Name and Title (Printed)

SURETY:

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

Name and Title (Printed)

Project Name: \_\_\_\_\_

Project Number: \_\_\_\_\_

**ADDITIONAL OBLIGEE RIDER**

(Additional obligee only allowed with prior HUD approval as indicated below.)

1. This Additional Obligee Rider is attached to and made a part of that certain Performance Bond-Dual Obligee (the "Performance Bond"), dated \_\_\_\_\_, 20\_\_, executed and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$\_\_\_\_) with respect to the Project referenced above.

2. All of the terms, conditions and provisions of the Performance Bond are hereby incorporated herein by this reference as if fully set forth herein.

3. All defined terms as set forth in the Performance Bond shall have the same meanings herein.

4. \_\_\_\_\_ is hereby added to the Performance Bond as an additional named Obligee.

5. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Performance Bond, including especially but without limitation, the aggregate liability of the Surety as described in paragraph 3 of the Performance Bond.

Signed and sealed this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor: \_\_\_\_\_

CONTRACTOR: \_\_\_\_\_

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

Name and Title (Printed) \_\_\_\_\_

SURETY: \_\_\_\_\_

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

Name and Title (Printed) \_\_\_\_\_

Approved by the United States Department of Housing and Urban Development

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

Project Name: \_\_\_\_\_

Project Number: \_\_\_\_\_

**ADDITIONAL SURETY RIDER**

(Additional surety only allowed with prior HUD approval as indicated below.)

6. This Additional Surety Rider is attached to and made a part of that certain Performance Bond-Dual Obligee ("Performance Bond"), dated \_\_\_\_\_, 20\_\_, executed and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$\_\_\_\_) with respect to the Project referenced above.

7. All of the terms, conditions and provisions of the Performance Bond are hereby incorporated herein by this reference as if fully set forth herein.

8. Except as set forth in paragraph 5 below, all defined terms as set forth in the Performance Bond shall have the same meanings herein.

9. \_\_\_\_\_ ("Additional Surety") is hereby added to the Performance Bond as an additional named surety.

10. Each surety and additional surety (hereinafter collectively called "Surety") is held and firmly bound, jointly and severally, onto Obligees. Further, each undersigned Surety binds itself in the aforesaid full sum, "jointly and severally," as well as "severally" for the purpose of allowing joint action or singular actions against any or all of them in the full amount of this Performance Bond and for all other purposes each Surety binds itself, jointly and severally with the Contractor, for the payment of the full sums above stated. All references in the Performance Bond to "Surety" shall include the Additional Surety.

11. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Performance Bond, including especially but without limitation, the aggregate liability of the Surety as described in paragraph 3 of the Performance Bond.

SIGNED AND SEALED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor: \_\_\_\_\_

CONTRACTOR: \_\_\_\_\_

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

Name and Title (Printed) \_\_\_\_\_

SURETY: \_\_\_\_\_

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

Name and Title (Printed) \_\_\_\_\_

Approved by the United States Department of Housing and Urban Development

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

**REQUEST FOR ENDORSEMENT OF CREDIT**

**INSTRUMENT AND CERTIFICATE OF MORTGAGEE, BORROWER AND GENERAL CONTRACTOR**

(Insurance upon Completion)

**U.S. Department of Housing and Urban Development**

Office of Housing

(Execute Original plus two copies)

OMB Approval No.

(Exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 1.0 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the

data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (OMB Approval No.), Washington, DC 20503. Do not send this completed form to either of the above addresses.

Project Name:

Lender:

Multifamily Accelerated Processing (MAP)

Project Number:

Borrower:

Traditional Application Processing (TAP)

**To the U.S. Department of Housing and Urban Development (HUD):**

The Lender submits separately the original Note evidencing a loan to the undersigned Borrower, together with a recorded copy of the Security Instrument of even date securing the Note. The Lender requests endorsement of the Note for mortgage insurance in the total sum of \$\_\_\_\_, in accordance with Section \_\_\_\_ of the National Housing Act and its implementing regulations.

The Lender submits separately a check for \$\_\_\_\_ covering the first mortgage insurance premium, together with the other items called for in the HUD commitment dated \_\_\_\_\_, 20\_\_, and in any extensions or amendments thereof (the Commitment). The Lender certifies that all conditions of the Commitment have been fulfilled to date.

The Lender understands that the Security Instrument, the Note, this Request for Endorsement, and any documents submitted with this Request for Endorsement are considered to be consistent with and shall be interpreted consistently with HUD's regulations as such regulations constitute and pertain to the Contract of Insurance. The Lender agrees to be bound by such regulations and by all Directives of HUD.

The definition of any capitalized term or word used herein can be found in this Request for Endorsement, the Regulatory Agreement between the Borrower and HUD, and/or the Security Instrument by the Borrower. The term "financing charge(s)," as used herein shall mean any charge, direct or indirect, for supplying the loan to or servicing the loan for the Borrower. Whenever used, the singular number shall include the plural, the plural the singular and the use of any gender shall be applicable to all genders.

The Lender submits separately an appropriate security agreement executed by the Borrower (and Lessee, if appropriate, in the case of Health Care Facilities) covering all of the Personalty which, under applicable law, may be subject to a security interest under the Uniform Commercial Code (UCC), whether acquired now or in the future, and all products and cash proceeds and non-cash proceeds (UCC Collateral). The Lender will file timely appropriate Financing Statements under the UCC. The Lender agrees to file timely the appropriate Financing Statements under the UCC on behalf of HUD pursuant to HUD's rights under the Regulatory Agreement.

The Lender submits separately the Sponsor's Guaranty Agreement to meet a subsidy differential in the amount of \$\_\_\_\_\_. (Applicable only to Section 231 and 232 nonprofit projects if required by HUD.)

The Lender agrees to furnish HUD with a complete report of the results of any inspection of the Mortgaged Property that the Lender is required to perform under the applicable regulations or Directives of HUD.

#### Certificate of Mortgagee

The Lender certifies that:

1. To the best of our knowledge and information, the construction or the required repairs, as the case may be, have been completed in accordance with HUD's requirements, except for such items approved by HUD for delayed completion, and noted hereinafter.

2. Impound accounts for taxes, insurance and mortgage insurance premiums have been established and are adequately funded.

3. The Project is fully covered by insurance as required by the terms of the Security Instrument and the Commitment, and all such insurance policies have attached thereto a standard mortgagee clause making the loss payable to the Lender and the Secretary, Department of Housing and Urban Development, as their interests may appear.

4. The Lender has received and submits to HUD separately (check applicable paragraphs):

a. An Escrow Agreement guaranteeing the completion of off-site improvements as required by HUD. The Borrower has made a cash deposit in the amount of \$\_\_\_\_\_.

b. Evidence that the off-site improvements will be provided by the public authorities having jurisdiction, or by public utility companies serving the Project, at no cost to the Borrower.

c. In the case of new construction or substantial rehabilitation, an Escrow Agreement covering incomplete on-site improvements. The Borrower has made a cash deposit in the amount of \$\_\_\_\_\_, at 150% of HUD's estimated cost.

d. Or, in the case of refinancing, an Escrow Agreement covering the delayed repairs. The Borrower has made a cash deposit in the amount of \$\_\_\_\_\_, at 100% of HUD's estimated cost; with an additional \_\_\_\_% required by HUD, in the form of (cash or letter of credit) \_\_\_\_\_.

5. The Lender has received a guarantee against defects due to faulty workmanship and defective materials and submits separately (check applicable paragraphs):

a. A surety bond in an amount not less than 10% of the cost of construction, running for a period of not less than two years from the date of completion of the Project, as determined by HUD, which bond has been assigned to the Lender (or under which bond the Lender is a joint obligee) and which is assignable to HUD.

b. An agreement between the Borrower, the general contractor and the Lender, under which the Lender is retaining for a period of one year following the date of completion of the Project, as determined by HUD, a sum equal to 2½% of the principal amount of the Security Instrument, in the form of (cash or letter of credit) \_\_\_\_\_, which sum, upon failure of the Borrower or the general contractor to cure any such defects due to faulty workmanship and defective materials to the satisfaction of HUD and the Lender, can be used for the purpose of curing such defects, or can be applied to the Indebtedness with HUD's consent.

c. If the Project is insured pursuant to Section 223, and required repairs are delayed until after HUD's endorsement, the Lender has obtained an assurance against latent defects in the amount of 2½% of the cost, in the form of (cash or letter of credit) \_\_\_\_\_, for a period of 12 months, which may be extended for up to 15 months, following the satisfactory completion of repairs.

6. The Lender submits separately an Escrow Agreement evidencing the deposit in the amount of \$\_\_\_\_\_, in the form of (cash or letter of credit) \_\_\_\_\_, to meet a possible initial operating deficit during the period specified in the Commitment.

7. If the Project is insured pursuant to Section 223, and if required by the Commitment, the Lender has collected cash as an initial deposit to the Reserve Fund for Replacements, in the amount of \$\_\_\_\_\_.

8. Beginning with the date on which the first payment toward amortization is required to be made by the terms of the insured Security Instrument or at such later date as may be agreed to by HUD in writing, the Lender shall require a monthly deposit with the Lender or in a depository satisfactory to the Lender of one-twelfth ( $\frac{1}{12}$ ) of the sum set forth in the Commitment constituting a Reserve Fund for Replacements which fund will be subject to the Lender's order and from which fund withdrawals may be made only upon the receipt of HUD's written permission. The amount of the monthly deposit may be increased or decreased from time to time at the direction of HUD. These funds will be deposited with the Lender by the Borrower in cash or in the form of obligations of, or guaranteed as to principal by, the United States of America. The Lender will, upon appropriate request by the Borrower, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. Notice of any failure to receive the required deposits will be forwarded to HUD within 60 days of the date such deposits are due.

9. In cases where a Residual Receipts Fund is required under the Regulatory Agreement, the Lender shall deposit or place in a depository satisfactory to the Lender all funds received from the Borrower after the end of each semi-annual or annual fiscal period, and will notify HUD if such funds are not received within 90 days of the end of such fiscal period. The Residual Receipts Fund will be subject to the control of the Lender and from which fund withdrawals may be made only upon the receipt of HUD's written permission except for permitted distributions pursuant to the terms of the Regulatory Agreement. These funds will be deposited with the Lender by Borrower in cash or in the form of obligations of or guaranteed as to principal by the United States of America. The Lender will, upon appropriate request by the Borrower, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. The Lender agrees to notify HUD in writing of any irregularity with respect to such Residual Receipts Fund immediately upon such irregularity coming to the attention of the Lender.

10. No financing charges other than charges disclosed herein have been made and the Lender agrees that no other charges for financing will be

made. (Check and complete the following applicable subparagraphs, a, b, c, d, e, f, g or h.)

a. No financing charges of any kind have been or will be imposed directly or indirectly.

b. The Lender has collected cash as an initial service charge in the amount of \$ \_\_\_\_\_.

c. In addition to the initial service charge, the Lender has collected cash in the amount of \$ \_\_\_\_\_ as a discount or financing charge for the construction or rehabilitation loan.

d. The Lender is retaining the permanent loan. In addition to the initial service charge, the Lender has collected cash as a permanent placement fee in the amount of \$ \_\_\_\_\_.

e. The Lender has a firm commitment from \_\_\_\_\_ to purchase the loan when insured at a financing charge or discount of \_\_\_\_\_ percent, and the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ to cover said charge or discount.

f. This Project will be financed with (tax-exempt or taxable) \_\_\_\_\_ bonds. Therefore, the Lender has collected in the form of (cash or letter of credit) \_\_\_\_\_ the amount of \$ \_\_\_\_\_ to cover the costs of issuance. A statement is attached itemizing these costs with an explanation of the necessity of each cost.

g. Additional financing charges or discounts of \$ \_\_\_\_\_ are to be collected pursuant to the attachment hereto for the purpose shown in (c), (d), (e), (f) (strike inapplicable letters). The arrangement for the collection of additional financing charges or discount must follow forms and procedures prescribed by HUD.

h. A servicing fee that is included in the interest rate and an administrative fee for investing the cash held in the Reserve Fund for Replacements and any other interest-bearing escrows required by HUD.

i. The Security Instrument loan to be made to the Borrower will be financed through funds being provided by a third-party investor through the issuance to the investor of construction and permanent participation certificates pursuant to a participation agreement between the Lender and the investor, with respect to which agreement the Lender has agreed to repay the investor at a stated interest rate according to a fixed payment schedule.

j. The Security Instrument loan to be made to the Borrower will be financed through funds being provided by a third-party investor through the issuance to the investor of construction and permanent fully modified, pass-

through, mortgage-backed securities, guaranteed as to principal and interest by the Government National Mortgage Association.

11. In the event of a default under the Security Instrument during the term of any prepayment lock-out or penalty, that is, prior to the date on which prepayments may be made with a penalty of one percent (1%) or less, the Lender will do the following:

a. Request a three-month extension of the deadline prescribed by 24 CFR 207.258 for filing a notice of our intention to file an insurance claim and our election to assign the Security Instrument;

b. If you grant the requested extension of the notice-filing deadline, or a shorter period, assist the Borrower in arranging a refinancing to cure the default and avert an insurance claim;

c. Report to HUD at least monthly on any progress in arranging a refinancing;

d. Otherwise cooperate with HUD in taking reasonable steps in accordance with prudent business practices to avoid an insurance claim; and

e. Require any successors or assigns to certify in writing that they agree to be bound by these conditions for the remainder of the term of the prepayment lock-out or penalty.

12. The Lender certifies that in any case where a letter of credit has been accepted instead of cash, (a) such unconditional and irrevocable letter of credit has been issued by (1) another banking institution; (2) the Lender, subject to receiving HUD's written permission prior to endorsement; (b) if demand under the letter of credit is not immediately met, the Lender will forthwith provide cash equivalent to the undrawn balance thereunder without recourse to the Borrower, any sponsor, or the general contractor.

13. The Lender has not paid any kickback or fee or other consideration, directly or indirectly, to any person who has received payment or other consideration from any other person in connection with this transaction, including the purchase or sale of the Mortgaged Property, except for compensation paid or to be paid, if any, for the actual performance of services and approved by HUD.

14. The following are the only identities of interest, as defined by HUD in MAP Directives, between the Lender and the Borrower, any Principal of the Borrower, the Contractor, any subcontractor, or the seller of the land: \_\_\_\_\_ (must indicate "none" for MAP transactions).

15. No identity of interest, as defined by HUD Directives, exists between the Lender and the counsel to the Borrower.

16. All funds, escrows, and deposits specified in this Request for Endorsement and any and all other funds held in connection with the transaction covered by this Request for Endorsement shall be funds held for or on behalf of the Borrower pursuant to the Contract of Insurance.

17. All HUD form closing documents submitted to HUD in connection with this transaction (with the exception of the Opinion by Counsel to the Borrower and the accompanying Certification by the Borrower) conform to those documents the Lender obtained from HUD on \_\_\_\_\_ and such documents have not been changed or modified in any manner except as suitably identified and specifically approved by HUD field counsel as evidenced by the attached memorandum. It is understood that changes and modifications do not include filling in blanks, attaching exhibits or riders, deleting inapplicable provisions or making changes authorized by applicable HUD regulations and/or Directives. The Lender further certifies that all closing documents submitted to and accepted by HUD in connection with this transaction are listed in the attached memorandum.

18. The Lender agrees to notify HUD in writing immediately upon learning of any violation of the Regulatory Agreement by the Borrower, the Lessee and/or the Operator, as applicable, in certain transactions involving the lease of the Project.

19. The Lender agrees to promptly review any Borrower's request to transfer the Project and not unreasonably withhold the Lender's approval of the transfer. If HUD approves the transfer, the Lender agrees to execute a Release and Assumption Agreement or a Mortgage Modification Agreement incorporating the Regulatory Agreement in the Mortgage. It is understood that the Lender's consent to the transfer will in no way prejudice the Lender's rights under the Contract of Insurance with HUD. The Lender shall not collect any fee in connection with reviewing the transfer except the Borrower may reimburse the Lender for actual expenses incurred by the Lender in connection with reviewing the transfer.

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a

multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Date \_\_\_\_\_  
Lender \_\_\_\_\_  
By \_\_\_\_\_

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

**CERTIFICATE OF MORTGAGOR**

The undersigned Borrower certifies to HUD:

1. The Borrower possesses the powers necessary for and incidental to the ownership and operation of the Project, as required by the appropriate provisions of the National Housing Act, the regulations, and Directives of HUD.

2. The Borrower has read the foregoing Certificate of Mortgagee, and to the best of its knowledge and belief considers it correct.

3. The project books and records will be kept in accordance with HUD Directives, and will be maintained to permit an accurate audit under HUD Directives. The undersigned further agrees that if the Project has been occupied prior to the date of this certificate, financial reports covering the entire period of occupancy will be furnished to HUD upon request.

4. All funds escrowed with the Lender, as set forth in the Certificate of Mortgagee, may be held by the Lender for the purposes indicated therein, or in the event of a default and with HUD's permission may be applied to the Indebtedness.

5. HUD and its authorized agents and the Lender are hereby granted the right to enter upon the Mortgaged Property at any and all times for the purpose of inspection.

6. No fixtures or personal property acquired for the Project have been purchased on a conditional sale contract or other form of delayed payment.

7. Additionally, the undersigned certifies that:

(a) The Borrower has received the sum of \$ \_\_\_\_\_, constituting the full principal amount of the loan for this Project.

(b) Construction or repairs are complete, except as otherwise noted in the Certificate of Mortgagee, and is in accordance with the drawings and specifications or list of repairs required by HUD. The Security Instrument is a good and valid first lien; the property is free and clear of all liens other than that of the \_\_\_\_\_ or such inferior liens as have been approved by HUD; and all outstanding unpaid obligations contracted by or on behalf of the Borrower, directly or indirectly, in connection with the mortgage transaction, the acquisition of the property, and the construction, substantial rehabilitation or repair of the Project are listed below:

- (1) HUD-approved notes (copies attached) \$ \_\_\_\_\_
- (2) Due General Contractor \$ \_\_\_\_\_
- (3) Other \$ \_\_\_\_\_

(Note: If the space provided is inadequate to list all unpaid obligations, insert the total in each category and attach itemizations. If there are no outstanding obligations, so state.)

(c) Except for any amounts due on notes listed in item 7(b)(1) above, the undersigned agrees to pay the foregoing obligations in cash and to furnish HUD with receipts, or other evidence of payment satisfactory to HUD, within 45 days following the date hereof.

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_  
By: \_\_\_\_\_  
/s/ \_\_\_\_\_  
Printed Name, Title: \_\_\_\_\_  
Dated: \_\_\_\_\_  
By: \_\_\_\_\_  
/s/ \_\_\_\_\_  
Printed Name, Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) Fines and imprisonment under 18 U.S.C. 287,

1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

**Certificate of General Contractor**

The undersigned general contractor certifies to HUD:

1. The construction is in accordance with the drawings and specifications approved by HUD.

2. All outstanding unpaid obligations contracted by or on behalf of the undersigned in connection with the construction contract are listed below:

- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_
- \$ \_\_\_\_\_

(Note: If the space provided is inadequate to list all unpaid obligations, insert the total in each category and attach itemizations. If there are no outstanding obligations, so state.)

3. Except for unfinished work funded by an escrow or escrows approved by HUD, the undersigned agrees to pay the foregoing obligations, and to furnish HUD receipts or other evidence satisfactory to HUD, within 15 days following receipt of payment from the Borrower.

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_  
By: \_\_\_\_\_  
/s/ \_\_\_\_\_  
Printed Name, Title: \_\_\_\_\_  
Dated: \_\_\_\_\_  
By: \_\_\_\_\_  
/s/ \_\_\_\_\_  
Printed Name, Title: \_\_\_\_\_  
Dated: \_\_\_\_\_

**Warning**

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**Surveyor's Report**

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (Exp. 00/00/00)

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Instructions: Submit a completed, signed Surveyor's Report with all survey map/plat submissions. See the Surveyor's Instructions for required map/plat submissions. Identify pertinent observed and otherwise known conditions on the Surveyor's Report.

I certify that, on (date) \_\_\_\_\_, I made a survey of the premises standing in the name of \_\_\_\_\_ situated at (city, county, state): \_\_\_\_\_ known as street numbers \_\_\_\_\_ and shown on the accompanying survey entitled:

I made a careful inspection of said premises and of the buildings located thereon at the time of making such survey, and again, on (date) \_\_\_\_\_, and on such latter inspection, I found said premises to be standing in the name of: In my professional opinion, the following information reflects the conditions observed on the date of the last site inspection or disclosed in the process of researching title to the premise, and I further certify that such conditions(s) are shown on the survey

map/plat dated or has/have been updated thereon under Revision Date \_\_\_\_\_

1. Rights of way, old highways or abandoned roads, lanes or driveways, drains, sewer or water pipes over and across said premises:

2. Springs, streams, rivers, ponds or lakes located, bordering on or running through said premises:

3. Cemeteries or family burying grounds located on said premises:

4. Electricity, or electromagnetic/communications signal, towers, antenna, lines, or line supports located on, overhanging or crossing said premises:

5. Disputed boundaries or encroachments. (If the buildings, projections or cornices thereof or signs affixed thereto, fences or other indications of occupancy encroach upon adjoining properties or the like encroach upon surveyed premises, specify all such):

6. Earth moving work, building construction, or building additions within recent months:

7. Building or possession lines. (In case of city or town property specify definitely as to whether or not walls are independent walls or party walls and as to all easements of support or "Beam Rights." In case of country property report specifically how boundary lines are evidenced, that is, whether by fences or otherwise):

8. Recent street or sidewalk construction and/or any change in street lines either completed or proposed by and available from the controlling jurisdiction:

9. Flood hazard.

10. Site used as a solid waste dump, sump, or sanitary landfill.

Surveyor's Name: (print or type) \_\_\_\_\_

License Number \_\_\_\_\_

Signature \_\_\_\_\_

**HUD Survey Instructions and Report for Insured Multifamily Projects**

U.S. Department of Housing and Urban Development, Office of Housing, Federal Housing Commissioner

OMB Approval No. 0000-0000 (exp. 00/00/0000)

Public reporting burden for this collection of information is estimated to average 0.5 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

This information is necessary to secure a marketable title and title insurance for the property that provides security for project

mortgage insurance furnished under the FHA multifamily programs. This information assists in making determinations regarding the property's compliance with applicable program regulations, e.g., those pertaining to flood hazard, and in reaching underwriting determinations regarding property suitability and worth for the intended use. This information is mandatory. HUD does not assure confidentiality and there are no sensitive questions.

This survey is to be used in a loan transaction for which the U.S. Department of Housing and Urban Development (HUD) is to insure a multifamily project mortgage.

Its uses will include:

Land title recordation (all cases).  
 Site grading plan preparation (item 1 below).

Plot plan design/redesign (item 2 below).

Special Project Features:

Care Facility,  
 Condo/Air-rights, and/or  
 Other: (Specify)

Standards of Performance: In every instance the survey and map(s) and/or plat(s) must be made in accordance with the requirements for an "ALTA/ACSM Land Title Survey" and in compliance with the:

- Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, as adopted by the American Land Title Association and American Congress on Surveying and Mapping, dated 1999;
- Table A, Optional Survey Responsibilities and Specifications, thereof, items 1 through 4 and 7 through 13 except for subitems 7b and 7c;
- And the following requirements as applicable:

1. Site Grading Involved: Comply with table A, item 5. Contours may not exceed 1-foot vertical intervals, except that 2-foot and 5-foot vertical intervals may be used where the mean site gradient exceeds 5 percent and 10 percent respectively. Where curbs and/or gutters exist, show top of curb and flow line

2. Plot Plan Design/Redesign Involved: Comply with Table A, Item 6.

3. Condo/Air-rights Involved: The surveyor must provide a survey made in accordance with any applicable jurisdictional requirements or, in the absence of such requirements, professionally recognized standards.

4. Flood Hazard Involved: Where any portion of the site is subject to flood hazard, show the 100 year return frequency flood hazard elevation and flood zone for all projects plus the 500 year return frequency, flood hazard elevation, and flood zone for care facility projects. For existing projects

show the site elevation at the entrances, lowest habitable finished floor, and basement for each primary building, and the vehicular parking area that serves each primary building. Take return frequency flood hazard elevations from the applicable Federal Flood Insurance Rate Map. Where such is not available, take the elevations from available State or local equivalent data, or when not available, work in conjunction with owner's engineer.

5. Blanket Easement Involved. Show on the map/plat the location of any facility that is located within or traverses the property under provisions of a blanket easement.

Additional Owner Requirements: The following requirements are not intended to void any other part of this instruction.

Owner's Representative/Contact: \_\_\_\_\_  
Name & Phone No: \_\_\_\_\_  
Address: \_\_\_\_\_

Surveyor's Report: A current Surveyor's Report (not more than 120 days old) must be included with the survey map(s)/plat(s) submitted to HUD for: project design review, construction contract document sets, as required during construction, upon project completion; and with the map(s)/plat(s) used at initial and final closing.

Certification: The survey map/plat must bear the following certification:

"I hereby certify to the U.S. Department of Housing and Urban Development (HUD), (Borrower), (Sponsor), (Lender), (Title Insurance Underwriter), (Other), and to their successors and assigns, that:

"I made an on the ground survey per record description of the land shown hereon located in (city or town, county, township, etc.), on (date); and that it and this (these) map(s) was (were) made in accordance with the HUD Survey Instructions and Report, form HUD-92457M, and the requirements for an ALTA/ACSM Land Title Survey, as defined in the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys dated 1999.

"To the best of my knowledge, belief and information, except as shown hereon: There are no encroachments either way across property lines; title lines and lines of actual possession are the same; and the premises are free of any (subject to a) 100/500 year return frequency flood hazard, and such flood

free (flood) condition is shown on the Federal Flood Insurance Rate Map, Community Panel No. (if none, so state)."

**Request for Approval of Advance of Escrow Funds**

U.S. Department of Housing and Urban Development Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

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*Request for Approval of Advance Payment of Escrow Funds:* Completed by the depository. Submit to FHA in triplicate.

Project Name:  
Project Number:  
Advance Number:  
Name of Borrower:  
Date of Escrow Agreement:  
Payment Amount Requested: \$  
Escrow Account Balance after this payment: \$

The Payment Requested is for:

- offsite facilities
- construction changes
- non-critical repair
- minor movables
- construction costs not paid at final endorsement
- (other) \_\_\_\_\_

The Remaining Balance is for:

- offsite facilities
- construction changes
- non-critical repair
- minor movables
- construction costs not paid at final endorsement
- (other) \_\_\_\_\_

The undersigned received the Request for Payment (see page 2) from the above-named Borrower.

To the best of our knowledge, information, and belief, the sum requested is now payable.

We intend to disburse that sum on or about (date): \_ upon your approval.

Name of the Depository:  
Name/signature of authorizing official/  
date:

Note: Original and two copies must be signed.

*Approval of Advance of Escrow Funds:* Completed by the Department of Housing and Urban Development.

Name & Address of Depository:  
Disbursement of funds is approved from the Escrow Deposit for:

- offsite facilities
- construction changes
- non-critical repair
- minor movables
- construction costs not paid at final endorsement
- (other) \_\_\_\_\_

Payment Approved: \$  
Approval Recommended: (name/  
signature of Housing Project Manager/  
date) x \_\_\_\_\_

Authorizing Agent for the Department of Housing and Urban Development:  
(name/signature/date)

x \_\_\_\_\_  
Request for Payment to be completed by Borrower. To be submitted to the depository in triplicate.

Project Name: Name/address of Depository:  
Project Number:  
Amount Requested: \$

The undersigned Borrower hereby requests a payment of funds covering advances provided by the Escrow Agreement for:

- offsite facilities heretofore executed on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as indicated by the net amount due for work performed up to \_\_\_\_\_ the day of \_\_\_\_\_, 20\_\_\_\_, according to the following statement with respect to all items of construction listed in schedule "A" attached to the Agreement;
- construction costs not paid at final endorsement and listed in Schedule "A" attached to the Agreement;
- construction change(s) as identified by request number(s): \_\_\_\_\_;
- non-critical repairs pursuant to Section 223(f), [  ] Section 223(a)(7), [  ] Section 232 or [  ] \_\_\_\_\_ (other).

| Item or construction change request number               | A. Estimated cost as stated in escrow agreement | B. Amounts from final endorsement escrow | C. Amounts completed<br>[ ] Offsite<br>[ ] 223f<br>[ ] 223(a)(7)<br>[ ] Change orders<br>[ ] 241(f) | D. FHA approved amount |
|----------------------------------------------------------|-------------------------------------------------|------------------------------------------|-----------------------------------------------------------------------------------------------------|------------------------|
| .....                                                    | \$                                              | \$                                       | \$                                                                                                  | \$                     |
| Total .....                                              | \$                                              | \$                                       | % \$                                                                                                | % \$                   |
| Less Retained 10% (Offsite/Construction Change(s)) ..... | \$                                              | \$                                       | \$                                                                                                  | \$                     |
| Balance: Total Amount due to date .....                  | \$                                              | \$                                       | \$                                                                                                  | \$                     |
| Less previous payments .....                             | \$                                              | \$                                       | \$                                                                                                  | \$                     |
| Net amount due on this requisition .....                 | \$                                              | \$                                       | \$                                                                                                  | \$                     |

- \* Percentage derived from subtotal of Breakdown Items (Col. C divided by Col. A)
- \*\* (Col. D divided by Col. A)

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_  
 By: /s/ \_\_\_\_\_  
 Printed Name, Title: \_\_\_\_\_  
 Dated: \_\_\_\_\_  
 By: /s/ \_\_\_\_\_  
 Printed Name, Title: \_\_\_\_\_  
 Dated: \_\_\_\_\_

[ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES]

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30.

**Offsite and Construction Change Certification:**

The undersigned hereby certifies that (mark the appropriate box) [ ] the total cost has been paid in full and in cash from funds other than mortgage proceeds; [ ] upon release of the amount deposited for this offsite item or construction change, payment in full shall be made to the contractor prior to

the next request for an insured advance or loan disbursement and a receipt of payment from the general contractor shall be submitted with the next request for an insured advance or loan disbursement. The undersigned further certifies that all work, labor and materials to be paid under this Request are satisfactory and in accordance with the contract documents.

Name of Borrower: \_\_\_\_\_  
 Signature of authorized Borrower  
 Official/date

Architect's Offsite and Construction Change Certification:  
 I certify, based on my on-site observations (or those of my authorized representative), that to the best of my knowledge, information and belief, the Work covered by the aforementioned is completed.  
 Architect's Signature/Date: \_\_\_\_\_

Inspector's Offsite and Construction Change Certification:  
 I certify that to the best of my knowledge, information and belief that the aforementioned work has been acceptably completed.  
 Inspector's Signature/Date: \_\_\_\_\_

**Escrow Agreement for Noncritical, Deferred Repairs**  
**U.S. Department of Housing and Urban Development**  
 Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for

reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

This Agreement is effective as of the \_\_\_\_ day of \_\_\_\_\_, between \_\_\_\_\_ Lender, and \_\_\_\_\_ Borrower.

The terms Lender and Borrower shall be deemed to have the meaning set forth in the HUD regulatory agreement for this transaction.

Borrower has acquired or refinanced a housing project or health care facility identified as HUD Project Number \_\_\_\_\_, with the proceeds of a loan (the Mortgage Loan) from Lender. The United States Department of Housing and Urban Development (HUD) has endorsed and insured the Mortgage Loan pursuant to § \_\_\_\_\_ of the National Housing Act, as amended, the regulations and the directives issued pursuant thereto. Initial/final endorsement is conditioned upon assurance that funds be available for non-critical repairs deferred until after endorsement of the Mortgage Loan, where repairs are to be completed using mortgage proceeds. Funds deposited with Lender are to be held by Lender under the Contract of Mortgage Insurance for and on behalf of Borrower.

The non-critical, deferred repair cost estimate and list of repairs itemized on Exhibit A are attached to and made part of this Agreement. Borrower agrees to establish an escrow with Lender equal to at least 150 percent of the estimated cost of the repairs. In consideration of the premises, the parties acknowledge and agree as follows:

1. Cash in the amount of \$ \_\_\_\_\_ has been withheld from the mortgage

proceeds. A letter of credit may not be substituted for this 100% escrow.

2. An additional cash amount (or letter of credit, at option of Lender) of not less than 50% of the repair cost estimate is hereby placed in escrow, in the amount of \$ \_\_\_\_\_.

3. Lender may release funds from the mortgage proceeds portion of the escrow in proportion to the cost of work completed, less a 10 percent holdback. The holdback amount must be held until all work is completed and found acceptable.

4. Funds remaining in the escrow account, including the holdback portion, together with interest, may be released to Borrower when: (a) all repairs have been satisfactorily completed, (b) evidence of clear title has been provided to the field office, and (c) latent defect assurances have been provided by one of the following: (i) an escrow in cash, or letter of credit at the option of Lender equal to 2½ percent, or greater as warranted, of the repair cost maintained for 15 months from completion of repairs to cover situations where the defect is discovered in the twelfth month and additional time is necessary to correct it or (ii) a Surety Bond covered by FHA form 3259 from a surety on the accredited list of the U.S. Treasury for at least 10 percent of the repair cost. The bond runs from the date of completion of repairs.

5. All non-critical deferred repairs must be completed by Borrower within twelve (12) months of endorsement, or such shorter period as HUD and Lender may specify. If Borrower has not completed all repairs by the end of the repair period, including any approved extensions, Lender will complete the repairs using the escrowed funds. For this purpose, Borrower irrevocably appoints Lender as its attorney-in-fact. Lender will provide Borrower with a breakdown of these repairs and the cost of completion, including administrative expenses. Funds remaining in the escrow account after completion of the repair work will be returned to Borrower less reasonable administrative costs incurred in completing the repairs.

6. In cases where actual costs are less than estimated, the maximum insurable loan amount must be recalculated. If the maximum insurable mortgage is reduced due to lower actual costs, the mortgagor must prepay the mortgage: (1) in amounts equal to the scheduled monthly principal payments, to the extent possible; with (2) any remainder going to the Reserve for Replacements Fund.

7. In the event Borrower defaults under the Mortgage Loan, the remaining balance in the repair escrow is to be

applied to the obligations of Borrower or to the Mortgage Loan, as directed by HUD.

8. If any amount deposited under this Agreement is in the form of a letter of credit, the letter of credit was issued to Lender by a banking institution, and is unconditional and irrevocable. Lender is not the issuer thereof unless HUD has granted prior written consent. Lender will be responsible to HUD for collection under any letter of credit. In the event a demand for payment under the letter of credit is not immediately met, Lender will immediately provide a cash deposit equivalent to the undrawn balance of the letter of credit.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.  
BORROWER:

By: \_\_\_\_\_  
Print name and title \_\_\_\_\_  
LENDER:

By: \_\_\_\_\_  
Print name and title \_\_\_\_\_

**Warning**

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**Agreement of Sponsor To Furnish Additional Funds**

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this

completed form to either of the above addresses.

This Agreement is given this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, having an office at \_\_\_\_\_, Sponsor of FHA Project No. \_\_\_\_\_, located in the City/County of \_\_\_\_\_, State of \_\_\_\_\_, which Project has been, is being, or will be constructed, rehabilitated, purchased or refinanced from the proceeds of a mortgage (or deed of trust) given by \_\_\_\_\_, as Borrower (which term, when used herein, also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), to \_\_\_\_\_, as Lender (which term, when used herein, also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), having an office at \_\_\_\_\_.

WHEREAS, the Secretary of Housing and Urban Development has issued his/her commitment to insure said mortgage pursuant to the provisions of the National Housing Act, which commitment is conditioned upon assurance that additional funds in the amount of \$ \_\_\_\_\_ be made available for project purposes, primarily for the absorption of any deficit in the operation of the project during the initial period of occupancy; and,

WHEREAS, financing of the project as proposed by the sponsors could not be obtained without the Secretary's endorsement for insurance;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That for and in consideration of the premises hereinabove set forth, and for the purpose of inducing the Secretary to insure said mortgage, the undersigned hereby jointly and severally agree and undertake with the Secretary to deposit on or before \_\_\_\_\_ [estimated date of completion], in escrow with a depository satisfactory to the Secretary, \$ \_\_\_\_\_ in the following form [specify one]:

\_\_\_\_ (a) in cash, or  
\_\_\_\_ (b) by an unconditional, irrevocable letter of credit issued to the depository by a banking institution, to be held and disbursed by the depository pursuant to the terms of an escrow agreement to be executed at the time of the making of the deposit in the form of HUD Form 2476a.

IN WITNESS WHEREOF, the sponsor has executed this agreement as of the day and year first above written. Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented,

and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

[ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES]

**Warning**

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**Escrow Agreement: Additional Contribution by Sponsors for Operating Deficit**

**U.S. Department of Housing and Urban Development**

Office of Housing

OMB Approval No. 0000-0000

(exp. 00/00/00)

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This Agreement made this \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_, by and between the Lender described more fully below and \_\_\_\_\_, having an office at \_\_\_\_\_, Sponsor of HUD Project No. \_\_\_\_, located in the

City/County of \_\_\_\_, State of \_\_\_\_, which Project has been, is being, or will be constructed, from the proceeds of a security instrument given by \_\_\_\_\_, as Borrower (which term, when used herein, also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), to \_\_\_\_, as Lender (which term, when used herein, also shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction), having an office at \_\_\_\_\_.

**WITNESSETH:**

WHEREAS, the Secretary of Housing and Urban Development (HUD) has issued his/her commitment to insure said mortgage (or deed of trust), on which insurance Sponsor is relying for financing of the Project, and

WHEREAS, said commitment is conditioned upon assurance that additional funds be made available for Project purposes, primarily for the absorption of any deficit resulting from the operation of the Project during the initial period of occupancy;

NOW, THEREFORE, Sponsor and Lender hereby agree as follows:

1. Sponsor has deposited with \_\_\_\_\_, Depository, \$\_\_\_\_, receipt of which is acknowledged by the Depository, to be held and disbursed by the Depository as hereinafter set out, said deposit being [specify one]:

\_\_\_ (a) cash, or

\_\_\_ (b) an unconditional irrevocable letter of credit issued to Depository by a banking institution,

2. Said deposit shall be held subject to disbursement at the direction of HUD for a period of \_ months following final endorsement of the mortgage loan for insurance plus any additional period by which the beginning of amortization of the loan may be deferred.

Disbursements from the escrow may be authorized monthly by HUD to meet any cash deficit in the operation of the Project for the period immediately following substantial completion of construction. In determining the amount of such cash deficit, effect will be given to the Borrower's payments for amortization and deposits in the Reserve for Replacements, but no effect will be given to depreciation, officers' salaries, and management fees paid to the Borrower, Sponsor, Principals (as such term is defined in the HUD regulatory agreement applicable to this transaction) or their nominees.

3. The deposit shall be subject to immediate application to the debt under the Security Instrument (as such term is defined in the HUD regulatory agreement applicable to this transaction)

in the event of default thereunder at any time prior to the expiration of the escrow period.

4. IT IS UNDERSTOOD AND AGREED that at the expiration of the escrow period, or at such earlier date as HUD, in his/her sole discretion, determines that the Project has achieved sustaining occupancy and income, any balance remaining on deposit will be returned to Sponsors, without interest.

5. IT IS FURTHER UNDERSTOOD AND AGREED that the Depository will hold and disburse this escrow at the sole direction of HUD; and Sponsor hereby authorizes Lender, in the event the deposit hereunder is other than in cash, to draw against the letter of credit or to sell the bonds to the extent necessary to provide the cash necessary to make the disbursements directed by HUD, and in the event that such letter of credit cannot be converted to cash, the Lender shall immediately provide a cash deposit equivalent to the undrawn balance of the letter of credit.

6. Whenever used herein, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

The parties have executed this Agreement as of the day and year first above written.

SPONSOR:

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

Name and Title

LENDER:

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

Name and Title

**Warning**

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**Bond Guaranteeing Sponsors' Performance**

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5

hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

This Agreement is made this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and between \_\_\_\_\_ Principal(s), having an office at \_\_\_\_\_, and \_\_\_\_\_, Surety, having an office at \_\_\_\_\_.

The Principals have entered into a certain Agreement with the Secretary of Housing and Urban Development (the Secretary) dated \_\_\_\_\_, 20\_\_\_, under which the Principals undertake to deposit in escrow the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) (herein, the Deposit), on or before \_\_\_\_\_, 20\_\_\_, in order to meet the requirements of the Secretary's Commitment for Insurance involving a certain housing project known as \_\_\_\_\_, No. \_\_\_\_\_ (the Project), located in \_\_\_\_\_.

The Principals and the Surety are held and firmly bound unto the Secretary in the amount of the Deposit, for the payment whereof the Principals and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally by these presents; and the condition of the obligation is such that if the Principals shall make the Deposit required by the Agreement, or, in the event that the Principals shall default in such obligation the Surety shall, promptly after written notice of such default, make the Deposit on behalf of the Principals, then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The parties hereto have duly executed this Agreement as of the day and year first above written.

PRINCIPAL: \_\_\_\_\_

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

Print name and title

SURETY: \_\_\_\_\_

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

Print name and title

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the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims and penalties under 24 CFR parts 24, 28 and 30.

**Borrower's Oath (For Residential Housing, but not Section 232 Projects)**

U.S. Department of Housing OMB and Urban Development, Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

To the Secretary of Housing and Urban Development:

Date \_\_\_\_\_

Project No. \_\_\_\_\_

In accordance with the stated intent of Congress and with the HUD Regulatory Agreement between the borrower (which term shall be deemed to have the meaning set forth in the HUD regulatory agreement applicable to this transaction) and HUD, the undersigned hereby certifies:

(1) That, to carry out the intent of Section 513 of the National Housing Act, 12 U.S.C. § 1731b, as amended, so long as the mortgage covering the above numbered project is insured or held under the provisions of the National Housing Act, as amended, no part of the property described in the aforesaid mortgage will be rented for a period of less than thirty days or used for transient or hotel purposes, and said property shall be used principally for residential use;

(2) That, to carry out the intent of Section 207(b) of the National Housing Act, 12 U.S.C. § 1713(b), as amended, in selecting tenants for the property covered by the mortgage to be insured under the above number there will be no discrimination against any family by reason of the fact that there are children in the family, unless the HUD

Regulatory Agreement covering the Project provides that the Project is intended primarily for occupancy by elderly persons; and

(3) That the property will not be sold while the mortgage insurance is in effect or the mortgage is held by the Secretary unless the purchaser files with the Secretary a like certification executed by such purchaser under oath.

BORROWER: \_\_\_\_\_

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

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

Name: \_\_\_\_\_  
Title \_\_\_\_\_

Name: \_\_\_\_\_  
Title \_\_\_\_\_

[The borrower entity must execute this Oath before a notary public.]

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Notary Acknowledgment for Borrower

**Note: THE FOREGOING CERTIFICATION MUST BE GIVEN UNDER OATH IN ACCORDANCE WITH STATE LAW REQUIREMENTS FOR TAKING AN OATH.**

County of \_\_\_\_\_)ss.

State of \_\_\_\_\_)ss

Personally appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, \_\_\_\_\_ who, after being duly sworn, says that he/she is the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of the State of \_\_\_\_\_ and that he/she has authority to execute under oath and has so executed the above certification for and on behalf of such \_\_\_\_\_, and for her/himself.

[SEAL]

Notary Public \_\_\_\_\_

My commission expires: \_\_\_\_\_

Notary Acknowledgment for Additional Principal

County of \_\_\_\_\_)ss.

State of \_\_\_\_\_)ss.

Personally appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_, who, after being duly sworn, says that he/she is a principal in \_\_\_\_\_, the borrower, and that as such he/she has executed the above certification for her/himself.

[SEAL]

Notary Public  
My commission expires: \_\_\_\_\_

**Off-Site Bond—Dual Oblige**

U.S. Department of Housing and Urban  
Development, Office of Housing

OMB Approval No. 0000-0000 (exp. 00/00/  
00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

CONTRACTOR/PRINCIPAL (Name and Address):

OWNER (Name and Address):

LENDER (Name and Address):

SURETY (Name and Principal Place of Business):

PROJECT (Name, FHA Number and Location):

OFF-SITE CONSTRUCTION CONTRACT:

Date:

Amount:

BOND:

Date:

Amount:

RIDERS TO THIS BOND:  Yes  No

This Off-Site Bond is issued in connection with the Project named above. As used herein, "Obligees" shall mean Owner, Lender and the additional obligee(s), if any, identified in a Rider to this Bond and "Obligee" shall mean any of the Obligees.

1. Contractor has entered into a construction contract with Owner for the completion of off-site facilities and utilities necessary to operate the Project successfully. The Off-Site Construction Contract (as the same may now or hereafter be amended by change order or otherwise) is made a part hereof by reference, and is hereinafter referred to as the "Off-Site Contract."

2. Lender has agreed to lend to Owner a sum of money to be secured by a mortgage on said project. The mortgage is to be insured by the Federal Housing Commissioner (hereinafter "FHA").

3. Lender is unwilling to advance said funds to the Owner and FHA is unwilling to insure said mortgage without assurance that all off-site facilities and/or utilities necessary to successfully operate the project will be installed not later than \_\_\_\_\_.

4. Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns, unto Owner and unto Lender, their successors and assigns, as each of their respective interests may appear, as OBLIGEES, in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) to pay for labor, materials and equipment furnished for use in the performance of the Off-Site Contract. Any approved increase in the total Off-Site contract price would increase the monetary obligation of the Obligor accordingly.

5. The obligations of this Bond shall be null and void if the Contractor installs and completes said off-site facilities and/or utilities, or cause the installation and completion of said off-site facilities and/or utilities according to the Off-Site Contract within the time hereinabove specified, free from all liens and claims of any and all persons performing the labor thereon or furnishing materials therefore, or both.

6. Any suit, action, or proceeding by reason of any default whatever shall be instituted within two years of the date Owner declares Contractor in default of the Off-Site Contract. If this limitation is deemed to be in contravention of any controlling law, this Bond is deemed amended so as to be equal to the minimum period of limitation permitted by such law.

7. Surety hereby waives notice of any change, including changes of time, to the Off-Site Contract or to related subcontracts, purchase orders and other obligations.

8. Notice to Surety, Owner, or Contractor shall be served by mailing the same by registered mail or certified mail, postage prepaid, to the address shown on this Bond or to such other address as may have been previously specified by the recipient in a notice given in accordance herewith.

9. Surety agrees that any right of action that any of the Obligees herein may have under this Off-Site Bond may be assigned, without the consent of Contractor or Surety, to the Secretary of Housing and Urban Development, acting by and through the Federal Housing Commissioner, and that such assignment will in no manner invalidate or qualify this instrument.

[Remainder of this page intentionally left blank.]

SIGNED and SEALED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

By:

\_\_\_\_\_  
Name and Title (Printed)

SURETY:

By:

\_\_\_\_\_  
Name and Title (Printed)

*ADDITIONAL OBLIGEE RIDER TO OFF-SITE BOND-DUAL OBLIGEE*  
(Additional obligee only allowed with prior FHA approval as indicated below)

1. This Additional Oblige Rider is attached to and made a part of that certain Off-Site Bond-Dual Oblige (the "Off-Site Bond"), dated \_\_\_\_\_, executed and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$ \_\_\_\_\_) with respect to the Project referenced above.

2. All of the terms, conditions and provisions of the Off-Site Bond are hereby incorporated herein by this reference as if fully set forth herein.

3. All defined terms, as set forth in the Off-Site Bond, shall have the same meaning herein.

4. \_\_\_\_\_ is hereby added to the Off-Site Bond as an additional named Oblige.

5. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Off-Site Bond, including especially but without limitation, the aggregate liability of the Surety as described in paragraph 4 of the Off-Site Bond.

SIGNED and SEALED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor:

\_\_\_\_\_  
CONTRACTOR:

By:

\_\_\_\_\_  
Name and Title (Printed)

SURETY:

By:

\_\_\_\_\_  
Name and Title (Printed)

Approved by The United States  
Department of Housing and Urban  
Development

By:

*ADDITIONAL SURETY RIDER*

(Additional surety only allowed with prior FHA approval as indicated below)

1. This Additional Surety Rider is attached to and made a part of that certain Off-Site Bond-Dual Oblige (the "Off-Site Bond"), dated \_\_\_\_\_, executed

and delivered by \_\_\_\_\_, as Contractor, and \_\_\_\_\_, as Surety, in favor of Obligees, in the sum of \_\_\_\_\_ (\$ \_\_\_\_\_) with respect to the Project referenced above.

2. All of the terms, conditions and provisions of the Off-Site Bond are hereby incorporated herein by this reference as if fully set forth herein.

3. All defined terms, as set forth in the Off-Site Bond, shall have the same meaning herein.

4. \_\_\_\_\_ is hereby added to the Off-Site Bond as an additional named surety.

5. Each surety and additional surety (hereinafter collectively called "Surety") is held and firmly bound, jointly and severally, onto Obligees. Further, each undersigned Surety binds itself in the aforesaid full sum, "jointly and severally," as well as "severally" for the purpose of allowing joint action or singular actions against any or all of them in the full amount of this Bond and for all other purposes each Surety binds itself, jointly and severally with the Contractor, for the payment of the full sums above stated.

6. Nothing herein shall alter or affect any of the terms, conditions and other provisions of the Off-Site Bond, including especially but without limitation, the aggregate liability of the Surety as described in paragraph 4 of the Off-Site Bond.

[Remainder of this page intentionally left blank.]

SIGNED AND SEALED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Witness as to Contractor:

CONTRACTOR:

By:

Name and Title (Printed)

SURETY:

By:

Name and Title (Printed)

Approved by The United States Department of Housing and Urban Development

By:

**Escrow Agreement For Latent Defects**

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000, (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for

reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

THIS AGREEMENT is effective the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between \_\_\_\_\_, the Lender and \_\_\_\_\_, the Borrower. The terms Lender and Borrower shall be deemed to have the meanings set forth set forth in the HUD regulatory agreement applicable to this transaction.

The Borrower has completed construction of a project known as \_\_\_\_\_ and further identified as HUD Project No. \_\_\_\_\_.

The Borrower is required to furnish a guarantee against latent defects, faulty workmanship and defective materials for a period of one year following the date of final completion of the project; and

The date of final completion of the project was \_\_\_\_\_, 20\_\_.

In consideration of the premises, the parties acknowledge and agree as follows:

1. The Borrower herewith deposits with the Lender, and the Lender hereby acknowledges receipt of, the sum of \$\_\_\_\_\_ (the Fund) which is an amount equal to 2½% of the total amount of the Construction Contract to be retained for a period of fifteen months from the date of final completion, in the form of cash or an irrevocable, unconditional letter of credit issued to the Lender by a banking institution. The Fund is held by the Lender under the Contract of Mortgage Insurance for and on behalf of the Borrower.

2. The Fund shall be maintained by the Lender to guarantee against defects in the construction due to faulty materials or workmanship, defective materials or damage to the project resulting from such defects, which defects or damage become apparent within one year after the date of final completion. Said Fund may be used for the correction of such defects or damage, as may be required by either the Lender or the U.S. Department of Housing and Urban Development (hereinafter, HUD), in the event the Borrower fails to make such corrections.

3. The Borrower covenants and agrees on demand of either the Lender or HUD to remedy or cause to be remedied all defects in construction due to faulty workmanship, defective materials, or damage to the project resulting from such defects, within 60 days of notification by the Lender or HUD.

4. The Borrower acknowledges that all work performed pursuant to this Agreement is subject to the labor standards contained in Form HUD-92554, Supplementary Conditions of the Contract for Construction, or its replacement, as acknowledged from time to time by the original General Contractor in executing the Contractor's Prevailing Wage Certificate on the back of Form HUD-92448, Contractor's Requisition, Project Mortgages, or its replacement. The Borrower expressly agrees to be bound by the terms and provisions of the said Conditions and the Certificate. Prior to the release of any funds deposited hereunder, the Borrower will submit a Contractor's Prevailing Wage Certificate duly executed by each and every contractor performing any of the work and dated subsequent to the completion of such work.

5. The Lender shall maintain such Fund separate from any escrow that may have been provided to assure completion of any incomplete construction items. The Fund shall be disbursed as follows:

a. In the event the Borrower fails to comply with the provisions of Paragraph 3 of this Agreement, the Lender shall have the right and/or option to proceed to correct all said defects in construction and pay the cost thereof, including all the costs of the Lender, from the Fund. For this purpose, the Borrower hereby irrevocably authorizes and empowers the Lender to do and perform in its name and with full powers of substitution all matters and things which said Lender shall in its judgment deem necessary and proper to be done to effectuate the completion of said repairs and to apply the moneys herewith deposited to the payment of debts contracted or incurred. This warrant of attorney shall be the Lender's full and sufficient authority as attorney-in-fact for the Borrower for all payments made by virtue thereof. The Borrower hereby irrevocably authorizes and empowers the Lender to enter into and upon the said Project and take charge of all materials on the Project and in the name of the Borrower, as its attorney-in-fact, to call upon and require contractors to do that repair work which is their responsibility. To the extent that the Lender and/or its contractors complete

said repairs, such work remains subject to the labor standards referenced in Section 4 of this Agreement, and the Lender shall obtain a Contractor's Prevailing Wage Certificate duly executed by each contractor performing any of the work.

b. The entire Fund or, if any sums were expended in accordance with the above paragraph, any balance remaining therein shall be returned to the Borrower upon the expiration of the time designated above unless there is a default under the Security Instrument.

c. In the event the Borrower completes the repairs in the time period specified at paragraph 3 above, or no defects become apparent within one year after completion of the project and there is no default under the Security Instrument, the Lender shall upon written approval of HUD, return to the Borrower the amount of the deposit, together with interest.

d. Any and all disbursements from said Fund shall be made only upon the prior written approval of HUD.

6. In the event the Mortgage is assigned to HUD at any time during which the Fund has a balance remaining therein in the form of an unconditional letter of credit, the Borrower hereby authorizes the Lender to draw the remaining balance of said letter of credit in cash, if so required by HUD, and to deliver such cash to HUD as required pursuant to paragraph 6 hereof,

7. In the event of a default by the Borrower under the Security Instrument and an assignment of the Security Instrument to HUD, the entire Fund or balance remaining therein shall be paid to HUD together with an assignment of all rights hereunder granted to the Lender. In such event, HUD may apply said funds to sums due under the Note. In the event the Lender elects to foreclose the Security Instrument in lieu of assigning it to HUD, the Lender may apply said funds to sums due under the Note.

8. The Borrower's liability for the correction of defects or damage shall not be limited by the amount of the Fund established hereunder.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

BORROWER:

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

Print Name and Title

LENDER:

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

Print Name and Title

### Warning

Any person who knowingly presents a false, fictitious, or fraudulent statement

or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24 and 28.

### Escrow Agreement For Working Capital

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000, (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

THIS AGREEMENT is effective the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between \_\_\_\_\_, the Lender and \_\_\_\_\_, the Borrower. The terms Lender and Borrower shall be deemed to have the meanings set forth set forth in the HUD regulatory agreement applicable to this transaction.

The Borrower is the owner of a project known as \_\_\_\_\_ located at and further identified as HUD Project No. \_\_\_\_\_, which project has been, is being, or will be constructed from proceeds of a Mortgage Loan (or Deed of Trust) in the original principal amount of \$ \_\_\_\_\_ (hereinafter, the Mortgage Loan) from the Lender with respect to which Mortgage Loan the Secretary of the United States Department of Housing and Urban Development (hereinafter, HUD) has issued a commitment to insure.

The commitment to insure is conditioned upon a working capital deposit being established and funded as indicated below, which working capital deposit has not been included in the Mortgage Loan proceeds but which could be funded from excess cash available to the Borrower. This requirement applies to both the profit-

motivated and the not-for-profit Borrower.

In consideration of the premises, the parties acknowledge and agree as follows:

1. At initial endorsement of the Mortgage Loan, the Borrower has deposited with the Lender, which acknowledges receipt of same, the sum of \$ \_\_\_\_\_ (herein called the Deposit) in the form of [specify one]:

a. \_\_\_ cash, or  
b. \_\_\_ an unconditional, irrevocable letter of credit issued to Lender by a banking institution.

2. The Lender controls the Deposit and it is understood that the funds in the Deposit may be released or allocated for the purposes indicated below and for no other purpose without the prior written approval of HUD:

(i) The cost of equipping and renting the project after final completion of construction of the project (Note: Not applicable to Section 232 Mortgages);

(ii) For accruals during the course of construction, for interest, mortgage insurance premiums, taxes, ground rents, property insurance premiums and assessments, when funds available for these purposes under the Building Loan Agreement have been exhausted, and also for allocation to such accruals after completion of construction.

3. Any balance of said funds, together with interest earned on the funds remaining in the Deposit after the date of sustaining occupancy as determined by HUD, will be returned to the Borrower, provided that the Mortgage Loan is not in default and unless HUD has directed other disposition.

4. The Lender will not make any disbursements from the Deposit without the prior written approval of HUD for projects involving Low-Income Housing Tax Credits, where the Borrower certifies at firm commitment that it will apply any balance of said funds to the reserve for replacement or any other restricted account specified by HUD.

5. The Deposit, if in the form of cash, shall be held by the Lender, in an interest-bearing account that is fully guaranteed by the United States of America. The Lender may draw upon any letter of credit included in the Deposit and convert the same to cash, which cash shall then be held and disbursed pursuant to the terms of this Agreement.

6. The Deposit together with interest, which is being held under the Contract of Mortgage Insurance, shall be subject to immediate application to the mortgage debt in the event of default under the Mortgage Loan at any time before the expiration of the escrow period.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

BORROWER:

By: \_\_\_\_\_  
Name and Title

LENDER:

By: \_\_\_\_\_  
Name and Title

### Warning

Any person who knowingly presents a false, fictitious or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims and penalties under 24 CFR parts 24 and 28.

### Sinking Fund Agreement (For Use in the Section 232 Program)

U.S. Department of Housing and Urban Development, Office of Housing

OMB Approval No. 0000-0000, (exp. 00/00/00)

Public Reporting Burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Reports Management Officer, Office of Information Policies and Systems, U.S. Department of Housing and Urban Development, Washington, DC 20410-3600 and to the Office of Management and Budget, Paperwork Reduction Project (2502-0468), Washington, DC 20503. Do not send this completed form to either of the above addresses.

THIS AGREEMENT is effective the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between \_\_\_\_\_, Lender, and \_\_\_\_\_, Borrower, and \_\_\_\_\_ the Lessee/ Operator, if any. The terms Lender and Borrower shall be deemed to have the meanings set forth set forth in the HUD regulatory agreement applicable to this transaction.

The Borrower is the owner of a project known as \_\_\_\_\_ and further identified as Project No. \_\_\_\_, which project is financed by a Mortgage (or Deed of Trust) from the Lender with respect to which Mortgage the Secretary of the United States Department of Housing and Urban Development (HUD) has issued a commitment to insure.

The commitment to insure is conditioned upon a Sinking Fund account being established and funded in accordance with the Regulatory Agreement to assure that there are sufficient funds to amortize the principal of the loan. This Sinking Fund is required in addition to the Reserve for Replacement Fund, where Medicaid reimbursement is on a depreciation plus interest basis rather than a pass through of principal and interest on the mortgage. This fund is held by the Lender under the Contract of Mortgage Insurance.

In consideration of the premises, the parties acknowledge and agree as follows:

1. The Borrower agrees to direct and empower the payor of the capital reimbursement funds to deposit such funds into a trust account with the Lender. It is understood that the trust instrument shall be irrevocable unless approved by the Lender and shall provide that the trustee shall immediately segregate from each provider payment an amount representing the excess depreciation component of the capital reimbursement per a schedule prepared by the Lender and pay it into the Sinking Fund held by the Lender. In jurisdictions which do not allow the Borrower to direct and empower the payor of the capital reimbursement fund to deposit funds into a trust account, the Borrower and the Lender enter into this agreement by which the parties are obliged to establish, make payments to and maintain a separate account for the Sinking Fund.

a. By October 1 of each year, Borrower shall prepare and file with the Lender a depreciation schedule reviewed by the Borrower's independent public account showing the total projected reimbursement for depreciation and amount payable for principal payments coming due in each of Borrower's fiscal years, including the fiscal year during which the Mortgage Loan is paid.

b. By January 1 of each year, the Lender shall prepare and file with the Borrower a funding schedule reflecting the amount required to be deposited in the Sinking Fund in each such project fiscal year and the cumulative balance in the Sinking Fund at the end of each project fiscal year.

c. The amount specified in the sinking fund schedule is to be deposited into the account to pay future principle payments of the Mortgage (Deed of Trust). Sums are deposited monthly into the Sinking Fund within 15 days of the close of each month, and shall commence upon the earlier of: (i) a scheduled commencement of principal

amortization of the Loan, or (ii) the receipt by the project of depreciation reimbursement by any third party payor. Such fund shall at all times be under control of the Lender.

2. The Lender agrees:

a. to establish and maintain the Sinking Fund in an interest bearing account in a bank whose capital and surplus are at least \$50,000,000 and which is federally insured.  
b. to furnish HUD quarterly financial reports on the investments, accounting on balances, deposits and withdrawals to the local field office having jurisdiction unless otherwise directed by HUD.

c. to monitor the Sinking Fund and examine the external auditor's fund balance report and notify HUD whether it complies with the Sinking Fund Agreement between the Borrower and the Lender, and

d. to promptly notify the Borrower and HUD of any irregularities in connection with the Sinking Fund and to take such corrective action as the Lender and HUD deem appropriate.

3. Nothing in this Agreement shall impair or prejudice any right that HUD may have with respect to such funds, particularly relating to the duty of the Lender of record to hold funds for and on behalf of the Borrower under the contract of mortgage insurance.

4. The Sinking Fund constitutes funds held by the Lender for and on behalf of the Borrower, and as such, is unrelated to the bond transaction or any other source of funds for the mortgage loan.

5. The Sinking Fund will be used to make principal payments in the later years of the Mortgage. In the event of default, the Lender shall have the power, only with the prior written approval of HUD or at the express direction of HUD, to apply the Sinking Fund to the payment of amounts due under the Note and related Loan Documents. Withdrawals from the Sinking Fund will be permitted by the Lender to be applied to principle payments due under the Note to the extent allowed by the Regulatory Agreement.

6. In the event of a claim for insurance benefits, the amount of benefits is subject to surcharge if funds have been disbursed from the Sinking Fund in a manner or for purposes not in compliance with the Regulatory Agreement between HUD and the Borrower. No such surcharge shall be made on the basis of the Borrower's failure to make required deposits into the Sinking Fund.

7. In the event the Borrower leases the Health Care Facility to an operator who is responsible for establishing and

maintaining the Sinking Fund with the Lender, the aforesaid Sinking Fund provisions shall be fully applicable to the Lessee/Operator.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

BORROWER

By: \_\_\_\_\_  
Print Name

LESSEE/OPERATOR, if applicable

By: \_\_\_\_\_  
Print Name and Title

LENDER

By: \_\_\_\_\_  
Print Name

### Warning

Any person who knowingly presents a false, fictitious or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims and penalties under 24 CFR parts 24 and 28.

### Agreement and Certification

U.S. Department of Housing and Urban Development Office of Housing.

OMB Approval No. 0000-0000, (exp. 00/00/00)

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*To the Secretary of Housing and Urban Development:*

Date \_\_\_\_\_  
Project No. \_\_\_\_\_

This Agreement is effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and among \_\_\_\_\_ (hereinafter, Borrower), and \_\_\_\_\_ (hereinafter, Lender), and (if applicable), \_\_\_\_\_ (hereinafter, the General Contractor), and the United States Department of Housing and

Urban Development (hereinafter, HUD). As used herein, the terms Borrower and Lender shall be deemed to have the meanings set forth, respectively, in the HUD regulatory agreement applicable to this transaction.

Borrower has applied to Lender for a mortgage loan (hereinafter, the Mortgage Loan) for one of the following purposes [check applicable box] in connection with a facility identified as HUD Project No. \_\_\_\_\_:

// Constructing or substantially rehabilitating a housing project or health care facility, the work to be performed by the General Contractor, and Lender has applied to HUD for insurance of the Mortgage Loan in the amount of \$\_\_\_\_\_, under Section \_\_\_\_\_ of the National Housing Act, as amended, in which case all paragraphs below shall apply;

or

// Financing or refinancing, after the completion of repairs (or satisfactory arrangements for completion of repairs), of a housing project or health care facility, and Lender has applied to HUD for insurance of the Mortgage Loan in the amount of \$\_\_\_\_\_, under Section \_\_\_\_\_ of the National Housing Act, as amended, in which case Paragraphs 1, 2, 6 and 8, below, shall apply; HUD has issued a Commitment to insure the Mortgage Loan in said amount pursuant to said Section and regulations and directives issued pursuant thereto. The amount of the Mortgage Loan is subject to reduction, as provided in said Act, regulations and directives, and this Agreement is required accordingly.

In consideration of the premises, the parties acknowledge and agree as follows:

1. Prior to receipt of the final advance under the Mortgage Loan, and within the time fixed by the Mortgage Loan documents, Borrower agrees, if required by HUD procedures for cost certification and the National Housing Act, to submit to HUD (a) a fully completed and executed Mortgagor's Certificate of Actual Cost; and (b) a fully completed and executed Contractor's Certificate of Actual Cost, on forms prescribed by HUD. Borrower and the General Contractor understand, agree and will insure that each of the certificates of cost is supported by the certificate of an independent Certified Public Accountant or independent public accountant in form acceptable to HUD, if required by HUD procedures for cost certification.

2. Borrower and Lender agree that the total advances under the Mortgage Loan

cannot exceed the amount permitted by Section 227 of the National Housing Act, as amended, and the regulations and directives issued pursuant thereto. In the case of Mortgage Loans insured pursuant to Sections 223(a) or 223(f) of the National Housing Act, as amended, Borrower and Lender understand and agree that the Commitment and Mortgage Loan may be reduced to comply with the provisions of said Section 227 and regulations and directives issued pursuant thereto, and Borrower and Lender further agree to execute such instruments as may be required to accomplish such reduction.

3. Borrower agrees that if it receives Mortgage Loan funds in excess of that permitted under the National Housing Act, and the regulations and directives issued pursuant thereto, it will pay upon demand forthwith to Lender any such excess for application to the reduction of the then-outstanding principal balance of the Mortgage Loan. Lender agrees that upon its receipt of such excess the contract of mortgage insurance is reduced accordingly, and Borrower and Lender agree to execute such instruments as may be required to accomplish such reduction. Borrower further agrees that if HUD, for cost certification purposes, accepts estimates for any items, Borrower will, at final endorsement, establish a cash escrow to pay all the "to be paid in cash items" identified in its Certificate of Actual Cost, and to pay debts to third parties who made the original disbursement for an item listed as paid on the Certificate, unless documentation, satisfactory to HUD, is submitted evidencing that Borrower paid these amounts after the submission of its Certificate. Borrower understands that the items covered by this cash escrow must be paid within 45 days of the date of final endorsement, except for those items in dispute, involved in litigation or those items that are non-critical repairs to be completed after endorsement and covered by an appropriate escrow agreement. If Borrower's actual cost is less than the estimates accepted for cost certification purposes, and HUD determines that this difference plus the net amount (total receipts less expenses of perfecting claims) of settlement of claims against bonding companies or others, would have required a reduction of the Mortgage Loan, Borrower understands that prepayment of the Mortgage Loan is required in an amount equal to the scheduled monthly principal payments, to the extent possible, and any remaining balance will be deposited to the project's Reserve Fund for Replacements.

4. Borrower certifies that any financial or business interests or family relationships which exist between Borrower, or any of its officers, directors, stockholders, partners or principals (hereinafter, Principals) with the Architect or with the General Contractor, or subcontractors, suppliers, or equipment lessors, or with any of the Principals of any of the foregoing entities (hereinafter, an Identity of Interest) for the project are herewith listed by name, title, address, relationship and interest: (Attach exhibit if necessary. If None, so state).

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

5. Borrower agrees to notify HUD in writing, and within 10 days of the event, of any change in relationships covered by paragraph 4 herein. In the event that such change establishes an Identity of Interest between Borrower or its Principals, and the General Contractor or its Principals, Borrower's Certificate of Actual Cost will be accompanied by the Contractor's Certificate of Actual Cost, in the form prescribed by HUD; and, if required by HUD, similar certificates by any subcontractor, supplier, or equipment lessor covered by this paragraph 5. It is agreed that the absence of such notice may be treated by HUD as a representation that no such change in relationship has occurred.

6. Borrower agrees to maintain and keep adequate records of all costs incurred in connection with the project, and to make such records available for examination by HUD upon request.

7. If this Agreement discloses an Identity of Interest between Borrower and the General Contractor, Borrower will include in the construction contract a provision requiring the General Contractor, upon completion of the project, to submit to Borrower for delivery to HUD its Certificate of Actual Cost, in the form prescribed by HUD. Borrower further agrees to include in said contract the requirement that the General Contractor will maintain adequate records of all such costs, and make such records, documents, contracts and accounts available for review upon request by HUD.

8. Borrower agrees that it will include in the construction contract, and require the inclusion in all subcontracts, whether for labor, material, or equipment leases, a provision that if there is, or comes into being, an Identity of Interest between Borrower and any subcontractor; or, in those cases in

which the General Contractor is required to certify actual costs, between the General Contractor and any subcontractor, then, if HUD so requires, such subcontractor will submit to HUD a Certificate of Actual Cost in the form and with the audit standards prescribed by HUD, including the deduction of all kickbacks, rebates, adjustments, discounts, or any other arrangements in the nature thereof. For purposes of determining actual cost, no profit or general overhead may be included in the subcontract unless HUD has granted advance written approval of a specific dollar amount or a specific percentage.

9. Borrower agrees that if there comes into being any Identity of Interest between Borrower and the Architect, or between the General Contractor and the Architect, the Architect will immediately be relieved of inspection duties and the maximum Architect's fees allowable for cost certification purposes will be \$\_\_\_\_\_ for design services only, and no fees will be allowed for supervision.

10. If HUD processed the project to include a Builder's and Sponsor's Profit and Risk Allowance (hereinafter, BSPRA) under the National Housing Act, as amended, Borrower and General Contractor agree as follows:

a. The form of construction contract will be cost-plus, with a maximum upset price. So long as the requisite Identity of Interest is maintained through final endorsement of the Mortgage Loan, and subject to paragraph 10.c herein, then in lieu of the General Contractor's fee, Borrower will be entitled to include in its Certificate of Actual Cost a BSPRA. The BSPRA will be determined by applying the profit and risk percentage provided for in Section 227 of the National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date of the Commitment, to the actual cost, as accepted by HUD, of those items which, under the provisions of the said Act, regulations and directives, are included in computing the BSPRA. For the purpose of determining actual cost, the General Contractor's general overhead will not exceed \$\_\_\_\_\_.

b. If the Identity of Interest between Borrower and General Contractor is not maintained through final endorsement of the Mortgage Loan, then the BSPRA provided for in paragraph 10.a herein will not be applicable. Instead, Borrower will be entitled to include in its Certificate of Actual Cost a Sponsor's Profit and Risk Allowance (hereinafter, SPRA). The SPRA will be determined by applying the profit and risk percentage provided for in Section 227 of the

National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date of the Commitment, to the actual cost, as accepted by HUD, of those items which, under the provisions of the said Act, regulations and directives, are included in computing the SPRA.

c. If more than 50 percent of the actual cost of construction is subcontracted with any one contractor or subcontractor, or more than 75 percent with three or fewer contractors or subcontractors (hereinafter, the 50-75% Rule), the BSPRA provided for in paragraph 10.a herein will not be allowed as an actual cost, and Borrower will be limited to the inclusion on its Certificate of Actual Cost of the SPRA cited in paragraph 10.b herein. Further, in that event, for the purpose of determining actual cost, HUD will not allow any expense for the General Contractor's general overhead.

11. If HUD did not process the project to include a BSPRA, Borrower and General Contractor agree that the provisions of this paragraph 11 apply. If there is an Identity of Interest between Borrower and the General Contractor, or in any other circumstance required by HUD, the form of construction contract will be cost-plus, with a maximum upset price. For the purpose of determining actual cost, the General Contractor's fee will not exceed \$\_\_\_\_\_, and the general overhead will not exceed \$\_\_\_\_\_. In the event that the 50-75% Rule is violated, for the purpose of determining actual cost, HUD will not allow any expense for the General Contractor's fee and general overhead. If an Identity of Interest does not exist or is not maintained through final endorsement of the Mortgage Loan, and if authorized by the National Housing Act, as amended, and the regulations and directives issued pursuant thereto, that were in effect on the date of the Commitment, Borrower will be allowed to include in its Certificate of Actual Cost the SPRA cited in paragraph 10.b of this Agreement.

12. Borrower and the General Contractor understand that for purposes of the 50-75% Rule, the terms "contractor" and "subcontractor" include material suppliers and equipment lessors, and any two or more contractors or subcontractors having an Identity of Interest or common ownership are considered as one contractor or subcontractor. Further, it is understood that the 50-75% Rule is not applicable to manufacturers of industrialized housing, trade items performed by persons on the General Contractor's payroll, mobile home park

programs, supplemental loan programs, or rehabilitation programs other than gut rehabilitation.

13. Borrower and the General Contractor further understand and agree that if an Identity of Interest arises between Borrower and the General Contractor following their execution of a lump-sum form of construction contract, allowable costs will be governed by the applicable provisions of paragraphs 11 and 12 of this Agreement.

14. The Contractor and Borrower represent, for themselves and any person or entity with which they are affiliated, as follows:

a. All costs for work to be performed on the Project or related property are reflected in the Construction Contract and in the Contractor's and Mortgagee's Cost Breakdown.

b. There are no agreements, contracts or arrangements, for costs, fees, consideration or compensation to the Contractor, its principals, employees or affiliates other than as recited as the contract sum in Article 4 (in the case of a Cost Plus Contract) or Article 4A (in the case of a Lump Sum Contract) except for BSPRA.

c. Borrower and Contractor acknowledge that the existence of undisclosed, agreements, contracts, or other arrangements concerning construction work to be performed on property covered by a security instrument insured by HUD or concerning the compensation payable for such work, whether or not such agreement, contract or arrangement is with a party to the construction contract, is not permitted in HUD-insured transactions. Borrower and Contractor acknowledge that full disclosure to HUD of all such agreements, contracts or arrangements, if any, is to permit accurate determination of the HUD-insured Mortgage Loan/construction amount. Failure to disclose any such agreements, contracts, or arrangements may constitute grounds for administrative sanctions and /or civil or criminal penalties.

d. No agreement, contract or other arrangement, whether or not disclosed, shall increase the HUD-approved construction amount. The existence of any such agreement, contract or arrangement shall not impute to Lender or HUD of any obligation, financial or otherwise, to Borrower, Contractor, or other third-party.

IN WITNESS WHEREOF, the parties have duly executed this Agreement.

BORROWER

By: \_\_\_\_\_  
Print name and title

GENERAL CONTRACTOR

By: \_\_\_\_\_  
Print name and title  
LENDER

By: \_\_\_\_\_  
Print name and title  
UNITED STATES DEPARTMENT OF  
HOUSING & URBAN DEVELOPMENT

By: \_\_\_\_\_  
Print name Authorized Agent

**APPENDIX 12—B.2**

*U.S. DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT*

HUD AMENDMENT TO AIA DOCUMENT  
B181 STANDARD FORM OF AGREEMENT  
BETWEEN OWNER AND ARCHITECT FOR  
HOUSING SERVICES FOR HUD PROJECT  
NO. \_\_\_\_\_

The provisions of this Amendment supersede and void all inconsistent provisions that may exist between this Amendment and the Agreement.

1. Definition of terms used in this Amendment. If not defined in this Amendment, terms shall have the meaning given them in the Agreement.

a. Agreement. The AIA Document B181, Standard Form of Agreement Between Owner and Architect for Housing Services, between the Owner and the Architect to which this Amendment is attached.

b. HUD. The U.S. Department of Housing and Urban Development.

c. Mortgagee. The Lender, as defined in the HUD regulatory agreement applicable to this transaction.

d. Owner. The Borrower, as defined in the HUD regulatory agreement applicable to this transaction.

e. Subcontractor. Any person or entity providing services, material supplier, equipment lessor or industrialized housing manufacturer/supplier who has a direct contract with the Contractor responsible for construction of the Project.

2. The Owner and the Architect represent that they have complied with outstanding architectural instructions in accordance with the Multifamily Accelerated Processing (MAP) Guide (for projects processed under the MAP Guide) or Handbook 4460.1 REV-2, Architectural Analysis and Inspections for Project Mortgage Insurance (for other projects), including review for compliance with appropriate HUD Minimum Property Standards; the accessible design, construction and alteration requirements of Section 504 of the Rehabilitation Act of 1973 (see 24 CFR part 8); the Fair Housing Accessibility Guidelines; the Uniform Federal Accessibility Standards; the accessible design and construction requirements of the Fair Housing Act (see 24 CFR 100.205 and ANSI-A117.1-1986, incorporated by reference into 24 CFR part 100); the Americans with Disabilities Act Guidelines, 37 CFR part 1191; and other current HUD directives. The Owner and Architect further represent that they will perform services for one another in accordance with the applicable requirements contained in these HUD directives.

3. No portion of the duties, responsibilities and authority of the Architect or Owner shall be restricted, modified or extended, nor shall this Agreement be assigned in whole to anyone, without the written consent of HUD. Neither the Owner nor the Architect shall contract with anyone currently listed by the General Services Administration as a firm which is disbarred, suspended, proposed for debarment, or declared ineligible by federal agencies or by the General Accounting Office. The Owner and the Architect shall each require from their contractors, consultants and agents similar agreements (a) prohibiting contracts with such persons or entities and (b) requiring previous participation certificates.

4. In order to assure the timely and economical completion of the project, the Owner, the Owner's Mortgagee, the surety under the performance bond or HUD may take control of the project or take responsibility for completion of the project's construction pursuant to said parties' legal rights under the agreements concerning the project. In such event, and notwithstanding the provisions of Paragraph 6.1 of this Agreement, the party taking control or taking responsibility for completion of construction, and any substitute contractor hired by said party, shall have the right to use the Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants. Such use shall be to the same extent and with the same limitations as the Owner under this Agreement or as the Contractor under the AIA Document A201 General Conditions of the Contract for Construction, provided the Owner has paid the Architect in accordance with this Agreement and is not in breach or default thereunder. The Architect's execution of this Amendment shall represent consent by the Architect and the Architect's consultants to such use.

5. The Owner shall provide information to or obtain approval from the Owner's Mortgagee and HUD regarding any action or observation by either the Owner or the Architect that significantly increases the Project's cost or time of construction or decreases the quality of construction.

a. The Architect shall assist the Owner in fulfilling the Owner's obligations to the Mortgagee and HUD by furnishing them with copies of all construction observation reports, certificates for payment, certificate of Substantial Completion, architect's supplemental instructions and other written interpretations of the Contract Documents made in the Architect's official capacity during the project.

b. The certificates for payment and the certificate of Substantial Completion shall be in forms as prescribed by HUD.

6. Notwithstanding the provisions of Article 9.8, the Architect shall:

a. Advise the Owner on:

(1) The type of consultant Owner should employ to specifically identify suspected on-site hazardous materials and preparation of the necessary Specifications for their abatement in accordance with HUD and other jurisdictional requirements, where:

(a) The Phase I Environmental Report supplied by the Owner and/or other Owner

supplied data indicate the potential presence of any hazardous material, or

(b) The Architect observes or is otherwise made aware of potential on-site hazardous materials during the course of performing Project duties, including during the construction phase for the rehabilitation of existing improvements.

(2) The format in which the Owner's consultants should prepare their Specifications for eliminating identified hazardous materials, and

b. Incorporate the Owner's consultant's specifications for abatement of the hazardous conditions into the construction documents, i.e., bid documents, or change orders where hazardous materials are identified during construction.

7. This Agreement shall not be terminated without seven days prior written Notice to the Mortgagee and HUD.

8. The Owner and the Architect recognize the interest of the Mortgagee and HUD and that any action or determination by either the Owner or the Architect is subject to acceptance or rejection by the Mortgagee and by HUD.

9. In addition to any other rights or remedies the Owner may have under this Agreement, if a duly authorized representative of HUD requests that the Architect be replaced due to the Architect's inadequate performance, unjustified delay or misrepresentation of material facts, the Owner may terminate this Agreement after giving the Architect at least seven days' written notice and an opportunity to correct such default.

10. The Architect administering the Construction Contract shall disclose any identity of interest with the Owner, Contractor, and/or any Project subcontractor. An identity of interest is construed to exist where:

a. The Architect has any financial interest in the Project other than the fee for professional service.

b. The Architect advances any funds to the Owner, Contractor and/or any subcontractor; and/or the Contractor and/or any subcontractor advance any funds to the Architect.

c. The Architect has any financial interest in the Owner, Contractor and/or any subcontractor; or the Owner, contractor and/or any subcontractor has any financial interest in the Architect.

d. Any officer, director, stockholder or partner of the Architect has any financial interest in the Owner, Contractor and/or any subcontractor; or any officer, director, stockholder or partner of the Owner, Contractor and/or any subcontractor has any financial interest in the Architect.

e. Any officer, director, stockholder or partner of the Architect is also an officer, director, stockholder or partner of the Owner, Contractor, and/or any subcontractor.

f. The Owner, Contractor and/or any subcontractor, or any officer, director,

stockholder or partner of such Owner, Contractor and/or subcontractor provides any of the required architectural services or, while not directly providing an architectural service, acts as a consultant to the Architect.

g. Any family relationships exist between the officers, directors, stockholders or partners of the Architect and officers, directors, stockholders or partners of the Owner, Contractor, and/or any subcontractor that could cause or result in control of or influence over prices paid to the Architect or could result in control of or influence over performance by the Architect.

h. Any side deal, agreement, contract or undertaking, that is inconsistent with related requirements for the relationship between the Owner and Architect as stipulated in the closing documents, except as approved by HUD.

11. All identities of interest known to exist between the Architect and the Owner, Contractor and/or any subcontractor are listed herein. The Architect and Owner shall each inform HUD in writing within 5 working days of its first knowledge of any identity of interest that develops after execution of this Agreement. Upon the discovery of an undisclosed identity of interest, HUD may require the termination of this Agreement in accordance with paragraph 9, above.

List All Identities of Interest:

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

12. The funds for this Project, including the Architect's funds under this Agreement, will be provided, as the case may be, by the proceeds of a mortgage from a Mortgagee who in turn obtained commitment for mortgage insurance from HUD, in accordance with the National Housing Act, or from a capital advance from the U.S. Treasury pursuant to Section 202 of the Housing Act of 1959 or Section 811 of the Cranston-Gonzalez National Affordable Housing Act. Said Mortgagee, pursuant to the terms of a Building Loan Agreement, or said U.S. Treasury, pursuant to a Capital Advance Agreement, in accordance with HUD's rules and regulations, will agree to advance the proceeds of the mortgage or capital advance to the Owner for completion of the work, but only to the extent that charges accrued and only to the extent and for the purposes specified in the Building Loan Agreement or Capital Advance Agreement. The Building Loan Agreement or Capital Advance Agreement, when executed, shall specify the mortgage or capital advance proceeds available for the Design Phase and for administration of the Construction Contract during the Construction Phase. However,

neither the mortgage or capital advance, nor the Building Loan Agreement or Capital Advance Agreement, provide funds for Reimbursable Expenses pursuant to paragraph 10 of this Agreement, Termination Expenses pursuant to paragraph 8 of this Agreement, or Additional Service Compensation pursuant to paragraph 11 of this Agreement. Although the Architect may agree to provide a greater degree of services for additional compensation, require compensation for reimbursable expenses or termination expenses, or require basic compensation in excess of that provided by the Building Loan Agreement or Capital Advance Agreement for such services, the obligation to compensate the Architect for the greater degree of services or the aforesaid expenses shall not be enforceable against the Owner, the Mortgagee, U.S. Treasury, HUD or the Project; provided, however, that any entity or individual other than Owner may agree to be responsible to the Architect for payment thereof and, in such case, shall be identified below.

Provider of additional payment pursuant to paragraph 12 of this Amendment, if any.

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

Executed as of the \_\_\_ day of \_\_\_\_\_, 20\_\_.

OWNER

DATE: \_\_\_\_\_

ARCHITECT

DATE: \_\_\_\_\_

[Remainder of this page intentionally left blank.]

Certification

Each signatory below hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD (acting by and through the FHA Commissioner) in insuring a multifamily rental or health care facility mortgage loan, and may be relied upon by HUD and the Commissioner as a true statement of the facts contained therein.

Name of Entity: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

By: /s/ \_\_\_\_\_

Printed Name, Title: \_\_\_\_\_

Dated: \_\_\_\_\_

[ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES]

Department of Housing and Urban Development, acting by and through the Federal Housing Commissioner

Authorized representative: \_\_\_\_\_

Dated: \_\_\_\_\_

**Warning**

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban

Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. 287, 1001, 1010 and 1012; (ii) civil penalties and

damages under 31 U.S.C. 3729; and (iii) administrative sanctions, claims, and penalties under 24 CFR parts 24, 28 and 30. [FR Doc. 04-16783 Filed 7-30-04; 8:45 am]

**BILLING CODE 4210-27-P**