

SUBMITTED ELECTRONICALLY

July 17, 2020

Colette Pollard  
Reports Management Officer, QDAM  
U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 4176  
Washington, DC 20410

Re: Comments related to 60-Day Notice of Proposed Information Collection: Rental Assistance Demonstration (RAD); Supporting Contract and Processing Requirements; OMB Control No.: 2502-0612

To Whom it May Concern:

The Council of Large Public Housing Authorities (“CLPHA”), the RAD Collaborative, and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments on the 60-Day Notice of Proposed Information Collection: Rental Assistance Demonstration (RAD); Supporting Contract and Processing Requirements.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

The RAD Collaborative, organized by CLPHA with the support of the National Equity Fund (“NEF”), HAI Group, Reno & Cavanaugh, and CF Housing Group, consists of interested Public Housing Authorities and their partners using the Rental Assistance Demonstration (“RAD”) to preserve and revitalize their public housing properties. Through an open system, the RAD Collaborative facilitates communication, information sharing and productive relationships among Housing Authorities, their residents and development and financing partners, advisors and transactional service providers, local government, policy makers and other stakeholders working to implement RAD across the country.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the

entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

On behalf of CLPHA, the RAD Collaborative, and Reno & Cavanaugh, we thank you for the opportunity to comment on the proposed RAD form documents. We appreciate HUD's efforts to simplify RAD and provide additional flexibility to PHAs seeking to utilize the RAD program. We applaud HUD for addressing these critical implementation issues so that PHAs and other practitioners can continue to build upon the success of the RAD program and we encourage HUD to consider our additional comments and continue to streamline RAD requirements for the benefit of practitioners and residents.

In the solicitation of public comment, HUD seeks feedback regarding whether the proposed collection of information is necessary, whether the information will have practical utility, and whether HUD's estimate of the burden is accurate. Unfortunately, it is difficult for us to assess this information on a document-by-document basis, as many of the documents proposed under this information collection lack the required Paperwork Reduction Act statements as required by 5 C.F.R. § 1320.8.<sup>1</sup> Accordingly, HUD should withdraw and reissue the revised documents proposed under this Notice of Proposed Information Collection (OMB Control No. 2502-0612) for a new sixty (60) day public comment period to ensure that commenters are able to fully review and provide informed responses to this requested information.

Based upon the documents posted for public comment, even if HUD does not withdraw the full information collection and refile the proposed information collection pursuant to our above request, HUD is simply not prepared to proceed with respect to its rollout of the new RAD for Section 202 Project Rental Assistance Contracts ("PRAC") program under Component Two.

Some of the documents that HUD proposes for comment with respect to RAD for PRAC under this Paperwork Reduction Act Notice of Proposed Information Collection are not in final form and include a number of internal HUD comments, track changes, and other items that, while providing valuable insight, demonstrate significant concerns within HUD about the form documents and a clear lack of internal consensus about proceeding in this manner. In particular, comments contained in the proposed "Second Component RAD for the Conversion of Section 202 Project Rental Assistance Contracts ("PRAC") to

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<sup>1</sup> Such documents include, but are not limited to: (1) Component One – Proposed RAD Application Form; (2) Component One – Proposed RAD Conversion Commitment; (3) Component One – PHA Counsel Opinion; (4) Component One – Project Owner Counsel Opinion; (5) Component One - Contract Administrator Funding Survey; (6) Component Two – Submission of Interest (Mod Rehab and PRAC); (7) Component Two – Mod Rehab Owner Information; (8) Component One and Two – Sample RAD Fair Housing, Civil Rights, and Relocation Checklists; (9) Component One and Two – Post Closing Completion Certifications (Rehab); and (10) and Component One and Two – Post Closing Completion Certifications (No-Rehab).

the Section 8 Project-Based Voucher (“PBV”) Housing Assistance Payment (“HAP”) Contract” include statements from HUD staff such as, “I think both program counsel and relevant program staff (in both Recap and PIH) need to fully understand what [this] contractual language means,” among other references to “problematic provisions” and the “opaque nature” of the language used. In addition, with respect to certain distribution language contemplated therein, HUD staff state “...I do not see how this works in PBV, nor how HUD or the PHA will be able to enforce this provision in a long-term PBV contract.” We agree with all of these comments. While we are excited about the prospect of using RAD to leverage external financing to rehabilitate this vitally-needed housing stock, the proposed RAD for PRAC PBV documents are simply not ready for use. We encourage HUD to continue its internal review process with respect to these documents and reissue them, at a later date, under a new information collection. In the meantime, we would be happy to work with HUD and other industry groups to find ways to resolve these and other concerns.

In addition to the above and at HUD’s request, we offer the comments shown in the attached markups to each of the proposed RAD form documents. For convenience of HUD’s review, we have enclosed a table of contents listing the proposed RAD form documents under Component One and Component Two. Following the table of contents, we have attached mark-ups of each document showing recommended changes to the text. Where applicable, additional commentary and explanation for each requested change is contained in an italicized footnote located in each attached mark-up.

Thank you for the opportunity to provide comments on the Notice. If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman  
Executive Director  
CLPHA



Julie S. McGovern  
Member  
Reno & Cavanaugh, PLLC



Patrick M. Costigan  
Strategic Advisor  
RAD Collaborative

Enclosures: Table of Contents - Comments on RAD Paperwork Reduction Act (PRA)  
Supporting Contracts and Processing Requirements, OMB Control No. 2502-0612

Markup of Proposed RAD Form Documents

**Comments on RAD Paperwork Reduction Act (PRA)  
Supporting Contracts and Processing Requirements  
OMB Control No.: 2502-0612  
Submission Date: July 17, 2020**

Tab	Document Name	Notes
Documentation under the First Component (Public Housing Conversions)		
1	RAD Conversion Commitment Public Housing First Component (HUD 52624)	
2	RAD First Component HAP Contract for the Conversion of Public Housing to Section 8 Project-Based Vouchers (PBV) Part I (HUD 52621A)	
3	RAD First Component HAP Contract for the Conversion of Public Housing to Section 8 Project-Based Vouchers (PBV) Part II (HUD 52621B)	
4	RAD First Component HAP Contract RAD for the Conversion of Public Housing to Project-Based Section 8 (PBRA) Part I (HUD 52620A)	
5	RAD First Component HAP Contract RAD for the Conversion of Public Housing to Project-Based Section 8 (PBRA) Part II (HUD 52620B)	
6	RAD First Component Use Agreement (HUD 52625)	
7	RAD/Section 18 Blend Rider to RAD Use Agreement	
8	PHA Counsel Opinion	
9	Project Owner Counsel Opinion	
10	RAD Transfer of Assistance Covenants	
Documentation under the Second Component (Multifamily)		
11	RAD Second Component Project Rental Assistance Contract (PRAC) Project-Based Section 8 (PBRA) Housing Assistance Payments (HAP) Contract Part I	

12	RAD Second Component Project Rental Assistance Contract (PRAC) Project-Based Section 8 (PBRA) Housing Assistance Payments (HAP) Contract Part II	
13	RAD Section 8 Project-based Voucher (PBV) Housing Assistance Payments (HAP) Contract for Existing Housing (PRAC; Second Component) Part I	Document not ready to be issued and not published in final form. See comments above.
14	RAD Section 8 Project-based Voucher (PBV) Housing Assistance Payments (HAP) Contract for Existing Housing (PRAC; Second Component) Part II	Document not ready to be issued and not published in final form. See comments above.
15	RAD PRAC Approval Letter Template	
16	PRAC Conversion Agreement	
17	Elderly Housing Use Agreement	
18	Counsel Opinion (PRAC)	
Documentation under the First and Second Component		
19	Sample RAD Fair Housing, Civil Rights, and Relocation Checklists	
20	Addendum to the HAP Contract – Labor Standards (HUD 5679)	

**Rental Assistance Demonstration (RAD)  
Conversion Commitment (Public  
Housing; First Component)**

**U.S. Department of Housing and  
Urban Development Office  
of Multifamily Housing**

<b>Complete each box, even if information is duplicative</b>			
Proposed Name and Address of Covered Project:	Proposed Project Owner:	Proposed Project Owner Notice Address:	
Existing Ownership Entity, Name and Address of Converting Project:	PHA:	PHA Notice Address:	
Dwelling Units in Covered Project: Total Dwelling Units: ____ RAD Units ____; Other (non-RAD) Affordable Units: ____; Market Rate Units: ____; <a href="#">Non-Revenue Units:</a> <sup>1</sup> ____			
PIH Information Center (PIC) removal application number (a/k/a Demolition-Disposition Application Number (DDA#)):			
Converting Project PIC Number(s) <i>(for all items to the right in this row, list data by each AMP # in the cells below):</i>	# of units converting to RAD to be removed from each AMP:	# of non-converting units to be removed from each AMP (e.g., due to a de minimis reduction):	Total # of units to be removed from each AMP (sum of two middle columns):
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<input type="checkbox"/> Project-Based Rental Assistance (PBRA) <input type="checkbox"/> Project-Based Vouchers (PBV). If PBV, list <a href="#">Housing Assistance Payment (HAP-)</a> Contract Administrator (PHA or another housing authority): ____		Number of RAD HAP Contracts and Term length of each <a href="#">RAD</a> HAP Contract: ____ contract(s), ____ years	

<sup>1</sup> [Comment: Current form does not otherwise include a way to incorporate any manager or other non-revenue units, which often leads to confusion and conflicting unit counts depending on whether such are classified as "affordable units" or "market units".](#)

	<input type="checkbox"/> Parties will execute a Delayed Conversion Agreement at <del>closing</del> <u>Closing</u> (Delayed HAP)
Reserve for Replacements Amount of Initial Deposit to Replacement Reserve: \$ _____ Deposit Due No Later Than: [At Closing] or [At Substantial Completion] Amount of Total Monthly Deposit to Replacement Reserve: \$ _____ First Monthly Deposit Due No Later Than: [HAP Effective Date] or [At Substantial Completion] <u>Approved Annual Escalation of Total Monthly Deposit to the Replacement Reserve:</u> _____ <sup>2</sup>	

<sup>2</sup> **Comment:** Many investors or lenders will set an escalation factor, or scheme, for the Reserve Fund for Replacements. Setting an approved escalation in the RCC will minimize confusion over the HUD requirement and help avoid conflicting requirements between HUD, FHA, and other investors and lenders.

**Key Features of Covered Project:****General:**☐ Ground lease

If yes, input fee owner: \_\_\_\_\_

☐ Transfer of Assistance☐ Scattered-site project☐ RAD/Section 18 Blend☐ Tenant Paid Utility Savings☐ Existing Mixed Finance☐ Joint RAD/CHOICE Transaction☐ Demolition of current public housing units☐ New Construction☐ Rent Bundling☐ This is a donor property☐ This is a recipient property

(In either case, identify below the associated property(ies) in the rent bundling arrangement and when the other project has or is expected to close)

**Relocation:**☐ Tenants will be Relocated off-site for >12 months☐ ~~Transfer of Assistance:~~ One-time permanent move to the[Covered Project<sup>3</sup>](#)☐ Tenants will be Relocated off-site for ≤12 months ~~Covered Project~~☐ On-site relocation only☐ No relocation anticipated**Financing:**☐ Public housing funds in Sources and Uses☐ Low-Income Housing Tax Credits anticipated☐ The property has been subject to prior or existing EPC, CFFP, or OFFP debt liens. If checked, indicate one of the below:☐ Previously paid off☐ To be paid off prior to or in conjunction with ~~closing~~ Closing☐ Debt to remain and subordinate to RAD Use Agreement☐ No new FHA-Insured, LIHTC or conventional financing☐ FHA-Insured Financing anticipated

If so, date of Firm Commitment: \_\_\_\_\_

☐ Conventional financing anticipated☐ The property has been subject to other existing debt (such as mixed-finance debt). If checked, indicate one of the below:☐ Previously paid off☐ To be paid off prior to or in conjunction with ~~closing~~ Closing☐ Debt to remain and subordinate to RAD Use Agreement**Unit Configuration:**☐ Reduction in units. If checked, \_\_\_\_\_ units reduced based on the following authority:☐ De minimis associated with this transaction (\_\_\_\_ units)☐ De minimis associated with another transaction (\_\_\_\_ units) (explain below)☐ Other (explain below)☐ Change in unit configuration (explain below)

If additional information is necessary to clarify the features above and/or if there are other important features of the Transaction not described above, such additional information may be listed here:

**RAD Rehab Assistance Payments:**

Per Unit Monthly RAD Rehab Assistance Payment: \$ \_\_\_\_\_

Maximum # of units eligible for RAD Rehab Assistance Payments: \_\_\_\_\_ Units

**Choice Mobility:**☐ Owner will comply with RAD Choice Mobility practices. [PHA NAME] has agreed to administer RAD Choice Mobility at the Covered Project.☐ Project Owner is exempt from implementing the RAD Choice Mobility practices with respect to the RAD units in the Covered Project.<sup>3</sup> [Comment: One-time moves can occur outside of the transfer of assistance context.](#)



**Repairs:**

Estimated number of months from the effective date of the RAD HAP ~~contract~~ Contract (or date of Delayed Conversion Agreement, if applicable, whichever is earlier) for completion for all Work: \_\_\_\_\_ months. Repairs in Exhibit D must be completed no later than three months after the estimated period set forth above. If not completed by such date, the Project Owner is in breach of this Commitment.

This commitment ("Commitment") to participate in the Rental Assistance Demonstration ("RAD") and convert the assistance of the Converting Project named in the above table is entered into by and among \_\_\_\_\_, a public housing authority organized and existing under the laws of \_\_\_\_\_ ("PHA"); \_\_\_\_\_, a \_\_\_\_\_ organized and existing under the laws of \_\_\_\_\_ ("Project Owner"); and the United States Department of Housing and Urban Development, acting by and through the Secretary, his or her successors, assigns or designates ("HUD"), as of the date executed by HUD below. If the PHA is to be the owner of the Covered Project, the PHA shall also be identified as the Project Owner.

#### TERMS AND CONDITIONS:

1. **Applicable HUD Regulations and Requirements.** By converting assistance and entering into the Closing Documents contemplated in this Commitment, the PHA and Project Owner agree, each as and to the extent applicable, to operate the Covered Project in accordance with all applicable law, including without limitation the Consolidated and Further Continuing Appropriations Act of 2012 (Pub. L. 112-55, signed November 18, 2011, as amended) ("RAD Statute"); all applicable program requirements and guidance, including without limitation Notice H-2019-09 PIH-2019-23 (HA), as amended and revised from time to time (the "RAD Notice") or any successor or additional statutes, regulations or guidance; and the terms and conditions set forth below (collectively, the "Program Requirements"). Any conflicts between this Commitment and any other HUD requirements shall be conclusively resolved by HUD. Any capitalized terms used herein but not defined have the meanings given them in the RAD Notice.
2. **Acceptance of Commitment/Expiration.**
  - a. This Commitment shall terminate thirty (30) days from the date executed by HUD unless the PHA and Project Owner execute and electronically return an unaltered copy of this Commitment to HUD per HUD instructions.
  - b. This Commitment shall not be effective or enforceable against HUD until all conditions stated herein have been satisfied in HUD's determination.
  - c. Unless all conditions stated herein have been satisfied as determined by HUD and the transactions contemplated by this Commitment (collectively, the "Transaction") are closed within 90 days from the date executed by HUD, this Commitment shall, unless extended by HUD in writing or through the RAD Resource Desk,<sup>4</sup> expire and be of no further force or effect. Upon expiration, all rights and obligations of the respective parties shall cease.
3. **Closing Requirements and HUD Approvals.** As used in this Commitment, "Closing" means execution of all binding legal instruments connected to the transaction contemplated by this Commitment and, if applicable, recordation of such instruments. All requirements set forth in this Commitment must be completed to HUD's satisfaction before the Closing can occur. A Closing checklist ("Closing Checklist") can be found on the RAD Resource Desk. The Closing Checklist lists those items HUD has determined necessary to be submitted to and approved by HUD in order for the Closing of this Transaction to occur. Should HUD determine that any other documents or items (in addition to those listed on the Closing Checklist) are necessary to meet the terms of this Commitment or Program Requirements, the PHA and Project Owner agree to provide such documents or other items in such form and substance as acceptable to HUD or to terminate this Commitment and not proceed to Closing. Unless otherwise agreed by HUD, in the case where the Project Owner differs from the PHA, all ~~post-closing~~ post-Closing requirements

<sup>4</sup> **Comment:** *In our experience, HUD often evidences RCC extensions directly through the RAD Resource Desk, rather than through separate writing.*

and obligations contained herein will apply to the Project Owner after the Closing. Any determination, approval or decision of HUD pursuant to this Commitment shall be in HUD's sole and absolute discretion. Unless otherwise set forth in writing by HUD prior to Closing,

HUD's execution and release of the Closing Documents shall constitute any approvals or decisions required herein and not previously given in writing.

4. **Public Housing Requirements.** The PHA and Project Owner acknowledge that the Converting Project remains subject to the United States Housing Act of 1937, its Consolidated Annual Contributions Contract and any amendments thereto, and all other pertinent Federal statutory, executive orders, regulations and other guidance, as those requirements may be amended from time to time (collectively the "Applicable HUD Requirements"), and shall not be subject to the RAD HAP Contract, until the ~~effective date of the HAP Contract~~Closing.<sup>5</sup> Unless HUD gives written instructions otherwise, for so long as the Converting Project remains public housing, the PHA and Project Owner shall take all steps necessary to ensure that:
  - a. Fire and other property insurance as required under Applicable HUD Requirements are and shall be maintained in full force and effect;
  - b. All ordinary and necessary operating expenses pursuant to Applicable HUD Requirements of the Converting Project are and shall be paid; and
  - c. The Converting Project remains in compliance with Applicable HUD Requirements, including without limitation all requirements related to the physical condition of the Converting Project and any remedial agreements between HUD and the PHA and remedial judicial or administrative orders, except as expressly modified by this Commitment and/or the Closing Documents.Execution of the Closing Documents by the PHA and Project Owner, respectively, constitute recertification to HUD of the foregoing statements.
5. **HUD Review of Project Ownership.** The PHA and Project Owner agree that HUD approval of the ownership and control of the Covered Project is a condition of ~~closing~~Closing. The PHA shall not transfer any ownership interest in the Converting Project prior to the Closing, unless otherwise approved by HUD.<sup>6</sup>
6. **Closing Documents.** The PHA and Project Owner shall execute or cause to be produced, as appropriate, such agreements, instruments, certificates and other documents as HUD may require to complete the Transaction (collectively, the "Closing Documents"), using forms prescribed by or acceptable to HUD and completed, executed, recorded and/or filed in the number of copies and in such manner as directed by HUD. Without limiting the foregoing, the Closing Documents may include:
  - a. If applicable, one or more releases or partial releases of the applicable Declaration(s) of Trust or comparable document;

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<sup>5</sup> **Comment:** We believe the correct reference above should be Closing, not the RAD HAP Contract effective date. Otherwise, the sentence sets up several regulatory conflicts since there can be as much as a month or two between the Closing of the RAD transaction and the effective date of the RAD HAP Contract. We believe that this requirement unfairly puts PHAs in the crosshairs of compliance, as PHAs cannot simultaneously comply with both the RAD Closing Documents and public housing requirements. For example, public housing requirements require there to be a recorded Declaration of Trust or Declaration of Restrictive Covenants against the public housing property; however, the Declaration of Trust or Declaration of Restrictive Covenants is often released at Closing in exchange for a RAD Use Agreement.

<sup>6</sup> **Comment:** As defined, the term "Closing" means "execution of all binding legal instruments connected to the transaction contemplated by this Commitment and, if applicable, recordation of such instruments." However, there are a number of circumstances in which transfer may occur before all binding legal instruments are executed. For example, certain permanent financing may be submitted to HUD in advance for its review, but not executed until permanent conversion. In addition, HUD may permit the parties to execute a "RAD Delayed Conversion Agreement" in cases of new construction, in which financial Closing occurs and the project may be transferred to its new Owner, but the RAD HAP Contract is not signed until units are completed. Also, in certain circumstances, such as units under a Converted Awaiting Transfer ("CAT") Agreement, HUD may allow the early removal of public housing units and subsequent transfer while the proposed RAD units remain pending conversion and before execution of a RAD HAP Contract and other legal documents.

- b. a RAD Use Agreement (document HUD-52625);
  - c. a Housing Assistance Payments Contract (for PBRA, documents HUD-52620 and HUD-52618; for PBV, ~~HUD-52530A Parts I and II and HUD-52624~~ HUD-52621A and HUD-52621B<sup>7</sup>), including any required exhibits;
  - d. Certifications and assurances; and
  - e. Any additional documents required by HUD in order to determine whether criteria for Closing have been met.
7. **Use Agreement Priority.** A title report must be provided for the Converting Project and Covered Project. In addition, an owner's pro forma title policy may be requested for the Covered Project involving the addition of financing to be secured by the Covered Project. Unless otherwise approved by HUD, the RAD Use Agreement shall be superior to any and all liens and/or encumbrances against the Covered Project, including, without limitation, the lien evidenced by any and all mortgages, deeds of trust and other financing documents and regulatory documents related to the Covered Project (including any LIHTC use agreement). The Project Owner shall obtain consents or subordination agreements, and have such documents executed, as HUD may determine necessary to establish such priority.
8. **Expenses and Transaction Costs.**<sup>8</sup> Except as otherwise set forth in this Commitment, ~~regardless of whether the Transaction is consummated, HUD shall~~ HUD is not be responsible for any expenses or transaction costs incurred by or at the direction of the PHA or Project Owner in connection with the Transaction (including without limitation, fees for consultants, attorneys, environmental contractors, tax advisors and accountants; city, county and/or state taxes and/or fees; recording fees, prepayment penalties and/or premiums; costs for title insurance and title examination; surveys and appraisals) or the Work.
9. **Tax, Financial, and Legal Consequences.** HUD has not provided, nor shall it provide, any opinions, representations, warranties, or covenants to any party regarding any federal, state and/or local tax consequences, financial consequences, or legal consequences relative to the Transaction. The PHA and Project Owner acknowledge that funding of the contemplated RAD Housing Assistance Payment Contract (the "RAD HAP Contract") is subject to appropriations.
10. **Certifications, Representations and Warranties by the PHA and Project Owner.** Any statement, certification, representation or warranty made by the PHA or Project Owner in or pursuant to this Commitment is true and correct when given, and shall remain true and correct at all times through and including the Closing. In the event any such statement, certification, representation or warranty is no longer complete or correct, and without limiting HUD's rights and remedies, the PHA or Project Owner, respectively, shall notify HUD in writing immediately. Without limiting the foregoing, the PHA and Project Owner, respectively, hereby represent and certify to HUD and warrant to maintain the veracity through Closing of the following statements:
- a. All notices required by Program Requirements relating to the transaction have been timely provided to such persons and in a manner complying with applicable Program Requirements.
  - b. The PHA and the Converting Project continue to meet all program eligibility requirements as stipulated in the RAD Notice.
  - c. With the exception of any ~~transfers under the PHA's Admissions and Continued Occupancy Policy~~ moves authorized under Section 7 of Notice H 2016-17 PIH 2016-17 (HA), or any such successor notice,<sup>9</sup> or as otherwise approved by HUD, the PHA

<sup>7</sup> **Comment:** Pursuant to this PRA process, HUD has provided the following form numbers for the form of PBV RAD HAP Contract: HUD 52621A and 52621B.

<sup>8</sup> **Comment:** The requested modification simplifies the language used and mirrors Section 7 of the PRAC Conversion Agreement.

<sup>9</sup> **Comment:** Notice H 2016-17 PIH 2016-17 (HA), Section 6.8 prohibits any involuntary or voluntary relocation for the project prior to the effective date of the RCC, "unless moves are authorized under Section 7 [of Notice H 2016-17 PIH

has not relocated any residents of the Converting Project in connection with the Transaction prior to the date this Commitment is executed by all parties.

- d. Except as specifically disclosed to and accepted by HUD in writing, neither the PHA nor the Project Owner (including, but not limited to Board Members, principals and executives of the PHA or Project Owner) has any knowledge that it (or any Board Members, principals and executives of the PHA or Project Owner in their official capacity as members, principals or executives of the PHA or Project Owner, as applicable) is the current subject of, nor has received any pending notice of, any debarment, suspension or other administrative proceeding, ~~audit or~~ investigation by HUD,<sup>10</sup> including without limitation by the Inspector General, the Departmental Enforcement Center, or the Office of Fair Housing and Equal Opportunity, or any other Federal or state government agency, whether or not sanctions have been imposed against such party, that would impact its ability to carry out its obligations under this Commitment.
- e. No disclosed debarment, suspension or other administrative proceeding, audit or investigation would impact the PHA's or the Project Owner's ability to carry out its obligations as contemplated under this Commitment.

Upon the request of HUD, the PHA shall provide HUD with evidence satisfactory to HUD relating to each of the foregoing certifications. Execution of the Closing Documents by the PHA and the Project Owner, respectively, constitute re-certification to HUD of the foregoing statements.

- 11. **Successors and Assigns.** This Commitment and its attachments are binding upon the PHA, the Project Owner and the successors and assigns of each. Unless otherwise provided herein, this Commitment may not be assigned, in whole or in part, except upon the prior written consent of HUD.
- 12. **Corrections.** Notwithstanding anything to the contrary contained in this Commitment, the PHA and Project Owner agree to execute, before or after the Closing, such documents, amendments or modifications as HUD deems necessary or appropriate to effectuate the intent of this Commitment or to complete or consummate the Transaction, including but not limited to instruments necessary to correct this Commitment or any of the Closing Documents.

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2016-17 (HA)]...or unless HUD proves explicit approval which will only be provided in extraordinary circumstances." Permitting only those moves in accordance with the PHA's ACOP, as set forth in the original language proposed by HUD, fails to account for authorized moves in connection with a PHA's "HCV Waiting List Administration Unrelated to the RAD Transaction" as permitted by Section 7.1 of Notice H 2016-17 PIH 2016-17 (HA). Accordingly, the above revisions are designed to track and incorporate the RAD program requirements into this Commitment.

<sup>10</sup> **Comment:** HUD's Office of the Inspector General often conducts routine and randomized audits of public housing agencies and other stewards of HUD funds. PHAs should not be required to disclose, penalized or otherwise prevented from converting a public housing project through RAD when they are the subject of a routine audit.

13. **Changes to This Commitment.** HUD has approved a Financing Plan for this transaction. The PHA and Project Owner shall notify HUD of any changes to the terms set forth in the Financing Plan, or any other business terms submitted to HUD. If HUD determines such changes to be material, HUD may require an amendment to this Commitment or other reviews or approvals as HUD determines necessary to account for the changed terms. The final business terms shall be determined as of the Closing and inserted into the applicable Closing Documents. The PHA's and Project Owner's execution of the Closing Documents shall constitute HUD's acceptance of the final business terms reflected therein.

14. **Sources of Funds.**

- a. **Required Approval of Debt.** HUD must review and approve all proposed debt (secured and unsecured) ~~proposed or in place~~ against the Covered Project prior to Closing.<sup>11</sup>
- b. **Development Budget.** HUD approval of this Transaction is based on the estimated Sources and Uses attached as Exhibit B. Any changes to this Sources and Uses shall be disclosed to HUD and if HUD determines that such changes are material, HUD may require additional review and approvals and/or amendment to this Commitment. PHA and/or Project Owner shall provide HUD with the final certified Sources and Uses upon Closing.
- c. **PHA Funds for Development Budget.** Where the Transaction includes public housing funds to be contributed by the PHA for uses other than funding the RAD HAP Contract, these funds must be shown on the Sources and Uses. The PHA certifies that all such funds are available and reserved for the Transaction, are irrevocable, and that the PHA has obtained all consents necessary in order for the PHA to commit such funds to the Transaction.
  - i. Prior to Closing, public housing Capital Funds shown in the Sources and Uses must be moved within the HUD Line of Credit Control System (LOCCS) to the "RAD Investment" Budget Line Item (BLI 1504). These funds must be drawn down out of LOCCS at ~~closing~~ Closing and, until they are disbursed for a use shown in the Sources and Uses, made subject to a General Depository Agreement (GDA, form HUD-51999).
  - ii. Until disbursed for a use shown in the Sources and Uses, Public housing Operating Reserves shown in the Sources and Uses must be held in an account or sub-account subject to a GDA.
  - iii. To the extent such funds must be subject to a GDA as described above, the PHA may use a pre-existing GDA if the PHA is making use of separate or segregated accounting. (For example, a PHA may have a pre-existing account for Operating Fund Reserves subject to a GDA and if the converted funds to be used as shown in the Sources and Uses may be adequately separated or segregated for accounting purposes in a sub-account or otherwise remaining subject to the pre-existing GDA, the requirements of this section are fulfilled.)
  - iv. If shown in the Sources and Uses, such funds may be used to satisfy obligations of the Covered Project, including without limitation, funding reserves (for example, to make an initial deposit for a replacement reserve or payment of construction or other project costs in accordance with this RCC and other project documents. Methods by which the PHA may choose to disburse such funds in accordance with this section include:

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<sup>11</sup> **Comment: If debt is pre-existing against the public housing project, HUD would have already reviewed and approved it pursuant to a mixed-finance public housing approval, Section 30 or other requirements.**

- In a lump sum as a loan to the Project Owner, subject to a loan agreement or other documentation;
- Incrementally over time as a loan to the Project Owner, subject to a loan agreement or other documentation;



- In a lump sum to the Project Owner as a grant or otherwise without the expectation of repayment; and/or
  - Incrementally over time to the Project Owner as a grant or otherwise without the expectation of repayment.
- d. No Additional PHA funds. Except for the amounts identified in the Sources and Uses and amounts identified in the RAD HAP Contract to fund the Covered Project in the calendar year of conversion,<sup>12</sup> no public housing funds may be used as an additional source of funds for the Covered Project. By way of illustration and not limitation, after Closing, no public housing funding not identified in Exhibit B or the Initial Year Funding Tool (including any funds deemed “project funds” or “program income” under public housing regulations) may be used to pay for any costs for any work (Work or other work) done in connection with the Covered Project.
- e. Nature of Property and Funds. Upon the conversion of assistance, the Converting Project, including any real or personal property thereof, shall no longer be used for public housing purposes, as originally authorized by the U.S. Housing Act of 1937. This Commitment provides instruction for such conversion and the treatment of the Converting Project. Any proceeds of disposition of the Converting Project (or of any real property or improvements that as of the date of this Commitment are considered public housing) in connection with the conversion of assistance contemplated by this Commitment shall be used for affordable housing purposes as defined in the RAD Notice. Any proceeds of any loans of converted public housing funds made in connection with the conversion of assistance contemplated by this Commitment shall be used for affordable housing purposes. Any uses of converted public housing funds listed in the Sources and Uses attached hereto as Exhibit B shall be considered end uses for purposes of 2 CFR Part 200.
- f. Fungibility. ~~Without in any way modifying the requirements of specific funding sources, HUD The RAD program~~ does not require ~~the~~ tracking of specific funds to specific uses ~~under RAD~~.<sup>13</sup> HUD shall review the availability of sources and their application to uses in the aggregate upon completion of the Work. HUD approves the use of unrestricted funds or of construction period project income for both hard and soft costs reflected in an approved Sources and Uses and as working capital to bridge the availability of funds during the course of the implementation of the Work.

~~15. **Moving to Work Considerations.** Participation in RAD by a Moving To Work (MTW) agency does not reflect a determination that the agency will remain an MTW agency, only a determination that the Covered Project will continue to be a RAD project under the terms of the RAD program.~~

15. **Moving to Work Considerations.** References to Moving to Work (MTW) in this Commitment does not reflect a HUD determination to amend any terms or conditions of the PHA's participation in the MTW program.<sup>14</sup>

<sup>12</sup> **Comment:** Insertion of the following “and amounts identified in the RAD HAP Contract to fund the Covered Project in the calendar year of conversion” restores existing HUD-approved language from the current version of the RCC. Because the Sources and Uses does not include capital or operating funds used to make HAP payments during the Year of Conversion, such needs to be included as a permissible use of public housing funds. If HUD is proposing a change to the Sources and Uses to include these funds, then that change should be made available as part of the Paperwork Reduction Act (“PRA”) Notice and Comment process.

<sup>13</sup> **Comment:** As previously drafted, this sentence was unclear. The above revision is intended to clarify the RAD requirements without limiting the ability of individual lenders or funding programs to establish their own requirements.

<sup>14</sup> **Comment:** An MTW Agency's participation in the RAD program remains subject to the terms and conditions of its Standard Agreement with HUD, which, among other things, establish a term for each agency's participation in the MTW Demonstration.

16. **RAD HAP Contract Funding in Initial Year.** From the effective date of the RAD HAP Contract through the remainder of the calendar year, the Covered Project will be funded only from available public housing amounts obligated by HUD prior to the effective date of the RAD HAP Contract and from any additional public housing amounts that HUD obligates ~~in full or in part to the PHA for the Covered Project~~, subject to the availability of sufficient appropriations, for the remainder of the calendar year in which the RAD HAP Contract becomes effective. **Project Owner acknowledges that this amount for the remainder of the calendar year in which the RAD HAP Contract becomes effective may be less than the contract rent for subsequent years.** During such time, the PHA will draw down funds from LOCCS as instructed by HUD and transfer amounts to the Project Owner as payments pursuant to the RAD HAP Contract in its capacity as or on behalf of the Contract Administrator, as applicable.
17. **RAD Rehab Assistance Payments.** It is anticipated that the Covered Project will be eligible for RAD Rehab Assistance Payments pursuant to its RAD HAP Contract to the extent set forth on the second page of this Commitment.
18. **Section 8 Contract Rents.** Exhibit C sets out the monthly Section 8 contract rents that will be specified in the RAD HAP Contract, subject to the limitation set out in Section 16 above.
19. **Planned Construction and Rehabilitation.** Exhibit D sets forth the planned construction, repairs and/or rehabilitation for the Covered Project, including any repairs that need to be completed before ~~closing~~Closing, to be funded in accordance with the Sources and Uses (the "Work").

The Project Owner hereby represents, warrants and certifies to HUD and will update such representation, warranty and certification at Closing, in a form and substance acceptable to HUD, that the sources of funds are anticipated to be sufficient to pay for the Work.<sup>15</sup> When applicable, Exhibit D will be amended prior to ~~closing~~Closing to reflect the final bids. **The Project Owner is responsible for funding all cost overruns with non-Public Housing funds.** The Work will be completed timely and in accordance with applicable RAD Program Requirements, including without limitation:

- a. The Work will be completed in accordance with:
  - i. The more stringent of: (1) any applicable national building code, such as Uniform Building Code, Council of American Building Officials Code, or Building Officials Conference of America Code; or (2) applicable state and local laws, codes, ordinances, and regulations;
  - ii. Other applicable Federal requirements including any Federal fire-safety requirements and HUD minimum property standards (e.g., 24 CFR part 200, subpart S for FHA-insured properties);
  - iii. The relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-484 6), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-485 6), and implementing regulations at 24 CFR part 35, as applicable;
  - iv. Notice PIH ~~2014-17~~ 2016-17 / H 2014-09, issued ~~July 14~~ November 10, 2014 ~~2016~~ (and any amendments, revisions or successor documents), ~~"Relocation-Requirements under the "~~ Rental Assistance Demonstration (RAD) ~~Program,-~~ Public Housing in the Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component ~~– Public Housing Conversions~~, which relocation requirements include, as applicable, the Uniform Relocation Assistance and Real Property

<sup>15</sup> **Comment:** As acknowledged in the bolded sentence in this section, there may be certain unforeseeable situations where cost overruns require the infusion of additional capital beyond that initially contemplated in the sources.

- Acquisition Policies Act of 1970 and its implementing regulations at 49 CFR Part 24 with regard to any relocation of residents;
  - v. Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 24 CFR part 8, including but not limited to accessibility standards, with regard to any “substantial alterations” or other “alterations,” each as defined in such regulations, as applicable;
  - vi. The design and construction requirements of the Fair Housing Amendments Act of 1988 and its implementing regulations at 24 CFR Part 100.25, as applicable;
  - vii. Section 3 of the Housing Act of 1968 and its implementing regulations at 24 CFR Part 135 and all of the related regulations, rules and requirements as applicable; and
  - viii. Davis-Bacon prevailing wage requirements, section 12 of the United States Housing Act of 1937, and Contract Work Hours and Safety Standards Act, and all of the related regulations, rules and requirements for any repairs that qualify as “construction” or “rehabilitation” as defined in such regulations, rules and requirements.
- b. Any Work not completed by three (3) months after the final completion date listed on page 2 of this Commitment<sup>16</sup> and set forth in the RAD HAP Contract, including any reduction in the scope of Work listed on Exhibit D, unless an extension of such date or such reduction in scope is approved in writing by HUD, constitutes a breach of this Commitment.
  - c. The Project Owner shall not be entitled to withdraw or take any Distributions from the Covered Project until after completion of the Work and certification of the actual cost of the Work ~~provided to HUD via the RAD Completion Certification submission.~~<sup>17</sup>
  - d. To the extent the Work includes new construction or substantial rehabilitation ~~in excess of 60% of the locally applicable public housing “hard construction cost” limit, unless otherwise approved by HUD~~ (as defined at 24 CFR 5.100),<sup>18</sup> the PHA and/or Project Owner shall engage a qualified general contractor who shall obtain prior to or at Closing either (i) a payment and performance bond from a properly licensed surety, which bond and surety shall be acceptable to HUD, or (ii) a letter of credit, acceptable to HUD.

20. **Reserve for Replacements.** The Project Owner shall establish a Reserve for Replacements, with an initial deposit to the replacement reserves as set forth in Exhibit B, the Sources and Uses. Initial monthly deposits into the Reserve for Replacements will be made in an amount equal to the greater of the amount set forth on the first page of this Commitment, the amount set forth in the RAD HAP Contract, or the amount requested by the Project Owner to satisfy the requirements of a lender or equity investor providing HUD-approved financing to the Covered Project. Monthly deposits into the Reserve for Replacements shall be adjusted annually as approved by HUD in accordance with the RAD HAP Contract and Program Requirements. No later than the date

<sup>16</sup> **Comment:** This is to make the language consistent with the newly added language under “Repairs,” which requires work to be completed within three (3) months of the estimated period set forth in the “Repairs” section.

<sup>17</sup> **Comment:** The RAD Completion Certification is generally provided by the PHA through the RAD Resource Desk, not the Project Owner.

<sup>18</sup> **Comment:** The inclusion of the requirement that rehabilitation is “substantial” when hard construction costs exceed sixty percent (60%) of the Housing Construction Costs in a given area is a number determined by HUD in order to qualify PBRA projects in designated Opportunity Zones for an additional \$100 per unit per month (“PUM”) rent increase. Per the RAD Notice, this definition of substantial rehabilitation is limited solely for use of determining whether a project would be eligible for this PUM increase. Instead, we believe that HUD’s definition of “substantial rehabilitation” at 24 CFR 5.100 should apply, which often used to determine when installation of broadband infrastructure is required and is triggered when pre-construction estimated costs of rehabilitation equals or exceeds seventy-five percent (75%) of the total estimated cost of replacing the multifamily rental housing after the rehabilitation is complete.

specified on the first page of this ~~Agreement~~Commitment, unless such date is extended in writing by HUD, the Project Owner shall make an Initial Deposit to the Reserve for Replacements. If "Substantial Completion" is referenced on the first page of this ~~Agreement~~Commitment, "Substantial Completion" shall mean the date thirty (30) days following completion of those portions of the Work which represent 95% of the dollar amount of the Work, as such dollar amount may be adjusted by any change orders necessary to complete the Work, or such other "Substantial Completion" date as may be required by lenders, investors, or other third parties and approved by HUD.<sup>19</sup> The date of Substantial Completion shall be disclosed to HUD in the RAD Completion Certification.

21. **Counsel.** Closing is conditioned upon review and approval of the Transaction by HUD, including without limitation a legal review and approval of diligence and ~~closing documents~~Closing Documents. The PHA and Project Owner, if different than the PHA, agree to select competent counsel in connection with this Transaction in a manner that satisfies the applicable rules of professional conduct. Counsel to the PHA and/or Project Owner, as appropriate, must provide a legal opinion with respect to the following matters and any other matters reasonably requested by HUD:
- The PHA and Project Owner are each duly organized, validly existing and in good standing under the laws of the applicable jurisdiction(s);
  - The PHA and Project Owner each have the requisite power and authority, and have secured all consents required, to consummate the Transaction;
  - Each of the Closing Documents executed by or on behalf of the PHA and/or Project Owner in connection with the Transaction is a legally binding obligation of such party, duly executed and delivered on behalf of such party and enforceable in accordance with its terms;
  - There is no litigation or other ~~claim-claims~~ pending or threatened against the PHA, Project Owner or the Covered Project, the resolution of which would have a materially adverse effect on the PHA or Project Owner's ability to comply with the requirements of this Commitment [if applicable]; other than as disclosed to ~~and~~ consented to by HUD<sup>20</sup> HUD];
  - Based upon a pro forma title policy acceptable to HUD and assuming the recordation of documents in the order contemplated by such pro forma title policy, provided counsel has no reason to believe the documents will be recorded in an order other than as listed in such pro forma title policy, the RAD Use Agreement is superior to the lien and/or encumbrance evidenced by any and all mortgages, deeds of trust and other financing

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<sup>19</sup> **Comment:** Lenders and investors will often tie certain installment payments to a project reaching a "Substantial Completion" milestone. However, "Substantial Completion," in that context, may or may not be defined consistent with HUD's use of the term in this Commitment. Having to track multiple completion dates can be unduly burdensome. Accordingly, for ease of administration and monitoring, Project Owners should be able to propose that HUD adopt the definition of "Substantial Completion" used by other parties to their transaction(s).

<sup>20</sup> **Comment:** The requested change reverts this language to that used in HUD's 2014 Form of Opinion and is consistent with our comments provided on the Project Owner Form of Opinion and the PHA Form of Opinion. The language in the proposed form of opinion and originally included in this proposed RCC is too broad and will sweep in all litigation of a PHA and/or Project Owner, which can be substantial through no fault of the PHA or Project Owner. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the PHA or Project Owner's ability to comply with RAD requirements. Also, this approach does not hold Project Owners and PHAs to the same standard. A large development company serving as a managing member or general partner would not be required to make similar disclosures because it has created a special purpose entity ("SPE"). The form of RAD opinion does not reach beyond the SPE. Therefore, especially for PHAs, this disclosure must be limited to only those issues that would have a materially adverse effect on the ability to comply with the requirements of the RCC as any other litigation, commonly related to landlord-tenant disputes or minor slip-and-fall occurrences, should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant litigation, such can be disclosed to HUD through the certification attached to the Project Owner and/or PHA Opinion at Exhibit A.

- documents and regulatory documents of record relating to the Covered Project, unless otherwise approved by HUD; and
- f. All Closing Documents conform with the legal requirements set forth in this RCC and any and all changes to HUD forms or sample language have been disclosed to HUD.
22. **Last public housing unit.** If, upon completion of this RAD conversion and other RAD conversions for which this PHA has an RCC and/or CHAP, the PHA will no longer have residential units in its public housing portfolio, the PHA agrees to comply with additional instructions provided by HUD regarding disclosure of future public housing development activities or the close-out of its residential public housing portfolio. The PHA acknowledges that failure to comply with HUD instructions may result in withholding Section 8 or other cash payments after Closing pending cure of such violation to HUD's satisfaction.
23. **Non-dwelling assets.** Any non-dwelling assets proposed for removal from PIC in connection with the Transaction must be listed in the PIC removal application (a/k/a Demolition-Disposition Application) identified on the first page of this Commitment and must be approved by HUD.
24. **Non-Real Property assets.** The Project Owner and PHA shall be responsible for entering into any necessary agreement, prior to ~~closing~~ or at Closing,<sup>21</sup> regarding the conveyance from the PHA to the Proposed Project Owner of any non-real property assets associated with the Converting Project which are anticipated to be used for the Covered Project.
24. **Special Conditions, Necessary Approvals and Additional Provisions.** This Commitment is subject to the requirements set forth on Exhibit A. All Special Conditions and Necessary HUD Approvals must be satisfied prior to ~~closing~~ or at Closing.<sup>22</sup> ~~The Additional Provisions listed in Exhibit A represent ongoing commitments that will survive closing.~~
25. **Breach and Default.** ~~Any~~ Following the expiration of any applicable notice and cure periods,<sup>23</sup> ~~any~~ failure to comply with the terms of this Commitment constitutes a breach of this Commitment and of any RAD HAP Contract entered into with respect to the Covered Project. Upon failure to cure such breach within ~~30~~ thirty (30) days of notice thereof or such longer time as may be agreed upon by HUD or otherwise reasonably required by the circumstances,<sup>24</sup> HUD may declare an event of default under this Commitment and the ~~HAP Contract(s). Upon an event of default, HUD may take any remedial action permitted at law or in equity under this Commitment or the HAP Contract(s), including, without limitation, termination of this Commitment, suspension of distributions of cash to the owner, suspension of payment under the HAP Contract(s), taking possession and operation of the Covered Project, transfer of the HAP Contract(s) to other units, and termination of the HAP Contract(s).~~ RAD HAP Contract(s). Upon a breach of this Commitment, the enforcing party shall have remedies available to it under statute, at law or in equity. The enforcing party shall have the right to seek specific performance of this Commitment and/or to enjoin any violation of this Commitment in Federal Court. The right to specific performance and injunction shall be in addition to all other remedies available under statute, at law or in equity. Without in any way limiting the foregoing, if HUD is the enforcing party, HUD may terminate the RAD HAP Contract relating to the Covered Project. No person or entity, other than the parties hereto, has any rights or remedies under this

<sup>21</sup> Comment: Because the HUD Public Housing Declaration of Trust or Declaration of Restrictive Covenants, as applicable, remains in place until Closing, a PHA is often limited in its ability to convey certain non-real property assets, such as improvements on the property, until the removal of the public housing use restriction.

<sup>22</sup> Comment: Per Section 27 of this Commitment, the entire Commitment shall survive Closing. Accordingly, this sentence is duplicative and creates unnecessary confusion.

<sup>23</sup> Comment: A project should not be placed in default until all applicable notice and cure periods have expired.

<sup>24</sup> Comment: By way of example, the RCC provides PHAs and Project Owners an additional three (3) months after the estimated number of months to complete all repairs listed in Exhibit D of the RCC (see Repairs Section, p. 2). Furthermore, despite best efforts of the parties, certain events of default may not be able to be cured within the set timeframes. Should such be deemed appropriate, parties should be provided the flexibility to extend the cure period as they see fit in order to avoid default when working in good faith to cure the breach.



Commitment.<sup>25</sup>

26. **Exhibits.** The following exhibits are a part of this Commitment and incorporated herein by this reference:
- Special Conditions, Necessary HUD Approvals, and Additional Provisions
  - Sources and Uses of Funds
  - Monthly RAD HAP Contract Rents
  - Scope of Work
27. **Entire AgreementCommitment; Survival.** The information listed on the chart on the first pages of this Commitment is a part of this Commitment. All prior and contemporaneous oral and written communications are merged herein and superseded hereby, and this Commitment and all exhibits attached constitute the entire agreement between the PHA, Project Owner and HUD with respect to the Transaction. This Commitment, and the responsibilities relating to each respective party, shall survive Closing of the Transaction.
28. **Post-Closing Responsibilities.** The PHA and Project Owner agree to follow the directions of the HUD Closing Coordinator with respect to post-Closing obligations. Without limiting the foregoing, but subject to extraordinary circumstances or other force majeure events, the PHA and Project Owner, as appropriate, will provide evidence of recording or evidence that the documents have been submitted for recording of the applicable Closing Documents and copies of any applicable executed RAD HAP ~~contract~~Contract, recorded RAD Use Agreement, ~~and DOT Release~~ within three (3) business days thereof will provide copies of, and the remaining Closing Documents as directed within ~~10~~ ten (10) business days of the HAP effective date, or such later date as may be mutually agreed upon with HUD, and will submit the RAD Completion Certification as directed.<sup>26</sup> In addition, the PHA must follow instructions provided by HUD to remove the Converting Project, or portions thereof, from PIC to effect conversion.
29. **Severability.** Should any provision of this Commitment be held by a court of law to be unenforceable, such determination shall in no way compromise the enforceability of the other provisions.
30. **Counterparts.** This Commitment may be executed in counterparts. Electronic copies of signatures (such as those in portable document format (pdf)) shall be evidence of and treated as original signatures.
31. **Consistency with Federal Law.** Nothing contained in this Commitment shall impose on HUD any duty, obligation, or requirement, the performance of which would be inconsistent with federal statutes, rules, or regulations in effect at the time of such performance.

(signature page follows)

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<sup>25</sup> **Comment:** The remedies inserted herein mirror those proposed by HUD in the PRAC Conversion Agreement (Section 19.2). We believe the available remedies as set forth therein are appropriate and should be used consistently throughout the applicable Component One and Component Two documents.

<sup>26</sup> **Comment:** The timeframes included in this section depend largely on factors outside a PHA or Project Owner's control, and it may be difficult to provide evidence of recording in a timely fashion, particularly if a jurisdiction does not electronically record documents. Accordingly, adherence to set timeframes may not be possible and, as originally drafted, would set a PHA and Project Owner up for a needless default, which could have severe implications and trigger defaults under other project documents. By subjecting this section to extraordinary circumstances or other force majeure events and allowing PHAs and Project Owners to provide evidence that documents have been submitted for recording in lieu of the recorded documents, HUD will reduce the risk of default under this Section of the Commitment and ensure that RAD participants will not be placed in default when there is a reasonable explanation as to why such recorded documentation may not be available.

Signature Page to RAD Conversion Commitment  
Project Identification: \_\_\_\_\_

**HUD: U.S. Department of Housing and Urban Development**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**PHA: [Insert PHA signature block.]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**Project Owner: [Insert Project Owner signature block.]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**If the Converting Project is not owned by the PHA, the terms of this Commitment are acknowledged and agreed to by the existing owner entity.**

**[Insert Existing Owner signature block.]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**WARNING:** HUD will prosecute false claims and statements. Convictions may result in criminal and/or civil penalties (18 U.S.C. 1001,1010,1012; 31 U.S.C. 3729/FS3802).

**EXHIBIT A**

**Special Conditions**

*List any special conditions.*

1.

**Necessary HUD Approvals**

*List any necessary HUD approvals:*

1. .

**Additional Provisions to the RCC**

*List any additional provisions:*

1. .

**EXHIBIT B**

**Sources and Uses**

(Populated from Transaction Log)

**Construction Financing**

**Lender:**

**Amount:**



### Monthly RAD HAP Contract Rents

Number of Contract Units	Number of Bedrooms	Contract Rent	Utility Allowance	Gross Rent
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.

## Scope of Work

Description of Repair	Approximate Cost	Target Completion Date

List all work to be done in connection with the transaction following closing.)	
Description of Improvement Work	Budget
<b>Total</b>	

**U.S. Department of Housing and Urban Development  
Office of Public and Indian Housing**

**Rental Assistance Demonstration (RAD)  
for the Conversion of Public Housing to the  
Section 8 Project-Based Voucher (PBV) Program<sup>1</sup>**

**PART 1 OF HAP CONTRACT**

Public reporting burden for this collection of information is estimated to average 30 minutes 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.<sup>2</sup>

This collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and to dictate the terms under which such payments will be made. There are no assurances of confidentiality.

**1. CONTRACT INFORMATION**

**a. Parties**

This housing assistance payments (HAP) Contract is entered into between:

<sup>1</sup> This form merges HUD 52530A and HUD 52621.

*Comment: Note: Form HUD 52621 is not a currently valid HUD form number (see [https://www.hud.gov/program\\_offices/administration/hudclips/forms](https://www.hud.gov/program_offices/administration/hudclips/forms)) and neither of the above form numbers, HUD 52530A or HUD 52621, are included in HUD's Federal Register Notice of Proposed Information Collection. In addition, the April 2015 version of form HUD 52530A that this HAP Contract relies upon per the document footer is outdated (the current version of form HUD 52530A was released in July 2019), and the OMB control number authorizing the April 2015 version of form HUD 52530A has expired. For the avoidance of confusion, the above footnote number 1 (indicating that this form merges HUD 52530A and HUD 52621) should be deleted. Further, the footer in this document should be revised to identify the document by its unique form number, HUD 52561A, as included in the Notice of Proposed Information Collection, and the dual OMB control numbers at the top of this form should be revised to only include OMB Approval No. 2502-0612 pursuant to this Notice of Proposed Information Collection.*

<sup>2</sup> *Comment: Per comments to fn. 1 above, this document should be identified by a single form number in the footer, and the dual OMB control numbers at the top of this form should be revised to only include OMB Approval No. 2502-0612 pursuant to this current Notice of Proposed Information Collection.*

Administrator) (CA)<sup>23</sup> and

(owner).

**b. Contents of contract**

The HAP Contract consists of Part 1, Part 2, and the Contract exhibits listed in paragraph c.

**c. Contract exhibits**

The HAP Contract includes the following exhibits:

EXHIBIT A: TOTAL NUMBER OF UNITS IN PROJECT COVERED BY THIS HAP CONTRACT; INITIAL RENT TO OWNER; AND THE NUMBER AND DESCRIPTION OF THE CONTRACT UNITS. (See 24 CFR 983.203 for required items.) If applicable as the result of Tenant-Paid Utility Savings in accordance with the provision of the RAD Notice governing such savings for Project Based Voucher Conversions (i.e., Attachment 1C of the RAD Notice), or successor provision, Exhibit A to this HAP Contract shall contain both the initial and revised rent to owner for each contract unit.

EXHIBIT B: SERVICES, MAINTENANCE AND EQUIPMENT TO BE PROVIDED BY THE OWNER WITHOUT CHARGES IN ADDITION TO RENT TO OWNER

EXHIBIT C: UTILITIES AVAILABLE IN THE CONTRACT UNITS, INCLUDING A LISTING OF UTILITY SERVICES TO BE PAID BY THE OWNER (WITHOUT CHARGES IN ADDITION TO RENT TO OWNER) AND UTILITIES TO BE PAID BY THE TENANTS

EXHIBIT D: FEATURES PROVIDED TO COMPLY WITH PROGRAM ACCESSIBILITY FEATURES OF SECTION 504 OF THE REHABILITATION ACT OF 1973

EXHIBIT E: ADDENDUM TO THE HAP CONTRACT – LABOR STANDARDS

ADDITIONAL EXHIBITS

<sup>23</sup> In Public Housing to PBV conversions, the Contract Administrator will be the Public Housing Agency that executes the HAP Contract with the Owner and administers the voucher funding under the Consolidated Annual Contributions Contract with HUD.

**d. Term of the HAP Contract**

**1. Beginning of Term**

The Contract begins on \_\_\_\_\_.

**2. Length of initial term**

- a. Subject to paragraph 2.b, the initial term of the HAP Contract for any contract unit is \_\_\_\_\_.
- b. The initial term of the HAP Contract for any unit may not be less than 15 years, and may be for a term of up to 20 years upon the request of the Owner and with the approval of the CA.

**3. Contract Administrator's Obligation to Offer to Renew and Owner Obligation to Accept Offers to Renew**

The CA and the Owner acknowledge and agree upon expiration of the initial term of the HAP Contract, and upon each renewal term of the HAP Contract, the CA shall offer to renew the HAP Contract and the Owner shall accept each offer to renew the HAP Contract, subject to the terms and conditions applicable at the time of each offer, and further subject to the availability of appropriations for each year of each such renewal.

**4. Funding of PBV HAP Contract**

- a. **Funding for the Year of Conversion.** In the Year of Conversion, the HAP Contract shall be funded only from public housing amounts obligated prior to the effective date of the HAP Contract, and from any additional public housing amounts that HUD obligates in full or in part, subject to the availability of sufficient appropriated funding, for the ~~remainder of the calendar year in which the HAP Contract becomes effective~~ Year of Conversion. Owner acknowledges that this amount for the ~~first year~~ Year of Conversion<sup>4</sup> may be less than the contract rent for subsequent years.<sup>35</sup>
- b. **Funding for remainder of the initial term and any renewal term.** Starting in the First Full Year and in each subsequent year in which the HAP Contract is

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<sup>4</sup> *Comment: To minimize confusion and ensure accuracy, HUD should rely on its newly added "Year of Conversion" definition in this section.*

<sup>35</sup> Note that new definitions of First Full Year, HUD requirements and Year of Conversion are added to Section 2 of Part 2 of the HAP Contract.

effective, for the remainder of the initial term and any renewal term, subject to the availability of sufficient appropriated funding (budget authority), as provided in appropriations acts and in the CA's Consolidated Annual Contributions Contract with HUD, the CA will make full payments of housing assistance payments due to an Owner for any contract year in accordance with the HAP Contract. The availability of sufficient funding must be determined by HUD or the CA in accordance with HUD requirements. If it is determined that there may not be sufficient funding to continue housing assistance payments for all contract units and for the full term of the HAP Contract, the CA has the right to terminate the HAP Contract by notice to the Owner for all or any of the Contract units. Such action by the CA shall be implemented in accordance with HUD requirements.

**e. Occupancy and payment**

**1. Payment for occupied unit**

During the term of the HAP Contract, the CA shall make housing assistance payments to the Owner for the months during which a contract unit is leased to and occupied by an eligible family. If an assisted family moves out of a Contract unit, the Owner may keep the housing assistance payment for the calendar month when the family moves out ("move-out month"). However, the Owner may not keep the payment if the CA determines that the vacancy is the Owner's fault.

**2. Vacancy payment**

THE PHA HAS DISCRETION WHETHER TO INCLUDE THE VACANCY PAYMENT PROVISION (PARAGRAPH f.2), OR TO STRIKE THIS PROVISION FROM THE HAP CONTRACT FORM.

- a. If an assisted family moves out of a Contract unit, the CA may provide vacancy payments to the Owner for a CA-determined vacancy period extending from the beginning of the first calendar month after the move-out month for a period not exceeding two full months following the move-out month.
- b. The vacancy payment to the Owner for each month of the maximum two-month period will be determined by the CA, and cannot exceed the monthly rent to Owner under the assisted lease, minus any portion of the rental payment received by the Owner (including amounts available from the tenant's security deposit). Any vacancy payment may only cover the period the unit remains vacant.
- c. The CA may only make vacancy payments to the Owner if:

1. The Owner gives the CA prompt, written notice certifying that the family has vacated the unit and the date when the family moved out (to the best of the Owner's knowledge and belief);
  2. The Owner certifies that the vacancy is not the fault of the Owner and that the unit was vacant during the period for which payment is claimed;
  3. The Owner certifies that it has taken every reasonable action to minimize the likelihood and length of vacancy; and
  4. The Owner provides any additional information required and requested by the CA to verify that the Owner is entitled to the vacancy payment.
- d. The CA must take every reasonable action to minimize the likelihood and length of vacancy.
- e. The Owner may refer families to the CA, and recommend selection of such families from the CA waiting list for occupancy of vacant units.
- f. The Owner must submit a request for vacancy payments in the form and manner required by the CA and must provide any information or substantiation required by the CA to determine the amount of any vacancy payments.

**3. PHA is not responsible for family damage or debt to Owner**

Except as provided in this paragraph e (Occupancy and Payment), the CA will not make any other payment to the Owner under the HAP Contract. The CA will not make any payment to Owner for any damages to the unit, or for any other amounts owed by a family under the family's lease.

**f. Non-Applicability of Income Mixing Requirement.**

There is no cap on the number of units that may receive PBV assistance in a project.

## EXECUTION OF HAP CONTRACT

### CONTRACT ADMINISTRATOR (CA)

*Name of CA (Print)*

By:

<i>Signature of Authorized Representative</i>
<i>Name and official title (Print)</i>
<i>Date</i>  <b>OWNER</b>  <i>Name of Owner (Print)</i>
By:
<i>Signature of Authorized Representative</i>
<i>Name and official title (Print)</i>
<i>Date</i>



**U.S. Department of Housing and Urban Development  
Office of Public and Indian Housing**

**Rental Assistance Demonstration (RAD)  
for the Conversion of Public Housing to the  
Section 8 Project-Based Voucher (PBV) Program**

**PART 2 OF HAP CONTRACT<sup>1</sup>**

Public reporting burden for this collection of information is estimated to average 30 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and to dictate the terms under which such payments will be made. There are no assurances of confidentiality.<sup>2</sup>

## 1. DEFINITIONS

<sup>1</sup> *Comment: In addition to our substantive comments contained herein, we have made a number of formatting adjustments throughout this document in order to ensure defined terms are capitalized and achieve consistent spacing, font size, kerning, and other modifications as needed. Here, and elsewhere in other documents proposed pursuant to this Notice of Proposed Information Collection, we would encourage HUD to review these forms prior to finalizing to ensure the use of consistently capitalized defined terms and uniform formatting as these will be binding legal documents.*

<sup>2</sup> *Comment: As noted in our comments on Part I, there are a number of procedural issues with this document as proposed pursuant to the Notice of Proposed Information Collection. First, form HUD 52621 is not a currently valid HUD form number (see [https://www.hud.gov/program\\_offices/administration/hudclips/forms](https://www.hud.gov/program_offices/administration/hudclips/forms)) and neither of the previously-included form numbers, HUD 52530A or HUD 52621, are included in HUD's Federal Register Notice of Proposed Information Collection. In addition, the form number that HUD uses to refer to this form, HUD 52621B (<https://www.hud.gov/rad/library/radnoticepra>) is also not included in this information collection as published by HUD in the Federal Register (<https://www.federalregister.gov/documents/2020/05/18/2020-10521/60-day-notice-of-proposed-information-collection-rental-assistance-demonstration-rad-supporting>).*

*The April 2015 version of form HUD 52530A that this HAP Contract relies upon per the document footer is outdated (the current version of form HUD 52530A was released in July 2019), and the OMB control number authorizing the April 2015 version of form HUD 52530A has expired. For the avoidance of confusion, the above footnote number 1 (indicating that this form merges HUD 52530A and HUD 52621) should be deleted. Further, the footer in this document should be revised to identify the document by its unique form number, HUD 52561B, as included in the Notice of Proposed Information Collection, and the dual OMB control numbers at the top of this form should be revised to only include OMB Approval No. 2502-0612 pursuant to this Notice of Proposed Information Collection. Nonetheless, while we note the above procedural issues, we offer these comments for consideration.*

**Contract Administrator (CA).** The Public Housing Agency that executes the HAP Contract with the Owner and administers the voucher funding under the Consolidated Annual Contributions Contract with HUD.

**Contract ~~units~~ Unit or Contract Units.** The housing ~~units~~ unit(s) covered by this HAP Contract. The ~~contract units~~ Contract Units are described in Exhibit A.

**Family.** The persons approved by the CA to reside in a ~~contract unit~~ Contract Unit with assistance under the program.

**First Full Year.** The first full calendar year of the HAP Contract beginning the year after the calendar year of the effective date. To clarify, in cases in which a project converts in December and the effective date of the HAP Contract is January 1, the Year of Conversion is the calendar year starting on the effective date and the First Full Year begins the year following.

**HAP Contract.** This ~~housing assistance payments contract~~ Housing Assistance Payments Contract between the CA and the owner. The contract consists of Part 1, Part 2, and the contract exhibits (listed in section 1.c of the HAP Contract).

**Housing ~~assistance payment~~ Assistance Payment or Housing Assistance Payments.** The monthly assistance payment by the CA for a ~~contract unit~~ Contract Unit, which includes: (1) a payment to the Owner for rent to the Owner under the family's lease minus the ~~tenant rent~~ Tenant Rent; and (2) an additional payment to or on behalf of the family if the utility allowance exceeds total tenant payment.

**Household.** The family and any CA-approved live-in aide.

**Housing ~~quality standards~~ Quality Standards (HQS).** The HUD minimum quality standards for dwelling units occupied by families receiving project-based voucher program assistance.

**HUD.** U.S. Department of Housing and Urban Development.

**HUD ~~requirements~~ Requirements.** HUD ~~requirements~~ Requirements which apply to the project-based voucher program. HUD ~~requirements~~ Requirements are issued by HUD headquarters, as regulations, Federal Register notices or other binding program directives. HUD ~~requirements~~ Requirements include Notice H-2019-09 PIH ~~2012-32~~ 2019-23 (HA), "Rental Assistance Demonstration—Final Implementation, Revision ~~24~~," as revised or amended from time to time (or any successor document) (RAD Notice). Any references in this HAP Contract to specific sections of the RAD Notice include any successor provisions whether explicitly stated or not.

**Owner.** Any person or entity who has the legal right to lease or sublease a unit to a participant.

**Premises.** The building or complex in which a ~~contract-unit~~ Contract Unit is located, including common areas or grounds.

**Principal or ~~interested party~~ Interested Party.** This term includes a management agent and other persons or entities participating in project management, and the officers and principal members, shareholders, investors, and other parties having a substantial interest in the HAP Contract, or in any proceeds or benefits arising from the HAP Contract.

**Program.** The project-based voucher program (see authorization for project-based assistance at 42 U.S.C. 1437f(o)(13)).

**PHA.** Public Housing Agency. A public housing agency as defined in the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(6)).

**Rent to Owner.** The total monthly rent payable to the Owner under the lease for a ~~contract-unit~~ Contract Unit. Rent to Owner includes payment for any housing services, maintenance and utilities to be provided by the Owner in accordance with the ~~lease.~~ lease.

**Tenant.** The person or persons (other than a live-in aide) who executes the lease as a lessee of the dwelling unit.

**Tenant ~~rent~~ Rent.** The portion of the ~~rent~~ Rent to Owner payable by the family, as determined by the CA in accordance with HUD ~~requirements~~ Requirements. The CA is not responsible for paying any part of the ~~tenant-rent~~ Tenant Rent.

**Year of Conversion.** The time from the effective date of the HAP Contract through the end of that calendar year.

## 2. PURPOSE

- a. This is a HAP Contract between the CA and the Owner.
- b. The purpose of the HAP Contract is to provide ~~housing-assistance-payments~~ Housing Assistance Payments for eligible families who lease ~~contract-units~~ Contract Units that comply with the HUD HQS from the Owner.
- c. The CA must make ~~housing-assistance-payments~~ Housing Assistance Payments to the Owner in accordance with the HAP Contract for ~~contract-units~~ Contract Units leased and occupied by eligible families during the HAP Contract term. HUD provides funds to the CA to make ~~housing-assistance-payments~~ Housing Assistance Payments to Owners for eligible families.

## 3. RENT TO OWNER; HOUSING ASSISTANCE PAYMENTS

**a. Amount of initial ~~rent~~ Rent to Owner**

The initial ~~rent~~ Rent to Owner for each ~~contract-unit~~ Contract Unit is stated in Exhibit A, which is attached to and made a part of the HAP Contract. At the beginning of the HAP ~~contract~~ Contract term, and until ~~rent~~ Rent to Owner is adjusted in accordance with section 5 of the HAP Contract, the ~~rent~~ Rent to Owner for each bedroom size (number of bedrooms) shall be the initial ~~rent~~ Rent to Owner amount listed in Exhibit A.

**b. HUD rent requirements**

Notwithstanding any other provision of the HAP Contract, the ~~rent~~ Rent to Owner may in no event exceed the amount authorized in accordance with HUD ~~requirements~~ Requirements. The CA has the right to reduce the ~~rent~~ Rent to Owner, at any time, to correct any errors in establishing or adjusting the ~~rent~~ Rent to Owner in accordance with HUD ~~requirements~~ Requirements. The CA may recover any overpayment from the Owner.

**c. CA payment to Owner**

1. Each month the CA must make a ~~housing-assistance-payment~~ Housing Assistance Payment to the Owner for a unit under lease to and occupied by an eligible family in accordance with the HAP Contract.
2. The monthly ~~housing-assistance-payment~~ Housing Assistance Payment to the Owner for a ~~contract-unit~~ Contract Unit is equal to the amount by which the rent to Owner exceeds the ~~tenant-rent~~ Tenant Rent.
3. Payment of the ~~tenant-rent~~ Tenant Rent is the responsibility of the family. The CA is not responsible for paying any part of the ~~tenant-rent~~ Tenant Rent, or for paying any other claim by the Owner against a family. The CA is only responsible for making ~~housing-assistance-payments~~ Housing Assistance Payments to the Owner on behalf of a family in accordance with the HAP Contract.
4. The Owner will be paid the ~~housing-assistance-payment~~ Housing Assistance Payment under the HAP Contract on or about the first day of the month for which payment is due, unless the Owner and the CA agree on a later date.
5. To receive ~~housing-assistance-payments~~ Housing Assistance Payments in accordance with the HAP ~~contract~~ Contract, the Owner must comply with all the provisions of the HAP ~~contract~~ Contract. Unless the Owner complies with all the provisions of the HAP Contract, the Owner does not

have a right to receive ~~housing assistance payments~~ Housing Assistance Payments.

6. If the CA determines that the Owner is not entitled to the payment or any part of it, the CA, in addition to other remedies, may deduct the amount of the overpayment from any amounts due the Owner, including amounts due under any other ~~housing assistance payments~~ Housing Assistance Payments contract.
7. The Owner will notify the CA promptly of any change of circumstances that would affect the amount of the monthly ~~housing assistance payment~~ Housing Assistance Payment, and will return any payment that does not conform to the changed circumstances.
8. Notwithstanding anything else in this HAP Contract, in the Year of Conversion, any ~~housing assistance payments~~ Housing Assistance Payments shall equal amounts funded in accordance with Section ~~1.e.4.a~~ 1.d.4.a (Funding for the Year of Conversion) of this HAP Contract.<sup>3</sup>

**d. Termination of assistance for family**

The CA may terminate housing assistance for a family under the HAP Contract in accordance with HUD ~~requirements~~ Requirements. The CA must notify the Owner in writing of its decision to terminate housing assistance for the family in such case.

**4. ADJUSTMENT OF RENT TO OWNER**

**a. PHA determination of adjusted rent**

1. Subject to section 5.b. of the HAP Contract, at each anniversary date during the term of the HAP Contract, the CA will adjust the ~~rent~~ Rent to Owner by applying HUD's operating cost adjustment factor (OCAF), subject to the availability of appropriations for each year of the HAP Contract term.
2. The adjustment of ~~rent~~ Rent to Owner shall always be determined in accordance with all HUD ~~requirements~~ Requirements. The amount of the ~~rent~~ Rent to Owner may be adjusted up or down, in the amount defined by the CA in accordance with HUD ~~requirements~~ Requirements.

**b. Reasonable ~~rent~~ Rent**

<sup>3</sup> *Comment: There is no Section 1.e.4.a.*

The ~~rent~~ Rent to Owner for each ~~contract-unit~~ Contract Unit may at no time exceed the reasonable rent charged for comparable units in the private unassisted market, as determined by the CA in accordance with 24 C.F.R. § 983.303.

However, the ~~rent~~ Rent to Owner shall not be reduced below the initial ~~rent~~ Rent to Owner for dwelling units under the HAP Contract except in the following cases: (1) to correct errors in calculations in accordance with HUD ~~requirements~~ Requirements; (2) if additional housing assistance has been combined with PBV assistance after the execution of the HAP Contract and a rent decrease is required pursuant to 24 C.F.R. § 983.55; or (3) if a decrease in ~~rent~~ Rent to Owner is required based on changes in the allocation of responsibility for utilities between the Owner and the tenant.;

**c. No special adjustments**

The CA will not make any special adjustments of the ~~rent~~ Rent to Owner.

**d. Owner compliance with HAP ~~contract~~ Contract**

The CA shall not approve, and the Owner shall not receive, any increase of ~~rent~~ Rent to Owner unless all ~~contract-units~~ Contract Units are in accordance with the HQS, and the Owner has complied with the terms of the assisted leases and the HAP Contract.

**e. Notice of rent adjustment**

Rent to Owner shall be adjusted by written notice by the CA to the Owner in accordance with this section. Such notice constitutes an amendment of the rents specified in Exhibit A.

**5. OWNER RESPONSIBILITY**

The Owner is responsible for:

- a. Performing all management and rental functions for the ~~contract-units~~ Contract Units.
- b. Maintaining the units in accordance with HQS.
- c. Complying with equal opportunity requirements.
- d. Enforcing tenant obligations under the lease.
- e. Paying for utilities and housing services (unless paid by the family under the lease).
- f. Collecting from the tenant:
  1. Any security deposit;

2. The ~~tenant rent~~ Tenant Rent; and
3. Any charge for unit damage by the family.

## 6. OWNER CERTIFICATION

The owner certifies that during the term of the HAP Contract:

- a. All ~~contract units~~ Contract Units meet HQS, or successor standard, or will meet HQS no later than the date of completion of the “Work” (including any environmental mitigation measures) as indicated in the RAD Conversion Commitment (RCC) which will be no later than \_\_\_\_\_.
- b. The Owner is providing all the services, maintenance and utilities as agreed to under the HAP Contract and the leases with assisted families.
- c. Each ~~contract unit~~ Contract Unit for which the Owner is receiving ~~housing assistance payments~~ Housing Assistance Payments is leased to an eligible family referred by the CA, and the lease is in accordance with the HAP Contract and HUD ~~requirements~~ Requirements.
- d. To the best of the Owner’s knowledge, the members of the family reside in each ~~contract unit~~ Contract Unit for which the Owner is receiving ~~housing assistance payments~~ Housing Assistance Payments, and the unit is the family’s only residence.
- e. The Owner (including a principal or other ~~interested party~~ Interested Party) is not the parent, child, grandparent, grandchild, sister, or brother of any member of a family residing in a contract unit.
- f. The amount of the ~~housing assistance payment~~ Housing Assistance Payment is the correct amount due under the HAP Contract.
- g. The ~~rent~~ Rent to Owner for each ~~contract unit~~ Contract Unit does not exceed rents charged by the Owner for other comparable unassisted units.
- h. Except for the ~~housing assistance payment~~ Housing Assistance Payment and the ~~tenant rent~~ Tenant Rent as provided under the HAP Contract, the Owner has not received and will not receive any payments or other consideration (from the family, the CA, HUD, or any other public or private source) for rental of the contract unit.
- i. The family does not own, or have any interest in the contract unit. If the Owner is a cooperative, the family may be a member of the cooperative.



## 7. CONDITION OF UNITS

### a. Owner maintenance and operation

The Owner must maintain and operate the ~~contract units~~ Contract Units and premises to provide decent, safe and sanitary housing in accordance with the HQS, including performance of ordinary and extraordinary maintenance. The Owner must provide all the services, maintenance and utilities set forth in Exhibits B and C, and in the lease with each assisted family.

### b. PHA inspections

1. The CA must inspect each Contract unit after rehabilitation is completed in accordance with the RCC.
2. Before providing assistance to a new family in a ~~contract unit~~ Contract Units, the CA must inspect the unit. The CA may not provide assistance on behalf of the family until the unit fully complies with the HQS.
3. At least annually during the term of the HAP Contract, the CA must inspect a random sample, consisting of at least 20 percent of the ~~contract units~~ Contract Units in each building, to determine if the ~~contract units~~ Contract Units and the premises are maintained in accordance with the HQS. Turnover inspections pursuant to paragraph 2 of this section are not counted towards meeting this annual inspection requirement.
4. If more than 20 percent of the annual sample of inspected ~~contract units~~ Contract Units in a building fail the initial inspection, the CA must reinspect 100 percent of the ~~contract units~~ Contract Units in the building.
5. The CA must inspect ~~contract units~~ Contract Units whenever needed to determine that the ~~contract units~~ Contract Units comply with the HQS and that the Owner is providing maintenance, utilities, and other services in accordance with the HAP Contract. The CA must take into account complaints and any other information that comes to its attention in scheduling inspections.

### c. Violation of the ~~housing quality standards~~ Housing Quality Standards

1. If the CA determines a ~~contract unit~~ Contract Unit is not in accordance with the HQS, the CA may exercise any of its remedies under the HAP Contract for all or any ~~contract units~~ Contract Units. Such remedies include termination, suspension or reduction of ~~housing assistance payments~~ Housing Assistance Payments, and termination of the HAP Contract.



2. The CA may exercise any such contractual remedy respecting a ~~contract unit~~ Contract Unit even if the family continues to occupy the unit.
3. The CA shall not make any housing assistance for a dwelling unit that fails to meet the HQS, unless the Owner corrects the defect within the period specified by the CA and the CA verifies the correction. If a defect is life threatening, the Owner must correct the defect within no more than 24 hours. For other defects, the owner must correct the defect within no more than 30 calendar days (or any CA-approved extension).

**d. Maintenance and replacement—owner's standard practice**

Maintenance and replacement (including redecoration) must be in accordance with the standard practice for the building concerned as established by the Owner.

**8. LEASING CONTRACT UNITS**

**a. Selection of tenants**

1. During the term of the HAP Contract, the Owner must lease all Contract ~~units~~ Units to eligible families selected and referred by the CA from the CA's waiting list. The waiting list shall be established and maintained in accordance with HUD ~~requirements~~ Requirements, including the special PBV waiting list provisions in the RAD Notice (including Section 1.6.D.4 or successor provision).
2. The Owner is responsible for adopting written tenant selection procedures that are consistent with the purpose of improving housing opportunities for very low-income families and reasonably related to program eligibility and an applicant's ability to perform the lease obligations.
3. Consistent with HUD ~~requirements~~ Requirements, the Owner may apply its own admission procedures in determining whether to admit a family referred by the CA for occupancy of a contract unit. The Owner may refer families to the CA, and recommend selection of such families from the CA waiting list for occupancy of vacant units.
4. The Owner must promptly notify in writing any rejected applicant of the grounds for rejection.
5. The CA must determine family eligibility in accordance with HUD ~~requirements~~ Requirements.
4. The ~~contract unit~~ Contract Unit leased to each family must be appropriate for the size of the family under the CA's subsidy standards.

5. If a ~~contract unit~~ Contract Unit was occupied by an eligible family at the time the unit was selected by the CA, or is so occupied on the effective date of the HAP Contract, the Owner must offer the family the opportunity to lease the same or another appropriately-sized ~~contract unit~~ Contract Unit with assistance under the HAP Contract.
6. The Owner is responsible for screening and selecting tenants from the families referred by the CA from its waiting list.

**b. Vacancies**

1. The Owner must promptly notify the CA of any vacancy in a contract unit. After receiving the Owner notice, the CA shall make every reasonable effort to refer a sufficient number of families for Owner to fill the vacancy.
2. The Owner must rent vacant ~~contract units~~ Contract Units to eligible families on the CA waiting list referred by the CA.
3. The CA and the Owner must make reasonable good faith efforts to minimize the likelihood and length of any vacancy.
4. If any ~~contract units~~ Contract Units have been vacant for a period of 120 or more days since Owner notice of vacancy (and notwithstanding the reasonable good faith efforts of the CA to fill such vacancies), the CA may give notice to the Owner amending the HAP Contract to reduce the number of ~~contract units~~ Contract Units by subtracting the number of ~~contract units~~ Contract Units (by number of bedrooms) that have been vacant for such period.

**9. TENANCY**

**a. Lease**

The lease between the Owner and each assisted family must be in accordance with HUD ~~requirements~~ Requirements. In all cases, the lease must include the HUD-required tenancy addendum. The tenancy addendum must include, word-for-word, all provisions required by HUD.

**b. Termination of tenancy**

1. The Owner may only terminate a tenancy in accordance with the lease and HUD ~~requirements~~ Requirements.
2. The Owner must give the CA a copy of any Owner eviction notice to the tenant at the same time that the Owner gives notice to the tenant. Owner

eviction notice means a notice to vacate, or a complaint or other initial pleading used to commence an eviction action under State or local law.

3. The Owner shall provide adequate written notice of termination of the lease, which shall be (A) a reasonable period of time, but not to exceed 30 days if the health or safety of other tenants, Owner employees, or persons residing in the immediate vicinity of the premises is threatened; or in the event of any drug-related or violent criminal activity or any felony conviction; (B) Not less than 14 days in the case of nonpayment of rent; and (C) Not less than 30 days in any other case, except that if a State or local law provides for a shorter period of time, such shorter period shall apply.

~~4. The Owner must renew all tenant leases upon expiration, unless good cause under 24 C.F.R. § 983.257(a) exists for non-renewal of a lease.~~

4. Reserved.<sup>4</sup>

#### c. Family payment

1. The ~~portion of the monthly rent to Owner payable by the family (“tenant rent”)~~ Tenant Rent will be determined by the CA in accordance with HUD ~~requirements~~ Requirements. The amount of the ~~tenant rent~~ Tenant Rent is subject to change during the term of the HAP Contract. Any changes in the amount of the ~~tenant rent~~ Tenant Rent will be effective on the date stated in a notice by the CA to the family and the Owner.
2. The amount of the ~~tenant rent~~ Tenant Rent as determined by the CA is the maximum amount the Owner may charge the family for rent of a ~~contract unit~~ Contract Unit, including all housing services, maintenance and utilities to be provided by the Owner in accordance with the HAP Contract and the lease.
3. The Owner may not demand or accept any rent payment from the tenant in excess of the ~~tenant rent~~ Tenant Rent as determined by the CA. The Owner must immediately return any excess rent payment to the tenant.
4. The family is not responsible for payment of the portion of the contract rent covered by the ~~housing assistance payment~~ Housing Assistance Payment under the HAP Contract. The Owner may not terminate the

<sup>4</sup> *Comment: This duplicates the updated PBV Regulations.*

tenancy of an assisted family for nonpayment of the CA ~~housing assistance payment~~ Housing Assistance Payment.

5. The CA is only responsible for making the ~~housing assistance payments~~ Housing Assistance Payments to the Owner on behalf of the family in accordance with the HAP Contract. The CA is not responsible for paying the ~~tenant rent~~ Tenant Rent, or any other claim by the Owner.

**d. Other Owner charges**

1. Except as provided in paragraph 2, the Owner may not require the tenant or family members to pay charges for meals or supportive services. Nonpayment of such charges is not grounds for termination of tenancy.
2. In assisted living developments receiving project-based voucher assistance, Owners may charge tenants, family members, or both for meals or supportive services. These charges may not be included in the ~~rent~~ Rent to Owner, nor may the value of meals and supportive services be included in the calculation of reasonable rent. Non-payment of such charges is grounds for termination of the lease by the Owner in an assisted living development.
3. The Owner may not charge the tenant or family members extra amounts for items customarily included in rent in the locality or provided at no additional cost to the unsubsidized tenant in the premises.

**e. Security deposit**

1. The Owner may collect a security deposit from the family.
2. The Owner must comply with HUD and CA requirements, which may change from time to time, regarding security deposits from a tenant.
3. The CA may prohibit security deposits in excess of private market practice, or in excess of amounts charged by the Owner to unassisted families.
4. When the family moves out of the contract unit, the Owner, subject to State and local law, may use the security deposit, including any interest on the deposit, in accordance with the lease, as reimbursement for any unpaid ~~tenant rent~~ Tenant Rent, damages to the unit or other amounts which the family owes under the lease. The Owner must give the family a written list of all items charged against the security deposit and the amount of each item. After deducting the amount used as

reimbursement to the Owner, the Owner must promptly refund the full amount of the balance to the family.

5. If the security deposit is not sufficient to cover amounts the family owes under the lease, the Owner may seek to collect the balance from the family. However, the CA has no liability or responsibility for payment of any amount owed by the family to the Owner.

## 10. FAMILY RIGHT TO MOVE

- a. The family may terminate its lease at any time after the first year of occupancy. The family must give the Owner advance written notice of intent to vacate (with a copy to the CA) in accordance with the lease. If the family has elected to terminate the lease in this manner, the CA must offer the family the opportunity for tenant-based rental assistance in accordance with HUD ~~requirements~~ Requirements.
- b. Before providing notice to terminate the lease under paragraph a, the family must first contact the CA to request tenant-based rental assistance if the family wishes to move with continued assistance. If tenant-based rental assistance is not immediately available upon lease termination, the CA shall give the family priority to receive the next available opportunity for tenant-based rental assistance.

## 11. OVERCROWDED, UNDER-OCCUPIED, AND ACCESSIBLE UNITS

The CA subsidy standards determine the appropriate unit size for the family size and composition. The CA and Owner must comply with the requirements in 24 CFR 983.260.

## 12. PROHIBITION OF DISCRIMINATION

- a. The Owner may not refuse to lease ~~contract units~~ Contract Units to, or otherwise discriminate against any person or family in leasing of a contract unit, because of race, color, religion, sex, national origin, disability, age or familial status.
- b. The Owner must comply with the following requirements: The Fair Housing Act (42 U.S.C. 3601–19) and implementing regulations at 24 CFR part 100 *et seq.*; Executive Order 11063, as amended by Executive Order 12259 (3 CFR, 1959– 1963 Comp., p. 652 and 3 CFR, 1980 Comp., p. 307) (Equal Opportunity in Housing Programs) and implementing regulations at 24 CFR part 107; title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs) and implementing regulations at 24 CFR part 1; the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107) and implementing regulations at 24 CFR part 146; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and implementing regulations at part 8 of this title; title II of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*; 24

CFR part ~~358~~<sup>5</sup>; section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and implementing regulations at 24 CFR part 135; Executive Order 11246, as amended by Executive Orders 11375, 11478, 12086, and 12107 (3 CFR, 1964–1965 Comp., p. 339; 3 CFR, 1966–1970 Comp., p. 684; 3 CFR, 1966–1970 Comp., p. 803; 3 CFR, 1978 Comp., p. 230; and 3 CFR, 1978 Comp., p. 264, respectively) (Equal Employment Opportunity Programs) and implementing regulations at 41 CFR chapter 60; Executive Order 11625, as amended by Executive Order 12007 (3 CFR, 1971–1975 Comp., p. 616 and 3 CFR, 1977 Comp., p. 139) (Minority Business Enterprises); Executive Order 12432 (3 CFR, 1983 Comp., p. 198) (Minority Business Enterprise Development); and Executive Order 12138, as amended by Executive Order 12608 (3 CFR, 1977 Comp., p. 393 and 3 CFR, 1987 Comp., p. 245) (Women's Business Enterprise).

- c. The CA and the Owner must cooperate with HUD in the conducting of compliance reviews and complaint investigations pursuant to all applicable civil rights statutes, Executive Orders, and all related rules and regulations.

### 13. PHA DEFAULT AND HUD REMEDIES

If HUD determines that the CA has failed to comply with the HAP Contract, or has failed to take appropriate action to HUD's satisfaction or as directed by HUD, for enforcement of the CA's rights under the HAP Contract, HUD may assume the CA's rights and obligations under the HAP Contract, and may perform the obligations and enforce the rights of the CA under the HAP Contract.

### 14. OWNER DEFAULT AND PHA REMEDIES

#### a. Owner default

Any of the following is a default by the Owner under the HAP Contract:

1. The Owner has failed to comply with any obligation under the HAP Contract, including the Owner's obligations to maintain all ~~contract units~~ Contract Units in accordance with ~~the housing quality standards~~ HQS.
2. The Owner has violated any obligation under any other ~~housing assistance payments~~ Housing Assistance Payments contract under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).
3. The Owner has committed any fraud or made any false statement to the CA or HUD in connection with the HAP Contract.

<sup>5</sup> *Comment: 24 CFR Part 35 refers to "Lead-Based Paint Poisoning Prevention in Certain Residential Structures." The correct citation in this section should be to 24 CFR Part 8 entitled, "Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development."*

4. The Owner has committed fraud, bribery or any other corrupt or criminal act in connection with any Federal housing assistance program.
5. If the property where the ~~contract units~~ Contract Units are located is subject to a lien or security interest securing a HUD loan or a mortgage insured by HUD and:
  - A. The Owner has failed to comply with the regulations for the applicable mortgage insurance or loan program, with the mortgage or mortgage note, or with the regulatory agreement; or
  - B. The Owner has committed fraud, bribery or any other corrupt or criminal act in connection with the HUD loan or HUD-insured mortgage.
6. The Owner has engaged in any drug-related criminal activity or any violent criminal activity.

**b. CA remedies**

1. If the CA determines that a breach has occurred, the CA may exercise any of its rights or remedies under the HAP Contract.
2. The CA must notify the Owner in writing of such determination. The notice by the CA to the Owner may require the Owner to take corrective action (as verified by the CA) by a time prescribed in the notice.
3. The CA's rights and remedies under the HAP Contract include recovery of overpayments, termination or reduction of ~~housing assistance payments~~ Housing Assistance Payments, and termination of the HAP Contract.

**c. CA remedy is not waived**

The CA's exercise or non-exercise of any remedy for Owner breach of the HAP Contract is not a waiver of the right to exercise that remedy or any other right or remedy at any time.

**15. OWNER DUTY TO PROVIDE INFORMATION AND ACCESS REQUIRED BY HUD OR PHA**

**a. Required information**



The Owner must prepare and furnish any information pertinent to the HAP Contract as may reasonably be required from time to time by the CA or HUD. The Owner shall furnish such information in the form and manner required by the CA or HUD.

**b. PHA and HUD access to premises**

The Owner must permit the PHA or HUD or any of their authorized representatives to have access to the premises during normal business hours and, for the purpose of audit and examination, to have access to any books, documents, papers and records of the Owner to the extent necessary to determine compliance with the HAP Contract, including the verification of information pertinent to the ~~housing assistance payments~~ [Housing Assistance Payments](#) or the HAP Contract.

**16. CA AND OWNER RELATION TO THIRD PARTIES**

**a. Injury because of Owner action or failure to act**

The CA has no responsibility for or liability to any person injured as a result of the Owner's action or failure to act in connection with the implementation of the HAP Contract, or as a result of any other action or failure to act by the Owner.

**b. Legal relationship**

The Owner is not the agent of the CA. The HAP Contract does not create or affect any relationship between the CA and any lender to the Owner or any suppliers, employees, contractors or subcontractors used by the Owner in connection with the implementation of the HAP Contract.

**c. Exclusion of third party claims**

Nothing in the HAP Contract shall be construed as creating any right of a family or other third party (other than HUD) to enforce any provision of the HAP Contract, or to assert any claim against HUD, the CA or the Owner under the HAP Contract.

**d. Exclusion of Owner claims against HUD**

Nothing in the HAP Contract shall be construed as creating any right of the Owner to assert any claim against HUD.

**17. PHA-OWNED UNITS**

Notwithstanding Section 17 of the HAP Contract, a CA may own units assisted under the PBV program, subject to the special requirements in 24 CFR ~~983.59 regarding PHA-owned units and all other HUD requirements governing PHA ownership of PBV units~~ [983.103\(f\) regarding inspections of PHA-owned units.](#)



Provisions regarding rent setting and reasonable rent for PHA-owned units shall not apply.<sup>6</sup>

## 18. CONFLICT OF INTEREST

### a. Interest of members, officers, or employees of CA, members of local governing body, or other public officials

1. No present or former member or officer of the CA (except tenant-commissioners), no employee of the CA who formulates policy or influences decisions with respect to the housing choice voucher program or project-based voucher program, and no public official or member of a governing body or State or local legislator who exercises functions or responsibilities with respect to these programs, shall have any direct or indirect interest, during his or her tenure or for one year thereafter, or in the HAP Contract.
2. HUD may waive this provision for good cause.

### b. Disclosure

The Owner has disclosed to the CA any interest that would be a violation of the HAP Contract. The Owner must fully and promptly update such disclosures.

### c. Interest of member of or delegate to Congress

No member of or delegate to the Congress of the United States of America or resident-commissioner shall be admitted to any share or part of this HAP Contract or to any benefits arising from the contract.

## 19. EXCLUSION FROM FEDERAL PROGRAMS

### a. Federal requirements

The Owner must comply with and is subject to requirements of 2 CFR part 2424.

### b. Disclosure

The Owner certifies that:

1. The Owner has disclosed to the CA the identity of the Owner and any principal or ~~interested party~~ Interested Party.

<sup>6</sup> *Comment: In RAD, HUD sets the initial rents and inflates by OCAF. An independent third party adds an expense and administrative burden to the project while having no power to override HUD's calculations.*

2. Neither the Owner nor any principal or ~~interested party~~ Interested Party is listed on the U.S. General Services Administration list of parties excluded from Federal procurement and nonprocurement programs; and none of such parties are debarred, suspended, subject to a limited denial of participation or otherwise excluded under 2 CFR part 2424.

## 20. TRANSFER OF THE CONTRACT OR PROPERTY

### a. When consent is required

1. The Owner and the CA agree that neither the HAP Contract nor the premises may be transferred without the written consent of CA and HUD.
2. "Transfer" includes:
  - A. Any sale or assignment or other transfer of ownership, in any form, of the HAP Contract or the property;
  - B. The transfer of any right to receive ~~housing assistance payments~~ Housing Assistance Payments that may be payable pursuant to the HAP Contract;
  - C. The creation of a security interest in the HAP Contract or the property;
  - D. Foreclosure or other execution on a security interest;
  - E. A creditor's lien, or transfer in bankruptcy; or
  - F. Any refinancing or restructuring of permanent debt imposing new liens on the property by the Owner of the project, except to such extent permitted pursuant to that certain Rental Assistance Demonstration Use Agreement entered into in connection with the premises.
3. Owner, CA and HUD hereby agree that:
  - A. CA and HUD hereby consent to any transfer of a passive or non-controlling interest in the Owner entity, including (by way of illustration and not of limitation, such transfers include transfers of the interests of limited partners in a limited partnership, transfers of the interests of members other than managing members or managers in a limited liability company, and transfers of interests in a corporation that cumulatively represent less than half the beneficial interest in the HAP Contract or the premises).

- B. The Owner must obtain advance consent of CA and HUD for transfer of any interest of a general partner of a limited partnership or for the transfer, elimination or addition of a manager or managing member of a limited liability company. If such assignment is made in connection with any HUD-approved financing for the premises, including without limitation low-income housing tax credits, subject to the provisions of Section 37 of this HAP Contract, HUD and CA hereby consent to: an assignment by a general partner of a limited partnership Owner to a limited partner; and an assignment by the managing member of a limited liability company Owner to another member of Owner.
- C. Limited CA and HUD consent to collateral assignments of the HAP Contract to lenders is provided in Section 36 of this HAP Contract.

**b. Transferee assumption of HAP Contract**

No transferee (including the holder of a security interest, the security holder's transferee or successor in interest, or the transferee upon exercise of a security interest) shall have any right to receive any payment of ~~housing assistance payments~~ Housing Assistance Payments pursuant to the HAP Contract, or to exercise any rights or remedies under the HAP Contract, unless the CA and HUD has consented in advance, in writing to such transfer, and the transferee has agreed in writing, in a form acceptable to the CA and HUD in accordance with HUD ~~requirements~~ Requirements, to assume the obligations of the Owner under the HAP Contract, and to comply with all the terms of the HAP Contract.

**c. Effect of consent to transfer**

1. The creation or transfer of any security interest in the HAP Contract is limited to amounts payable under the HAP Contract in accordance with the terms of the HAP Contract.
2. The CA and HUD's consent to transfer of the HAP Contract or the property does not to change the terms of the HAP Contract in any way, and does not change the rights or obligations of the PHA or the Owner under the HAP Contract.
3. The CA and HUD's consent to transfer of the HAP Contract or the property to any transferee does not constitute consent to any further transfers of the HAP Contract or the property, including further transfers to any successors or assigns of an approved transferee.

**d. When transfer is prohibited**

The CA and HUD will not consent to the transfer if any transferee, or any principal or ~~interested party~~ Interested Party is debarred, suspended subject to a limited denial of participation, or otherwise excluded under 2 CFR part 2424, or is listed on the U.S. General Services Administration list of parties excluded from Federal procurement or nonprocurement programs.

## 21. SUBSIDY LAYERING

### a. Owner disclosure

The Owner must disclose to the PHA, in accordance with HUD ~~requirements~~ Requirements, information regarding any related assistance from the Federal Government, a State, or a unit of general local government, or any agency or instrumentality thereof, that is made available or is expected to be made available with respect to the ~~contract units~~ Contract Units. Such related assistance includes, but is not limited to, any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance.

### b. Limit of payments

Housing ~~assistance payments~~ Assistance Payments under the HAP Contract must not be more than is necessary, as determined in accordance with HUD ~~requirements~~ Requirements, to provide affordable housing after taking account of such related assistance. The CA will adjust in accordance with HUD ~~requirements~~ Requirements the amount of the ~~housing assistance payments~~ Housing Assistance Payments to the Owner to compensate in whole or in part for such related assistance.

## 22. OWNER LOBBYING CERTIFICATIONS

- a. The Owner certifies, to the best of Owner's knowledge and belief, that:
  1. No Federally appropriated funds have been paid or will be paid, by or on behalf of the Owner, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of the HAP Contract, or the extension, continuation, renewal, amendment, or modification of the HAP Contract.
  2. If any funds other than Federally appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the HAP Contract, the Owner must complete and submit Standard Form-

LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

- b. This certification by the Owner is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. 1352.

~~23.~~

~~Intentionally Omitted.~~

## 23. INTENTIONALLY OMITTED

## 24. TERMINATION OF HAP CONTRACT FOR WRONGFUL SELECTION OF CONTRACT UNITS

The HAP Contract may be terminated upon at least 30 days' notice to the Owner by the CA or HUD if the CA or HUD determines that the ~~contract-units~~ Contract Units were not eligible for selection in conformity with HUD ~~requirements~~ Requirements.

## 25. NOTICES AND OWNER CERTIFICATIONS

- a. Where the Owner is required to give any notice to the CA pursuant to the HAP Contract or any other provision of law, such notice must be in writing and must be given in the form and manner required by the CA.
- b. Any certification or warranty by the Owner pursuant to the HAP Contract shall be deemed a material representation of fact upon which reliance was placed when this transaction was made or entered into.

## 26. ENTIRE AGREEMENT; INTERPRETATION

- a. The HAP Contract, including the exhibits, is the entire agreement between the CA and the Owner.
- b. The HAP Contract must be interpreted and implemented in accordance with all statutory requirements, and with all HUD ~~requirements~~ Requirements, including amendments or changes in HUD ~~requirements~~ Requirements during the term of the HAP Contract. The Owner agrees to comply with all such laws and HUD ~~requirements~~ Requirements.

## 27. RAD REHAB ASSISTANCE PAYMENTS

For any unit (1) that is vacant at any time during the period of Work pursuant to the RCC; and (2) for which the Owner is not otherwise receiving ~~housing-assistance payments~~ Housing Assistance Payments in accordance with section 4(c) of this HAP Contract; the Owner is entitled to receive a monthly RAD Rehab Assistance Payment

calculated in accordance with the provision of the RAD Notice governing RAD Rehab Assistance Payments (i.e., Notice [H 2019-09](#) PIH ~~2012-32~~ [2019-23](#) (HA), ~~REV-2, section 1.7.A.9.~~ or successor provision), in the amount of \$\_\_ per unit, as determined by HUD; shall apply to no more than \_\_\_\_\_ units in any given month; and shall commence upon the effective date of this HAP Contract, so long as the Owner is in compliance with the approved repair schedule as provided in the RCC. All RAD Rehab Assistance Payments shall end, and the Owner will cease to be entitled to any such payments, (1) on \_\_\_\_\_ ; or (2) upon actual completion of the Work, if sooner. Provided, however, during the Year of Conversion (as defined in Section 2), any RAD Rehab Assistance Payments shall not exceed amounts funded pursuant to Section ~~1.e.4(a)~~ [1.d.4.a.](#)<sup>7</sup>

## 28. CA BOARD APPROVAL

The CA's Board must approve the operating budget for the covered project annually in accordance with HUD ~~requirements~~ [Requirements](#).

## 29. PROPERTY AND LIABILITY INSURANCE

The Owner agrees that the project shall be covered at all times by commercially available property and liability insurance to protect the project from financial loss. To the extent insurance proceeds permit, or as determined feasible by the first mortgage lender, the Owner agrees to promptly restore, reconstruct, and/or repair any damaged or destroyed property of a project, except with the written approval of HUD to the contrary.

## 30. RESIDENT PROCEDURAL RIGHTS' GRIEVANCE PROCESS

The Owner and the CA must comply with the grievance process requirements in the RAD Notice (including section 1.6.C.7.ii. or successor provision) for projects converting to PBV assistance.

## 31. RESIDENT PARTICIPATION AND FUNDING

In accordance with Attachment 1B.2.B. of the RAD Notice, captioned "PBV Resident Participation and Funding," families in projects that convert to PBV assistance have the right to establish and operate resident organizations for the purpose of addressing issues related to their living environment. The Attachment details all of the requirements governing Resident Participation and Funding, with which the Owner must comply.

## 32. FLOOD INSURANCE

<sup>7</sup> *Comment: There is no Section 1.e.4.a.*

If the project is located in an area that has been identified by the Federal Emergency Management Agency as an area having special flood hazards and if the sale of flood insurance has been made available under the National Flood Insurance Program, the Owner agrees that: (1) the project will be covered, during the life of the property, by flood insurance in an amount at least equal to its development or project cost (less estimated land cost) or to the limit of coverage made available with respect to the particular type of property under the National Flood Insurance Act of 1968, whichever is less; and (2) that it will advise any prospective purchaser or transferee of the property in writing of the continuing requirement to maintain such flood insurance during the life of the property.

### 33. REPLACEMENT RESERVE REQUIREMENT

The Owner shall establish and maintain a replacement reserve in accordance with the RCC.

### 34. LABOR STANDARDS

By execution of this HAP Contract, the Owner warrants that construction or repair Work on the project that is initiated within eighteen (18) months of the effective date of the HAP Contract shall be in compliance with applicable labor standards, including Davis-Bacon wage requirements, as stated in the “Addendum to the HAP Contract—Labor Standards.” The “Addendum to the HAP Contract—Labor Standards” shall be included as an “Additional Exhibit” under Section ~~1.4.e.~~ 1.c<sup>8</sup> of the HAP Contract.

### 35. LENDER PROVISIONS

Notwithstanding anything else in this HAP Contract:

- a. The holder of any HUD-approved mortgage against the project may take action against the Owner and the project that results in the holder of the mortgage or its designee (either referred to herein as “Lender Temporary Custodian”) coming into ownership of the project or assuming the role of “Owner” under this HAP Contract. Transfer of the project or the HAP Contract from the Owner is grounds for termination of the HAP Contract assistance unless otherwise approved by HUD. HUD and CA hereby consent to a collateral assignment of this contract to any Lender Temporary Custodian and pre-approve any Lender Temporary Custodian as a temporary custodian of the project and as a new “Owner” pursuant to this HAP Contract, and continued assistance to the project pursuant to this HAP Contract, subject to the following conditions:

<sup>8</sup> *Comment: There is no Section 1.4.c of the HAP Contract.*



1. HUD and CA must receive thirty (30) days prior written notice of the transfer of the project to the Lender Temporary Custodian and the form of the documents necessary to effect such transfer.
2. In connection with the transfer, Lender Temporary Custodian must execute and deliver to HUD and CA an assumption on the HAP Contract, in such form as acceptable to HUD.
3. Such approval and consent to continue assistance pursuant to this HAP Contract is expressly limited to a period of only 90 days that commences the date of such transfer of the project, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary for Lender to find a permanent replacement Owner. Consistent with Public Law 112-55, in the event that the Lender Temporary Custodian comes into ownership of the project, the Lender Temporary Custodian shall use such interim period to identify a proposed permanent Owner determined by HUD to be capable of abiding by the HAP Contract, Use Agreement, and any and all applicable RAD program requirements. The provision of ~~housing assistance payments~~ [Housing Assistance Payments](#) to any proposed permanent replacement Owner is subject to HUD's consent.
4. Prior to a transfer of the project to a Lender Temporary Custodian, HUD may at any time by written notice to a Lender Temporary Custodian revoke the approvals given herein if HUD becomes aware of any conditions or circumstances (by way of illustration and not limitation, such conditions or circumstances may include debarment, suspension or limited denial of participation) that would disqualify or compromise the ability of Lender Temporary Custodian from acting as an interim custodian of the project pursuant to the HAP Contract.

### 36. LOW-INCOME HOUSING TAX CREDIT PROVISIONS

Notwithstanding anything else in this HAP Contract:

- a. **Notice.** As long as the equity investor identified below ("Equity Investor") is a partner or member of Owner, HUD shall endeavor as a courtesy to Equity Investor to deliver to Equity Investor a copy of any notice of default that is delivered to Owner under the terms of the HAP Contract. Use Agreement or RAD Conversion Commitment (RCC). Equity Investor's Address for such purposes is:

\_\_\_\_\_  
 \_\_\_\_\_



- 
- 
- b. **Right to Cure.** Any cure of any default by Owner under the HAP Contract, Use Agreement or RCC offered by Equity Investor shall be treated the same as if offered by Owner.
- c. **Transfer of Investor Members/Partners.** Equity Investor, and each successor member or partner in Owner, may transfer its interest in the Owner without prior written consent of HUD if:
1. HUD receives prior written notice of such transfer; and
  2. HUD receives executed copies of any and all documents necessary to effect such transfer, including any and all amendments to Owner's organizational documents.
- d. **Removal of General Partner/Managing Member**
1. HUD and CA have pre-approved the replacement of the Owner's general partner or managing member with an affiliate of Equity Investor, or any successor equity investor ("Interim Replacement GP/MM") as a temporary replacement general partner/managing member of the Owner, in the event Owner's general partner or managing member is removed for cause in accordance with Owner's organizational documents.
  2. Interim Replacement GP/MM may remove Owner's general partner or managing member in accordance with the Owner's organizational documents without further written consent from HUD or CA and HUD and CA shall continue assistance to the project in accordance with the HAP Contract, provided that Interim Replacement GP/MM provide HUD and CA with prior written notice of such replacement and HUD and CA receive executed copies of any and all documents necessary to effect such replacement.
  3. Such approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary to provide for a permanent replacement of the general partner or managing member. After such interim period, any proposed permanent replacement for the Owner's general partner or managing member is subject to HUD's consent.

4. HUD may at any time by written notice to Equity Investor or any successor revoke the approvals given herein if HUD becomes aware of any conditions or circumstances that would disqualify or compromise the ability of Interim Replacement GP/MM from acting as an interim general partner/managing member pursuant to this HAP Contract.

### 37. CONTINUATION OF HAP CONTRACT

Except where otherwise approved by HUD, this HAP Contract shall continue in effect and ~~housing assistance payments~~ Housing Assistance Payments will continue in accordance with the terms of the HAP Contract in the event: (1) Of assignment, sale, or other disposition of this HAP Contract; (2) Of foreclosure, including foreclosure by HUD; (3) Of assignment of the mortgage or deed in lieu of foreclosure; (4) HUD or the CA takes over possession, operation or ownership; or (5) The Owner prepays the mortgage.

### 38. ALTERNATIVE REQUIREMENTS

- a. Owner Proposal Selection Procedures. Projects will be selected for assistance in accordance with the provisions in the RAD Notice. Therefore, 24 C.F.R. § 983.51 does not apply.
- b. Percentage Limitation. Section 8(o)(13)(B) of the 1937 Act and 24 C.F.R. § 983.6 do not apply to assistance provided under RAD.
- c. Consistency with PHA Plan and Other Goals. Section 8(o)(13)(ii) of the 1937 Act and 24 C.F.R. §§ 983.57(b)(1) and (c) do not apply.

**Signatures:**  
**Contract Administrator**

**Owner**

Print or Type Name of Contract Administrator

Print or Type Name of Owner

Signature

Signature

Print or Type Name and Title of Signatory

Print or Type Name and Title of Signatory

Date (mm/dd/yyyy)

Date (mm/dd/yyyy)

OMB Approval No. 2577-0169

(Exp. 04/30/2018)

OMB Approval No. No. 2502-0612

(Exp. 04/30/2020)

**Part I**  
**PBRA Housing Assistance Payments**  
**Contract for the Conversion of Public**  
**Housing to Project-Based Section 8**  
(Rental Assistance Demonstration  
Component 1)

**U.S. Department of Housing and**  
**Urban Development**  
**Office of Multifamily Housing Programs**

Public reporting burden for this collection of information is estimated to average 30 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and to dictate the terms under which such payments will be made. There are no assurances of confidentiality.

Type of Financing at Time of Conversion:	Section 8 Project Number:	FHA Project Number (if applicable):

This contract is a housing assistance payments contract (HAP Contract) between the United States of America, acting through the Department of Housing and Urban Development (HUD), and

(Owner). The HAP Contract is subject to Notice PIH 2012-32 (HA), as revised or amended from time to time (or any successor document) ("RAD Notice"), including 24 C.F.R. Part 880 (as in effect November 5, 1979, as amended), as modified and as published in Appendix I of Notice PIH 2012-32 (HA).

**1.1 Statutory Authority, Purpose of HAP Contract, and HAP Contract Terminology.**

- (a) **Statutory Authority.** The HAP Contract is entered pursuant to the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 673 – 675 (Nov. 18, 2011); as amended by the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 635 (Jan. 17, 2014); as further amended by the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2757 – 2758 (Dec. 6, 2014), as further amended from time to time; section 8 of the United States Housing Act of 1937 (Act), 42 U.S.C. 1437 et seq.; and the Department of Housing and Urban Development Act, 42 U.S.C. 3531 et seq.
- (b) **Purpose.** The purpose of the HAP Contract is to effectuate the conversion of Public Housing to a Multifamily Housing project with Project-Based Rental Assistance under section 8 of the Act.
- (c) **Terminology.** Terms in the HAP Contract that are not otherwise defined herein have the definition given in the RAD Notice, including those terms defined in Appendix I of the RAD Notice setting forth 24 C.F.R. Part 880 except as struck in part. Terms that are not defined in the RAD Notice (including Appendix I) shall have the meanings given in 24 C.F.R. Part 5, which applies pursuant to 24 C.F.R. § 880.104(d). In addition, "Year of Conversion" shall mean the time from the effective date of the HAP Contract through the end of that calendar year; "First Full Year" shall mean the first full calendar year of the HAP Contract beginning the year after the calendar year of the effective date.<sup>1</sup>

<sup>1</sup> To clarify, in cases in which a project converts in December and the effective date of the Contract is January 1, the Year of the Conversion is the calendar year starting on the effective date and the First Full Year begins the

## **1.2 Scope; Assignability of HAP Contract; and HUD Requirements.**

- (a) **Scope of HAP Contract.** The HAP Contract consists of Part I, Part II, and the exhibits identified in section 1.4(d) of the HAP Contract, which are hereby incorporated into and made a part of the HAP Contract.
- (b) **Assignability of HAP Contract.** HUD may assign the HAP Contract at any time to a public housing agency (PHA) for the purpose of PHA administration of the HAP Contract to the extent permitted under any Annual Contributions Contract (ACC) between HUD and the PHA. Unless and until HUD assigns the HAP Contract to a PHA, HUD shall be the Contract Administrator (CA) and, in that capacity, a party to the HAP Contract. Upon any assignment of the HAP Contract by HUD to a PHA, the PHA shall assume all the contractual obligations of HUD under the HAP Contract (or of any PHA to which HUD had previously assigned the HAP Contract) and shall replace HUD (or any PHA to which HUD had previously assigned the HAP Contract) as the CA and as a party to the HAP Contract during the ACC term.
- (c) **HUD Requirements.** The HAP Contract shall be construed and administered in accordance with the RAD Notice. With the exception of the provisions of 24 C.F.R. Part 880 and section 8 of the Act that are identified in Appendix I and Appendix II of the RAD Notice, respectively, as inapplicable, the HAP Contract shall further be construed and administered in accordance with all statutory requirements and all HUD regulations and other requirements, including any amendments to and/or changes in statutory requirements, HUD regulations (including 24 C.F.R. Part 880), and other requirements. However, any changes in HUD requirements, except to the extent required by statute, that are inconsistent with the provisions of sections 2.5(a)(1) or 2.8 shall not be applicable.
- (d) **Statutory Changes during Term.** If any statutory change during the term of the HAP Contract is inconsistent with section 2.5(a)(1) or 2.8 of the HAP Contract, and if HUD determines and so notifies the Contract Administrator and the Owner, that the Contract Administrator is unable to carry out the provisions of such sections because of such statutory change, then the Contract Administrator or the Owner may terminate the HAP Contract upon notice to the other party. Notwithstanding such termination, the project shall remain subject to the RAD Use Agreement encumbering the property on which the project is located.

## **1.3 Effective Date, Initial Term, and Funding For Initial Term of HAP Contract.**

- (a) **Effective Date and Initial Term.** The HAP Contract begins on \_\_\_\_\_ and shall run for an initial term of twenty (20) years.
- (b) **Funding for Initial Term.**
- (1) **Funding for the Year of Conversion.** In the Year of Conversion (as defined in 1.1(c)), the HAP Contract shall be funded only from public housing amounts obligated prior to the effective date of the HAP Contract, and from any additional public housing amounts that HUD obligates in full or in part, subject to the availability of sufficient appropriations, for the remainder of the calendar year in which the HAP Contract becomes effective. Owner acknowledges that this amount for the first year may be less than the contract rent for subsequent years.
- (2) **Funding for the Remainder of the Initial Term.** Starting in the First Full Year (as defined in section 1.1(c)) and in each subsequent year in which the HAP Contract is effective, subject to the availability of sufficient appropriations, HUD will obligate funding in accordance with this HAP Contract and provide the Owner written notification of (i) the amount of such additional funding, (ii) the approximate period of time within the HAP Contract term to which it will be applied.

## **1.4 Fiscal Year, Project Description, Statement of Services, and Exhibits.**

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year following.

- (a) **Fiscal Year**. The ending date of each Fiscal Year shall be

\_\_\_\_\_.  
(Insert March 31, June 30, September 30, or December 31, as approved by HUD.) The Fiscal Year for the project shall be the 12-month period ending on this date. However, the first Fiscal Year for the project is the period beginning with the effective date of the Contract and ending on the last day of the Fiscal Year. The project must comply with 24 CFR part 5, subpart H, as amended, revised, or modified by HUD.

- (b) **Project Description** (Print or type the street address(es) and the number of units by bedroom size.).

(c) **Statement of Services, Maintenance and Utilities Provided by the Owner.**

- (1) Services and Maintenance (check those included in rent):

- |   |  |  |
|---|--|--|
| <input type="checkbox"/> Parking            | <input type="checkbox"/> Trash Removal | <input type="checkbox"/> Nursing Care  |
| <input type="checkbox"/> Laundry Facilities | <input type="checkbox"/> Swimming Pool | <input type="checkbox"/> Tennis Courts |
| <input type="checkbox"/> Linen/Maid Service |  |  |
| <input type="checkbox"/> _____              |  |  |
| <input type="checkbox"/> _____              |  |  |
| <input type="checkbox"/> _____              |  |  |

- (2) Equipment in Unit (check those included in rent):

- |  |                                      |  |
|--|--------------------------------------|--|
| <input type="checkbox"/> Range           | <input type="checkbox"/> Dishwasher  | <input type="checkbox"/> Kitchen Exhaust Fan |
| <input type="checkbox"/> Refrigerator    | <input type="checkbox"/> Carpet      | <input type="checkbox"/> Ceiling Fans        |
| <input type="checkbox"/> Air Conditioner | <input type="checkbox"/> Drapes      | <input type="checkbox"/> _____               |
| <input type="checkbox"/> Disposal        | <input type="checkbox"/> Mini Blinds | <input type="checkbox"/> _____               |

- (3) Utilities (Check those included in rent. For each item, even those not included in rent, enter E, F, or G on line beside that item; E = electric; G = gas; F = fuel oil or coal):

- |                                  |                                    |                                       |
|----------------------------------|------------------------------------|---------------------------------------|
| <input type="checkbox"/> Heating | <input type="checkbox"/> Hot Water | <input type="checkbox"/> Lights, etc. |
| <input type="checkbox"/> Cooling | <input type="checkbox"/> Cooking   | <input type="checkbox"/> Water/Sewer  |

(4) Other:

(d) **Exhibits.** The exhibits to the HAP Contract consist of the following:

- (1) **Exhibit 1A:** Initial Schedule of Contract Units and Contract Rents;
- (2) **Exhibit 1B:** Revised Schedule of Contract Units and Contract Rents (if applicable as the result of Tenant-Paid Utility Savings);
- (3) **Exhibit 2:** Affirmative Fair Housing Marketing Plan; and
- (4) **Exhibit 3:** Addendum to the HAP Contract—Labor Standards<sup>2</sup>

### **1.5 Contract Rent Levels.**

- (a) **Initial Contract Rent Levels.** The initial Contract Rent for each contract unit shall be as stated in Exhibit 1A, which is attached to and made a part of the HAP Contract. Initial Contract Rents do not take effect until the First Full Year (as defined in Section 1.1(c)). As of the beginning of the First Full Year, and unless the Contract Rents are revised in accordance with section 1.5(b), the Contract Rent for each bedroom size (i.e., number of bedrooms) shall be the initial Contract Rent as reflected in Exhibit 1A.
- (b) **Revised Contract Rent Levels.** If applicable as the result of Tenant-Paid Utility Savings in accordance with the provision of the RAD Notice governing such savings for Project-Based Rental Assistance Conversions (i.e., Attachment 1C of the RAD Notice), or successor provision, the revised Contract Rent for each contract unit shall be as stated in Exhibit 1B, which is attached to and made a part of the HAP Contract, and which shall be adjusted annually, or continue to be adjusted annually, in the manner prescribed in section 2.8 of the HAP Contract. The revised Contract Rents shall become effective on the first day of the month following the date on which HUD approves the cost certification submitted by the Owner after completion of the Work (as defined and set forth in the RAD Conversion Commitment (RCC)).
- (c) **Year of Conversion Contract Rent.** During the Year of Conversion (as defined in Section 1.1(c)), the Owner is due subsidy in the amount described in Section 1.3(b)(1). Contract Rents shall equal such subsidy amounts plus any portions payable by Families in accordance with HUD regulations.

### **1.6 Contract Administrator's Obligation to Offer to Renew and Owner's Obligation to Accept Offers to**

**Renew.** The Contract Administrator and the Owner acknowledge and agree that upon expiration of the initial term of the HAP Contract, and upon expiration of each renewal term of the HAP Contract, the Contract Administrator shall offer to renew the HAP Contract and the Owner shall accept each offer to renew the HAP Contract, subject to the terms and conditions applicable at the time of each offer, and further subject to the availability of appropriations for each year of each such renewal.

### **1.7 Owner's Obligation to Operate Project.** The Owner agrees to operate the project for the full initial term of the HAP Contract specified in section 1.3(a) and for each renewal term in accordance with the HAP

<sup>2</sup> *Comment: Per comments on the Addendum to the HAP Contract – Labor Standards, it should receive a HUD form number in addition to an OMB control number so that it is easily identifiable. For the avoidance of doubt, both the HUD form number and OMB control number should be cross-referenced here, in addition to the document name.*

Contract, the RAD Notice, all statutory requirements, and all HUD regulations and other requirements, including any amendments to and/or changes in statutory requirements, HUD regulations (including 24 C.F.R. Part 880), and other requirements.

### **1.8 Flood Insurance Applicability.**

- ☐ If the preceding box is checked, the Owner agrees that the project will be covered, during the life of the property, regardless of transfer of ownership, by flood insurance 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, whichever is less.

### **Signature Page**

**Warning:** 18 U.S.C. 1001 provides, among other things, that whoever knowingly and willfully makes or uses any writing containing any materially false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of the executive branch of the Government of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

As evidenced by the signature below of their authorized representative, the Owner and HUD hereby agree to the terms of this HAP Contract, the scope of which is set forth in section 1.2(a) of the HAP Contract.

#### **Owner**

Name of Owner (Print or Type)

---

By: \_\_\_\_\_  
Signature of authorized representative

Name of Signatory (Print or Type)

---

Official Title (Print or Type)

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Date (mm/dd/yyyy): \_\_\_\_\_

United States of America  
Secretary of Housing and Urban Development

By: \_\_\_\_\_  
Signature of authorized representative

Name of Signatory (Print or Type)

---



Official Title (Print or Type)

---

Date (mm/dd/yyyy): \_\_\_\_\_

**Exhibit 1A**

### Initial Schedule of Contract Units and Contract Rents

**Exhibit 1B**

**Revised Schedule of Contract Units and Contract Rents (if applicable)**  
*[after HUD-Approved Utility Allowances, as revised]*

Number of Contract Units	Number of Bedrooms	Contract Rent	Utility Allowance	Gross Rent

**Exhibit 2**

**Affirmative Fair Housing Marketing Plan**

Placeholder for “Addendum to the HAP Contract—Labor Standards”

**Part II**  
**PBRA Housing Assistance Payments**  
**Contract Rental Assistance Demonstration**  
**(RAD) for the Conversion of Public Housing**  
**to**  
**Project-Based Section 8 (Component 1)**

**U.S. Department of Housing and**  
**Urban Development**  
**Office of Multifamily Housing Programs**

Public reporting burden for this collection of information is estimated to average 30 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and to dictate the terms under which such payments will be made. There are no assurances of confidentiality.

Section 8 Project Number:	FHA Project Number (if applicable):
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**2.1 OWNER'S WARRANTIES.**

- (a) **Legal Capacity.** The Owner warrants that it has the legal right to execute this HAP Contract and to lease dwelling units covered by this HAP Contract.
- (b) **Condition of Property.** The Owner warrants that the rental units to be leased by the Owner under the HAP Contract are in decent, safe and sanitary condition (as defined and determined in accordance with HUD regulations and procedures) or will be in such condition no later than the date of completion of the Work (including any environmental mitigation measures), as indicated in Exhibit D to the RAD Conversion Commitment (RCC), which will be on \_\_\_\_\_. The ~~owner~~ Owner warrants that the rental units, common areas, and routes comply with any applicable accessibility requirements, including under the Fair Housing Act, Section 504 of the Rehabilitation Act, and Titles II or III of the Americans with Disabilities Act. The Owner further warrants that it will remedy any defects or omissions covered by this warranty if called to its attention within 12 months of the date of completion of Work indicated in the previous sentence.
- (c) **Labor Standards.** By execution of the HAP Contract, the Owner warrants that construction or repair work on the project that is initiated within eighteen (18) months of the effective date of the HAP Contract shall be in compliance with applicable labor standards, including Davis-Bacon wage requirements as stated in Exhibit 4: Addendum to the HAP Contract – Labor Standards.

**2.2 FAMILIES TO BE HOUSED; WAITING LIST; CONTRACT ADMINISTRATOR (CA) ASSISTANCE.**

- (a) **Families to Be Housed.** The Contract Units are to be leased by the Owner to eligible Low-Income Families (Families) for occupancy by such Families solely as private dwellings and as their principal place of residence. (See also section 2.11.)
- (b) **Waiting List.** The Owner shall establish the waiting list for the project in accordance with the provisions of the RAD Notice governing the establishment of the waiting list for conversions from public housing to Section 8 Project-Based Rental Assistance (i.e., Notice PIH 2012-32 2019-23 (HA), REV-2REV-4, section 4.7.C.3. or successor provisionnotice).
- (c) **CA Assistance.**

- (1) The CA hereby agrees to make housing assistance payments on behalf of Families for the Contract Units, to enable the Families to lease decent, safe, and sanitary housing pursuant to section 8 of the Act.
- (2) If there is a Utility Allowance and if the Allowance exceeds the total Family contribution, the Owner shall pay the Family the amount of the excess. The CA will pay funds to the Owner in trust solely for the purpose of making this payment. Any pledge by the Owner of payments properly payable under this HAP Contract shall not be construed to include payments covered by this paragraph (c)(2). (See 24 C.F.R. § 880.501(e).)

**2.3 RESIDENT PROCEDURAL RIGHTS; GRIEVANCE PROCESS.** The Owner agrees to comply with the provisions of the RAD Notice governing resident procedural rights including the grievance process, for conversions from public housing to Section 8 Project-Based Rental Assistance (i.e., Notice PIH ~~2012-32-2019-23~~ (HA), ~~REV-2, section 1.7.B.6., including section 1.7.B.6.ii.~~ [REV-4](#), or successor ~~provision~~ [notice](#)).

**2.4 RESIDENT PARTICIPATION AND FUNDING.** In accordance with the Attachment to the RAD Notice, captioned "PBRA: Resident Participation and Funding" (i.e., ~~Notice~~ PIH ~~2012-32-2019-23~~ (HA), ~~REV-2~~ [REV-4](#), ~~Attachment 1B-2A~~ or successor ~~attachment or provision~~ [notice](#)), families in projects that convert to assistance under this HAP Contract have the right to establish and operate a resident organization in accordance with 24 C.F.R. Part 245. The Attachment details all of the requirements governing Resident Participation and Funding, with which the Owner must comply.

## **2.5 HOUSING ASSISTANCE PAYMENTS TO OWNER.**

### **(a) Housing Assistance Payments on Behalf of Families.**

- (1) Housing assistance payments shall be paid to the Owner for units under lease for occupancy by Families in accordance with the HAP Contract. The housing assistance payment will cover the difference between the Contract Rent and that portion of the rent payable by the Family as determined in accordance with the HUD-established schedules and criteria. In the Year of Conversion (as defined in Section 1.1(c)), housing assistance payments shall equal amounts funded pursuant to Section 1.3(b)(1).
- (2) The amount of housing assistance payment payable on behalf of a Family and the amount of rent payable by the Family shall be subject to change by reason of changes in Family Income, Family composition, extent of exceptional medical or other unusual expenses or program rules in accordance with the HUD-established schedules and criteria; or by reason of a change in any applicable Utility Allowance approved or required by the CA. Any such change shall be effective as of the date stated in a notification of the change to the Family, which need not be at the end of the Lease Term.

- (b) **RAD Rehab Assistance Payments.** For any unit (1) that is vacant at any time during the period of Work pursuant to the RCC; and (2) for which the Owner is not otherwise receiving housing assistance payments in accordance with section 2.5(a), 2.5(c), 2.5(d), or 2.5(e) of this HAP Contract; ~~the~~ the Owner is entitled to receive a monthly RAD Rehab Assistance Payment calculated in accordance with the provision of the RAD Notice governing RAD Rehab Assistance Payments (i.e., Notice [H 2019-09](#) PIH ~~2012-32-2019-23~~ (HA), ~~REV-2, section 1.7.A.9.~~ or successor provision), in the amount of \$\_\_\_\_\_ per unit, as determined by HUD; shall apply to no more than \_\_\_\_\_ units in any given month; and shall commence upon the effective date of the HAP Contract, so long as the Owner is in compliance with the approved repair schedule as provided in the RCC. All RAD Rehab Assistance Payments shall end, and the Owner will cease to be entitled to any such payments, (1) on \_\_\_\_\_; or (2) upon actual completion of the Work, if sooner. Provided, however, during the Year of Conversion (as defined in Section 1.1(c)), any RAD Rehab Assistance Payments shall not exceed amounts funded pursuant to Section 1.3(b)(1).

- (c) **Vacancies During Rent-Up.** If a Contract Unit is not leased as of the effective date of the HAP Contract, the Owner is entitled to housing assistance payments in the amount of 80 percent of the HAP Contract Rent

for the unit for a vacancy period not exceeding 60 days from the effective date of the HAP Contract, provided that the Owner (1) commenced marketing; (2) has taken and continues to take all feasible actions to fill the vacancy, including, but not limited to, contacting applicants on its waiting list, if any, and advertising the availability of the unit in a manner specifically designed to reach eligible Families; and (3) has not rejected any eligible applicant, except for good cause acceptable to the CA. Provided, however, that during the Year of Conversion (as defined in Section 1.1(c)), payments made to the Owner ~~equal~~ shall not exceed amounts funded pursuant to Section 1.3(b)(1).

- (d) **Vacancies after Rent-Up.** Provided that, during the Year of Conversion (as defined in Section 1.1(c)), payments made to the Owner shall not exceed amounts funded pursuant to Section 1.3(b)(1), if an eligible Family vacates a unit, the Owner is entitled to housing assistance payments in the amount of 80 percent of the Contract Rent for the first 60 days of vacancy if the Owner:
- (1) Certifies that it did not cause the vacancy by violating the lease, the HAP Contract or any applicable law or by moving a Family to another unit;
  - (2) Notified the CA of the vacancy or prospective vacancy and the reasons for it immediately upon learning of the vacancy or prospective vacancy;
  - (3) Has fulfilled and continues to fulfill the requirements specified in paragraphs (b)(1), (2), and (3) of this section; and
  - (4) Certifies that any eviction resulting in a vacancy was carried out in compliance with section 2.10.
- (e) **Vacancies for Longer than 60 Days.** If an assisted unit continues to be vacant after the period specified in paragraph (c) or (d) of this section, the Owner may apply to receive additional payments for the vacancy period in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit (see Exhibit 2) for up to 12 additional months for the unit if:
- (1) The unit was in decent, safe and sanitary condition during the vacancy period for which payments are claimed;
  - (2) The Owner has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate; and
  - (3) The Owner has demonstrated to the satisfaction of HUD that:
    - (i) For the period of vacancy, the project is not providing the Owner with revenues at least equal to project expenses (exclusive of depreciation), and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit; and
    - (ii) The project can achieve financial soundness within a reasonable time.
- (f) **Prohibition of Double Compensation for Vacancies.** The Owner is not entitled to payments for vacant units to the extent it can collect for the vacancy from other sources (such as security deposits, other amounts collected from the Family, payments from the CA under section 2.9(b), and governmental payments under other programs). If the Owner collects any of the Family's share of the rent for a vacancy period in an amount which, when added to the vacancy payment, results in more than the Contract Rent, the excess must be reimbursed as HUD directs.
- (g) **CA Not Obligated for Family Rent.** The CA has not assumed any obligation for the amount of rent payable by any Family or the satisfaction of any claim by the Owner against any Family other than in accordance with section 2.9(b) of this HAP Contract. The financial obligation of the CA is limited to making housing assistance payments on behalf of Families in accordance with this HAP Contract.
- (h) **Owner's Monthly Requests for Payments.**



- (1) The Owner shall submit monthly requests to the CA or as directed by the CA for housing assistance payments. Each request shall set forth: (i) the name of each Family and the address and/or number of the unit leased by the Family; (ii) the address and/or the number of each unit, if any, not leased to Families for which the Owner is claiming payments; (iii) the Contract Rent as set forth in Exhibit 1 for each unit for which the Owner is claiming payments; (iv) the amount of rent payable by the Family leasing the unit (or, where applicable, the amount to be paid the Family in accordance with section 2.2(c)(2)); and (v) the total amount of housing assistance payments requested by the Owner.
- (2) Each of the Owner's monthly requests shall contain a certification by it that to the best of its knowledge and belief (i) the dwelling units are in decent, safe, and sanitary condition, (ii) all the other facts and data on which the request for funds is based are true and correct, (iii) the amount requested has been calculated in accordance with the provisions of this HAP Contract and is payable under the HAP Contract, (iv) none of the amount claimed has been previously claimed or paid under this HAP Contract, and (v) the Owner has not received and will not receive any payments or other consideration from the Family, the PHA (where the CA is a PHA), HUD, or any other public or private source for the unit beyond that authorized in this HAP Contract and the lease.
- (3) If the Owner has received an excessive payment, the CA, in addition to any other rights to recovery, may deduct the amount from any subsequent payment or payments.
- (4) The Owner's monthly requests for housing assistance payments are subject to penalty under 18 U.S.C. 1001, which provides, among other things, that whoever knowingly and willfully makes or uses any writing containing any materially false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of the executive branch of the Government of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

## **2.6 MAINTENANCE, OPERATION AND INSPECTION.**

- (a) **Maintenance and Operation.** The Owner agrees to maintain and operate the Contract Units, unassisted units, if any, and related facilities to provide decent, safe, and sanitary housing, including the provision of all the services, maintenance and utilities set forth in section 1.4(c), in accordance with HUD's Uniform Physical Condition Standards and inspection Requirements, currently codified in 24 C.F.R. Part 5 Subpart G, and HUD's Uniform Physical Condition Standards for Multifamily Properties, currently codified in 24 C.F.R. Part 200 Subpart P. The Owner also agrees to comply with the lead-based paint regulations at 24 C.F.R. Part 35. If the CA determines that the Owner is not meeting one or more of these obligations, the CA shall have the right to take action under section 2.21(b).
- (b) **Inspection.**
  - (1) Prior to occupancy of any Contract Unit by a Family, the Owner and the Family shall inspect the unit and both shall certify that they have inspected the unit and have determined it to be decent, safe, and sanitary. The Owner shall keep copies of these reports on file for at least three years.
  - (2) The CA shall inspect or cause to be inspected the Contract Units and related facilities at least annually, or as otherwise directed by HUD, and at such other times (including prior to initial occupancy and rerenting of any unit) as may be necessary to ensure that the Owner is meeting its obligation to maintain the units in decent, safe, and sanitary condition including the provision of the agreed-upon utilities and other services. The CA shall take into account complaints by occupants and any other information coming to its attention in scheduling inspections and shall notify the Owner and the Family of its determination.
- (c) **Units Not Decent, Safe, and Sanitary.**
  - (1) If the CA notifies the Owner that it has failed to maintain a dwelling unit in decent, safe, and sanitary condition and the Owner fails to take corrective action within the time prescribed in the notification, the

CA may exercise any of its rights or remedies under the HAP Contract, including reduction or suspension of housing assistance payments, even if the Family continues to occupy the unit. If, however, the Family wishes to be rehoused in another dwelling unit with section 8 assistance and the CA does not have other section 8 funds for such purposes, the CA may use the abated housing assistance payments for the purpose of rehousing the Family in another dwelling unit. If the Family continues to occupy the unit, it will do so in accordance with the terms of its lease, including the termination date and amount of rent payable by the Family.

(2) The foregoing provision, section 2.6(c)(1), shall be construed and applied in accordance with section 2.1(b) of the HAP Contract.

- (d) **Notification of Abatement.** Any reduction or suspension of housing assistance payments shall be effective as provided in written notification to the Owner. The Owner shall promptly notify the Family of any such abatement.
- (e) **Overcrowded and Underoccupied Units.** Where the CA determines a unit is larger or smaller than appropriate for an eligible Family, the Owner agrees to correct the situation in accordance with HUD regulations and requirements in effect at the time of the determination.

## **2.7 FINANCIAL REQUIREMENTS.**

(a) **Submission of Financial and Operating Statements.**

The Owner agrees to comply with HUD's Uniform Financial Reporting Standards, currently codified in 24 C.F.R. Part 5 Subpart H.

(b) **Use of Project Funds.**

- (1) Project funds must be used for the benefit of the project, to make mortgage payments, to pay operating expenses, to make required deposits to the replacement reserve in accordance with section 2.7(c) of the HAP Contract, and to provide distributions to the Owner as provided in section 2.7(b)(2) of the HAP Contract.
- (2) For the life of the HAP Contract, Surplus Cash may be distributed to the Owner only at the end of each fiscal year of project operation following the effective date of the HAP Contract after all project expenses have been paid, or funds have been set aside for payment, and all reserve requirements have been met.

(c) **Replacement Reserve.**

- (1) The Owner shall establish and maintain a replacement reserve in an interest-bearing account to aid in funding extraordinary maintenance and repair and replacement of capital items in accordance with the RCC.
- (i) The obligation of the Owner to deposit into the replacement reserve shall commence in accordance with the RCC. In accordance with 24 CFR 880.602(a)(1)(ii), the amount of the deposit to the replacement reserve will be adjusted each year ~~at least by the amount of the automatic annual adjustment factor (see 24 C.F.R. Part 888) and may be increased by such additional amounts as required in connection with HUD-approved financing~~ in accordance with the RCC.<sup>1</sup>

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<sup>1</sup> **Comment:** See comments provided to the RCC which would incorporate an escalation factor.

- (ii) The reserve must be built up to and maintained at a level determined by HUD to be sufficient to meet projected requirements. Should the reserve achieve that level, the rate of deposit to the reserve may be reduced with the approval of HUD.
  - (iii) All earnings including interest on the reserve must be added to the reserve.
  - (iv) Funds will be held by the mortgagee and may be drawn from the reserve account and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.
  - (v) In the event the project is not subject to any financing, funds will be held by the Owner, and may be drawn from the reserve account and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.
  - (vi) The Owner shall not fund extraordinary maintenance and repair and/or replacement of capital items out of project funds without the prior written consent of HUD.
- (2) In the case of HUD-insured projects, the provisions of ~~this paragraph (c) will apply instead of the otherwise applicable mortgage insurance requirements~~ [the FHA Regulatory Agreement shall apply.](#)<sup>2</sup>

## **2.8 RENT ADJUSTMENTS.**

- (a) **Operating Cost Adjustment Factor.** Contract Rents will be adjusted annually by HUD's Operating Cost Adjustment Factor (OCAF) at each Anniversary of the HAP Contract, subject to the availability of appropriations for each year of the HAP Contract term and provided that the OCAF-adjusted rent potential shall not exceed the Maximum Rent. The Maximum Rent is equal to the greater of (i) 140% of the Fair Market Rent (FMR) potential based on the FMRs in effect at such time for the FMR area in which the project is located, less Utility Allowances; or (ii) the comparable market rent potential for the market area, as demonstrated by a Rent Comparability Study (RCS) prepared in accordance with HUD requirements and procured and paid for by the Owner. If the Maximum Rent exceeds the OCAF-adjusted rent potential, the Contract Rents shall be adjusted by the OCAF. If the OCAF-adjusted rent potential exceeds the Maximum Rent, the adjusted rents shall be limited by the Maximum Rent.
- (b) **Exception to Application of Maximum Rent.** When an RCS has been used to establish the initial Contract Rents or to justify an OCAF-adjusted rent potential in excess of 140% of the Fair Market Rent potential any time during the term of the HAP Contract, for the next four annual rent adjustments, the Maximum Rent shall not apply and the Contract Rents shall be adjusted by the OCAF.
- (c) **Terminology.** For purposes of this section 2.8, the term "OCAF-adjusted rent potential" means the sum of all OCAF-adjusted Contract Rents for all units under the HAP Contract; the term "Fair Market Rent potential" means the sum of all fair market rents for all units under the HAP Contract; and the term "comparable market rent potential" means the sum of all comparable market rents for all units under the HAP Contract.

## **2.9 MARKETING AND LEASING OF UNITS.**

- (a) **Compliance with Equal Opportunity Requirements.** Marketing of units and selection of Families by the Owner shall be in accordance with the Owner's HUD-approved Affirmative Fair Housing Marketing Plan (Exhibit 3 to this HAP Contract) and with all regulations relating to fair housing advertising. Projects shall be managed and operated without regard to race, color, religion, sex, disability, familial status or national origin.

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<sup>2</sup> [Comment: Revised in order to comply with requirements as set forth in the RAD Notice \(H 2019-09 PIH2019-23 \(HA\), page 73\) which requires, "For FHA transactions, Replacement Reserves shall be maintained in accordance with the FHA Regulatory Agreement."](#)

(b) **Security Deposits.** The Owner agrees to comply with applicable section 8 regulations and other requirements, as revised from time to time, regarding security deposits and to comply with all State and local law.

(c) **Eligibility, Selection and Admission of Families.**

- (1) The Owner shall be responsible for determination of eligibility of applicants, selection of Families from among those determined to be eligible, computation of the amount of housing assistance payments on behalf of each selected Family and of total Family contributions and recordkeeping in accordance with applicable HUD regulations and requirements.
- (2) The Owner shall not charge any applicant or assisted Family any amount in excess of the total Family contribution except as authorized by HUD.
- (3) Except for initial residents at the time of conversion, in the renting of the Contract Units, the Owner must comply with the income eligibility requirements of section 16(c)(1) of the Act [42 U.S.C. § 1437n(c)(1)] and 24 C.F.R. § 5.653(d)(1). The Owner must further comply with the income targeting requirements of section 16(c)(3) of the Act [42 U.S.C. § 1437n(c)(3)] and 24 C.F.R. § 5.653(c). Sections 16(c)(4) – (6) of the Act [42 U.S.C. § 1437n(c)(4) – (6)] shall also apply.
- (4) The Lease entered into between the Owner and each selected Family shall be on the form of Lease approved by HUD.
- (5)
  - (i) The Owner shall make a reexamination of Family income, composition, and the extent of medical or other unusual expenses incurred by the Family at least as often as required by HUD regulations or other requirements, and appropriate redeterminations shall be made by the Owner of the amount of Family contribution and the amount of housing assistance payment, all in accordance with applicable HUD regulations and requirements.
  - (ii) If a Family reports a change in income or other circumstances that would result in a **decrease change** of total Family contribution between regularly scheduled reexaminations, the Owner, upon receipt of verification of the change, must promptly make appropriate adjustments in the total Family contribution. The Owner may require in its lease that Families report increases in income or other changes between scheduled reexaminations.
  - (iii) A Family's eligibility for housing assistance payments continues until the total Family contribution equals the **total housing expense contract rent plus utility allowance**<sup>3</sup> for the unit it occupies. The termination of eligibility at this point will not affect the Family's other rights under the lease nor preclude resumption of payments as a result of later changes in income or other circumstances during the term of this HAP Contract.
- (6) Where fewer than 100 percent of the units in the project are covered by this HAP Contract, assisted Families shall be dispersed throughout. At initial rent-up, the Owner shall lease the units identified in Exhibit 1 to eligible Families. Thereafter, the Owner may lease other units of appropriate size and type to eligible Families in accordance with Exhibit 1.
- (7) The Owner shall maintain as confidential all information relating to section 8 applicants and assisted Families, the disclosure of which would constitute an unwarranted invasion of personal privacy.

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<sup>3</sup> **Comment: Total Housing Expense is not a defined term.**

- (8) The project's Affirmative Fair Housing Marketing Plan (Exhibit 3) including any admissions preferences for which applicable guidance or regulations require prior HUD approval (e.g., residency preferences, marketing and outreach policies and strategies) must be approved by HUD before they are implemented.
- (d) **Rent Redetermination after Adjustment in Utility Allowance.** In the event that the Owner is notified of a CA determination approving or requiring an adjustment in the Utility Allowance applicable to any of the Contract Units, the Owner shall promptly make a corresponding adjustment in the amount of rent to be paid by the affected Families and the amount of housing assistance payments.
- (e) **Processing of Applications and Complaints.** The Owner shall process applications for admission, notifications to applicants, and complaints by applicants in accordance with applicable HUD and PHA regulations (where the CA is a PHA), and requirements and shall maintain records and furnish such copies or other information as may be required by HUD or the PHA.
- (f) **Review: Incorrect Payments.** In making housing assistance payments to Owners, the PHA (where the CA is a PHA) or HUD will review the Owner's determinations under this section. If, as a result of this review, or other reviews, audits or information received by the PHA or HUD at any time, it is determined that the Owner has received improper or excessive housing assistance payments, the PHA or HUD shall have the right to deduct the amount of such overpayments from any amounts otherwise due the Owner, or otherwise effect recovery.

**2.10 Termination of Tenancy or Section 8 Assistance by the Owner.** The Owner agrees not to terminate any tenancy of or assistance on behalf of an assisted Family except in accordance with all HUD regulations and other requirements in effect at the time of the termination, including the provisions of the RAD Notice governing termination notification (i.e., ~~Notice PIH 2012-32~~ 2019-23 (HA), ~~REV-2~~ REV-4, ~~section 1.7.B.6.i.~~ or successor ~~provision~~notice), and any State and local law.

**2.11 Reduction of Number of Units for Failure to Lease to Eligible Families.**

- (a) **Limitation on Leasing to Ineligible Families.** The Owner may not at any time during the term of this HAP Contract lease more than 10 percent of the assisted units in the project to families which are ineligible under section 8 requirements at initial occupancy without the prior written approval of HUD. Failure on the part of the Owner to comply with this prohibition is a violation of the HAP Contract and grounds for all available legal remedies, including specific performance of the HAP Contract, suspension or debarment from HUD programs and reduction of the number of units under the HAP Contract, as set forth in paragraph (b) of this section. (See also section 2.21.)
- (b) **Reduction for Failure to Lease to Eligible Families.** If, at any time beginning six months after the effective date of the HAP Contract, the Owner fails for a continuous period of six months to have at least 90 percent of the assisted units leased or available for leasing by Families eligible under section 8 requirements at initial occupancy, HUD (or the PHA at the direction of HUD, as appropriate) may, on at least 30 days' notice, reduce the number of units covered by the HAP Contract. HUD or the PHA may reduce the number of units to the number of units actually leased or available for leasing plus 10 percent (rounded up). This reduction, however, will not be made if the failure to lease units to eligible Families is permitted in writing by HUD under paragraph (a) of this section.
- (c) **Restoration.** HUD will agree to an amendment of the ACC or the HAP Contract, as appropriate, to provide for subsequent restoration of any reduction made pursuant to paragraph (b) of this section if:
- (1) HUD determines that the restoration is justified by demand,
  - (2) The Owner otherwise has a record of compliance with its obligations under the HAP Contract, and
  - (3) Sufficient appropriations are available to support the funding of the units to be restored.

## **2.12 NONDISCRIMINATION.**

- (a) **General.** The Owner shall operate the project in a manner consistent with all applicable nondiscrimination, equal opportunity, and equal access requirements, including but not limited to the requirements in this section 2.12 of the HAP Contract.
- (b) **Equal Access Rule.** The Owner shall make residential housing in the project available without regard to sexual orientation, gender identification, or marital status in accordance with 24 C.F.R. 5.105(a)(2).
- (c) **The Fair Housing Act.** The Owner shall comply with all applicable requirements imposed by the Fair Housing Act and HUD's implementing regulations at 24 C.F.R. Parts 100, 108, 110, 121, and 200 which, among other requirements, prohibit discrimination in the sale, rental, financing, and advertising of housing on the basis of race, color, national origin, religion, sex, disability, and familial status, and require the Owner to affirmatively further fair housing in the operation of the project.
- (d) **Title VI of the Civil Rights Act of 1964 and Executive Order 11063.** The Owner shall comply with all requirements imposed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. et seq.; the HUD Regulations issued thereunder, 24 C.F.R. Part 1; the HUD requirements pursuant to these regulations; and Executive Order 11063 and the regulations and requirements issued thereunder at 24 C.F.R. Part 107 to the end that, in accordance with that Act, Executive Order 11063, and the regulations and requirements of HUD, no person in the United States shall, on the grounds of race, color, religion (creed), sex, or national origin, be excluded from participation in, or be denied the benefits of, the Section 8 Program, or be otherwise subjected to discrimination. This provision is included pursuant to HUD's implementing regulations for Title VI at 24 C.F.R. Part 1, the implementing regulations for Executive Order 11063 at 24 C.F.R. Part 107, and the HUD requirements pursuant to the regulations. The obligation of the Owner to comply therewith inures to the benefit of the United States of America, HUD, and the PHA (where the CA is a PHA), any of which shall be entitled to invoke any remedies available by law to redress any breach or to compel compliance by the Owner.
- (e) **Section 504 of the Rehabilitation Act of 1973 and Other Accessibility Requirements.** The Owner shall comply with all the requirements imposed by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 et seq., and HUD regulations issued thereunder at 24 C.F.R. Part 8. Section 504 applies design standards on housing that receives Federal financial assistance and, more generally, provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. Accordingly, the Owner (1) shall not discriminate against any qualified individual with a disability on the basis of disability, and (2) shall cause to be incorporated into all contracts executed in connection with this project a provision requiring compliance with rules and regulations issued pursuant to section 504. The Owner shall comply, as applicable, with accessible design and operations requirements under the Fair Housing Act and implementing regulations at 24 C.F.R. Part 100, and Title II and III of the Americans with Disabilities Act and implementing regulations at 28 C.F.R. Parts 35 and 36, respectively.
- (f) **Section 3 of the Housing and Urban Development Act of 1968.** Section 3 and its implementing regulations at 24 CFR Part 135 ensure that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns that provide economic opportunities to low- and very low-income persons. The Owner shall comply with Section 3, in accordance with 24 CFR Part 135, as applicable.
- (g) **Employees of Owner.**
  - (1) In carrying out the obligations under this HAP Contract, the Owner will not discriminate against any employee or applicant for employment because of race, color, creed, religion, sex, disability, familial status, or national origin. The Owner will take affirmative action to ensure that applicants are employed,



and that employees are treated during employment, without regard to race, color, creed, religion, sex, disability, familial status, 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.

- (2) The Owner agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by HUD setting forth the provisions of this nondiscrimination clause. The Owner will in all solicitations or advertisements for employees placed by or on behalf of the Owner state that all qualified applicants will receive consideration for employment without regard to race, color, creed, religion, sex, disability, familial status, or national origin. The Owner will incorporate the foregoing requirements of this paragraph in all of its contracts for project work, except contracts for standard commercial supplies or raw materials, and will require all of its contractors for such work to incorporate such requirements in all subcontracts for project work.

- (h) **Age Discrimination Act of 1975.** The Owner shall comply with any rules and regulations issued or adopted by HUD under the Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq. at 24 C.F.R. Part 146, which prohibits discrimination on the basis of age in programs and activities receiving Federal financial assistance.

**2.13 COOPERATION IN EQUAL OPPORTUNITY COMPLIANCE REVIEWS.** The Owner and the PHA (where the CA is a PHA) agree to cooperate with HUD in the conducting of compliance reviews and complaint investigations pursuant to or permitted by all applicable civil rights statutes, Executive Orders, and rules and regulations.

**2.14 PROPERTY AND LIABILITY INSURANCE.** The Owner agrees that the project shall be covered at all times by commercially available property and liability insurance to protect the project from financial loss. To the extent insurance proceeds permit, and as determined feasible by any first mortgage lender (determination of infeasibility shall be subject to HUD approval), the Owner agrees to promptly restore, reconstruct, and/or repair any damaged or destroyed property of a project.

**2.15 FLOOD INSURANCE.** (See section 1.8 of the HAP Contract for applicability.) The Owner agrees that the project will be covered, during the life of the property, regardless of transfer of ownership, by flood insurance 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, whichever is less.

**2.16 REPORTS AND ACCESS TO PREMISES AND RECORDS.**

- (a) The Owner shall furnish any information and reports pertinent to this HAP Contract as reasonably may be required from time to time by HUD and the PHA (where the CA is a PHA).
- (b) The Owner shall permit HUD and the PHA (where the CA is a PHA) or any of their duly authorized representatives to have access to the premises and, for the purpose of audit and examination, to have access to any books, documents, papers and records of the Owner that are pertinent to compliance with this HAP Contract, including the verification of information pertinent to the housing assistance payments.

**2.17 DISPUTES.**

- (a) **Projects for which a PHA is the CA.**

- (1) Any dispute concerning a question of fact arising under this HAP Contract which cannot be resolved by the PHA (where the CA is a PHA) and the Owner may be submitted by either party to the HUD Field Office, which will promptly make a decision and furnish a written copy to the Owner and the PHA.
- (2) The decision of the Field Office will not be reviewable unless, within 30 calendar days from the date of receipt of the Field Office's determination, either party mails or otherwise furnishes to HUD a written

appeal with written justification addressed to the Secretary of Housing and Urban Development. Both parties shall proceed diligently with the performance of the HAP Contract and in accordance with the decision of the Field Office pending resolution of the appeal.

- (b) **Projects for which HUD is the CA.** Any dispute concerning a question of fact arising under this HAP Contract which cannot be resolved by agreement between the HUD Field Office and the Owner may be submitted by the Owner to the Secretary of Housing and Urban Development. Both parties shall proceed diligently with the performance of the HAP Contract and in accordance with the decision of the Field Office, pending resolution of the appeal.

**2.18 INTEREST OF MEMBERS, OFFICERS, OR EMPLOYEES OF PHA, MEMBERS OF LOCAL GOVERNING BODY, OR OTHER PUBLIC OFFICIALS.**

- (a) No person or entity in the following clauses shall have an interest, direct or indirect, in this HAP Contract or in any proceeds or benefits arising from it, during his or her tenure or for one year thereafter.
- (1) any member or officer of the PHA (where it is the CA or the Owner), except where his or her interest is as a tenant;
  - (2) (i) any employee of the PHA (where it is the CA or the Owner) who formulates policy or influences decisions with respect to the section 8 project;  
(ii) any other employee of the PHA (where it is the CA or the Owner), except where his or her interest is as a tenant;
  - (3) any member of the governing body or the executive officer of the locality (city or county) in which the project is situated;
  - (4) any member of the governing body or executive officer of the locality (city or county) in which the PHA (where it is the CA or the Owner) was activated;
  - (5) any other State or local public official (including State legislators), who exercise any functions or responsibilities with respect to the section 8 project;
  - (6) any PHA (which is not the CA), where any of its members, officers, or employees has a personal interest in the project, including an interest by reason of membership on the board of the PHA which is the CA (except an employee who does not formulate policy or influence decisions with respect to the section 8 project may have an interest as a tenant).
- (b) Members of the classes described in paragraph (a) who involuntarily acquire an interest in the section 8 program or in a section 8 project, or who had acquired prior to the beginning of their tenure any such interest, must disclose any interest or ~~perspective~~ prospective<sup>4</sup> interest to the PHA (where it is the CA or the Owner) and the HUD Field Office, and may, with appropriate justification, if consistent with State law, apply to the HUD Field Office (through the PHA where it is the CA) for a waiver. Any other requests for waivers of paragraph (a) must be referred to HUD Headquarters, with appropriate recommendations from the Field Office, for a determination of whether a waiver will be granted.
- (c) No person to whom a waiver is granted shall be permitted (in his or her capacity as member of a class described in paragraph (a)) to exercise responsibilities or functions with respect to a HAP Contract executed, or to be executed, on his or her behalf, or with respect to a HAP Contract to which this person is a party.

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<sup>4</sup> *Comment: Correct term should be "prospective," not "perspective."*



- (d) The Owner shall insert in all contracts, subcontracts, and arrangements entered into in connection with the project or any property included or planned to be included in the project, and shall require its contractors and subcontractors to insert in each of the subcontracts, the provisions of paragraphs (a) through (d).
- (e) The provisions of paragraphs (a) through (d) of this section shall not apply to a utility service if the rates are fixed or controlled by a governmental agency or applicable to the Depositary Agreement.

**2.19 INTEREST OF MEMBER OR DELEGATE TO CONGRESS.** No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of this HAP Contract or to any benefits which may arise from it.

**2.20 ASSIGNMENT, SALE, FORECLOSURE, OR DEED IN LIEU OF FORECLOSURE.**

- (a) Except as permitted in sections 2.24 and 2.25 of this HAP Contract, the Owner agrees that it has not made and will not make any sale, assignment, or conveyance or transfer in any fashion of this HAP Contract or the project, or of any part of the HAP Contract or the project, or any of the Owner's interest in the HAP Contract or the project, without the prior written consent of HUD.
- (b) The Owner agrees to notify HUD (and the PHA where it is the CA) promptly of any proposed action covered by paragraph (a) of this section. The Owner further agrees to request the prior written consent of HUD for any such proposed action.
- (c) The Owner agrees that HUD may condition any prior written consent required under section 2.20(a) of this HAP Contract on any reasonable requirements related to the effective administration of the HAP Contract, as determined by HUD.
- (d) For purposes of this section, a sale, assignment, conveyance, or transfer includes but is not limited to one or more of the following:
  - (i) A transfer by the Owner, in whole or in part,
  - (ii) A transfer by a party having a controlling interest in the Owner,
  - (iii) Transfers by more than one party of interests aggregating a controlling interest in the Owner, and
  - (iv) The creation of any lien, including pursuant to any refinancing, or any restructuring of permanent debt by the Owner of the project, including any loan modification, except to such extent permitted pursuant to the Use Agreement entered into in connection with this project.
- (e) If such assignment is made in connection with any HUD-approved financing for the project, including without limitation low-income housing tax credits, subject to the provisions of 2.25, HUD hereby consents to:
  - (1) an assignment by the Owner of an interest in the project or in this HAP Contract to one of its members, partners or shareholders; or
  - (2) an assignment by the general partner or managing member of Owner of its interest to a limited partner or other member of Owner, respectively.
- (f) The term "controlling interest" means the interest of any general partner, managing member, or other organization or entity that controls the day-to-day operations of the Owner.
- (g) Limited consent to collateral assignment of this HAP Contract is provided in section 2.24.
- (h) The Owner and the party signing this HAP Contract on behalf of the Owner represent that they have the authority of all of the parties having ownership interests in the Owner to agree to this provision on their behalf and to bind them with respect to it.

- (i) Except where otherwise approved by HUD, this HAP Contract, and the ACC (if applicable) shall continue in effect and housing assistance payments will continue in accordance with the terms of the HAP Contract in the event:
  - (1) Of assignment, sale, or other disposition of the project or this HAP Contract, or the ACC,
  - (2) Of foreclosure, including foreclosure by HUD,
  - (3) Of assignment of the mortgage or deed in lieu of foreclosure,
  - (4) The PHA or HUD takes over possession, operation or ownership,
  - (5) The Owner prepays the mortgage.

## **2.21 DEFAULTS BY PHA (if a PHA is the CA) AND/OR OWNER.**

### **(a) Rights of Owner if PHA (where the CA is a PHA) Defaults under HAP Contract.**

- (1) Events of Default. The occurrence of any of the following events, if the Owner is not in default, is defined as a default under the ACC:
  - (i) If the PHA (where the CA is a PHA) fails to perform or observe any term or condition of this HAP Contract;
  - (ii) If the HAP Contract is held to be void, voidable, or ultra vires;
  - (iii) If the power or right of the PHA (where the CA is a PHA) to enter into the HAP Contract is drawn into question in any legal proceeding; or
  - (iv) If the PHA (where the CA is a PHA) asserts or claims that the HAP Contract is not binding upon the PHA for any such reason.
- (2) Owner Request for HUD Determination of Default. If the Owner believes that an event as specified in paragraph (a)(1) has occurred, and the Owner is not in default, the Owner may, within 30 days of the initial occurrence of the event:
  - (i) Notify HUD of the occurrence of the event;
  - (ii) Provide supporting evidence of the default and of the fact that the Owner is not in default; and
  - (iii) Request HUD to determine whether there has been a default.
- (3) HUD Determination of Default and Curing of Default. HUD, after notice to the PHA (where the CA is a PHA) giving it a reasonable opportunity to take corrective action, or to demonstrate that it is not in default, shall make a determination whether the PHA is in default and whether the Owner is not in default. If HUD determines that the PHA is in default and that the Owner is not, HUD shall take appropriate action to require the PHA to cure the default. If necessary for the prompt continuation of the project, HUD shall assume the PHA's rights and obligations under the HAP Contract, including any funds. HUD shall continue to pay annual contributions with respect to the units covered by this HAP Contract in accordance with the ACC and this HAP Contract until reassigned to the PHA. All rights and obligations of the PHA assumed by HUD will be returned as constituted at the time of the return: (i) when HUD is satisfied that all defaults have been cured and that the project will thereafter be administered in accordance with all applicable requirements, or (ii) when the HAP Contract is at an end, whichever occurs sooner.

- (4) Enforcement by Owner. The provisions of this paragraph (a) are made for the benefit of the Owner, the lender, the PHA where it is the lender and then only in its capacity as lender, and the Owner's other assignees, if any, who have been specifically approved by HUD prior to the assignment. These provisions shall be enforceable by these parties against HUD by suit at law or in equity.

**(b) Rights of PHA (where the CA is a PHA) and HUD if Owner Defaults under HAP Contract.**

- (1) Events of Default. A default by the Owner under this HAP Contract shall result if:

- (i) The Owner has violated or failed to comply with any provision of, or obligation under, this HAP Contract or of any Lease, including failure to correct any deficiencies identified by the CA in connection with any annual or other inspection; or
- (ii) The Owner has asserted or demonstrated an intention not to perform some or all of its obligations under this HAP Contract or under any Lease; or
- (iii) For projects with mortgages insured by HUD or loans made by HUD, the Owner has violated or failed to comply with the regulations for the applicable insurance or loan program, with the insured mortgage, or with the regulatory agreement; or the Owner has filed any false statement or misrepresentation with HUD in connection with the mortgage insurance or loan.

- (2) CA Determination of Default. Upon a determination by the CA that a default has occurred, the CA shall notify the Owner and the lender, with a copy to HUD (where the CA is a PHA), of

- (i) The nature of the default;
- (ii) The actions required to be taken and the remedies to be applied on account of the default (including actions by the Owner and/or the lender to cure the default); and
- (iii) The time within which the Owner and/or the lender shall respond with a showing that all the required actions have been taken.

If the Owner and/or lender fail to respond or take action to the satisfaction of the CA (and HUD, where the CA is a PHA), the CA shall have the right to take corrective action to achieve compliance in accordance with paragraph (b)(3), or to terminate this HAP Contract with HUD approval (where the CA is a PHA), in whole or in part, or to take other corrective action to achieve compliance in the CA's discretion, or as directed by HUD (where the CA is a PHA).

- (3) Corrective Actions. Pursuant to paragraph (b)(2) of this section, the CA, in its discretion or as directed by HUD (where the CA is a PHA), may take the following corrective actions either directly or in conjunction with or acting through a PHA:

- (i) Take possession of the project, bring any action necessary to enforce any rights of the Owner growing out of the project operation, and operate the project in accordance with the terms of this HAP Contract until such time as HUD determines that the Owner is again in a position to operate the project in accordance with this HAP Contract. If the CA takes possession, housing assistance payments shall continue in accordance with the HAP Contract.
- (ii) Collect all rents and charges in connection with the operation of the project and use these funds to pay the necessary expenses of preserving the property and operating the project and to pay the Owner's obligations under the note and mortgage or other loan documents.
- (iii) Apply to any court, State or Federal, for specific performance of this HAP Contract, for an injunction against any violation of the HAP Contract, for the appointment of a receiver to take over and operate the project in accordance with the HAP Contract, or for such other relief as may be appropriate. These remedies are appropriate since the injury to the PHA (where the CA is a PHA) and/or HUD

arising from a default under any of the terms of this HAP Contract could be irreparable and the amount of damage would be difficult to ascertain.

(iv) Reduce or suspend housing assistance payments.

(v) Recover any overpayments.

(4) HUD Rights.

(i) Notwithstanding any other provisions of this HAP Contract, in the event HUD determines that the Owner is in default of its obligations under the HAP Contract, HUD shall have the right, after notice to the Owner, the trustee, if any, and the PHA (where the CA is a PHA) giving them a reasonable opportunity to take corrective action, to proceed in accordance with paragraph (b)(3).

(ii) In the event HUD takes any action under this section, the Owner and the PHA hereby expressly agree to recognize the rights of HUD to the same extent as if the action were taken by the PHA. HUD shall not have the right to terminate the HAP Contract except by proceeding in accordance with paragraphs (b)(1), (2), and (3) of this section and with the ACC.

(c) **Remedies Not Exclusive and Non-Waiver of Remedies.** The availability of any remedy under this HAP Contract or the ACC, where applicable, shall not preclude the exercise of any other remedy under this HAP Contract or the ACC or under any provisions of law, nor shall any action taken in the exercise of any remedy be considered a waiver of any other rights or remedies. Failure to exercise any right or remedy shall not constitute a waiver of the right to exercise that or any other right or remedy at any time.

**2.22 EXCLUSION OF THIRD PARTY RIGHTS.**

(a) A Family that is eligible for housing assistance under the HAP Contract is not a party to or a third party beneficiary of the HAP Contract.

(b) Nothing in the HAP Contract shall be construed as creating any right of any third party to enforce any provision of the HAP Contract, or to assert any claim against HUD or the PHA (where the CA is a PHA), under the HAP Contract.

**2.23 NO AGENCY RELATIONSHIP BETWEEN HUD AND THE PHA (WHERE THE CA IS A PHA).** If the CA is a PHA under ACC with HUD, the PHA is not the agent of HUD, and the HAP Contract does not create any relationship between HUD and any suppliers, employees, contractors, or subcontractors used by the PHA to carry out functions or responsibilities in connection with administration of the HAP Contract under the ACC.

**2.24 LENDER PROVISIONS.** Notwithstanding anything else in this HAP Contract:

(a) The holder of any HUD-approved mortgage encumbering the property on which the project is located may take action against the Owner and the project that results in the holder of the mortgage or its designee (either referred to herein as "Lender Temporary Custodian") coming into ownership of the project or assuming the role of "Owner" under this HAP Contract. Transfer of the project or the HAP Contract from the Owner is grounds for termination of the HAP Contract assistance unless otherwise approved by HUD. HUD hereby consents to a collateral assignment of this HAP Contract to any Lender Temporary Custodian and pre-approves any Lender Temporary Custodian as a temporary custodian of the project and as a new "Owner" pursuant to this HAP Contract, and continued assistance to the project pursuant to this HAP Contract, subject to the following conditions:

(1) HUD must receive thirty (30) days prior written notice of the transfer of the project to the Lender Temporary Custodian and the form of the documents necessary to effect such transfer.

- (2) In connection with the transfer, Lender Temporary Custodian must execute and deliver to HUD an assumption of the HAP Contract, in such form as acceptable to HUD.
- (3) Such approval and consent to continue assistance pursuant to this HAP Contract is expressly limited to a period of only 90 days that commences the date of such transfer of the project, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary for Lender to find a permanent replacement owner. Consistent with Public Law 112-55, in the event that the Lender Temporary Custodian assumes the role of "Owner" under the HAP Contract, the Lender Temporary Custodian shall use such interim period to identify a proposed permanent Owner determined by HUD to be capable of abiding by the HAP Contract, Use Agreement, and any and all applicable RAD program requirements. The provision of housing assistance payments to any proposed permanent replacement Owner is subject to HUD's consent.
- (4) Prior to a transfer of the project to a Lender Temporary Custodian, HUD may at any time by written notice to a Lender Temporary Custodian revoke the approvals given herein if HUD becomes aware of any conditions or circumstances (by way of illustration and not limitation, such conditions or circumstances may include debarment, suspension or limited denial of participation) that would disqualify or compromise the ability of Lender Temporary Custodian from acting as an interim custodian of the project pursuant to the HAP Contract.

**2.25 LOW-INCOME HOUSING TAX CREDIT PROVISIONS.** Notwithstanding anything else in the HAP Contract:

- (a) **Notice.** As long as the equity investor identified below ("Equity Investor") is a partner or member of Owner, HUD shall endeavor as a courtesy to Equity Investor to deliver to Equity Investor a copy of any notice of default that is delivered to Owner under the terms of the HAP Contract, Use Agreement or RCC. Equity Investor's address for such notice purposes is:

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- (b) **Right to Cure.** Any cure of any default by Owner under the HAP Contract, Use Agreement or RCC offered by Equity Investor shall be treated the same as if offered by Owner.
- (c) **Transfer of Investor Members/Partners.** Equity Investor, and each successor member or partner in Owner, may transfer its interest in the Owner without prior written consent of HUD if:
  - (1) HUD receives prior written notice of such transfer; and
  - (2) HUD receives executed copies of any and all documents necessary to effect such transfer, including any and all amendments to Owner's organizational documents.
- (d) **Removal of General Partner/Managing Member.**
  - (1) HUD has pre-approved the replacement of the Owner's general partner or managing member with an affiliate of Equity Investor, or any successor equity investor ("Interim Replacement GP/MM") as a temporary replacement general partner/managing member of Owner, in the event Owner's general partner or managing member is removed for cause in accordance with Owner's organizational documents.

- (2) Interim Replacement GP/MM may remove Owner's general partner or managing member in accordance with the Owner's organizational documents without further written consent from HUD and HUD shall continue assistance to the project in accordance with the HAP Contract, provided that Interim Replacement GP/MM provide HUD with prior written notice of such replacement and HUD receives executed copies of any and all documents necessary to effect such replacement.
- (3) Such approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary to provide for a permanent replacement of the general partner or managing member. After such interim period, any proposed permanent replacement for the Owner's general partner or managing member is subject to HUD's consent.
- (4) HUD may at any time by written notice to Equity Investor or any successor revoke the approvals given herein if HUD becomes aware of any conditions or circumstances that would disqualify or compromise the ability of Interim Replacement GP/MM from acting as an interim general partner/managing member pursuant to this HAP Contract.

**Rental Assistance  
Demonstration  
Use Agreement**

**U.S. Department of Housing  
and Urban Development**  
Office of Housing  
Office of Public and Indian Housing

**OMB Approval No. 2502-0612  
(Exp. 04/30/2020)**

**Public reporting burden** for this collection of information is estimated to average 30 minutes 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, Paperwork Reduction Project (2577-0276), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. This information will be used as the binding agreement between the owner and HUD and sets out affordability and use restrictions for the converted projects. There are no assurances of confidentiality.

Prepared by:

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\_\_\_\_\_  
\_\_\_\_\_

After recording return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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**This Rental Assistance Demonstration Use Agreement** (hereinafter called ~~the~~ this “Agreement”) is made as of [\_\_\_\_\_] (date)], for the benefit of and agreed to by the United States Department of Housing and Urban Development, acting by and through the Secretary, his or her successors, assigns or designates (hereinafter called “HUD”) by \_\_\_\_\_, (“Project Owner”), [and \_\_\_\_\_, (“PHA”) (if Project Owner is not the owner of the fee estate, include PHA or other owner of the fee estate.)].



**Whereas,** the Rental Assistance Demonstration (hereinafter called “RAD”) provides the opportunity to test the conversion of public housing and other HUD-assisted properties to long-term, project-based Section 8 rental assistance to achieve certain goals, including the preservation and improvement of these properties through access to private debt and equity to address immediate and long-term capital needs.

**Whereas,** the [PHA or Project Owner] is the fee owner of the real property described on Exhibit A (the “Property”) [and the Project Owner is the leasehold owner of the Property], upon which is or will be located improvements owned or to be owned by Project Owner receiving assistance converted pursuant to RAD, which project will commonly be known as \_\_\_\_\_ (the “Project”). The Project will contain [\_\_\_\_\_] dwelling units, of which [\_\_\_\_\_] (the “Assisted Units”) are subject to a RAD Housing Assistance Payment ~~contract~~Contract, as the same may be renewed, amended or replaced from time to time (the “RAD HAP ~~contract~~Contract”).

**Whereas,** pursuant to the Consolidated and Further Continuing Appropriations Act of 2012 (Public Law 112-55, approved November 18, 2011, as amended from time to time, the “RAD Statute”); and Notice H-2019-09 PIH-2019-23 (HA), as amended from time to time, and any successor document and/or regulations (hereinafter called the “RAD Notice”), which this Agreement incorporates by this reference, the PHA and/or the Project Owner, as applicable, has agreed to encumber the Property and the Project Owner has agreed to operate the Project in accordance with this Agreement in exchange for HUD’s agreement to execute or permit the execution of the RAD HAP ~~contract~~Contract and the assistance provided thereby;

**Whereas,** in accordance with the RAD Statute and RAD Notice, except as otherwise agreed in writing by HUD, this Agreement is to be recorded superior to other liens on the Property, run until the conclusion of the initial term of the RAD HAP ~~contract~~Contract, automatically renew upon each extension or renewal of the RAD HAP ~~contract~~Contract for a term that runs with each renewal term of the RAD HAP ~~contract~~Contract, and remain in effect even in the case of abatement or prior termination of the RAD HAP ~~contract~~Contract for the term the RAD HAP ~~contract~~Contract would have run, absent the abatement or termination.

**Now Therefore,** in consideration of the foregoing, conversion of assistance pursuant to RAD, provision of rental assistance pursuant to the RAD HAP ~~contract~~Contract and other valuable consideration, the parties hereby agree as follows:

1. **Definitions.** All terms used in this Agreement and not otherwise defined have the same meaning as set forth in the RAD Notice.
2. **Term.** The initial term of this Agreement commences upon the date this Agreement is entered into and shall run until the conclusion of the initial term of the RAD HAP ~~contract~~Contract. The RAD HAP ~~contract~~Contract is effective for [15/20 years (insert appropriate term)]. Unless otherwise approved by HUD, this Agreement shall remain in effect through the initial term of the RAD HAP ~~contract~~Contract and for additional periods to coincide with any renewal term of the RAD HAP ~~contract~~Contract or any replacement RAD HAP ~~contract~~Contract. It is the intention of the parties that the RAD HAP ~~contract~~Contract and this Agreement shall each renew upon the completion of its initial term and each renewal term.



Therefore, this Agreement shall remain in effect until a release is recorded as contemplated by Section 8 of this Agreement.<sup>1</sup> Such release shall be the evidence of the non-renewal of the RAD HAP Contract, of the determination not to execute a replacement RAD HAP ~~contract~~ Contract and of the expiration of this Agreement according to its terms.

**3. Use Restriction and Tenant Incomes.** The Assisted Units shall be leased in accordance with the RAD HAP ~~contract~~ Contract, the RAD Statute, and the RAD Notice, including any applicable eligibility and/or income-targeting requirements. In the case that the RAD HAP ~~contract~~ Contract is terminated prior to the completion of the term or renewal term, as applicable, of this Agreement (by way of illustration and not limitation, for breach or non-compliance), for the remainder of the term of this Agreement new tenants leasing the Assisted Units (except if any of the Assisted Units is a HUD-approved manager unit) must have incomes at or below ~~80-eighty~~ percent (80%) of the Area Median Income (AMI) at the time of admission (“Eligible Tenants”). Additionally, rents for such Assisted Units must not exceed 30% of 80% of the AMI for households of the size occupying an appropriately sized unit. Notwithstanding the foregoing, in the event the Project Owner so requests and is able to demonstrate to HUD’s satisfaction that despite the Project Owner’s good faith and diligent efforts to do so, the Project Owner is unable either (1) to rent a sufficient percentage of Assisted Units to Eligible Tenants in order to satisfy the restrictions in this paragraph, or (2) to otherwise provide for the financial viability of the Project, HUD may, in its sole discretion, agree to reduce the percentage of units subject to the restriction under this paragraph or otherwise modify this restriction in a manner acceptable to the Project Owner and HUD. Any such modification of the restrictions listed in this paragraph shall be evidenced by a written amendment to this Agreement executed by each of the parties hereto.

**4. Survival.** ~~Unless Subject to the occurrence of a force majeure event<sup>2</sup> or unless~~ otherwise approved by HUD, this Agreement will survive abatement of assistance under the RAD HAP ~~contract, Contract or~~ termination of the RAD HAP ~~contract~~ Contract at any point other than the natural expiration of its term, ~~or termination of the RAD Conversion Commitment executed in connection with the Project.~~<sup>3</sup> This Agreement will survive foreclosure and bankruptcy.

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<sup>1</sup> **Comment:** Because Section 8 is often used to refer to Section 8 of the United States Housing Act of 1937, it is important to clarify that, in this context, the reference is to Section 8 of this Use Agreement.

<sup>2</sup> **Comment:** Incorporating a force majeure provision provides much-needed flexibility in the event of certain conditions beyond a PHA or Project Owner’s control (e.g., natural disasters).

<sup>3</sup> **Comment:** The RAD Notice, H 2019-09 PIH 2019-23 (HA) (the “RAD Notice”), requires the RAD Use Agreement “[r]un until the conclusion of the initial term of the HAP Contract, automatically renew upon extension or renewal of the HAP Contract...and remain in effect even in the case of abatement or termination of the HAP Contract, unless the Secretary approves termination of the RAD Use Agreement in the case of a transfer of assistance.” Consistent with the terms of the RAD Notice, references to termination of the RAD Conversion Commitment (“RCC”) executed in connection with the Project do not belong in the RAD Use Agreement and ought to be deleted. The documentation proposed by HUD pursuant to this Notice of Proposed Information Collection ought to be consistent with the requirements HUD establishes for the RAD program in the RAD Notice. If HUD wishes to modify those requirements, it should do so through revision to the RAD Notice.

**5. Fair Housing and Civil Rights Requirements.** The Project Owner and its agents, where applicable, shall ensure that the Project complies with applicable federal fair housing and civil rights laws, regulations, and other legal authorities, including those identified at 24 ~~C.F.R.~~ § CFR 5.105.

**6. Accessibility Requirements.** The Project Owner and its agents, where applicable, shall ensure that the Project complies with all applicable federal accessibility requirements under the Fair Housing Act and implementing regulations at 24 CFR Part 100, Section 504 of the Rehabilitation Act of 1973 and implementing regulations at 24 CFR Part 8, and Titles II and III of the Americans with Disabilities Act and implementing regulations at 28 CFR Parts 35 and 36, respectively.

**7. Restrictions on Transfer.** HUD has been granted and is possessed of an interest in the above described Project. Except as authorized below, the Project Owner and, if a party hereto, the PHA, shall not transfer, convey, encumber or permit or suffer any transfer, conveyance, assignment, lease, mortgage, pledge or other encumbrance of ~~said the~~ Project and/or Property or any part thereof without prior written consent of HUD. Notwithstanding the foregoing, HUD hereby authorizes (a) leases in the normal operation of the Project, (b) subordinate liens contemplated by and on the terms set forth in a RAD Conversion Commitment or otherwise approved by HUD and executed in connection with the Project, whether such liens are recorded concurrent with the recordation of this ~~Use~~-Agreement or recorded subsequent hereto (such as permanent financing to replace construction-period financing), provided notice of such subordinate lien is provided to HUD within thirty (30) days of execution, and (c) conveyance or dedication of land for use as streets, alleys, or other public rights-of-way and grants and easements for the establishment, operation and maintenance of public utilities. Except as otherwise approved in writing by HUD, any lien on the Project and/or Property shall be subject and subordinate to this Agreement. Unless this Agreement is released by HUD, any transferee of the Project and/or Property shall take title subject to this Agreement.

**8. Amendment or Release.** This Agreement may not be amended without HUD consent. This Agreement shall remain as an encumbrance against the Property unless and until HUD executes a release for recording. This Agreement may only be released by HUD in its sole discretion.

**9. Enforcement.**

A. In the event of a breach of any of the provisions of this Agreement, and failure to cure such breach within ~~60-sixty (60)~~ days of notice thereof or such longer time as may be reasonably required by the circumstances,<sup>4</sup> ~~any eligible tenant or applicant for occupancy within~~

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<sup>4</sup> *Comment: Despite best efforts of the parties, certain events of default may not be able to be cured within the set timeframes. Should such be deemed appropriate, parties should be provided the flexibility to extend the cure period as they see fit in order to avoid default when working in good faith to cure the breach.*

HUD, the PHA, and/or the Project Owner, as applicable,<sup>5</sup> may institute proper legal action to enforce performance of such provisions or to enjoin any acts in violation of such provisions, to recover whatever damages can be proven, and/or to obtain whatever other relief may be appropriate.

B. In the event of a ~~breach or threatened~~ breach of any of the provisions of this Agreement or the RAD HAP ~~contract~~ Contract including, without limitation, upon any transfer of the Property or Project without HUD consent, and failure to cure such breach ~~or threatened breach~~ within ~~60~~ sixty (60) days of notice thereof, ~~the Secretary or his or her successors or delegates~~ or such longer time as may be reasonably required by the circumstances,<sup>6</sup> the enforcing party may institute proper legal action to enforce performance of such provisions, to enjoin any acts in violation of such provisions, to recover whatever damages can be proven, and/or to obtain whatever other relief may be appropriate.<sup>7</sup> Upon an event of default, the enforcing party shall have remedies available to it under statute, at law or in equity. The enforcing party shall have the right to seek specific performance of this Agreement and/or to enjoin any violation of this Agreement in Federal Court. The right to specific performance and injunction shall be in addition to all other remedies available under statute, at law or in equity. Without in any way limiting the foregoing, the Secretary or his or her successors or delegates may take possession of the project and operate the Project in accordance with the terms of this Agreement and the RAD HAP contract or may apply to any court, State or Federal, for the appointment of a receiver to take over and operate the Project in accordance with the terms of this Agreement and the RAD HAP contract, until such time as the Secretary determines that the Project Owner is again in a position to operate the Project in accordance with this Agreement and the RAD HAP contract. Further, the Secretary or his or her successors or delegates may transfer the RAD HAP contract and the rental assistance contemplated therein to another entity and/or Property and/or Project. The Project Owner has constituted the Secretary as its attorney-in-fact

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<sup>5</sup> Comment: HUD does not bestow any third-party beneficiary rights under the RAD Use Agreement upon eligible tenants or applicants for occupancy within the Project and neither are party to this document. Accordingly, enforcement should be limited to those with standing and privity under the document. If an eligible tenant or applicant has concerns or believe there to be a violation of the RAD Use Agreement, the eligible tenant or applicant should notice HUD, the PHA, and/or the Project Owner, as appropriate, who can then take action accordingly.

<sup>6</sup> Comment: Despite best efforts of the parties, certain events of default may not be able to be cured within the set timeframes. Should such be deemed appropriate, parties should be provided the flexibility to extend the cure period as they see fit in order to avoid default when working in good faith to cure the breach.

<sup>7</sup> Comment: We strongly object to HUD's attempted use of threats in order to circumvent the default process and institute legal action and other enforcement against PHAs and Project Owners. Threatened action is not enforceable and deprives the parties of their due process rights. If there has been a breach of the RAD Use Agreement, then, subject to all applicable notice and cure periods, there is a default under which parties may seek appropriate remedies. However, anything short of a breach should not be sufficient to trigger the sweeping enforcement remedies provided to HUD hereunder.

~~to effect any such transfer~~forgoing, if HUD is the enforcing party, HUD may terminate the HAP Contract relating to the Covered Project. Termination of the HAP Contract shall have no impact on the continuing requirements under this Agreement. No person or entity, other than the parties hereto, has any rights or remedies under this Agreement.<sup>8</sup>

10. **Section 18 (75%/25% Blend) Non-RAD PBV Rider.** If attached to this Agreement, the Rental Assistance Demonstration (RAD) Section 18 (75%/25% Blend) Non-RAD PBV Rider to RAD Use Agreement is made a part hereof and incorporated by reference.<sup>9</sup>

11. **Severability.** The invalidity, in whole or in part, of any of the provisions set forth in this Agreement shall not affect or invalidate any remaining provisions.

12. **Conflicts.** Any conflicts between this Agreement, the RAD Conversion Commitment, the RAD HAP ~~contract~~Contract, or any other applicable HUD program requirements shall be conclusively resolved by the Secretary.

13. **Execution of Other Agreements.** The Project Owner and, if a party hereto, the PHA, agrees that it has not and will not execute any other agreement with provisions contradictory to, or in opposition to, the provisions of this Agreement, and that in any event, the provisions of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other conflicting requirements.

14. **Subsequent Statutory Amendments.** If revisions to the provisions of this Agreement are necessitated by subsequent statutory amendments, the Project Owner and, if a party hereto, the PHA, agrees to execute modifications to this Agreement that are needed to conform to the statutory amendments. At HUD's option, HUD may implement any such statutory amendment through rulemaking pursuant to the Administrative Procedure Act (5 U.S.C. § 551 et seq.), or successor legislation.<sup>10</sup>

## 15. Lender Provisions.

A. Nothing in this Agreement prohibits any holder of a mortgage or other lien against the Property or Project from foreclosing its lien or accepting a deed in lieu of foreclosure. Any lien holder shall give HUD, as a courtesy, written notice prior to declaring an event of default. Any lien holder shall provide HUD concurrent notice with any written filing of foreclosure filed

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<sup>8</sup> **Comment:** The remedies inserted herein mirror those proposed by HUD in the PRAC Conversion Agreement (Section 19.2) and are consistent with the remedies we propose in Section 25 of the RAD Conversion Commitment. We believe the available remedies as set forth therein are appropriate and should be used consistently throughout the applicable Component One and Component Two documents.

<sup>9</sup> **Comment:** Revised to correspond to title of the Proposed Rider.

<sup>10</sup> **Comment:** If HUD seeks to revise the terms of this Agreement in order to implement subsequent changes in law, such rulemaking should be conducted pursuant to the Administrative Procedure Act ("APA"). By citing to the APA, all parties are placed on notice about the rulemaking process that HUD would be required to follow.

in accordance with state law provided that the foreclosure sale shall not occur sooner than sixty ~~days~~ (60) days after such notice to HUD. The Notice to HUD may be personally delivered or sent by U.S. certified or registered mail, return receipt requested, first class postage prepaid, addressed as follows:

If for PBRA transactions:

U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 9100  
Washington, DC 20410

Attention: Office of the Assistant Secretary for Housing - Rental Assistance  
Demonstration

If for PBV transactions:

U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 4100  
Washington, DC 20410

Attention: Office of the Assistant Secretary for Public and Indian Housing -  
Rental Assistance Demonstration

B. Notwithstanding any lien holder's foreclosure rights, this Agreement survives foreclosure and any new owners of the Property or the Project take ownership subject to this Agreement.

C. Transfer of title to the Property or the Project may be grounds for termination of assistance under the RAD HAP ~~contract~~Contract. However, HUD may permit, through prior written consent by HUD, the new owner of the Property or ~~the~~ Project to assume the RAD HAP ~~contract~~Contract, subject to the terms included therein, or enter into a new RAD HAP ~~contract~~Contract. Any HUD consent to continued RAD HAP Contract assistance is subject to the RAD Statute and other RAD program requirements.

D. Each entity interested in purchasing the Property in a foreclosure sale administered under state foreclosure law may submit a written request to HUD to continue RAD HAP ~~contract~~Contract assistance in the event of such entity's successful acquisition at the foreclosure sale. Such request shall be submitted by the latter of ten (10) business days after first publication of the foreclosure sale or ~~60~~sixty (60) days prior to such foreclosure sale.

**16. Successors and Assigns.** This Agreement shall be binding upon the Project Owner and, if a party hereto, the PHA, and all future successors and assigns of either with respect to any portion of the Property or ~~the~~ Project.

**In Witness Whereof**, these declarations are made as of the first date written above.

**Department of Housing and Urban Development**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

District of Columbia )  
 ) ss:  
 )

Before me, \_\_\_\_\_, a Notary Public in  
and for the District of Columbia on this \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_, personally appeared

\_\_\_\_\_, who is  
personally known to me to be the person who executed the foregoing instrument by virtue of the  
authority vested in him by the Department of Housing and Urban Development, and did  
acknowledge the signing thereof to be a free and voluntary act and done on behalf of the  
Secretary of Housing and Urban Development for the uses, purposes and considerations therein  
set forth.

Witness my hand and official seal this \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_.  
(Seal)

\_\_\_\_\_ (Notary Public)

My commission expires \_\_\_\_\_, 20\_\_\_\_\_.

**WARNING:** It is a crime to knowingly make false statements to a federal agency. Penalties upon conviction can include a fine and imprisonment. See Criminal Codes 18 U.S. Code Sections 1001 and 1010.

**Project Owner:**

*[Insert Project Owner signature block.]*

Date: \_\_\_\_\_

State of \_\_\_\_\_ )  
County of \_\_\_\_\_ ) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, before me a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared \_\_\_\_\_, proved to me on the basis of satisfactory evidence to be the *[title]* of *[Project Owner entity name]* and the person who executed this instrument on behalf of Project Owner.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.  
(Seal)

\_\_\_\_\_  
(Notary Public)

My commission expires \_\_\_\_\_, 20\_\_\_\_\_.

**WARNING:** It is a crime to knowingly make false statements to a federal agency. Penalties upon conviction can include a fine and imprisonment. See Criminal Codes 18 U.S. Code Sections 1001 and 1010.

**[PHA or fee owner]:**

*[Insert PHA or fee owner signature block.]*

Date: \_\_\_\_\_

State of \_\_\_\_\_ )  
County of \_\_\_\_\_ ) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, before me, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared \_\_\_\_\_ proved to me on the basis of satisfactory evidence to be the [title] of [Lessee entity name] and the person who executed this instrument on behalf of Lessee.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.  
(Seal)

\_\_\_\_\_ (Notary Public)

My commission expires \_\_\_\_\_, 20\_\_\_\_\_.



## **EXHIBIT A – Property Subject to this RAD Use Agreement**

**Rental Assistance Demonstration (RAD)  
Section 18 (75%/25% Blend) Non-RAD PBV  
Rider to RAD Use Agreement<sup>1</sup>**

U.S. Department of Housing and Urban  
Development Office of Multifamily Housing

Public reporting burden for this collection of information is estimated to average 15 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and to dictate the terms under which such payments will be made. There are no assurances of confidentiality.

The provisions of this Rental Assistance Demonstration (RAD) Section 18 (75%/25% Blend) Non-RAD PBV Rider to RAD Use Agreement (this “Rider”) are hereby incorporated in the preceding Rental Assistance Demonstration Use Agreement (“RAD Use Agreement”) executed by the United States Department of Housing and Urban Development (“HUD”) and (“Project Owner”), [and (“PHA”) (if Project Owner is not the owner of the fee estate, include PHA or other owner of the fee estate.)]. Capitalized terms used in this Rider and not otherwise defined herein shall have the meaning given in the RAD Use Agreement.<sup>2</sup>

**WHEREAS**, PHA owned and operated ~~\_\_\_\_\_ buildings containing \_\_\_\_\_ (—) dwelling units (collectively, the “Units,” or singularly, a “Unit”) at \_\_\_\_\_, more particularly in Exhibit A, attached hereto and incorporated herein (the “Disposition Property”);~~ **WHEREAS**, PHA owned and operated the Disposition (\_\_\_\_\_) dwelling units at the Property as low-rent public housing with financial assistance provided by HUD under the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437 et. seq. (the “Act”);<sup>3</sup>

<sup>1</sup> **Comment:** In order to maximize revenue and ensure the long-term sustainability of a project, PHAs and Project Owners often combine RAD and Section 18/PBV in ratios other than the 75%/25% “blending” concept. Accordingly, we believe it is important to note in the document title that this Rider is only to be used in the “blending” context. Corresponding document title changes were suggested in the comments to the RAD Use Agreement.

<sup>2</sup> **Comment:** Adding a preamble to state the parties and clarify that the Rider is attached to RAD Use Agreement will avoid confusion for lenders, investors, title companies and recorders’ offices. In addition, to simplify the Rider, we suggest that defined terms in the RAD Use Agreement also be used in the Rider and that the Rider state as much (as opposed to creating new defined terms in the Rider).

<sup>3</sup> **Comment:** See above comment regarding use of defined terms from the RAD Use Agreement. Recognizing that more often than not, RAD and PBV units are combined on one site and there is typically not a separate legal description for the property containing the RAD units and the property containing the PBV units, referencing the “Property” defined in the RAD Use Agreement is clearer than establishing a new defined term “Disposition Property” to refer to the same property. RAD and PBV units and property are typically indistinguishable within a “blended” project. However, should the RAD units and PBV units be on separate (usually non-contiguous sites), a

WHEREAS, construction and/or operation of the ~~Disposition~~ Property was financed in part by HUD under the Act;

WHEREAS, PHA requested HUD approval to dispose of the ~~conveyance of the Disposition~~ Property in accordance with the RAD program and Section 18 of the Act, and specifically ~~based on Section 3)-3)A.3.c of PHH Notice PIH 2018-04 (HA): “Comprehensive Rehabilitation or Replacement through Rental Assistance Demonstration (RAD).” Specifically, the PHA is converting at least 75 percent~~ ”;

WHEREAS, PHA is converting at least seventy-five percent (75%) of the public housing units at the ~~Disposition~~ Property under RAD to Section 8 project-based rental assistance and is replacing the units proposed for disposition under Section 18 of the Act (up to ~~25 twenty-five percent (25%)~~ of the public housing units within the Property) with Section 8 ~~project-based voucher (PBV)~~ Project-Based Voucher (“PBV”) assistance in accordance with 24 CFR part 983. The aggregate number of replacement units (RAD and ~~PBVs~~ PBV) meets the RAD “substantial conversion of assistance” requirements ~~;~~ and

WHEREAS, as part of the RAD conversion, ~~PHA will convey the Disposition Property to the Project Owner who will own and operate the Disposition Property as a combination of RAD Section 8 PBV and non-RAD Section 8 PBV replacement units, which project will commonly be known as \_\_\_\_\_ (the “Project”) and the PHA will retain a ground lease with the Project Owner. The Project will contain \_\_\_\_\_ (Project, containing \_\_\_\_\_ (\_\_\_\_) dwelling units, of which \_\_\_\_\_ (\_\_\_\_) (“RAD Units” \_\_\_\_\_) are subject to a RAD Section 8 PBV Housing Assistance Payment the RAD HAP Contract (HAP contract), and \_\_\_\_\_ (— \_\_\_\_\_) dwelling units that will be subject to a non-RAD Section 8 PBV HAP contract Housing Assistance Payments Contract (“PBV HAP Contract”) in accordance with HUD’s ~~Section 18~~ disposition approval ~~(“Non-RAD Units”)~~ under Section 18 of the Act.<sup>4</sup>~~

~~Now Therefore~~ NOW THEREFORE, in consideration of the foregoing, conversion of assistance pursuant to RAD, provision of rental assistance pursuant to the RAD ~~Section 8 PBV HAP contract~~ Contract, ~~SAC’s HUD’s~~ approval of the disposition of a portion of the ~~Disposition~~ Property under Section 18 of the Act, and other valuable consideration, the parties hereby agree as follows:

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*separate legal description may be required. In practice, where RAD units and PBV units are on entirely separate sites, a restriction separate from the RAD Use Agreement has been required for the Section 18/PBV site.*

<sup>4</sup> *Comment: We suggest simplifying this Recital to differentiate units by HAP Contract (RAD or PBV) instead of introducing new defined terms “RAD Units” and “Non-RAD Units” which are not used in the RAD Use Agreement or, in the case of Non-Rider Units, this Rider. The revisions to this Section achieve substantively the same purposes as the original language, but without excess terms. Further, the proposed language refers to RAD PBV and non-RAD PBV, but it is possible to combine RAD PBRA with non-RAD PBV. Therefore, more using the RAD Use Agreement term “RAD HAP Contract” prevents internal conflicts between the Rider and RAD Use Agreement.*

Modification of Section 9 of the RAD Use Agreement. The following provision of Section 9.B. of the RAD Use Agreement shall not apply to the PBV HAP Contract:<sup>5</sup>

~~With respect to Section 7 of the RAD Use Agreement on Transfer of HAP which states that “In the event of a default under the RAD HAP contract “Upon an event of default, and without in any way limiting the foregoing, the Secretary or his or her successors or delegates may take any remedial action permitted at law or in equity under this Agreement or the RAD HAP Contract, including, without limitation, upon any transfer of the Property or Project without HUD consent, upon expiration of any applicable notice and/or cure periods, HUD suspension of payment under the RAD HAP Contract, taking possession and operation of the Project, transfer of the RAD HAP Contract to other units, and/or termination of the RAD HAP Contract, until such time as the Secretary determines that the Project Owner is again in a position to operate the Project in accordance with this Agreement and the RAD HAP Contract. Further, the Secretary or his or her successors or delegates may transfer the RAD HAP contract Contract and the rental assistance contemplated therein to another entity and/or Property and/or Project” does not apply to the Non-RAD Units.—. The Project Owner has constituted the Secretary as its attorney-in-fact to effect any such transfer.”~~

#### **Exhibit A**

#### **Legal Description**

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<sup>5</sup> *Comment: The language in the proposed Rider references Section 7 of the RAD Use Agreement. However, the cited language was moved to Section 9 and revised in the proposed, revised RAD Use Agreement. The revisions to this Section correspond to the forgoing changes to the RAD Use Agreement.*

**INSTRUCTIONS:** *This form contains HUD-required language which must be included in any Opinion of PHA Counsel in a Rental Assistance Demonstration program transaction. HUD-required Opinion language may not be changed. Additional Assumption and Qualification language needed for individual transactions may be added only with prior written approval of HUD, must not so substantially differ as to thwart the HUD-required language and must be in bold typeface in the space provided. Enter all transaction relevant information within the bold bracketed spaces provided and provide Schedule 1 and Exhibit A.*

## OPINION OF PHA COUNSEL

**[LAW FIRM LETTERHEAD]**

**[DATE]**

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U.S. Department of Housing  
and Urban Development  
451 Seventh Street SW  
Washington, D.C. 20410

Re: **[COVERED PROJECT NAME, with project number identified in RCC, if any]**

Ladies and Gentleman:

We represent **[NAME OF PHA]** (“PHA”), [\[a public body corporate and politic\]<sup>1</sup>](#), organized and existing under the laws of **[STATE OR COMMONWEALTH]** in connection with the conversion of assistance pursuant to the Rental Assistance Demonstration (“RAD”) and provision of rental assistance to the project located at **[ADDRESS OF THE COVERED PROJECT]** and commonly known as **[COVERED PROJECT NAME]** (the “Covered Project”).

We have been requested by the PHA to deliver this opinion in accordance with and pursuant to RAD requirements by the United States Department of Housing and Urban Development (“HUD”) and the associated RAD Conversion Commitment entered into by and between HUD, PHA and **[NAME OF THE PROJECT OWNER]** (said document is hereafter referred to as the “RCC”).

### Instruments and Loan Documents Examined

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<sup>1</sup> [Comment: This should be bracketed to allow counsel to modify as needed to incorporate such other descriptors that may be used by PHAs. While some State Enabling Acts create PHAs as “a public body corporate and politic,” this term is not uniformly applied to all PHAs.](#)

In preparing this opinion, we have prepared or reviewed executed originals or true and complete copies of the instruments and documents, all of which are dated the date hereof (unless otherwise indicated), as set forth in Schedule 1 attached hereto and incorporated herein by this reference. Items under Heading A [and B (if ~~Mixed-Finance~~[conversion of a mixed finance public housing property](#)<sup>2</sup>)] of Schedule 1 are collectively referred to as the “PHA Documents” and all of the items listed on Schedule 1 are collectively referred to as the “Documents.” The Documents represent all of the material, legally binding agreements entered into by PHA in association with the RAD conversion of public housing units approved by HUD pursuant to its execution of the RCC.

## Assumptions

The Opinions expressed herein are subject to the following assumptions, in addition to the assumptions and qualifications set forth elsewhere herein:

1. All Documents submitted to us as originals are authentic, and all copies of the Documents, and all records and letters examined by us are accurate, true, complete, and correct copies of the originals thereof and all factual warranties, representations, and statements made by the parties in the Documents are accurate, true, and correct.
2. Each of the individuals executing the PHA Documents has the requisite legal capacity and all the signatures, other than those of the PHA on PHA Documents, are genuine.
3. The PHA Documents have been duly authorized, executed, and delivered by all parties other than the PHA and constitute legal, valid, and binding obligations of each such other party enforceable in accordance with their terms.
4. [Each PHA Document or other document submitted for review is accurate and complete. Each PHA Document that is an original is authentic, each PHA Document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of any PHA Document submitted as an unexecuted copy does not differ in any respect relevant to this Opinion Letter from the form and content of such PHA Document as executed and delivered.](#)<sup>3</sup>
5. ~~4.~~ Each party to any of the PHA Documents, other than the PHA, is a duly organized corporation, general partnership, limited partnership, limited liability company, national banking association, authority, agent, public body, branch of the government of the United States of America, or other duly organized entity, as the case may be, under and pursuant to the laws of each such party’s organizational jurisdiction and, to the extent necessary for the delivery of the opinions set forth herein, is in good

<sup>2</sup> [Comment: Revised wording for the avoidance of confusion.](#)

<sup>3</sup> [Comment: When opining on the PHA Documents, in many cases, fully executed original versions of each document may not be available. Accordingly, this assumption is required in order to provide Opinion #4. This is a standard assumption set forth in the ABA Illustrative Opinion, published in the Real Property, Trust and Estate Law Journal \(Fall 2018/Winter 2019 edition\).](#)

standing under the laws of, and authorized to transact business in, the State or Commonwealth in which the Covered Project is located ("State").

6. ~~5.~~ Each party to any of the PHA Documents, other than the PHA, has all requisite certifications of authority, licenses, permits, consents, qualifications, and documentation, and all requisite organizational power and authority, to execute such of the PHA Documents to which it is a party, to perform its obligations under such of the PHA Documents to which it is a party, and to enforce such of the PHA Documents to which it is a party.
7. ~~6.~~ There are no oral or written modifications or amendments to the Documents and there has been no waiver of any of the provisions of the Documents by actions or conduct of the parties or otherwise.

**[ENTER ALL HUD-APPROVED ADDITIONAL ASSUMPTIONS HERE OR MARK N/A]**

~~7.~~

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We have made no investigation of the facts of law underlying the foregoing ~~Assumptions but nothing has come to our attention that would provide us with knowledge that we are not justified in making such~~ Assumptions.<sup>4</sup> We have made no investigation regarding the accuracy or

<sup>4</sup> **Comment:** Under customary opinion practice, outside of the securities context, negative assurances are not appropriate. Attorneys are not permitted to assume facts that they have reason to know are not accurate or do not warrant reliance under the circumstances. The American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, Real Estate Opinion Letter Guidelines, 38 Real Prop. Prob. & Tr. J. 241, 245 (2003) [hereinafter referred to as the Opinion Letter Guidelines], as affirmed in Joint Drafting Committee, Real Estate Finance Opinion Report of 2012, 47 Real Prop. Tr. & Est. L.J. 213, 220-221, 232-233 (2012) [hereinafter referred to as

completeness of any documents, records, instruments, letters, or other writings examined by us, or the accuracy of any warranties, representations, and statements of fact contained therein, and we express no opinion regarding the same. No opinion is expressed regarding the existence or nonexistence of, or the effect of, any form of fraud, misrepresentation, mistake duress, or criminal activity upon the legality, validity, binding effect, or enforceability of any of the PHA Documents, and we have made no investigation of the facts or law pertaining to such conduct, ~~but nothing has come to our attention which would provide us with actual knowledge of the existence of any such conduct.~~<sup>5</sup>

## Opinions

Based upon, and subject to, the Assumptions set forth above and subject to the Assumptions, Qualifications, exceptions, and limitations set forth in this opinion, we are of the opinion that:

1. ~~The PHA is a [State]~~Based on the [Certificate of Existence or Certificate of Good Standing], the PHA is a [insert entity type] ~~public body, corporate and politic~~validly existing under the laws of the [State].<sup>6</sup> The PHA has the requisite power and authority to execute and deliver the PHA Documents and to perform its obligations thereunder.
2. The PHA Documents have been duly executed and delivered by the PHA. In addition, those parties executing the PHA Documents on behalf of the PHA, and the consummation by the PHA of the transactions contemplated thereby, have been duly authorized by all necessary corporate or organizational actions, as applicable.
3. Based upon the certification of PHA attached hereto as Exhibit A, there is no litigation or other claims pending or threatened against the PHA or the Covered Project ~~other than as disclosed to and consented to by HUD. The,~~ the resolution of ~~any litigation or other claim disclosed to HUD which~~ would ~~not~~ have a materially adverse effect on the PHA's ability to comply with the ~~RAD~~ requirements of the RCC

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*the 2012 Opinion Report]. Accordingly, attorneys should not be asked to confirm their lack of knowledge of particular factual matters. Opinion Letter Guidelines 255. We recognize that a few well-known opinion recipients such as Fannie Mae include negative assurances in their forms of Opinion of Borrower's Counsel, however, unlike HUD these opinion recipients allow opinion givers to deviate from their opinion forms and accept opinions that do not include the negative assurance language.*

<sup>5</sup> **Comment:** *Id.*

<sup>6</sup> **Comment:** *It is customary for opinions regarding the existence of an entity to be based on a Certificate of Existence or Certificate of Good Standing from the jurisdiction of formation. 2012 Opinion Report 231-232. Many Certificates of Existence and Certificates of Good Standing do not state that the PHA is a "public body, corporate and politic, even if that is the statutory language. For example, in Tennessee, the Certificate of Existence says that PHAs are corporations. These recommended revisions have been accepted by HUD Field Counsel on past RAD transactions and ought to be incorporated in HUD's form of Opinion. 2012 Opinion Report 237-238*



[if applicable: other than as disclosed to HUD on Exhibit A, including those set forth in the RCC Schedule A-1].<sup>7</sup>

4. The PHA Documents constitute valid and legally enforceable agreements and/or contracts of the PHA, enforceable in accordance with their respective terms under the laws of the State and local law, subject to the Qualifications that the enforceability of any PHA Document may be limited or affected by customary principles governing equitable relief generally and by bankruptcy, insolvency, reorganization, rearrangement, moratorium, liquidation, fraudulent conveyance, receivership, conservatorship, and other laws affecting the rights of creditors or the collection of debtors' obligations generally and a court may refuse to grant an order for specific performance or any other principles of equity which may limit the availability of certain equitable remedies.

~~5. Based on the foregoing and subject to the Assumptions and Qualifications set forth in this letter, it is our opinion that each of the PHA Documents conforms to the legal requirements of the RCC and that there is nothing in any of such PHA Documents that conflicts with, or is inconsistent with, the legal requirements of the RCC or exhibits thereto.~~

5. Intentionally Omitted.<sup>8</sup>

6. Intentionally Omitted.<sup>9</sup>

## Qualifications

The Foregoing opinion is subject to the following Qualifications:

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<sup>7</sup> **Comment:** The requested change reverts this language to that used in HUD's 2014 Form of Opinion. The language in the proposed form of opinion is too broad and will sweep in all the litigation of a PHA, which can be substantial through no fault of the PHA. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the PHA's ability to comply with RAD requirements. Also, this approach does not hold Project Owners and PHAs to the same standard. A large development company serving as a managing member or general partner would not be required to make similar disclosures because it has created a special purpose entity ("SPE"). The form of RAD opinion does not reach beyond the SPE. Therefore, for PHAs, this disclosure must be limited to only those issues that would have a materially adverse effect on the ability to comply with the requirements of the RCC as any other litigation should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant litigation, such can be disclosed to HUD through the certification at Exhibit A.

<sup>8</sup> **Comment:** An opinion requesting opinion givers to determine whether the PHA Documents conform to the RCC requires opinion givers not to evaluate discrete legal issues, but instead to give broad guidance and counsel to HUD that the documents are legally adequate for HUD's intended purpose. Such guidance and counsel is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. Accordingly, this opinion should be deleted.

<sup>9</sup> **Comment:** For reasons described below, this is not an opinion, but rather a qualification and has been relocated within this letter accordingly.

1. ~~6.~~ To the extent that we have relied upon the certifications of other persons in preparing this opinion, or the written statements or opinions of other counsel, we have attached to this opinion a copy of each such certification, statement, or opinion.<sup>10</sup>

## Qualifications

~~—The Foregoing opinion is subject to the following Qualifications:~~

2. ~~1.~~ We express no opinion as to the truth or accuracy of any warranties, representations, or statements of fact contained in any documents examined by us, including, but not limited to, the PHA Documents listed in Heading A of Schedule 1.
3. ~~2.~~ We express no opinion as to:
- (a) the effect of bankruptcy, insolvency, reorganization, receivership, moratorium, fraudulent transfer, conveyance, and other similar laws affecting the rights and remedies of creditors generally; or
  - (b) the effect of general principles of equity, whether applied by a court of law or equity.
4. ~~3.~~ We express no opinion as to the enforceability of any provisions in any of the Documents purporting to:
- (a) preclude the modification thereof through conduct, custom or course of performance, action, or dealing;
  - (b) waive equitable, statutory, or constitutional rights or remedies;
  - (c) require the payment or reimbursement of fees, costs, expenses or other amount which are unreasonable in nature or amount;
  - (d) limit the liability of the recipient of this opinion, or require indemnification of recipient of this opinion, for its own action or inaction; or
  - (e) specify the forum or venue where disputes shall be settled.
5. ~~4.~~ No opinion is given herein as to any laws regulating the business of any the parties other than the PHA, including without limitation: (a) the types of investments that can be made by any of the parties other than the PHA; or (b) the legal lending limit of any of the parties other than the PHA.
6. ~~5.~~ Whenever our opinion herein is qualified by the phrases “to our knowledge,” “known to us,” “our attention,” or words of similar import, it is intended to indicate that the current

<sup>10</sup> Comment: This language was previously included as Opinion #7; however, it is best suited as a qualification, as it is simply a qualifying statement of fact and not a legal opinion.

actual knowledge of the attorneys within this firm engaged in the representations of the PHA (and not to the knowledge of the firm generally) is not inconsistent with that portion of the opinion which such phrases qualify. We have made no independent investigation with respect to such matters.

7. ~~6.~~ The opinions set forth are based solely upon the laws and regulations of the State and federal law, and the state of facts in effect on the date hereof. Nothing herein shall be construed to be an opinion as to the applicability or effect of the laws of any other jurisdiction.
8. ~~7.~~ This opinion speaks only as of the date of its delivery. We have no obligation to advise the recipients of this opinion, or anyone else, of any matter of fact or law thereafter occurring, whether or not brought to our attention, even though that matter affects any analysis or conclusion of this opinion.
9. ~~8.~~ The opinion is limited to the matters expressly set forth herein, and no opinion is to be inferred or may be implied beyond the matters expressly so stated.

[ENTER ALL HUD-APPROVED QUALIFICATIONS HERE OR MARK N/A]

~~7~~10.

~~8~~11.

~~9~~12.

~~10~~13.]

This opinion letter has been provided solely for the benefit of the addressee, at its request, and no other person or entity shall be entitled to rely hereon without the express written consent of **[LAW FIRM PROVIDING OPINION]** This opinion letter shall not be quoted in whole or in part, used, published, or otherwise referred to or relied upon in any manner, including, without limitation, in any financial statement or other document.

Sincerely,

**[LAW FIRM PROVIDING OPINION]**

By:

**[NAME]**

**[TITLE]**

#### Schedule 1

A. PHA Documents:

1. **[RAD Conversion Commitment]**
2. **[RAD Use Agreement]**
3. **[HAP Contract, including PBV rider, if applicable]**
4. **[Ground Lease, if applicable]**
5. **[Full Release or Partial Release of Declaration of Trust or Declaration of Restrictive Covenants, if applicable and executed by PHA]**
6. **[List all ~~Other PHA~~ other documents ~~as applicable~~ executed by the PHA and submitted to HUD for review as part of the RAD conversion]<sup>11</sup>**

B. Mixed Finance Documents (if applicable):

1. **[Termination of Mixed-Finance ACC, if applicable]**
2. **[Full Release or Partial Release from the Declaration of Restrictive Covenants if applicable and executed by PHA]**
3. **[Termination of the Regulatory and Operating Agreement, if applicable]**
4. **[Omnibus Amendment to Loan Documents, if applicable]**

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<sup>11</sup> **Comment:** The request to list all other “PHA Documents” without defining that term or providing additional detail is circular. Opinions should be limited to only those documents that are reviewed and approved by HUD as part of the RAD conversion process.

5. [List all ~~Other~~ other Mixed Finance Documents ~~as applicable~~ executed by the PHA and submitted to HUD for review as part of the RAD conversion]<sup>12</sup>

C. Other Documents

1. *[HAP Contract, if PBRA]*
2. *[Pro Forma Title Insurance Policy]*
3. *[Certification and Assurances]*
4. *[Consolidated Owner's Certification]*
5. *[Other documents used to support the opinions with respect to the PHA documents (e.g. bylaws and articles of incorporation,)]*

Exhibit A

**CERTIFICATION OF PHA**

This Certification of PHA ("Certification") is made the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, by PHA for reliance upon by *[LAW FIRM PROVIDING OPINION]* ("Counsel") in connection with the issuance of an opinion letter dated of even date herewith as a condition for conversion of assistance pursuant to the Rental Assistance Demonstration by the Department of Housing and Urban Development ("HUD"). In connection with the opinion letter, PHA hereby certifies to the best of its knowledge to Counsel for its reliance, the truth, accuracy and completeness of the following matter:

- There is no litigation or other ~~claim~~ claims pending or threatened against PHA or the Covered Project, the resolution of which would have a materially adverse effect on the PHA's ability to comply with the requirements of the RCC, except for: *[LIST on ATTACHED SCHEDULE A-1 OR IF NONE, STATE "NONE" HERE]*

<sup>12</sup> **Comment:** The request to list all other "Mixed Finance Documents" without defining that term or providing additional detail is circular. Opinions should be limited to only those documents that are reviewed and approved by HUD as part of the RAD conversion process.

- ~~The resolution of any such pending or threatened litigation or claims will not have a materially adverse effect on the ability of PHA to comply with the RAD requirements, including those set forth in the RCC.~~

The PHA and its authorized representative who executes this Certification, each certifies that the statements and representations contained in this Certification and all supporting documentation hereto are true, accurate, and complete. This Certification has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD and Counsel as a true statement of the facts contained therein.

***[INSERT SIGNATURE BLOCK]***

## SCHEDULE A-1

***Litigation or other Claims Pending or Threatened against PHA or the Covered Project, the Resolution of Which Would Have a Materially Adverse Effect on the PHA's Ability to Comply with the Requirements of the RCC***

***INSTRUCTIONS: This form contains HUD-required language which must be included in any Opinion of Project Owner Counsel in a Rental Assistance Demonstration program transaction. HUD-required Opinion language may not be changed. Additional Assumption and Qualification language needed for individual transactions may be added only with prior written approval of HUD, must not so substantially differ as to thwart the HUD-required language and must be in bold typeface in the space provided. Enter all transaction relevant information within the bold bracketed spaces provided and provide Schedule 1 and ~~Exhibits A and B~~ Exhibit A.***

**OPINION OF PROJECT OWNER'S COUNSEL**

***[LAW FIRM LETTERHEAD]***

***[DATE]***

U.S. Department of Housing  
and Urban Development  
451 Seventh Street SW  
Washington, D.C. 20410

Re: ***[COVERED PROJECT NAME, WITH PROJECT NUMBER IDENTIFIED IN RCC, IF ANY]***

Ladies and Gentleman:

We represent ***[FULL NAME OF PROJECT OWNER]***, a ***[STATE OR COMMONWEALTH ORGANIZED]*** ***[LEGAL STRUCTURE OF PROJECT OWNER]*** ("Project Owner"), in connection with the conversion of assistance pursuant to the Rental Assistance Demonstration ("RAD") and provision of rental assistance to the project located at ***[ADDRESS OF THE COVERED PROJECT]*** and commonly known as ***[COVERED PROJECT NAME]*** (the "Covered Project").

We have been requested by the Project Owner to deliver this opinion in accordance with and pursuant to the RAD requirements by the United States Department of Housing and Urban Development (“HUD”) and the associated RAD Conversion Commitment entered into by and between HUD, the Project Owner and *[NAME OF PUBLIC HOUSING AUTHORITY]*, [a public body corporate and politic]<sup>1</sup>, organized and existing under the laws of *[NAME OF STATE OR COMMONWEALTH]* (said document is hereafter referred to as the “RCC”

## Instruments and Loan Documents Examined

In preparing this opinion, we have prepared or reviewed executed originals or true and complete copies of the instruments and documents, all of which are dated the date hereof (unless otherwise indicated), as set forth in Schedule 1 attached hereto and incorporated herein by this reference. Items under Heading A *[and B (if ~~Mixed-Finance~~ conversion of a mixed finance public housing property<sup>2</sup>)]* of Schedule 1 are collectively referred to as the “Project Owner Documents” and all of the items listed on Schedule 1 are collectively referred to as the “Documents.” The Documents represent all of the material, legally binding agreements entered into by the Project Owner in association with the RAD conversion of public housing units approved by HUD pursuant to its execution of the RCC.

## Assumptions

The Opinions expressed herein are subject to the following Assumptions, in addition to the Assumptions and Qualifications set forth elsewhere herein:

1. ~~1.~~ All Documents submitted to us as originals are authentic, and all copies of the Documents, and all records and letters examined by us are accurate, true, complete, and correct copies of the originals thereof and all factual warranties, representations, and statements made by the parties in the Documents are accurate, true, and correct.
2. ~~2.~~ Each of the individuals executing the Project Owner Documents has the requisite legal capacity and all the signatures, other than those of the Project Owner on Project Owner Documents, are genuine.
3. ~~3.~~ The Project Owner Documents have been duly authorized, executed, and delivered by all parties other than the Project Owner and constitute legal, valid, and binding obligations of each such other party enforceable in accordance with their terms.
4. Each Project Owner Document or other document submitted for review is accurate and complete. Each Project Owner Document that is an original is authentic, each Project Owner Document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of any Project Owner Document

<sup>1</sup> Comment: This should be bracketed to allow counsel to modify as needed to incorporate such other descriptors that may be used by PHAs. While some State Enabling Acts create PHAs as “a public body corporate and politic,” this term is not uniformly applied to all PHAs.

<sup>2</sup> Comment: Revised wording for the avoidance of confusion.



submitted as an unexecuted copy does not differ in any respect relevant to this Opinion Letter from the form and content of such Project Owner Document as executed and delivered.<sup>3</sup>

5. ~~4.~~ Each party to any of the Project Owner Documents, other than the Project Owner, is a duly organized corporation, general partnership, limited partnership, limited liability company, national banking association, authority, agent, public body, branch of the government of the United States of America, or other duly organized entity, as the case may be, under and pursuant to the laws of each such party's organizational jurisdiction and, to the extent necessary for the delivery of the opinions set forth herein, is in good standing under the laws of, and authorized to transact business in, the State or Commonwealth in which the Covered Project is located ("State").
6. ~~5.~~ Each party to any of the Project Owner Documents, other than the Project Owner, has all requisite certifications of authority, licenses, permits, consents, qualifications, and documentation, and all requisite organizational power and authority, to execute such of the Project Owner Documents to which it is a party, to perform its obligations under such of the Project Owner Documents to which it is a party, and to enforce such of the Project Owner Documents to which it is a party.
7. ~~6.~~ There are no oral or written modifications or amendments to the Documents and there has been no waiver of any of the provisions of the Documents by actions or conduct of the parties or otherwise.

[ENTER ALL HUD-APPROVED ADDITIONAL ASSUMPTIONS HERE OR MARK N/A]

~~7.~~

8.

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10.

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<sup>3</sup> **Comment:** When opining on the Project Owner Documents, in many cases, fully executed original versions of each document may not be available. Accordingly, this assumption is required in order to provide Opinion #5. This is a standard assumption set forth in the ABA Illustrative Opinion, published in the Real Property, Trust and Estate Law Journal (Fall 2018/Winter 2019 edition).

11.]

We have made no investigation of the facts of law underlying the foregoing ~~Assumptions but nothing has come to our attention that would provide us with knowledge that we are not justified in making such~~ Assumptions.<sup>4</sup> We have made no investigation regarding the accuracy or completeness of any documents, records, instruments, letters, or other writings examined by us, or the accuracy of any warranties, representations, and statements of fact contained therein, and we express no opinion regarding the same. No opinion is expressed regarding the existence or nonexistence of, or the effect of, any form of fraud, misrepresentation, mistake duress, or criminal activity upon the legality, validity, binding effect, or enforceability of an of the Project Owner Documents, and we have made no investigation of the facts or law pertaining to such conduct, ~~but nothing has come to our attention which would provide us with actual knowledge of the existence of any such conduct.~~<sup>5</sup>

## Opinions

Based upon, and subject to, the Assumptions set forth above and subject to the Assumptions, Qualifications, exceptions, and limitations set forth in this opinion, we are of the opinion that:

1. ~~The~~ Based on the [Certificate of Existence or Certificate of Good Standing],<sup>6</sup> the Project Owner is a **[TYPE OF ENTITY AND STATE OR COMMONWEALTH WHERE PROJECT OWNER IS ORGANIZED AND EXISTING]** and duly organized, validly existing [if recognized by the jurisdiction: and in good standing<sup>7</sup>] and authorized to

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<sup>4</sup> Comment: Under customary opinion practice, outside of the securities context, negative assurances are not appropriate. Attorneys are not permitted to assume facts that they have reason to know are not accurate or do not warrant reliance under the circumstances. The American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, Real Estate Opinion Letter Guidelines, 38 Real Prop. Prob. & Tr. J. 241, 245 (2003) [hereinafter referred to as the Opinion Letter Guidelines], as affirmed in Joint Drafting Committee, Real Estate Finance Opinion Report of 2012, 47 Real Prop. Tr. & Est. L.J. 213, 220-221, 232-233 (2012) [hereinafter referred to as the 2012 Opinion Report]. Accordingly, attorneys should not be asked to confirm their lack of knowledge of particular factual matters. Opinion Letter Guidelines 255. We recognize that a few well-known opinion recipients such as Fannie Mae include negative assurances in their forms of Opinion of Borrower's Counsel, however, unlike HUD these opinion recipients allow opinion givers to deviate from their opinion forms and accept opinions that do not include the negative assurance language.

<sup>5</sup> Comment: Id.

<sup>6</sup> Comment: It is customary for opinions regarding the existence of an entity to be based on a Certificate of Existence or Certificate of Good Standing from the jurisdiction of formation. 2012 Opinion Report 231-232, 237-238. These recommended revisions have been accepted by HUD Field Counsel on past RAD transactions and ought to be incorporated in HUD's form of Opinion.

<sup>7</sup> Comment: Note that the good standing concept is not recognized in all jurisdictions. HUD should only require this language to be included when the jurisdiction recognizes it. 2012 Opinion Report 237.

transact business in the State. The Project Owner has the requisite power and authority to execute and deliver the Project Owner Documents to which it is a party and to perform its obligations thereunder.

2. The Project Owner Documents have been duly executed and delivered by the Project Owner. In addition, those parties executing the Project Owner Documents on behalf of the Project Owner, and the consummation by the Project Owner of the transactions contemplated thereby, have been duly authorized by all necessary partnership, company, corporate or other actions, as applicable.
3. Based upon the certification of Project Owner attached hereto as Exhibit A, there is no litigation or other claims pending or threatened against the Project Owner or the Covered Project ~~other than as disclosed to and consented to by HUD. The, the~~ resolution of ~~any litigation or other claim disclosed to HUD which~~ would ~~not~~ have a materially adverse effect on ~~the~~ Project Owner's ability to comply with the ~~RAD requirements, including those set forth in the RCC.~~ requirements of the RCC ~~[if applicable: other than as disclosed to HUD on Exhibit A, Schedule A-1].~~<sup>8</sup>

4. Intentionally Omitted.<sup>9</sup>

~~4. —Based solely on the pro forma title policy no. \_\_\_\_\_ issued by [NAME OF TITLE INSURANCE COMPANY] attached hereto as Exhibit B and reviewed and approved by HUD and assuming recordation of the documents listed therein in the order listed therein, and except as otherwise reflected in such policy, the RAD Use Agreement is superior to the lien and/or encumbrance of any mortgage, deed of trust, financing document or regulatory agreement relating to the Covered Project. To our knowledge, we have no reason to believe that the title policy issued will differ substantively with respect to the listing of liens and/or encumbrances~~

<sup>8</sup> Comment: The requested change reverts this language to that used in HUD's 2014 Form of Opinion. The language in the proposed form of opinion is too broad and will sweep in all the litigation of a Project Owner, which can be substantial through no fault of the Project Owner. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the Project Owner's ability to comply with RAD requirements. Therefore, this disclosure should be limited to only those issues that would have a materially adverse effect on the ability to comply with the requirements of the RCC as any other litigation should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant litigation, such can be disclosed to HUD through the certification at Exhibit A.

<sup>9</sup> Comment: This is neither a legal opinion nor a confirmation of fact. The opinion requests that the opinion giver read the pro forma title policy for HUD and adds nothing beyond the information stated in the pro forma title policy upon which the opinion relies. Because of the availability of title insurance, opinions regarding the status of title or encumbrances on real property are inappropriate. Opinion Letter Guidelines 252. In addition, conduit opinions, which add nothing beyond the documentation cited and may be misconstrued by the opinion recipient as adding evaluation of the source when none is, in fact, given, are disfavored under customary opinion practice. Opinion Letter Guidelines 246. To the extent HUD intends for the opinion giver to do more than recite what the pro forma title policy already says, the request is for broad guidance and counsel to HUD that is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. The pro forma title policy is submitted to HUD for programmatic and legal review. HUD counsel has ample opportunity to review and confirm that the RAD Use Agreement will be recorded in a manner that complies with RAD program requirements. Accordingly, this opinion should be deleted.

~~from the pro forma reviewed and approved by HUD or that the documents will be recorded in an order different than the recording order previously submitted to HUD for review.~~

5. The Project Owner Documents constitute valid and legally enforceable agreements and/or contracts of the Project Owner, enforceable in accordance with their respective terms under the laws of the State and local law, subject to the Qualifications that the enforceability of any Project Owner Document may be limited or affected by customary principles governing equitable relief generally and by bankruptcy, insolvency, reorganization, rearrangement, moratorium, liquidation, fraudulent conveyance, receivership, conservatorship, and other laws affecting the rights of creditors or the collection of debtors' obligations generally and a court may refuse to grant an order for specific performance or any other principles of equity which may limit the availability of certain equitable remedies.

~~6. Based on the foregoing and subject to the Assumptions and Qualifications set forth in this letter, it is our opinion that each of the Project Owner Documents conforms to the legal requirements of the RCC and that there is nothing in any of such Project Owner Documents that conflicts with, or is inconsistent with, the legal requirements of the RCC or exhibits thereto.~~

6. Intentionally Omitted.<sup>10</sup>

7. Intentionally Omitted.<sup>11</sup>

### Qualifications

The Foregoing opinion is subject to the following Qualifications:

1. ~~7.~~ To the extent that we have relied upon the certifications of other persons in preparing this opinion, or the written statements or opinions of other counsel, we have attached to this opinion a copy of each such certification, statement, or opinion.<sup>12</sup>

### Qualifications

~~The Foregoing opinion is subject to the following Qualifications:~~

2. ~~1.~~ We express no opinion as to the truth or accuracy of any warranties, representations, or statements of fact contained in any documents examined by us,

<sup>10</sup> Comment: An opinion requesting opinion givers to determine whether the Project Owner Documents conform to the RCC requires opinion givers not to evaluate discrete legal issues, but instead to give broad guidance and counsel to HUD that the documents are legally adequate for HUD's intended purpose. Such guidance and counsel is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. Accordingly, this opinion should be deleted.

<sup>11</sup> Comment: For reasons described below, this is not an opinion, but rather a qualification and has been relocated within this letter accordingly.

<sup>12</sup> Comment: This language was previously included as Opinion #7; however, it is best suited as a qualification, as it is simply a qualifying statement of fact and not a legal opinion.

including, but not limited to, the Project Owner Documents listed in Heading A of Schedule 1.

3. ~~2.~~ We express no opinion as to:
- (a) the effect of bankruptcy, insolvency, reorganization, receivership, moratorium, fraudulent transfer, conveyance, and other similar laws affecting the rights and remedies of creditors generally; or
  - (b) the effect of general principles of equity, whether applied by a court of law or equity.
4. ~~3.~~ We express no opinion as to the enforceability of any provisions in any of the Documents purporting to:
- (a) preclude the modification thereof through conduct, custom or course of performance, action, or dealing;
  - (b) waive equitable, statutory, or constitutional rights or remedies;
  - (c) require the payment or reimbursement of fees, costs, expenses or other amount which are unreasonable in nature or amount;
  - (d) limit the liability of the recipient of this opinion, or require indemnification of recipient of this opinion, for its own action or inaction; or
  - (e) specify the forum or venue where disputes shall be settled.
5. ~~4.~~ No opinion is given herein as to any laws regulating the business of any the parties other than the Project Owner, including without limitation: (a) the types of investments that can be made by any of the parties other than the Project Owner; or (b) the legal lending limit of any of the parties other than the Project Owner.
6. ~~5.~~ Whenever our opinion herein is qualified by the phrases “to our knowledge,” “known to us,” “our attention,” or words of similar import, it is intended to indicate that the current actual knowledge of the attorneys within this firm engaged in the representations of the Project Owner (and not to the knowledge of the firm generally) is not inconsistent with that portion of the opinion which such phrases qualify. We have made no independent investigation with respect to such matters.
7. ~~6.~~ The opinions set forth are based solely upon the laws and regulations of the State and federal law, and the state of facts in effect on the date hereof. Nothing herein shall be construed to be an opinion as to the applicability or effect of the laws of any other jurisdiction.

8. ~~7.~~ This opinion speaks only as of the date of its delivery. We have no obligation to advise the recipients of this opinion, or anyone else, of any matter of fact or law thereafter occurring, whether or not brought to our attention, even though that matter affects any analysis or conclusion of this opinion.
9. ~~8.~~ The opinion is limited to the matters expressly set forth herein, and no opinion is to be inferred or may be implied beyond the matters expressly so stated.

[ENTER ALL HUD-APPROVED QUALIFICATIONS HERE OR MARK N/A]

~~7~~10.

~~8~~11.

~~9~~12.

~~10~~13.

This opinion letter has been provided solely for the benefit of the addressee, at its request, and no other person or entity shall be entitled to rely hereon without the express written consent of **[LAW FIRM PROVIDING OPINION]** This opinion letter shall not be quoted in whole or in part, used, published, or otherwise referred to or relied upon in any manner, including, without limitation, in any financial statement or other document.

Sincerely,

**[LAW FIRM PROVIDING OPINION]**

By:

**[NAME]**

**[TITLE]**

### Schedule 1

- A. Project Owner Documents:
1. **[RAD Conversion Commitment]**
  2. **[RAD Use Agreement]**
  3. **[HAP Contract]**
  4. **[Ground Lease, if applicable]**

5. *[LIST ALL OTHER DOCUMENTS EXECUTED BY THE PROJECT OWNER DOCUMENTS AND SUBMITTED TO HUD FOR REVIEW AS PART OF THE RAD CONVERSION]*<sup>13</sup>

B. Mixed Finance Documents (if applicable):

1. *[Termination of Mixed-Finance ACC]*
2. *[Full Release or Partial Release from the Declaration of Restrictive Covenants]*
3. *[Termination of the Regulatory and Operating Agreement]*
4. *[Omnibus Amendment to Loan Documents]*

~~5. *[Other documents as applicable]*~~

5. *[List all other Mixed Finance Documents executed by the Project Owner and submitted to HUD for review as part of the RAD conversion]*<sup>14</sup>

C. Other Documents

1. *[Full or Partial Releases of Declarations of Trust – Total # of Releases]*
2. *[Pro Forma Title Insurance Policy]*
3. *[Certifications and Assurances]*
4. *[Certification of Project Owner, attached as Exhibit A]*
5. *[Consolidated Owner's Certification]*
6. *[Project Owner Organizational Documents]*
  - i. *[Amended and Restated Agreement of Limited Partnership]*
  - ii. *[Certificate of Limited Partnership]*
  - iii. *[Certificate of Existence]*
  - iv. *[Other documents used to support the opinions with respect to the Project Owner documents (e.g. bylaws and articles of incorporation)]*

<sup>13</sup> *Comment: The request to list all other "Project Owner Documents" without defining that term or providing additional detail is circular. Opinions should be limited to only those documents that are reviewed and approved by HUD as part of the RAD conversion process.*

<sup>14</sup> *Comment: The request to list "other documents as applicable" without defining that term or including additional detail is ambiguous.*

Exhibit A

**CERTIFICATION OF PROJECT OWNER**

This Certification of Project Owner ("Certification") is made the \_\_\_\_ day of \_\_\_\_\_, 202\_, by Project Owner for reliance upon by [**LAW FIRM PROVIDING OPINION**] ("Counsel") in connection with the issuance of an opinion letter dated of even date herewith as a condition for conversion of assistance pursuant to the Rental Assistance Demonstration by the Department of Housing and Urban Development ("HUD"). In connection with the opinion letter, Project Owner hereby certifies to the best of its knowledge to Counsel for its reliance, the truth, accuracy and completeness of the following matter:

- There is no litigation or other claims pending or threatened against Project Owner or the Covered Project, the resolution of which would have a materially adverse effect on the Project Owner's ability to comply with the requirements of the RCC, except for: [LIST on ATTACHED SCHEDULE A-1 OR IF NONE, STATE "NONE" HERE]
- ~~• The resolution of any such pending or threatened litigation or claims will not have a materially adverse effect on the ability of Project Owner to comply with the RAD requirements, including those set forth in the RCC.~~

The Project Owner and its authorized representative who executes this Certification, each certifies that the statements and representations contained in this Certification and all supporting documentation hereto are true, accurate, and complete. This Certification has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD and Counsel as a true statement of the facts contained therein.

**[INSERT SIGNATURE BLOCK, SUCH AS**

**[NAME OF PROJECT OWNER]**

**a [STATE AND LEGAL STRUCTURE OF ENTITY]**

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

**[NAME OF ITS GENERAL PARTNER]**

**its General Partner**

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

**[NAME OF ITS MANAGING MEMBER]**

**its Managing Member]**

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



*[NAME OF ITS PRESIDENT]*

**SCHEDULE A-1**

*Litigation or other Claims Pending or Threatened against PHA or the Covered Project, the Resolution of Which Would Have a Materially Adverse Effect on the Project Owner's Ability to Comply with the Requirements of the RCC*

**~~Exhibit B~~**

**~~PRO-FORMA TITLE INSURANCE POLICY~~**

**~~(attached)~~**

**Rental Assistance Demonstration  
Transfer of Assistance Restrictive  
Covenants**

U.S. Department of Housing  
and Urban Development

OMB Approval No.  
2502-0612  
(Exp. xx/xx/xxxx)

**Public reporting burden** for this collection of information is estimated to average 30 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used as the binding agreement between the owner and HUD for certain properties released from the Public Housing Declaration of Trust following a transfer of assistance. There are no assurances of confidentiality.

Recording requested by:

[ 1 ]

When recorded mail to:

[ 2 ]

---

(Space above this line for recorder's use.)

**RENTAL ASSISTANCE DEMONSTRATION  
TRANSFER OF ASSISTANCE RESTRICTIVE COVENANTS**

These Rental Assistance Demonstration Transfer of Assistance Restrictive Covenants (these "Covenants"), dated as of [ 3 ], are entered into by and between the U.S. Department of Housing and Urban Development, with an address of 451 Seventh Street, S.W., Washington, DC 20410, Attention: Office of Recapitalization, Office of Multifamily Housing ("HUD"), and [ 4 ], a public body corporate and politic duly organized under the laws of the [ 5 ] with an address of [ 6 ] (the "PHA").

**RECITALS**

A. The PHA owns certain real property described in Exhibit A, attached hereto and incorporated herein, together with the personal property associated therewith (the "Property"). The development of the Property, the operation of the Property, and/or the acquisition of the site or sites thereof was financed with assistance provided by HUD and the Property was previously used for public housing purposes pursuant to agreements by and between HUD and the PHA.

B. The public housing assistance related to this Property has been converted under the Rental Assistance Demonstration (RAD) to housing subject to a Section 8 Project Based Voucher (PBV) or Project Based Rental Assistance (PBRA) contract located at another site, pursuant to a transfer of assistance under RAD. HUD and the PHA have released the Property from any declaration of restrictive covenants, declaration of trust and/or obligation associated with the prior public housing uses of the Property recorded at [\_\_\_\_ 7 \_\_\_\_], in the records of [\_\_\_\_ 8 \_\_\_\_], dated [\_\_\_\_ 9 \_\_\_\_]. In lieu of the prior restrictions, HUD and the PHA desire to restrict the ongoing use of the Property as set forth in these Covenants.<sup>1</sup>

C. The parties hereto desire that ~~the Property itself, or alternatively all~~ (i) the Property be used for Affordable Housing Purposes, (ii) all net income from the operation of the Property for purposes other than Affordable Housing Purposes be used for Affordable Housing Purposes and/or (iii) financial proceeds from the ~~operation or~~ sale of the Property be used for Affordable Housing Purposes, ~~be used for Affordable Housing Purposes, as set forth in these Covenants.~~<sup>2</sup>

### AGREEMENT

In consideration of the promises and covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as set forth below. The Recitals are incorporated by reference.

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<sup>1</sup> **Comment:** As a general matter, we object to the encumbrance of Converting Projects and property (i.e. transferor property in a RAD Transfer of Assistance) following encumbrance of a Converted Project and property (i.e. transferee property in a RAD Transfer of Assistance) with a RAD Use Agreement in cases where a PHA-controlled entity is the owner. Where a PHA has acquired property in an opportunity neighborhood for a transfer of assistance using unrestricted nonfederal funds and complied with the one-for-one replacement requirements of RAD, HUD should not have a continuing interest in the Converting Project or the underlying real estate through these Covenants or otherwise. In these cases, HUD has effectively accepted a substitute property to restrict for at least forty years. It is particularly unreasonable for HUD to regulate both properties when the value of the Converted Project property far exceeds the value of the Converting Project Property. Moreover, State housing authority enabling acts require PHAs to use their properties and income for the benefit of their mission. There is no need for HUD to regulate the Converting Property real estate or the income from it, when it has approved a transfer of assistance. The financing plan process could be adapted to be more explicit on this issue. In cases where the transfer of assistance is to sites not controlled by a PHA-controlled owner, we can see why the analysis might be different.

<sup>2</sup> **Comment:** Section 1.4.A.12.a.i.c) of the RAD Notice restricts property to Affordable Housing Purposes or restricts net income from non-Affordable Housing Purposes to Affordable Housing Purposes. The proposed revisions clarify that only net income from non-Affordable Housing Purposes is restricted to Affordable Housing Purposes (i.e. net income from Affordable Housing Purposes is not restricted). Further, HUD has approved the use of a single property for both Affordable Housing Purposes and non-Affordable Housing Purposes and restricted only the net income of the non-Affordable Housing Purposes. These changes correspond to changes in Section 1 of these Covenants and the terms of Section 3. However, in the case of the transfers of assistance described in Footnote 1, there is no need for HUD to regulate the use of proceeds or to require this Covenant.

1. Definitions.

a. “Act” shall mean the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437 et. seq.

b. “Affordable Housing Purposes” shall mean any activity that supports the pre-development, development, rehabilitation or operation of other RAD conversions, public housing, housing assisted under Section 8 of the Act, properties subject to low-income housing tax credit use restrictions, or properties participating in other federal, state or local housing programs serving households with incomes at or below eighty percent (80%-) of area median income, or that provides services or amenities that will be used primarily by low-income families as defined by the Act. [ 10 ]

c. “Proceeds” shall mean any net income generated from use of the Property for purposes other than Affordable Housing Purposes, including through lease agreements, prior to the expiration of the Restricted Period, and any payments upon transfer of the Property.<sup>3</sup>

~~d. “Reference Date” shall mean [ 11 ].~~

~~d.~~ e. “Restricted Period” shall mean the period the Property is subject to the lien of the Use Requirement, as set forth in Section 2(b).

~~e.~~ f. “Restrictions on Proceeds” shall mean the restrictions on the use of the Proceeds set forth in Section 3.

~~f.~~ g. “Use Requirement” shall mean the restrictions on the use of the Property set forth in Section 2.

2. Property Use Requirement.

a. Generally. The PHA, for itself and for its successors and assigns, hereby covenants and agrees for the benefit of HUD that throughout the Restricted Period, the Property shall be used for Affordable Housing Purposes.

b. Restricted Period.

i. The Use Requirement set forth in this Section 2 shall encumber the Property from the date of these Covenants through such date which is twenty (20) years following the date of these Covenants.

ii. Notwithstanding the foregoing, if the PHA receives payment upon transfer of the Property to a third party, such twenty-year period shall be reduced by multiplying twenty years by the ratio of (i) the payment from the third party to the PHA relative to (ii) the fair

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<sup>3</sup> Comment: “Reference Date” was deleted from the Definitions because the term is not used in these Covenants.

market value, as documented by an appraisal commissioned by the PHA and acceptable to HUD. Upon request from the PHA and recognizing that there is variation among appraisals and that an arms-length purchase agreement may not correspond precisely to the appraised value, HUD may accept a ten percent (10%) variation from the appraised value for purposes of this calculation if the Property is sold for cash, without seller take-back financing, to an unrelated third party purchaser. Upon request from the PHA, HUD may accept, in its sole discretion, an alternative methodology to determine fair market value for purposes of this calculation, provided that such alternative method meets the requirements of 2 CFR 200.311(c)(2). If any payment is made at the time these Covenants are executed, the Restricted Period shall end on [ 12 ]. The letters "NA," a blank, or similar markings shall indicate that no current adjustment from the twenty-year period has been approved. In the event any payment is made after execution of these Covenants, HUD shall execute an amendment to the Covenants specifying the new duration of the Restricted Period.

iii. For the duration of the Use Requirement, the PHA shall retain records of and annually report to its board of directors regarding the use of the Property (including any use for Affordable Housing Purposes) and any proposed transfer of the Property. The PHA shall provide such records to HUD whenever HUD approval is needed pursuant to Section 5 hereof or upon request.

c. Release of the Use Requirement.

i. HUD agrees to execute and deliver to the PHA a release of the Use Restriction when an alternative restrictive covenant is placed upon the Property that, in HUD's determination, satisfies the Affordable Housing Purposes requirement.

ii. Upon the expiration of the Restricted Period, the Use Requirement shall cease and terminate, and the Property shall automatically be and be deemed released of the Use Requirement and these Covenants without the requirement of any further writing between the parties herein. Notwithstanding the foregoing, upon expiration of the Restricted Period, HUD agrees to execute and deliver to the PHA such documents as the PHA shall reasonably request releasing and confirming the release of the Use Requirement and these Covenants from title to the Property and clearing title to the Property from any cloud created by the Use Requirement or these Covenants.

3. Restrictions on Proceeds.

a. To the extent the Property or any portion thereof is not used for Affordable Housing Purposes, any Proceeds shall be held in a restricted account and be used exclusively for Affordable Housing Purposes. The Restrictions on Proceeds set forth in this Section 3 shall govern the use of the Proceeds until the funds are disbursed for an Affordable Housing Purpose or returned to HUD.

b. Any Proceeds must be deposited by the PHA in a bank account covered by a General Depository Agreement (HUD Form 51999) until the funds are disbursed for an Affordable Housing Purpose.

c. For the duration of the Restriction on Proceeds set forth in Section 3(a), the PHA shall retain records of and annually report to its board of directors the calculation of the Proceeds (the net income generated from the Property and the proceeds of any transfer of the Property), and the use of any Proceeds for Affordable Housing Purposes. The PHA shall provide such records to HUD whenever HUD approval is needed pursuant to Section 5 hereof or upon request.

4. Actions Requiring the Prior Written Approval of HUD.

a. The PHA shall not convey, assign, transfer, lease, sublease, pledge, hypothecate, encumber or otherwise dispose of the Property or any interest therein or permit the conveyance, assignment, transfer, lease, pledge or encumbrance of the Property during the period covered by these Covenants without the prior written approval of HUD. Notwithstanding the foregoing, the PHA need not obtain the prior written approval of HUD for (i) the conveyance or dedication of land for use as streets, alleys or other public rights-of-way, (ii) the granting of easements for the establishment, operation and maintenance of public utilities, and/or (iii) the documentation of residential leases or other occupancy arrangements in the normal course of operation of the Property. To the extent required for the PHA to effectuate (i) above, HUD agrees to execute and deliver to the PHA such documents as the PHA shall reasonably request releasing and confirming the release of the Use Requirement and these Covenants.<sup>4</sup>

b. If any transfer is approved by HUD at the time these Covenants are executed, the name of the transferee shall appear here: [        **13**        ]. The letters “NA,” a blank, or similar markings shall indicate that no transferee has been approved.

5. Events of Default.

a. Upon breach of any of the terms of these Covenants, HUD shall give the PHA written notice of the breach. The PHA shall have ~~thirty-sixty~~ (3060) calendar days after receipt of such notice of breach to cure the breach; provided that, if the PHA uses commercially reasonable efforts to cure the breach within the prescribed ~~thirty-sixty~~ (3060) day period and is unable to do so, HUD may approve in writing an extension of an additional thirty (30) calendar days or such longer time as may be reasonably required by the circumstances to cure the breach,<sup>5</sup> such approval not to be unreasonably withheld, conditioned or delayed. If the breach is not

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<sup>4</sup> **Comment:** Certain state and local governments do not accept dedications of property that are subject to a HUD restriction.

<sup>5</sup> **Comment:** Despite best efforts of the parties, certain events of default may not be able to be cured within the set timeframes. Should such be deemed appropriate, parties should be provided the flexibility to extend the cure period as they see fit in order to avoid default when working in good faith to cure the breach.

corrected to the satisfaction of HUD within the prescribed cure period HUD may declare a default under these Covenants (an “Event of Default”) without further notice.<sup>6</sup>

b. The PHA does hereby acknowledge and declare that, upon an Event of Default during the Restricted Period and without further action by the PHA, the PHA is possessed of the Property and holds the Property in trust for the benefit of HUD. During the existence of the trust hereby created, HUD has been granted and is possessed of an interest in the above described Property, specifically the right to require the PHA to remain seized of the title to the Property and to refrain from transferring, conveying, assigning, leasing, mortgaging, pledging, or otherwise encumbering or permitting or suffering any transfer, conveyance, assignment, lease, mortgage, pledge or other encumbrance of the Property or any part thereof, any appurtenances thereto, or any rent, revenues, income, or receipts therefrom or in connection therewith, or any interest in any of the same, except that the PHA may (a) lease dwellings and other spaces and facilities in the Property, or (b) convey or dedicate land for use as streets, alleys, or other public right-of-way, and grant easements for the establishment, operation, and maintenance of public utilities; or (c) upon request by HUD, convey title to or deliver possession of the Property to HUD.

c. In addition to the foregoing, upon an Event of Default, HUD shall have all other remedies available under statute, at law or in equity. No person or entity, other than the parties to these Covenants, has any rights or remedies under these Covenants. Further, HUD may take whatever investigative steps it deems necessary to ensure compliance. In the Event of Default, to the extent permitted by applicable law, HUD shall have the right to seek specific performance of these Covenants and/or to enjoin any violation of these Covenants in Federal Court. The right to specific performance and injunction shall be in addition to all other remedies available to HUD under statute, at law or in equity.

6. Third Party Beneficiaries. No person or entity, other than the parties to these Covenants, has any rights or remedies under these Covenants.

7. Successors and Assigns.

a. Recordation of these Covenants shall constitute public notice of the PHA’s agreement to be bound by and to comply with the restrictions set forth in these Covenants. The benefits and burdens of these Covenants touch and concern and run with the land and are binding upon and shall inure to the benefit of the respective successors and assigns of the parties to these Covenants, including any HUD-approved transferee through the term of the Restricted Period.

b. Following expiration or earlier termination of the Restricted Period, the Restrictions on Proceeds set forth in this Agreement shall not run with the land, nor bind the successors in title to the Property. The continued existence of Proceeds subject to the Restrictions on Proceeds shall not affect any release of the Use Requirement as a lien on the

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<sup>6</sup> *Comment: The cure period should be sixty (60) days to correspond with the cure period granted under the RAD Use Agreement.*

Property pursuant to Section 2(c). The Restrictions on Proceeds shall be a contractual relationship between HUD and the PHA and shall inure to the benefit of the respective successors and assigns of the parties with respect to the Proceeds. The Restrictions on Proceeds shall survive the expiration of the Use Requirement and any release of the lien on the Property; provided, any Proceeds accruing after the expiration or earlier termination of the Use Requirement shall not be subject to the Restrictions on Proceeds.

8. Notices. All notices under these Covenants shall be in writing and shall be served by (a) personal service or receipted courier service, (b) by registered or certified first-class mail, return receipt requested, or (c) nationally-recognized overnight delivery service, addressed to HUD or the PHA, as appropriate, at the addresses for such parties set forth above. Any notice or other communication sent pursuant to clause (a) hereof shall be deemed received upon such personal service, if sent pursuant to clause (b) shall be deemed received seven (7) calendar days following deposit in the mail, and/or if sent pursuant to clause (c) shall be deemed received the next succeeding business day following deposit with such nationally recognized overnight delivery service. Any party may change its address by notice given in accordance with this Section 9.

9. Amendments. These Covenants may be amended only by a written instrument signed by the parties to these Covenants. Notwithstanding the foregoing, the parties may not amend, modify, rescind, revoke and/or terminate these Covenants without the prior written approval of HUD. Further, these Covenants are not subject to negotiation by the PHA, any lessee or any lender with a security interest in the Property.

10. Subordination. Any mortgage liens shall be subject and subordinate to these Covenants. These Covenants shall survive foreclosure and bankruptcy.<sup>7</sup>

11. Execution of Other Covenants. PHA covenants and agrees that it has not and shall not execute any other agreement with provisions contradictory of, or in opposition to, the provisions of these Covenants, and that in any event, the provisions of these Covenants are paramount and controlling as to the rights and obligations set forth herein and supersede any conflicting requirements.

12. Governing Law. These Covenants shall be governed, construed and interpreted in accordance with the laws of the state in which the Property is located, and the parties shall submit to the jurisdiction and venue of the courts in the county where the Property is located.

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<sup>7</sup> **Comment:** We recommend HUD develop a form of Rental Assistance Demonstration Transfer of Assistance Restrictive Covenants for homeownership programs (similar, for example, to CNI or HOPE VI) that permits termination of the Covenants following foreclosure. Such homeownership Covenants should address, among other customary homeownership requirements, restrictions on conveyances from an original home owner to a subsequent homeowner, if any.



13. Severability. The invalidity or unenforceability of any clause, part or provision of these Covenants shall not affect the validity or enforceability of the remaining portions thereof.

14. Counterpart Signatures. These Covenants may be executed in any number of original counterparts, all of which evidence only one agreement, and only one of which need be produced for any purpose.

*Remainder of this page intentionally left blank.*

IN WITNESS WHEREOF, the parties hereto, by their respective duly authorized representatives, have caused their names to be subscribed hereto, on the date first written above.

*PHA hereby certifies that the statements and representations contained in this instrument and all supporting documentation are true, accurate, and complete and that each signatory has read and understands the terms of these Covenants. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD as a true statement of facts contained therein.*

PHA: [ 14 ], a public body corporate and politic

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

*A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.*

[ 15 ]

[ 16 ]

ss.

On \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under penalty of perjury under the laws of this State or Commonwealth that the foregoing paragraph is true and correct. Witness my hand and official seal.

\_\_\_\_\_  
Notary Public  
Print Name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

HUD: U.S. Department of Housing and Urban  
Development

By: \_\_\_\_\_  
Thomas R. Davis  
Director, Office of Recapitalization

*A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.*

District of Columbia | ss.

On \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_, Notary Public, personally appeared Thomas R. Davis, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under penalty of perjury under the laws of the District of Columbia that the foregoing paragraph is true and correct. Witness my hand and official seal.

\_\_\_\_\_  
Notary Public  
Print Name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

Warning:

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in any matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

**EXHIBIT A**  
**LEGAL DESCRIPTION OF THE PROPERTY**

**Address:** [ 17 ]

Real property in the City of \_\_\_\_\_, County of \_\_\_\_\_,  
State/Commonwealth of \_\_\_\_\_, described as follows:

[ 18 ]

## INSTRUCTIONS:

1. Insert the name and address of the PHA requesting the release of the DOT or of their attorneys.
2. Insert the name and address of the PHA requesting the release of the DOT or of their attorneys.
3. Insert the day, month and year.
4. Insert the legal name of the PHA.
5. Insert the place of legal formation, e.g., Commonwealth of Virginia.
6. Insert the PHA's legal address.
7. Insert the document number or book and page recording information for the Release.
8. Insert the name of the Local Recording Entity where the Release is recorded (e.g., Office of the Register of Deeds for Fairfax County, Virginia).
9. Insert the day, month and year of the Release.
10. Additional detail regarding the nature of affordable housing use may be, but is not required to be, included as additional sentences in this paragraph.
11. Fill in either the effective date of the HAP contract on the Transfer of Assistance site or a phrase such as the following: "the effective date of the HAP contract for the Property referenced in that certain Rental Assistance Demonstration Conversion Commitment (RCC) executed by and among HUD, the PHA and \_\_\_\_\_, dated as of \_\_\_\_\_." The inserted phrase should be adequate to identify the applicable RCC.
12. Insert the date for the end of the Restricted Period or type "NA".
13. Insert the legal name of any approved transferee or type "NA".
14. Insert the legal name of the PHA.
15. Insert the name of the State or Commonwealth.
16. Insert the name of the County.
17. Insert street address and any other tax map identification
18. Insert complete metes and bounds legal description or other legal description (such as a reference to a plat map) which is legally sufficient in the State or Commonwealth.

**Part I**  
**PBRA Housing Assistance Payments**  
**Contract for the Conversion of**  
**Section 202 Project Rental**  
**Assistance Contract (PRAC) to**  
**Project-Based Section 8 (Rental**  
**Assistance Demonstration**  
**Component 2)**

**U.S. Department of Housing and**  
**Urban Development**  
**Office of Multifamily Housing Programs**

Type of Financing at Time of Conversion:	Section 8 Project Number:	FHA Project Number (if applicable):

This contract is a housing assistance payments contract (HAP Contract) between the United States of America, acting through the Department of Housing and Urban Development (HUD), and

(Owner). The HAP Contract is subject to Notice H-2019-09 PIH-2019-23(HA), as amended or revised from time to time (or any successor document) (RAD Notice), including 24 C.F.R. Part 880 (as in effect November 5, 1979, as amended), as modified and as published in Appendix I of the RAD Notice.

**1.1 Statutory Authority, Purpose of HAP Contract, and HAP Contract Terminology.**

- (a) **Statutory Authority.** The HAP Contract is entered pursuant to the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 673 – 675 (Nov. 18, 2011); as amended by the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 635 (Jan. 17, 2014); as further amended by the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2757 – 2758 (Dec. 6, 2014); as further amended by the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2897 (Dec. 18, 2015); as further amended by the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 789 (May 5, 2017); as further amended by the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 1038 – 1039 (Mar. 23, 2018), as further amended from time to time; section 8 of the United States Housing Act of 1937 (Act), 42 U.S.C. § 1437 et seq.; and the Department of Housing and Urban Development Act, 42 U.S.C. § 3531 et seq.
- (b) **Purpose.** The purpose of the HAP Contract is to effectuate the conversion of a Section 202 Project Rental Assistance Contract (PRAC) project to a Multifamily Housing project with Project-Based Rental Assistance under section 8 of the Act.
- (c) **Terminology.** Terms in the HAP Contract that are not otherwise defined herein have the definition given in the RAD Notice, including those terms defined in Appendix I of the RAD Notice setting forth 24 C.F.R. Part 880 except as struck in part. Terms that are not defined in the RAD Notice (including Appendix I) shall have the meanings given in 24 C.F.R. part 5, which applies pursuant to 24 C.F.R. § 880.104(d).

**1.2 Scope; Assignability of HAP Contract; and HUD Requirements.**

- (a) **Scope of HAP Contract.** The HAP Contract consists of Part I, Part II, and the exhibits identified in section 1.4(d) of the HAP Contract, which are hereby incorporated into and made a part of the HAP

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Contract.

- (b) **Assignability of HAP Contract.** HUD may assign the HAP Contract at any time to a public housing agency (PHA) for the purpose of PHA administration of the HAP Contract to the extent permitted under any Annual Contributions Contract (ACC) between HUD and the PHA. Unless and until HUD assigns the HAP Contract to a PHA, HUD shall be the Contract Administrator (CA) and, in that capacity, a party to the HAP Contract. Upon any assignment of the HAP Contract by HUD to a PHA, the PHA shall assume all the contractual obligations of HUD under the HAP Contract (or of any PHA to which HUD had previously assigned the HAP Contract) and shall replace HUD (or any PHA to which HUD had previously assigned the HAP Contract) as the CA and as a party to the HAP Contract during the ACC term.
- (c) **HUD Requirements.** The HAP Contract shall be construed and administered in accordance with the RAD Notice. With the exception of the provisions of 24 C.F.R. Part 880 and section 8 of the Act that are identified in Appendix I and Appendix II of the RAD Notice, respectively, as inapplicable, the HAP Contract shall further be construed and administered in accordance with all statutory requirements and all HUD regulations and other requirements, including any amendments to and/or changes in statutory requirements, HUD regulations (including 24 C.F.R. Part 880), and other requirements. However, any changes in HUD requirements, except to the extent required by statute, that are inconsistent with the provisions of sections 2.3(a)(1) or 2.6 of the HAP Contract, shall not be applicable.
- (d) **Statutory Changes during Term.** If any statutory change during the term of the HAP Contract is inconsistent<sup>1</sup> with section 2.3(a)(1) or 2.6 of the HAP Contract, and if HUD determines, and so notifies the Contract Administrator and the Owner, that the Contract Administrator is unable to carry out the provisions of such sections because of such statutory change, then the Contract Administrator or the Owner may terminate the HAP Contract upon notice to the other party.<sup>2</sup>

### **1.3 Effective Date, Initial Term, and Funding For Initial Term of HAP Contract.**

- (a) **Effective Date and Initial Term.** The HAP Contract begins on \_\_\_\_\_ and shall run for an initial term of twenty (20) years.
- (b) **Funding for Initial Term.**
- (1) Execution of the HAP Contract by HUD is an obligation of HUD of \$ \_\_\_\_\_, an amount sufficient to provide housing assistance payments for approximately \_\_\_\_\_ months of the first annual increment of the HAP Contract term.
- (2) HUD will provide additional funding for any remainder of the first annual increment and for subsequent annual increments, including any remainder of such subsequent annual increments,<sup>3</sup> subject to the availability of sufficient appropriations.<sup>4</sup> When such appropriations are available, HUD will obligate additional funding and provide the Owner written notification of (i) the amount of such additional funding, and (ii) the approximate amount of time within the HAP Contract term to which it will be applied.

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<sup>1</sup> *Comment: "Inconsistent" is undefined and vague, and could potential encompass a broad range of Congressionally mandated changes.*

<sup>2</sup> *Comment: Termination of the HAP contract on the basis of statutory changes is a troubling concept, particularly if Congress were to determine that programmatic changes are necessary to ensure the continued viability of such HAP assisted properties.*

<sup>3</sup> *Comment: The terms "first annual increment" or "subsequent annual increments" are undefined. These terms appear nowhere in Section IV of RAD Notice rev 4.*

<sup>4</sup> *Comment: The entirety of Section 1.3(b)(2) anticipates short-funding of the program, which may deter lenders and investors from participating in the RAD for PRAC program.*

#### **1.4 Fiscal Year, Project Description, Statement of Services, and Exhibits.**

- (a) **Fiscal Year**. The ending date of each Fiscal Year shall be \_\_\_\_\_ . (Insert March 31, June 30, September 30, or December 31, as approved by HUD.) The Fiscal Year for the project shall be the 12-month period ending on this date. However, the first Fiscal Year for the project is the period beginning with the effective date of the Contract and ending on the last day of the Fiscal Year. The project must comply with 24 CFR part 5, subpart H, as amended, revised, or modified by HUD.



(b) **Project Description** (Print or type the street address(es) and the number of units by bedroom size).

(c) **Statement of Services, Maintenance and Utilities Provided by the Owner.**

(1) Services and Maintenance (check all items included in rent):

- |   |  |  |
|---|--|--|
| <input type="checkbox"/> Parking            | <input type="checkbox"/> Trash Removal | <input type="checkbox"/> Nursing Care  |
| <input type="checkbox"/> Laundry Facilities | <input type="checkbox"/> Swimming Pool | <input type="checkbox"/> Tennis Courts |
| <input type="checkbox"/> Linen/Maid Service | <input type="checkbox"/> _____         | <input type="checkbox"/> _____         |
| <input type="checkbox"/> _____              |  |  |

(2) Equipment (check all items included in rent):

- |  |                                      |  |
|--|--------------------------------------|--|
| <input type="checkbox"/> Range           | <input type="checkbox"/> Dishwasher  | <input type="checkbox"/> Kitchen Exhaust Fan |
| <input type="checkbox"/> Refrigerator    | <input type="checkbox"/> Carpet      | <input type="checkbox"/> Ceiling Fans        |
| <input type="checkbox"/> Air Conditioner | <input type="checkbox"/> Drapes      | <input type="checkbox"/> _____               |
| <input type="checkbox"/> Disposal        | <input type="checkbox"/> Mini Blinds | <input type="checkbox"/> _____               |
| <input type="checkbox"/> _____           |                                      |  |

(3) Utilities (check all items included in rent. For each item, even those not included in rent, enter E, F, or G on line beside that item; E = electric; G = gas; F = fuel oil or coal):

(4)

- |   |   |  |
|---|---|--|
| <input type="checkbox"/> Heating <input type="checkbox"/> | <input type="checkbox"/> Hot Water <input type="checkbox"/> | <input type="checkbox"/> Lights, etc. <input type="checkbox"/> |
| <input type="checkbox"/> Cooling <input type="checkbox"/> | <input type="checkbox"/> Cooking <input type="checkbox"/>   | <input type="checkbox"/> Water/Sewer <input type="checkbox"/>  |
| <input type="checkbox"/> _____ <input type="checkbox"/>   | <input type="checkbox"/> _____ <input type="checkbox"/>     | <input type="checkbox"/> _____ <input type="checkbox"/>        |

(5) Other:

(d) **Exhibits.** The exhibits to the HAP Contract consist of the following:

- (1) **Exhibit 1:** Schedule of Contract Units and Contract Rents;
- (2) **Exhibit 2:** Affirmative Fair Housing Marketing Plan; and
- (3) **Exhibit 3:** Supportive Services for Elderly Families

**1.5 Contract Rent Levels.** The Contract Rent level for each contract unit shall be as stated in Exhibit 1 and shall be adjusted in accordance with section 2.6 of the HAP Contract and the RAD Notice or successor provision.

**1.6 Owner Obligation to Operate Project.** The Owner agrees to operate the project for the full initial term of the HAP Contract specified in section 1.3(a) and for each renewal term in accordance with the HAP Contract, the RAD Notice, all statutory requirements, and all HUD regulations and other requirements, including any amendments to and/or changes in statutory requirements, HUD regulations (including 24 C.F.R. Part 880, as modified and as published in Appendix I of the RAD Notice), and other requirements.

**1.7 Mandatory Contract Renewal During Term of Elderly Housing Use Agreement.** Upon expiration of the initial term and each renewal term of the HAP Contract, the Contract Administrator shall offer to renew the HAP Contract subject to the terms and conditions applicable at the time of each offer, and the Owner shall accept each such offer, as long as the Elderly Housing Use Agreement required under the RAD Notice is in effect.

**1.8 Owner's Obligation to Provide Supportive Services and Employ Service Coordinator.**

- (a) Throughout the initial term and each renewal term of the HAP Contract, the Owner shall subject to subsections (b) and (c), make available the supportive services listed in Exhibit 3 of the HAP Contract for Elderly Families residing in the project.
- (b) The Owner may request that HUD periodically revise Exhibit 3 as needed for the Owner to accommodate the needs of such Elderly Families, as such needs may change from time to time.
- (c) If HUD agrees to the revision(s), HUD shall provide the Owner a revised Exhibit 3 that specifies the supportive services that the Owner is required to provide and the date on which Exhibit 3, as revised, shall take effect. When HUD provides a revised Exhibit 3 to the Owner, the revised Exhibit shall automatically constitute an amendment to the HAP Contract.
- (d) The Owner may not require any Elderly Family to accept any of the supportive services.

**1.9 Flood Insurance Applicability.**

- ☐ If the adjacent box is checked, the Owner agrees that the project will be covered, during the life of the property, regardless of transfer of ownership, by flood insurance 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, whichever is less.



## **Signature Page**

**Warning:** 18 U.S.C. 1001 provides, among other things, that whoever knowingly and willfully makes or uses any writing containing any materially false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of the executive branch of the Government of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

As evidenced by the signature below of their authorized representative, the Owner and HUD hereby agree to the terms of this HAP Contract, the scope of which is set forth in section 1.2(a) of the HAP Contract.

### Owner

Name of Owner (Print or Type)

---

By: \_\_\_\_\_  
Signature of authorized representative

Name of Signatory (Print or Type)

---

Official Title (Print or Type)

---

Date (mm/dd/yyyy): \_\_\_\_\_

United States of America  
Secretary of Housing and Urban Development

By: \_\_\_\_\_  
Signature of authorized representative

Name of Signatory (Print or Type)

---

Official Title (Print or Type)

---

Date (mm/dd/yyyy): \_\_\_\_\_

## Exhibit 1

## Schedule of Contract Units and Contract Rents

Number of Contract Units	Number of Bedrooms	Contract Rent	Utility Allowance	Gross Rent

**Exhibit 2**

**Affirmative Fair Housing Marketing Plan**

**Exhibit 3**

**Supportive Services for Elderly Families**

The Owner shall:

- ☐ If the adjacent box is checked, employ or otherwise retain the services of one or more individuals to coordinate the provision of such services; and
- ☐ If the adjacent box is checked, use at least \_\_\_\_\_ of project funds per unit per month to aid in paying for the supportive services.

The Owner shall make available the following supportive services consistent with the requirements of section 1.8 of the HAP Contract:





~~2.1(c), unless extended in writing by HUD: (i) completion certification (as specified in the RAD Notice); (ii) a certification that all Contract Units meet the requirements of the Physical Condition Standards and Inspection Requirements, as codified in 24 CFR Part 5 Subpart G; and (iii) a certification that the Owner is in possession of a valid certificate of occupancy for the project. Any knowing or willful submission of false, fictitious, or fraudulent statements in the required certifications shall constitute a breach of the HAP Contract.~~

(d) ~~(e)~~ **Labor Standards.** By execution of the HAP Contract, the Owner warrants that to the extent that construction or rehabilitation is performed on nine or more units that were not previously rent-assisted or rent-restricted and will be newly assisted as a result of the conversion under RAD (including without limitation, through transfer of assistance), such construction or rehabilitation shall be in compliance with applicable labor standards, including Davis-Bacon wage requirements.

(e) ~~(f)~~ **Inspection Requirement.** The Owner agrees to submit a written request to HUD for an inspection of the project by HUD's Real Estate Assessment Center no later than the Completion Date for any Work referenced in Section ~~2.1~~(~~e~~2.1(b)).

## **2.2 FAMILIES TO BE HOUSED; CONTRACT ADMINISTRATOR (CA) ASSISTANCE.**

(a) **Families to Be Housed.** The Contract Units are to be leased by the Owner to eligible Low-Income Elderly Families (Families) for occupancy by such Families solely as private dwellings and as their principal place of residence. (See also section 2.9.)

(b) **CA Assistance.**

(1) The CA hereby agrees to make housing assistance payments on behalf of Families for the Contract Units, to enable the Families to lease decent, safe, and sanitary housing pursuant to section 8 of the Act.

(2) If there is a Utility Allowance and if the Allowance exceeds the total Family contribution, the Owner shall pay the Family the amount of the excess. The CA will pay funds to the Owner in trust solely for the purpose of making this payment. Any pledge by the Owner of payments properly payable under this HAP Contract shall not be construed to include payments covered by this paragraph (b)(2). (See 24 C.F.R. § 880.501(e).)

## **2.3 HOUSING ASSISTANCE PAYMENTS TO OWNER.**

(a) **Housing Assistance Payments on Behalf of Families.**

(1) Housing assistance payments shall be paid to the Owner for units under lease for occupancy by Families in accordance with the HAP Contract. The housing assistance payment will cover the difference between the Contract Rent and that portion of the rent payable by the Family as determined in accordance with the HUD-established schedules and criteria.

(2) The amount of housing assistance payment payable on behalf of a Family and the amount of rent payable by the Family shall be subject to change by reason of changes in Family Income, Family composition, extent of exceptional medical or other unusual expenses or program rules in accordance with the HUD-established schedules and criteria; or by reason of a change in any applicable Utility Allowance approved or required by the CA. Any such change shall be effective as of the date stated in a notification of the change to the Family, which need not be at the end of the Lease Term.

(b) **Vacancies During Rent-Up.** If a Contract Unit is not leased as of the effective date of the HAP Contract, the Owner is entitled to housing assistance payments in the amount of 80 percent of the Contract Rent for the unit for a vacancy period not exceeding 60 days from the effective date of the HAP Contract, provided that the Owner (1) commenced marketing; (2) has taken and continues to take all feasible actions to fill the

vacancy, including, but not limited to, contacting applicants on its waiting list, if any, and advertising the availability of the unit in a manner specifically designed to reach eligible Families; and (3) has not rejected any eligible applicant, except for good cause acceptable to the CA.

- (c) **Vacancies after Rent-Up.** If an eligible Family vacates a unit, the Owner is entitled to housing assistance payments in the amount of 80 percent of the Contract Rent for the first 60 days of vacancy if the Owner:
- (1) Certifies that it did not cause the vacancy by violating the lease, the HAP Contract or any applicable law or by moving a Family to another unit;
  - (2) Notified the CA of the vacancy or prospective vacancy and the reasons for it immediately upon learning of the vacancy or prospective vacancy;
  - (3) Has fulfilled and continues to fulfill the requirements specified in paragraphs (b)(1), (2), and (3) of this section; and
  - (4) Certifies that any eviction resulting in a vacancy was carried out in compliance with section 2.8.
- (d) **Vacancies for Longer than 60 Days.** If an assisted unit continues to be vacant after the period specified in paragraph (b) or (c) of this section, the Owner may apply to receive additional payments for the vacancy period in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit, as determined or approved by HUD, for up to 12 additional months for the unit if:
- (1) The unit was in decent, safe and sanitary condition during the vacancy period for which payments are claimed;
  - (2) The Owner has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate; and
  - (3) The Owner has demonstrated to the satisfaction of HUD that:
    - (i) For the period of vacancy, the project is not providing the Owner with revenues at least equal to project expenses (exclusive of depreciation), and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit; and
    - (ii) The project can achieve financial soundness within a reasonable time.
- (e) **Prohibition of Double Compensation for Vacancies.** The Owner is not entitled to payments for vacant units to the extent it can collect for the vacancy from other sources (such as security deposits, other amounts collected from the Family, payments from the CA under section 2.7(b), and governmental payments under other programs). If the Owner collects any of the Family's share of the rent for a vacancy period in an amount which, when added to the vacancy payment, results in more than the Contract Rent, the excess must be reimbursed as HUD directs.
- (f) **CA Not Obligated for Family Rent.** The CA has not assumed any obligation for the amount of rent payable by any Family or the satisfaction of any claim by the Owner against any Family other than in accordance with section 2.7(b) of this HAP Contract. The financial obligation of the CA is limited to making housing assistance payments on behalf of Families in accordance with this HAP Contract.
- (g) **Owner's Monthly Requests for Payments.**
- (1) The Owner shall submit monthly requests to the CA or as directed by the CA for housing assistance payments. Each request shall set forth: (i) the name of each Family and the address and/or number of the unit leased by the Family; (ii) the address and/or the number of each unit, if any, not leased to

Families for which the Owner is claiming payments; (iii) the Contract Rent as set forth in Exhibit 1 for each unit for which the Owner is claiming payments; (iv) the amount of rent payable by the Family leasing the unit (or, where applicable, the amount to be paid the Family in accordance with section 2.2(b)(2)); and (v) the total amount of housing assistance payments requested by the Owner.

- (2) Each of the Owner's monthly requests shall contain a certification by it that to the best of its knowledge and belief (i) the dwelling units are in decent, safe, and sanitary condition, (ii) all the other facts and data on which the request for funds is based are true and correct, (iii) the amount requested has been calculated in accordance with the provisions of this HAP Contract and is payable under the HAP Contract, (iv) none of the amount claimed has been previously claimed or paid under this HAP Contract, and (v) the Owner has not received and will not receive any payments or other consideration from the Family, the PHA (where the CA is a PHA), HUD, or any other public or private source for the unit beyond that authorized in this HAP Contract and the lease.
- (3) If the Owner has received an excessive payment, the CA, in addition to any other rights to recovery, may deduct the amount from any subsequent payment or payments.
- (4) The Owner's monthly requests for housing assistance payments are subject to penalty under 18 U.S.C. 1001, which provides, among other things, that whoever knowingly and willfully makes or uses any writing containing any materially false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of the executive branch of the Government of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

## **2.4 MAINTENANCE, OPERATION AND INSPECTION.**

- (a) **Maintenance and Operation.** The Owner agrees to maintain and operate the Contract Units, unassisted units, if any, and related facilities to provide decent, safe, and sanitary housing, including the provision of all the services, maintenance and utilities set forth in section 1.4(c), in accordance with HUD's Uniform Physical Condition Standards and inspection Requirements, currently codified in 24 C.F.R. Part 5 Subpart G, and HUD's Uniform Physical Condition Standards for Multifamily Properties, currently codified in 24 C.F.R. Part 200 Subpart P. The Owner also agrees to comply with the lead-based paint regulations at 24 C.F.R. Part 35. If the CA determines that the Owner is not meeting one or more of these obligations, the CA shall have the right to take action under section 2.19(b).

- (b) **Inspection.**

- (1) Prior to occupancy of any Contract Unit by a Family, the Owner and the Family shall inspect the unit and both shall certify that they have inspected the unit and have determined it to be decent, safe, and sanitary. The Owner shall keep copies of these reports on file for at least three years.
- (2) The CA shall inspect or cause to be inspected the Contract Units and related facilities at least annually, or as otherwise directed by HUD, and at such other times (including prior to initial occupancy and reentering of any unit) as may be necessary to ensure that the Owner is meeting its obligation to maintain the units in decent, safe, and sanitary condition including the provision of the agreed-upon utilities and other services. The CA shall take into account complaints by occupants and any other information coming to its attention in scheduling inspections and shall notify the Owner and the Family of its determination.

- (c) **Units Not Decent, Safe, and Sanitary.**

- (1) If the CA notifies the Owner that it has failed to maintain a dwelling unit in decent, safe, and sanitary condition and the Owner fails to take corrective action within the time prescribed in the notification, the CA may exercise any of its rights or remedies under the HAP Contract, including reduction or suspension of housing assistance payments, even if the Family continues to occupy the unit. If, however, the Family wishes to be rehoused in another dwelling unit with section 8 assistance and the

CA does not have other section 8 funds for such purposes, the CA may use the abated housing assistance payments for the purpose of rehousing the Family in another dwelling unit. If the Family continues to occupy the unit, it will do so in accordance with the terms of its lease, including the termination date and amount of rent payable by the Family.

(2) The foregoing provision, section 2.4(c)(1), shall be construed and applied in accordance with section 2.1(b) of the HAP Contract.

(d) **Notification of Abatement.** Any reduction or suspension of housing assistance payments shall be effective as provided in written notification to the Owner. The Owner shall promptly notify the Family of any such abatement.

(e) **Overcrowded and Underoccupied Units.** Where the CA determines a unit is larger or smaller than appropriate for an eligible Family, the Owner agrees to correct the situation in accordance with HUD regulations and requirements in effect at the time of the determination.

## **2.5 FINANCIAL REQUIREMENTS.**

(a) **Submission of Financial and Operating Statements.**

The Owner agrees to comply with HUD's Uniform Financial Reporting Standards, currently codified in 24 C.F.R. Part 5 Subpart H.

(b) **Use of Project Funds.**

(1) Project funds must be used for the benefit of the project, to make mortgage payments, to pay operating expenses, to make required deposits to the replacement reserve in accordance with section 2.5(c) of the HAP Contract, and to provide distributions to the Owner as provided in section 2.5(b)(2) of the HAP Contract.

(2) After HUD's acceptance of the Owner's completion certification (as required in the Conversion Agreement), Surplus Cash may be distributed to the Owner for the life of the HAP Contract only at the end of each fiscal year of project operation and only after all project expenses have been paid (or funds have been set aside for payment), and all reserve requirements have been met, including the operating reserve, as required in paragraph 2.5(d).

(c) **Replacement Reserve.**

(1) The Owner shall establish and maintain a replacement reserve in an interest-bearing account to aid in funding extraordinary maintenance and repair and replacement of capital items in accordance with the RAD Conversion Agreement.

(i) The obligation of the Owner to deposit into the replacement reserve shall commence upon the effective date of the HAP Contract, unless otherwise stated in the RAD Conversion Agreement. The amount of the deposit to the replacement reserve will be adjusted each year by the amount of the automatic annual adjustment factor. See 24 C.F.R. Part 888.

(ii) The reserve must be built up to and maintained at a level determined by HUD to be sufficient to meet projected requirements. Should the reserve achieve that level, the rate of deposit to the reserve may be reduced with the approval of HUD.

(iii) All earnings including interest on the reserve must be added to the reserve.

(iv) Funds will be held by the mortgagee and may be drawn from the reserve account and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.

- (v) In the event the project is not subject to any financing, funds will be held by the Owner, and may be drawn from the reserve account and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.
  - (vi) The Owner shall not fund extraordinary maintenance and repair and/or replacement of capital items out of project funds without the prior written consent of HUD.
- (2) In the case of HUD-insured projects, the provisions of this paragraph (c) will apply instead of the otherwise applicable mortgage insurance requirements.
- (d) **Operating Reserve.** The Owner shall establish and maintain an operating reserve consistent with the requirements of the RAD Notice.

## **2.6 RENT ADJUSTMENTS.**

- (a) **Operating Cost Adjustment Factor.** Contract Rents will be adjusted annually by HUD's Operating Cost Adjustment Factor (OCAF) at each Anniversary of the HAP Contract, subject to the availability of appropriations for each year of the HAP Contract term and provided that the OCAF-adjusted rent potential shall not exceed the Maximum Rent. The Maximum Rent is equal to the greater of (i) 120% of the Fair Market Rent (FMR) potential based on the FMRs in effect at such time for the FMR area in which the project is located, less Utility Allowances; or (ii) the comparable market rent potential for the market area, as demonstrated by a Rent Comparability Study (RCS) prepared in accordance with HUD requirements and procured and paid for by the Owner. If the Maximum Rent exceeds the OCAF-adjusted rent potential, the Contract Rents shall be adjusted by the OCAF. If the OCAF-adjusted rent potential exceeds the Maximum Rent, the adjusted rents shall be limited by the Maximum Rent.
- (b) **Use of Small Area Fair Market Rent in Calculation of Maximum Rent.** Subject to approval by HUD, the Owner may request that the applicable Small Area Fair Market Rent (SAFMR) be used in lieu of the applicable FMR for purposes of calculating the Maximum Rent.
- (c) **Exception to Application of Maximum Rent.** When an RCS has been used to justify an OCAF-adjusted rent potential in excess of 120% of the Fair Market Rent potential any time during the term of the HAP Contract, for the next four annual rent adjustments, the Maximum Rent shall not apply and the Contract Rents shall be adjusted by the OCAF.
- (d) **Terminology.** For purposes of this section 2.6, the term "OCAF-adjusted rent potential" means the sum of all OCAF-adjusted Contract Rents for all units under the HAP Contract; the term "Fair Market Rent potential" means the sum of all fair market rents for all units under the HAP Contract; and the term "comparable market rent potential" means the sum of all comparable market rents for all units under the HAP Contract.

## **2.7 MARKETING AND LEASING OF UNITS.**

- (a) **Compliance with Equal Opportunity Requirements.** Marketing of units and selection of Families by the Owner shall be in accordance with the Owner's HUD-approved Affirmative Fair Housing Marketing Plan (Exhibit 2 to this HAP Contract) and with all regulations relating to fair housing advertising. Projects shall be managed and operated without regard to race, color, religion, sex, disability, familial status or national origin.
- (b) **Security Deposits.** The Owner agrees to comply with applicable section 8 regulations and other requirements, as revised from time to time, regarding security deposits and to comply with all State and local law.
- (c) **Eligibility, Selection and Admission of Families.**
  - (1) The Owner shall be responsible for determination of eligibility of applicants, selection of Families from among those determined to be eligible, computation of the amount of housing assistance payments on behalf of each selected Family and of total Family contributions and recordkeeping in accordance with applicable HUD regulations and requirements.
  - (2) The Owner shall not charge any applicant or assisted Family any amount in excess of the total Family contribution except as authorized by HUD.
  - (3) In initial renting of the Contract Units, the Owner must comply with the income eligibility requirements of section 16(c)(2) of the Act [42 U.S.C. § 1437n(c)(2)] and 24 C.F.R. § 5.653(d)(2). The Owner must further comply with the income targeting requirements of section 16(c)(3) of the Act [42 U.S.C. § 1437n(c)(3)] and 24 C.F.R. § 5.653(c). Section 16(c)(4) – (6) of the Act [42 U.S.C. § 1437n(c)(4) – (6)] shall also apply.

- (4) The Lease entered into between the Owner and each selected Family shall be on the form of Lease approved by HUD.
- (5) (i) The Owner shall make a reexamination of Family income, composition, and the extent of medical or other unusual expenses incurred by the Family at least as often as required by HUD regulations or other requirements, and appropriate redeterminations shall be made by the Owner of the amount of Family contribution and the amount of housing assistance payment, all in accordance with applicable HUD regulations and requirements.
- (ii) If a Family reports a change in income or other circumstances that would result in a ~~decrease~~ change of total Family contribution between regularly scheduled reexaminations, the Owner, upon receipt of verification of the change, must promptly make appropriate adjustments in the total Family contribution. The Owner may require in its lease that Families report increases in income or other changes between scheduled reexaminations.
- (iii) A Family's eligibility for housing assistance payments continues until the total Family contribution equals the ~~total housing expense~~ contract rent plus utility allowance<sup>3</sup> for the unit it occupies. The termination of eligibility at this point will not affect the Family's other rights under the lease nor preclude resumption of payments as a result of later changes in income or other circumstances during the term of this HAP Contract.
- (6) Where fewer than 100 percent of the units in the project are covered by this HAP Contract, assisted Families shall be dispersed throughout. At initial rent-up, the Owner shall lease the units identified in Exhibit 1 to eligible Families. Thereafter, the Owner may lease other units of appropriate size and type to eligible Families in accordance with Exhibit 1.
- (7) The Owner shall maintain as confidential all information relating to section 8 applicants and assisted Families, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- (8) The project's Affirmative Fair Housing Marketing Plan (Exhibit 2) including any admissions preferences for which applicable guidance or regulations require prior HUD approval (e.g., residency preferences) must be approved by HUD before they are implemented.
- (d) **Rent Redetermination after Adjustment in Utility Allowance.** In the event that the Owner is notified of a CA determination approving or requiring an adjustment in the Utility Allowance applicable to any of the Contract Units, the Owner shall promptly make a corresponding adjustment in the amount of rent to be paid by the affected Families and the amount of housing assistance payments.
- (e) **Processing of Applications and Complaints.** The Owner shall process applications for admission, notifications to applicants, and complaints by applicants in accordance with applicable HUD and PHA regulations (where the CA is a PHA), and requirements and shall maintain records and furnish such copies or other information as may be required by HUD or the PHA.
- (f) **Review: Incorrect Payments.** In making housing assistance payments to Owners, the PHA (where the CA is a PHA) or HUD will review the Owner's determinations under this section. If, as a result of this review, or other reviews, audits or information received by the PHA or HUD at any time, it is determined that the Owner has received improper or excessive housing assistance payments, the PHA or HUD shall have the right to deduct the amount of such overpayments from any amounts otherwise due the Owner, or otherwise effect recovery.

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<sup>3</sup> *Comment: Total Housing Expense is undefined.*

**2.8 Termination of Tenancy or Section 8 Assistance by the Owner.** The Owner agrees not to terminate any tenancy of or assistance on behalf of an assisted Family except in accordance with all HUD regulations and other requirements in effect at the time of the termination and any State and local law.



## **2.9 Reduction of Number of Units for Failure to Lease to Eligible Families.**

- (a) **Limitation on Leasing to Ineligible Families.** The Owner may not at any time during the term of this HAP Contract lease more than 10 percent of the assisted units in the project to families which are ineligible under section 8 requirements at initial occupancy without the prior written approval of HUD. Failure on the part of the Owner to comply with this prohibition is a violation of the HAP Contract and grounds for all available legal remedies, including specific performance of the HAP Contract, suspension or debarment from HUD programs and reduction of the number of units under the HAP Contract, as set forth in paragraph (b) of this section. (See also section 2.19.)
- (b) **Reduction for Failure to Lease to Eligible Families.** If, at any time beginning six months after the effective date of the HAP Contract, the Owner fails for a continuous period of six months to have at least 90 percent of the assisted units leased or available for leasing by Families eligible under section 8 requirements at initial occupancy, HUD (or the PHA at the direction of HUD, as appropriate) may, on at least 30 days' notice, reduce the number of units covered by the HAP Contract. HUD or the PHA may reduce the number of units to the number of units actually leased or available for leasing plus 10 percent (rounded up). This reduction, however, will not be made if the failure to lease units to eligible Families is permitted in writing by HUD under paragraph (a) of this section.
- (c) **Restoration.** HUD will agree to an amendment of the ACC or the HAP Contract, as appropriate, to provide for subsequent restoration of any reduction made pursuant to paragraph (b) of this section if:
- (1) HUD determines that the restoration is justified by demand,
  - (2) The Owner otherwise has a record of compliance with its obligations under the HAP Contract, and
  - (3) Sufficient appropriations are available to support the funding of the units to be restored.

## **2.10 NONDISCRIMINATION.**

- (a) **General.** The Owner shall operate the project in a manner consistent with all applicable nondiscrimination, equal opportunity, and equal access requirements, including but not limited to the requirements in this section 2.10 of the HAP Contract.
- (b) **Equal Access Rule.** The Owner shall make residential housing in the project available without regard to sexual orientation, gender identification, or marital status in accordance with 24 C.F.R. 5.105(a)(2).
- (c) **The Fair Housing Act.** The Owner shall comply with all applicable requirements imposed by the Fair Housing Act and HUD's implementing regulations at 24 C.F.R. Parts 100, 108, 110, 121, and 200 which, among other requirements, prohibit discrimination in the sale, rental, financing, and advertising of housing on the basis of race, color, national origin, religion, sex, disability, and familial status, and require the Owner to affirmatively further fair housing in the operation of the project.
- (d) **Title VI of the Civil Rights Act of 1964 and Executive Order 11063.** The Owner shall comply with all requirements imposed by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. et seq.; the HUD Regulations issued thereunder, 24 C.F.R. Part 1; the HUD requirements pursuant to these regulations; and Executive Order 11063 and the regulations and requirements issued thereunder at 24 C.F.R. Part 107 to the end that, in accordance with that Act, Executive Order 11063, and the regulations and requirements of HUD, no person in the United States shall, on the grounds of race, color, religion (creed), sex, or national origin, be excluded from participation in, or be denied the benefits of, the Section 8 Program, or be otherwise subjected to discrimination. This provision is included pursuant to HUD's implementing regulations for Title VI at 24 C.F.R. Part 1, the implementing regulations for Executive Order 11063 at 24 C.F.R. Part 107, and the HUD requirements pursuant to the regulations. The obligation of the Owner to comply therewith inures

to the benefit of the United States of America, HUD, and the PHA (where the CA is a PHA), any of which shall be entitled to invoke any remedies available by law to redress any breach or to compel compliance by the Owner.

- (e) **Section 504 of the Rehabilitation Act of 1973 and Other Accessibility Requirements.** The Owner shall comply with all the requirements imposed by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 et seq., and HUD regulations issued thereunder at 24 C.F.R. Part 8. Section 504 applies design standards on housing that receives Federal financial assistance and, more generally, provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. Accordingly, the Owner (1) shall not discriminate against any qualified individual with a disability on the basis of disability, and (2) shall cause to be incorporated into all contracts executed in connection with this project a provision requiring compliance with rules and regulations issued pursuant to section 504. The Owner shall comply, as applicable, with accessible design and operations requirements under the Fair Housing Act and implementing regulations at 24 C.F.R. Part 100, and Title II and III of the Americans with Disabilities Act and implementing regulations at 28 C.F.R. Parts 35 and 36, respectively.
- (f) **Section 3 of the Housing and Urban Development Act of 1968.** Section 3 and its implementing regulations at 24 CFR Part 135 ensure that employment and other economic opportunities generated by certain HUD financial assistance shall, to the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns that provide economic opportunities to low- and very low-income persons. The Owner shall comply with Section 3, in accordance with 24 CFR Part 135, as applicable.
- (g) **Employees of Owner.**
- (1) In carrying out the obligations under this HAP Contract, the Owner will not discriminate against any employee or applicant for employment because of race, color, creed, religion, sex, disability, familial status, or national origin. The Owner will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, creed, religion, sex, disability, familial status, 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.
- (2) The Owner agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by HUD setting forth the provisions of this nondiscrimination clause. The Owner will in all solicitations or advertisements for employees placed by or on behalf of the Owner state that all qualified applicants will receive consideration for employment without regard to race, color, creed, religion, sex, disability, familial status, or national origin. The Owner will incorporate the foregoing requirements of this paragraph in all of its contracts for project work, except contracts for standard commercial supplies or raw materials, and will require all of its contractors for such work to incorporate such requirements in all subcontracts for project work.
- (h) **Age Discrimination Act of 1975.** The Owner shall comply with any rules and regulations issued or adopted by HUD under the Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq. at 24 C.F.R. Part 146, which prohibits discrimination on the basis of age in programs and activities receiving Federal financial assistance.

**2.11 COOPERATION IN EQUAL OPPORTUNITY COMPLIANCE REVIEWS.** The Owner and the PHA (where the CA is a PHA) agree to cooperate with HUD in the conducting of compliance reviews and complaint investigations pursuant to or permitted by all applicable civil rights statutes, Executive Orders, and rules and regulations.

**2.12 PROPERTY AND LIABILITY INSURANCE.** The Owner agrees that the project shall be covered at all times by commercially available property and liability insurance to protect the project from financial loss. To the extent insurance proceeds permit, and as determined feasible by any first mortgage lender (determination of infeasibility shall be subject to HUD approval), the Owner agrees to promptly restore, reconstruct, and/or repair any damaged or destroyed property of a project.

**2.13 FLOOD INSURANCE.** (See section 1.9 of the HAP Contract for applicability.) The Owner agrees that the project will be covered, during the life of the property, regardless of transfer of ownership, by flood insurance 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, whichever is less.

**2.14 REPORTS AND ACCESS TO PREMISES AND RECORDS.**

- (a) The Owner shall furnish any information and reports pertinent to this HAP Contract as reasonably may be required from time to time by HUD and the PHA (where the CA is a PHA).
- (b) The Owner shall permit HUD and the PHA (where the CA is a PHA) or any of their duly authorized representatives to have access to the premises and, for the purpose of audit and examination, to have access to any books, documents, papers and records of the Owner that are pertinent to compliance with this HAP Contract, including the verification of information pertinent to the housing assistance payments.

**2.15 DISPUTES.**

- (a) **Projects for which a PHA is the CA.**
  - (1) Any dispute concerning a question of fact arising under this HAP Contract which cannot be resolved by the PHA (where the CA is a PHA) and the Owner may be submitted by either party to the HUD Field Office, which will promptly make a decision and furnish a written copy to the Owner and the PHA.
  - (2) The decision of the Field Office will not be reviewable unless, within 30 calendar days from the date of receipt of the Field Office's determination, either party mails or otherwise furnishes to HUD a written appeal with written justification addressed to the Secretary of Housing and Urban Development. Both parties shall proceed diligently with the performance of the HAP Contract and in accordance with the decision of the Field Office pending resolution of the appeal.
- (b) **Projects for which HUD is the CA.** Any dispute concerning a question of fact arising under this HAP Contract which cannot be resolved by agreement between the HUD Field Office and the Owner may be submitted by the Owner to the Secretary of Housing and Urban Development. Both parties shall proceed diligently with the performance of the HAP Contract and in accordance with the decision of the Field Office, pending resolution of the appeal.

**2.16 INTEREST OF MEMBERS, OFFICERS, OR EMPLOYEES OF PHA, MEMBERS OF LOCAL GOVERNING BODY, OR OTHER PUBLIC OFFICIALS.**

- (a) No person or entity in the following clauses shall have an interest, direct or indirect, in this HAP Contract or in any proceeds or benefits arising from it, during his or her tenure or for one year thereafter.
  - (1) any member or officer of the PHA (where it is the CA or the Owner), except where his or her interest is as a tenant;
  - (2) (i) any employee of the PHA (where it is the CA or the Owner) who formulates policy or influences decisions with respect to the section 8 project;

- (ii) any other employee of the PHA (where it is the CA or the Owner), except where his or her interest is as a tenant;
  - (3) any member of the governing body or the executive officer of the locality (city or county) in which the project is situated;
  - (4) any member of the governing body or executive officer of the locality (city or county) in which the PHA (where it is the CA or the Owner) was activated;
  - (5) any other State or local public official (including State legislators), who exercise any functions or responsibilities with respect to the section 8 project;
  - (6) any PHA (which is not the CA), where any of its members, officers, or employees has a personal interest in the project, including an interest by reason of membership on the board of the PHA which is the CA (except an employee who does not formulate policy or influence decisions with respect to the section 8 project may have an interest as a tenant).
- (b) Members of the classes described in paragraph (a) who involuntarily acquire an interest in the section 8 program or in a section 8 project, or who had acquired prior to the beginning of their tenure any such interest, must disclose any interest or ~~perspective~~ prospective<sup>4</sup> interest to the PHA (where it is the CA or the Owner) and the HUD Field Office, and may, with appropriate justification, if consistent with State law, apply to the HUD Field Office (through the PHA where it is the CA) for a waiver. Any other requests for waivers of paragraph (a) must be referred to HUD Headquarters, with appropriate recommendations from the Field Office, for a determination of whether a waiver will be granted.
  - (c) No person to whom a waiver is granted shall be permitted (in his or her capacity as member of a class described in paragraph (a)) to exercise responsibilities or functions with respect to a HAP Contract executed, or to be executed, on his or her behalf, or with respect to a HAP Contract to which this person is a party.
  - (d) The Owner shall insert in all contracts, subcontracts, and arrangements entered into in connection with the project or any property included or planned to be included in the project, and shall require its contractors and subcontractors to insert in each of the subcontracts, the provisions of paragraphs (a) through (d).
  - (e) The provisions of paragraphs (a) through (d) of this section shall not apply to a utility service if the rates are fixed or controlled by a governmental agency or applicable to the Depositary Agreement.

**2.17 INTEREST OF MEMBER OR DELEGATE TO CONGRESS.** No member of or delegate to the Congress of the United States of America or resident commissioner shall be admitted to any share or part of this HAP Contract or to any benefits which may arise from it.

**2.18 ASSIGNMENT, SALE, FORECLOSURE, OR DEED IN LIEU OF FORECLOSURE.**

- (a) The Owner agrees that it has not made and will not make any sale, assignment, or conveyance or transfer in any fashion of this HAP Contract or the project, or of any part of the HAP Contract or the project, or any of the Owner's interest in the HAP Contract or the project, without the prior written consent of HUD. However, in the case of an assignment as security for the purpose of obtaining financing of the project, HUD shall consent in writing if HUD has approved the terms of the financing. Certain limited consents are set forth in this Section 2.18 and in Sections 2.22 and 2.23 below.

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<sup>4</sup> *Comment: Correct term should be "prospective" not "perspective."*

- (b) The Owner agrees to notify HUD (and the PHA where it is the CA) promptly of any proposed action covered by paragraph (a) of this section. The Owner further agrees to request the prior written consent of HUD for any such proposed action.
- (c) The Owner agrees that HUD may condition any prior written consent required under section 2.18(a) of this HAP Contract on any reasonable requirements related to the effective administration of the HAP Contract, as determined by HUD.
- (d) (1) For purposes of this section, a sale, assignment, conveyance, or transfer includes but is not limited to one or more of the following:
- (i) A transfer by the Owner, in whole or in part,
  - (ii) A transfer by a party having a controlling interest in the Owner,
  - (iii) Transfers by more than one party of interests aggregating a controlling interest in the Owner,
  - (iv) ~~Any other similarly significant change in the ownership of interests in the Owner, or in the relative distribution of interests by any other method or means,~~ and
  - (v) The creation or modification of any lien, including pursuant to any refinancing or any restructuring of permanent debt by the Owner of the project, including any loan modification, except to such extent permitted pursuant to the Elderly Housing Use Agreement entered into in connection with this project.<sup>6</sup>
- (2) If such assignment is made in connection with any HUD-approved financing for the project, including without limitation low-income housing tax credits, subject to the provisions of section 2.23, HUD hereby consents to:
- (i) an assignment by the Owner of an interest in the project or in this HAP Contract to one of its members, partners or shareholders; or
  - (ii) an assignment by the general partner or managing member of Owner of its interest to a limited partner or other member of Owner, respectively.
- (3) The term "controlling interest" means the interest of any general partner, managing member, or other organization or entity that controls the day-to-day operations of the Owner.
- (e) The Owner and the party signing this HAP Contract on behalf of the Owner represent that they have the authority of all of the parties having ownership interests in the Owner to agree to this provision on their behalf and to bind them with respect to it.

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<sup>5</sup> **Comment:** The proposed language is too broad and vague for an owner to know whether it is in or out of compliance. Instead, the terms should be the same as the Component One provisions. If HUD is trying to ensure that no change of sponsor occurs without HUD approval, those concerns should be articulated here, rather than relying on language so vague that enforcement could be arbitrary.

<sup>6</sup> **Comment:** The Elderly Housing Use Agreement expressly permits "subordinate liens contemplated by and on the terms set forth in a RAD Conversion Agreement executed in connection with the Project." To avoid conflicting requirements, the terms of the HAP should align with the permitted transfers contained in the Elderly Housing Use Agreement. In addition, we would note that this treatment of liens, as revised above, is consistent with HUD's position in Component One.

(f) Except where otherwise approved by HUD, this HAP Contract, and the ACC (if applicable) shall continue in effect and housing assistance payments will continue in accordance with the terms of the HAP Contract in the event:

- (1) Of assignment, sale, or other disposition of the project or this HAP Contract, or the ACC,
- (2) Of foreclosure, including foreclosure by HUD,
- (3) Of assignment of the mortgage or deed in lieu of foreclosure,
- (4) The PHA or HUD takes over possession, operation or ownership,
- (5) The Owner prepays the mortgage.

## **2.19 DEFAULTS BY PHA (if a PHA is the CA) AND/OR OWNER.**

### **(a) Rights of Owner if PHA (where the CA is a PHA) Defaults under HAP Contract.**

- (1) Events of Default. The occurrence of any of the following events, if the Owner is not in default, is defined as a default under the ACC:
  - (i) If the PHA (where the CA is a PHA) fails to perform or observe any term or condition of this HAP Contract;
  - (ii) If the HAP Contract is held to be void, voidable, or ultra vires;
  - (iii) If the power or right of the PHA (where the CA is a PHA) to enter into the HAP Contract is drawn into question in any legal proceeding; or
  - (iv) If the PHA (where the CA is a PHA) asserts or claims that the HAP Contract is not binding upon the PHA for any such reason.
- (2) Owner Request for HUD Determination of Default. If the Owner believes that an event as specified in paragraph (a)(1) has occurred, and the Owner is not in default, the Owner may, within 30 days of the initial occurrence of the event:
  - (i) Notify HUD of the occurrence of the event;
  - (ii) Provide supporting evidence of the default and of the fact that the Owner is not in default; and
  - (iii) Request HUD to determine whether there has been a default.
- (3) HUD Determination of Default and Curing of Default. HUD, after notice to the PHA (where the CA is a PHA) giving it a reasonable opportunity to take corrective action, or to demonstrate that it is not in default, shall make a determination whether the PHA is in default and whether the Owner is not in default. If HUD determines that the PHA is in default and that the Owner is not, HUD shall take appropriate action to require the PHA to cure the default. If necessary for the prompt continuation of the project, HUD shall assume the PHA's rights and obligations under the HAP Contract, including any funds. HUD shall continue to pay annual contributions with respect to the units covered by this HAP Contract in accordance with the ACC and this HAP Contract until reassigned to the PHA. All rights and obligations of the PHA assumed by HUD will be returned as constituted at the time of the return: (i) when HUD is satisfied that all defaults have been cured and that the project will thereafter be administered in accordance with all applicable requirements, or (ii) when the HAP Contract is at an end, whichever occurs sooner.



- (4) Enforcement by Owner. The provisions of this paragraph (a) are made for the benefit of the Owner, the lender, the PHA where it is the lender and then only in its capacity as lender, and the Owner's other assignees, if any, who have been specifically approved by HUD prior to the assignment. These provisions shall be enforceable by these parties against HUD by suit at law or in equity.

**(b) Rights of PHA (where the CA is a PHA) and HUD if Owner Defaults under HAP Contract.**

- (1) Events of Default. A default by the Owner under this HAP Contract shall result if:

- (i) The Owner has violated or failed to comply with any provision of, or obligation under, this HAP Contract or of any Lease, including failure to correct any deficiencies identified by the CA in connection with any annual or other inspection; or
- (ii) The Owner has asserted or demonstrated an intention not to perform some or all of its obligations under this HAP Contract or under any Lease; or
- (iii) For projects with mortgages insured by HUD or loans made by HUD, the Owner has violated or failed to comply with the regulations for the applicable insurance or loan program, with the insured mortgage, or with the regulatory agreement; or the Owner has filed any false statement or misrepresentation with HUD in connection with the mortgage insurance or loan.

- (2) CA Determination of Default. Upon a determination by the CA that a default has occurred, the CA shall notify the Owner and the lender, with a copy to HUD (where the CA is a PHA), of

- (i) The nature of the default;
- (ii) The actions required to be taken and the remedies to be applied on account of the default (including actions by the Owner and/or the lender to cure the default); and
- (iii) The time within which the Owner and/or the lender shall respond with a showing that all the required actions have been taken.

If the Owner and/or lender fail to respond or take action to the satisfaction of the CA (and HUD, where the CA is a PHA), the CA shall have the right to take corrective action to achieve compliance in accordance with paragraph (b)(3), or to terminate this HAP Contract with HUD approval (where the CA is a PHA), in whole or in part, or to take other corrective action to achieve compliance in the CA's discretion, or as directed by HUD (where the CA is a PHA).

- (3) Corrective Actions. Pursuant to paragraph (b)(2) of this section, the CA, in its discretion or as directed by HUD (where the CA is a PHA), may take the following corrective actions either directly or in conjunction with or acting through a PHA:

- (i) Take possession of the project, bring any action necessary to enforce any rights of the Owner growing out of the project operation, and operate the project in accordance with the terms of this HAP Contract until such time as HUD determines that the Owner is again in a position to operate the project in accordance with this HAP Contract. If the CA takes possession, housing assistance payments shall continue in accordance with the HAP Contract.
- (ii) Collect all rents and charges in connection with the operation of the project and use these funds to pay the necessary expenses of preserving the property and operating the project and to pay the Owner's obligations under the note and mortgage or other loan documents.
- (iii) Apply to any court, State or Federal, for specific performance of this HAP Contract, for an injunction against any violation of the HAP Contract, for the appointment of a receiver to take over and operate the project in accordance with the HAP Contract, or for such other relief as may be appropriate.

These remedies are appropriate since the injury to the PHA (where the CA is a PHA) and/or HUD arising from a default under any of the terms of this HAP Contract could be irreparable and the amount of damage would be difficult to ascertain.

(iv) Reduce or suspend housing assistance payments.

(v) Recover any overpayments.

(4) HUD Rights.

(i) Notwithstanding any other provisions of this HAP Contract, in the event HUD determines that the Owner is in default of its obligations under the HAP Contract, HUD shall have the right, after notice to the Owner, the trustee, if any, and the PHA (where the CA is a PHA) giving them a reasonable opportunity to take corrective action, to proceed in accordance with paragraph (b)(3).

(ii) In the event HUD takes any action under this section, the Owner and the PHA hereby expressly agree to recognize the rights of HUD to the same extent as if the action were taken by the PHA. HUD shall not have the right to terminate the HAP Contract except by proceeding in accordance with paragraphs (b)(1), (2), and (3) of this section and with the ACC.

(c) **Remedies Not Exclusive and Non-Waiver of Remedies.** The availability of any remedy under this HAP Contract or the ACC, where applicable, shall not preclude the exercise of any other remedy under this HAP Contract or the ACC or under any provisions of law, nor shall any action taken in the exercise of any remedy be considered a waiver of any other rights or remedies. Failure to exercise any right or remedy shall not constitute a waiver of the right to exercise that or any other right or remedy at any time.

**2.20 EXCLUSION OF THIRD-PARTY RIGHTS.**

(a) A Family that is eligible for housing assistance under the HAP Contract is not a party to or a third-party beneficiary of the HAP Contract.

(b) Nothing in the HAP Contract shall be construed as creating any right of any third party to enforce any provision of the HAP Contract, or to assert any claim against HUD or the PHA (where the CA is a PHA), under the HAP Contract.

**2.21 NO AGENCY RELATIONSHIP BETWEEN HUD AND THE PHA (WHERE THE CA IS A PHA).** If the CA is a PHA under ACC with HUD, the PHA is not the agent of HUD, and the HAP Contract does not create any relationship between HUD and any suppliers, employees, contractors, or subcontractors used by the PHA to carry out functions or responsibilities in connection with administration of the HAP Contract under the ACC.

**2.22 LENDER PROVISIONS.** Notwithstanding anything else in this HAP Contract:

(a) The holder of any HUD-approved mortgage encumbering the property on which the project is located may take action against the Owner and the project that results in the holder of the mortgage or its designee (either referred to herein as "Lender Temporary Custodian") coming into ownership of the project or assuming the role of "Owner" under this HAP Contract. Transfer of the project or the HAP Contract from the Owner is grounds for termination of the HAP Contract assistance unless otherwise approved by HUD. HUD hereby consents to a collateral assignment of this HAP Contract to any Lender Temporary Custodian and pre-approves any Lender Temporary Custodian as a temporary custodian of the project and as a new "Owner" pursuant to this HAP Contract, and continued assistance to the project pursuant to this HAP Contract, subject to the following conditions:

(1) HUD must receive thirty (30) days prior written notice of the transfer of the project to the Lender Temporary Custodian and the form of the documents necessary to effect such transfer.



- (2) In connection with the transfer, Lender Temporary Custodian must execute and deliver to HUD an assumption of the HAP Contract, in such form as acceptable to HUD.
- (3) Such approval and consent to continue assistance pursuant to this HAP Contract is expressly limited to a period of only 90 days that commences the date of such transfer of the project, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary for Lender to find a permanent replacement owner. In the event that the Lender Temporary Custodian assumes the role of "Owner" under the HAP Contract, the Lender Temporary Custodian shall use such interim period to identify a proposed permanent Owner determined by HUD to be capable of abiding by the HAP Contract and any and all applicable RAD program requirements. The provision of housing assistance payments to any proposed permanent replacement Owner is subject to HUD's consent.
- (4) Prior to a transfer of the project to a Lender Temporary Custodian, HUD may at any time by written notice to a Lender Temporary Custodian revoke the approvals given herein if HUD becomes aware of any conditions or circumstances (by way of illustration and not limitation, such conditions or circumstances may include debarment, suspension or limited denial of participation) that would disqualify or compromise the ability of Lender Temporary Custodian from acting as an interim custodian of the project pursuant to the HAP Contract.

**2.23 LOW-INCOME HOUSING TAX CREDIT PROVISIONS.** Notwithstanding anything else in the HAP Contract:

- (a) **Notice.** As long as the equity investor identified below ("Equity Investor") is a partner or member of Owner, HUD shall endeavor as a courtesy to Equity Investor to deliver to Equity Investor a copy of any notice of default that is delivered to Owner under the terms of the HAP Contract. Equity Investor's address for such notice purposes is:

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- (b) **Right to Cure.** Any cure of any default by Owner under the HAP Contract- [Elderly Housing Use Agreement, or RAD Conversion Agreement](#) offered by Equity Investor shall be treated the same as if offered by Owner.<sup>7</sup>
- (c) **Transfer of Investor Members/Partners.** Equity Investor, and each successor member or partner in Owner, may transfer its interest in the Owner without prior written consent of HUD if:
  - (1) HUD receives prior written notice of such transfer; and
  - (2) HUD receives executed copies of any and all documents necessary to effect such transfer, including any and all amendments to Owner's organizational documents.

<sup>7</sup> [Comment: These revisions are consistent with how HUD treats efforts by investors to cure Owner defaults in Component One.](#)

(d) **Removal of General Partner/Managing Member.**

- (1) HUD has pre-approved the replacement of the Owner's general partner or managing member with an affiliate of Equity Investor, or any successor equity investor ("Interim Replacement GP/MM") as a temporary replacement general partner/managing member of Owner, in the event Owner's general partner or managing member is removed for cause in accordance with Owner's organizational documents.
- (2) Interim Replacement GP/MM may remove Owner's general partner or managing member in accordance with the Owner's organizational documents without further written consent from HUD and HUD shall continue assistance to the project in accordance with the HAP Contract, provided that Interim Replacement GP/MM provide HUD with prior written notice of such replacement and HUD receives executed copies of any and all documents necessary to effect such replacement.
- (3) Such approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days, or for so long as HUD deems reasonably necessary to provide for a permanent replacement of the general partner or managing member. After such interim period, any proposed permanent replacement for the Owner's general partner or managing member is subject to HUD's consent.
- (4) HUD may at any time by written notice to Equity Investor or any successor revoke the approvals given herein if HUD becomes aware of any conditions or circumstances that would disqualify or compromise the ability of Interim Replacement GP/MM from acting as an interim general partner/managing member pursuant to this HAP Contract.

13. RAD Section 8 Project-based Voucher (PBV) Housing Assistance Payments (HAP) Contract for Existing Housing (PRAC; Second Component) Part I

Document not ready to be issued and not published in final form. Refer to comments in transmittal letter.

14. RAD Section 8 Project-based Voucher (PBV) Housing Assistance Payments (HAP) Contract for Existing Housing (PRAC; Second Component) Part II

Document not ready to be issued and not published in final form. Refer to comments in transmittal letter.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-8000

OFFICE OF HOUSING

[PRAC Owner Entity Name  
and Address]

SUBJECT: Project Name: [PRAC Original Project Name]  
Capital Advance Project #: [Capital Advance Number]  
PRAC Contract #: [Contract Number]  
Location: [PRAC Original Site Address, State and Zip]

Dear [Contact Name]:

This letter serves as a conditional approval of your request to convert a Section 202 Project Rental Assistance Contract (PRAC) providing rental assistance for [original number of PRAC units] units at the subject project to a Project Based Rental Assistance (PBRA) Housing Assistance Payments (HAP) contract under the Rental Assistance Demonstration (RAD). The Department has reviewed your request in accordance with the Rental Assistance Demonstration – Final Implementation, Revision 4 Notice, H-2019-09 PIH-2019-23 (HA), issued September 5, 2019. Based on this review and in reliance on the accuracy of the materials you have submitted, HUD has made a preliminary determination that your request meets the applicable RAD requirements. However, final approval and authority to implement the conversion is conditioned on the requirements set forth in this letter and on HUD's final determination that all RAD requirements have been met to HUD's satisfaction. In the event of a RAD conversion, the project will receive rental assistance in the form of a 20-year PBRA HAP contract, administered by HUD, providing rental assistance for up to [post-conversion number of PBRA units].

Attached to this conditional approval as "Attachment A" is a draft of the RAD Section 202 PRAC Conversion Agreement for informational purposes only. The Conversion Agreement contains the terms approved by HUD as a result of your Conversion Plan submission, the approved sources and uses of funds, construction commitments, required representations, warranties and program certifications, and other terms associated with the RAD conversion. Also attached to this conditional approval as "Attachment B" is the form of HAP contract to be executed at Closing. These documents include many transaction-specific terms and facts on which this conditional approval rely.

You must notify HUD in writing of any proposed factual corrections to the Conversion Agreement or the HAP contract which, if approved, will be incorporated into the final version of these documents. The final version of the Attachments A and B will be issued by HUD for execution by the relevant parties at Closing. Neither the Conversion Agreement nor any other agreement shall be effective or enforceable against HUD until all conditions stated herein have been satisfied in HUD's determination.

Prior to final approval of the proposed conversion, the following conditions must be satisfied:

- 1) Completion of all Pre-Closing Repairs identified on Attachment C;
- 2) Satisfaction of the following Special Conditions listed in this paragraph 2:
  - a) [If none, state “None” here, otherwise, list special conditions]
- 3) Production and submission for HUD review of the following due diligence documents (“Due Diligence Documents”) which Due Diligence Documents must be acceptable to HUD:
  - a) A contact list of parties involved in the closing;
  - b) The proposed legal description for the property;
  - c) Survey and Site Plans;
  - d) Title Report;
  - e) Copies of all existing title encumbrances and exception documents, which must include all documentation proposed for release by HUD;
  - f) Title Pro Forma representing the anticipated title insurance policy;
  - g) UCC Search if any releases of UCC-1s will be requested;
  - h) The draft deed or ground lease and, if applicable, memorandum of ground lease;
  - i) Draft financing documents for all debt to appear as a lien on the property post-Closing, including the note, the mortgage of deed of trust, and any intercreditor or subordination agreements;
  - j) A draft note for any unsecured surplus cash notes, including, without limitation, for any identity of interest obligation to be repaid through the Closing or to exist post-Closing;
  - k) Executed or draft ownership entity documents if requested by HUD;
  - l) If a new owner entity or management agent is proposed, owner/management agent entity profiles, owner/management agent certifications, and evidence of owner’s/management agent’s fidelity bond coverage, as applicable, to satisfy HUD asset management requirements;
  - m) An Affirmative Fair Housing Management Plan;
  - n) The form of tenant lease;
  - o) The property house rules; and
  - p) Such additional documents required by HUD in order to determine whether criteria for Closing have been met.
- 4) Review and approval of the Due Diligence Documents by HUD counsel and approval by HUD counsel of the ownership and control of the Covered Project, including confirmation that the ownership and control structure meets the applicable RAD requirements.
- 5) Execution of such agreements, instruments, certificates and other documents as HUD may require, using forms prescribed by or acceptable to HUD, to implement the conversion transaction (the “Closing Documents”) including, without limitation, the following:
  - a) The Conversion Agreement;
  - b) A Release of Mortgage and Regulatory Agreement with respect to the Section 202 capital advance documents;
  - c) An Allonge indicating cancellation of the Capital Advance Mortgage Note;
  - d) A Release of UCC-1 with respect to the Section 202 capital advance documents;
  - e) The Elderly Housing Use Agreement;
  - f) The HAP contract Parts I and II, with all exhibits

- g) The Owner's closing certifications and assurances; and
  - h) A subordination agreement confirming the first lien position of the Elderly Housing Use Agreement.
- 6) Receipt and approval by HUD counsel of executed HUD form legal opinions issued by the existing owner's counsel and the proposed owner's counsel. The existing owner and the proposed owner ~~must agree to~~ select competent counsel ~~acceptable to HUD counsel, and in connection with this Transaction~~ in a manner that satisfies the applicable rules of professional conduct.<sup>1</sup> Counsel to the existing owner and the proposed owner, if different, must provide the HUD form of legal opinion(s), as supplemented to address matters reasonably requested by HUD.
- 7) No material changes in the nature of the transaction as described in the Conversion Plan submission or, in the event of such changes, full disclosure of such changes. HUD shall review the transaction as revised to determine whether it remains acceptable. The draft Conversion Agreement attached hereto shall be modified before execution to reflect any necessary changes. The final business terms shall be determined as of the Closing and reflected in the applicable Closing Documents. Your execution of the Closing Documents shall constitute acceptance of the final business terms reflected therein. The Owner's closing certifications and assurances, listed in Section ~~7(h)~~5(g),<sup>2</sup> above, shall reaffirm the absence of material changes relative to the information previously provided to HUD.
- 8) Issuance of an escrow instructions letter produced by HUD, submitting HUD-executed documents into escrow and setting forth the documents which must be fully executed and held in escrow prior to release of such documents for Closing. The escrow instructions shall specify that all the enumerated documents must be complete and fully executed and shall further specify that they be recorded and/or filed in the manner directed in the escrow instructions. The escrow instructions shall specify that if the escrow is not released and the Closing does not occur within ten (10) business days, the HUD-executed documents must be returned to HUD.
- 9) Final determination by HUD, set forth either in the escrow instructions letter or as specified in the escrow instructions letter, that all RAD requirements have been met to HUD's satisfaction. This determination shall be communicated through an authorization to proceed to Closing and an authorization to release the Conversion Agreement and other Closing Documents for purposes of the Closing.

As used in this letter, "Closing" means execution of all binding legal instruments connected to the transaction contemplated by this letter or the Conversion Agreement and, if applicable, recordation of such instruments. All requirements set forth in this letter must be completed to HUD's satisfaction before the Closing can occur. HUD reserves the right to require additional documents or items in addition to those listed as part of HUD's final review and determination of program compliance. In the event any of the conditions set forth in this letter are not met to HUD's

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<sup>1</sup> **Comment:** This language has been revised to mirror what is used in Component One. We can think of no reason why the PRAC conversions should be held to a different standard when selecting counsel to represent them in these transactions.

<sup>2</sup> **Comment:** There is no Section 7(h) in this letter.

satisfaction, HUD may decline to proceed to Closing in HUD's sole and absolute discretion. Unless otherwise set forth in writing by HUD prior to Closing, HUD's release of the Conversion Agreement for purposes of the Closing shall constitute any approvals or decisions required herein and not previously given in writing.

Regardless of whether the RAD conversion is consummated, HUD shall not be responsible for any expenses or transaction costs incurred by you or at your direction in connection with the RAD conversion (including without limitation, fees for consultants, attorneys, environmental contractors, tax advisors and accountants; city, county and/or state taxes and/or fees; recording fees, prepayment penalties and/or premiums; costs for title insurance and title examination; surveys and appraisals).

Simultaneous with the issuance of this conditional approval, HUD will assign a Closing Coordinator and a HUD Field Office Counsel to work with you to finalize this transaction. Project owners shall upload the documents listed above to the RAD Resource Desk at [www.radresource.net](http://www.radresource.net) for review by the assigned Closing Coordinator. Project owners shall submit a copy of these documents to the assigned Field Office Counsel in a format of the Field Office Counsel's choosing.

The HUD Closing Coordinator will work with you to establish a target date for the execution of the Conversion Agreement, HAP contract and other Closing Documents. Please note that if the Closing does not occur within 90 calendar days from the date hereof, unless extended by HUD, the transaction will be returned to the HUD underwriting team for additional review.

Thank you for your commitment to affordable housing and your interest in the RAD program. If you have any questions, please contact your Closing Coordinator or Bev Rudman, Director of the Closing and Post-Closing Division, at [Beverly.N.Rudman@hud.gov](mailto:Beverly.N.Rudman@hud.gov) or at 202 402-8395.

Sincerely,

Thomas R. Davis  
Director  
Office of Recapitalization

Attachments:

- Attachment A – Conversion Agreement
- Attachment B – PBRA HAP Contract Parts I and II
- Attachment C – Pre-Closing Repairs



cc: Beverly Rudman, RAD Closing and Post-Closing Division Director, Recap HQ  
John Ardovini, Branch Chief, Recap HQ  
[Applicable RAD Transaction Manager]  
Lorri Farrell, Branch Chief, OAMPO HQ, Assisted Housing Oversight Division  
[Applicable Regional Director]  
[Applicable Asset Management Division Director]  
[Applicable Asset Management Branch Chief]  
[Applicable Account Executive]  
[Applicable Regional Funding Specialist]

**Rental Assistance Demonstration (RAD)  
Section 202 Project Rental Assistance Contract  
Conversion Agreement**

**U.S. Department of Housing  
and Urban Development  
Office of Multifamily Housing**

**Public reporting burden** for this collection of information is estimated to average 30 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to enter into a contract for housing assistance payments and dictates the terms under which such payments will be made. There are no assurances of confidentiality.

Ownership (complete each box, even if information is duplicative)		
Existing PRAC Ownership Entity:		Post-Conversion Ownership Entity:
Converting Project (Existing) Name and Address:		Covered Project (Future) Name and Address:
Converting Project(s) PRAC Contract Number(s):		Covered Project Sec. 8 HAP Contract Number(s):
Converting Project(s) Capital Advance Project Number(s):		
Assistance Contract		
<input type="checkbox"/> Project-Based Rental Assistance (PBRA) <input type="checkbox"/> Project-Based Vouchers (PBV). If PBV, list HAP Contract Administrator: _____		Number of RAD HAP Contracts: _____ Term (in years) of the HAP Contract(s): _____ HAP Effective Date: _____
Unit count		
Unit Type of PRAC/RAD Units	PRAC Contract(s)	RAD HAP Contract
0 BDM		
1 BDM		
2 BDM		
Sub-Total		
Post-Conversion Non-RAD Units:		
Post-Conversion Total Covered Project Units:		
Reserves		
	Amount	Timing of 1 <sup>st</sup> Payment

Initial <sup>1</sup> Deposit to Replacement Reserves:	\$	
Monthly Deposit to Replacement Reserves (total for all RAD units):	\$	
Elderly Housing Use Agreement		
Elderly Housing Use Agreement Effective Date:		
Elderly Housing Use Agreement Transition Date:		
Elderly Housing Use Agreement Term end date:		

<sup>1</sup> **Comment:** Please include add an option for new construction to make the initial deposit at completion, similar to RCC in Component I. Accordingly, please insert sections for the following information: Amount of Initial Deposit to Replacement Reserve: \$ \_\_\_\_\_; Deposit Due No Later Than: [At Closing] or [At Substantial Completion]; Amount of Total Monthly Deposit to Replacement Reserve: \$ \_\_\_\_\_; First Monthly Deposit Due No Later Than: [HAP Effective Date] or [At Substantial Completion]; and Approved Annual Escalation of Total Monthly Deposit to the Replacement Reserve: \_\_\_\_\_.

**Key Terms and Features of the Conversion Transaction (check all that apply)**

**Covered Project configuration:**

- ☐ The Covered Project is a single, contiguous site
- ☐ The Covered Project is on multiple sites

**Proceeds from a Sale or Refinance:**

Amount of Proceeds	\$ _____
Less Allowed Deductions	\$ _____
Amount of Net Proceeds	\$ _____
Amount of Restricted Proceeds	\$ _____

☐ **Rent Bundling:**

- ☐ This is a donor property
- ☐ This is a recipient property

☐ **Transfer of Assistance**

**Financing:**

- ☐ No debt
- ☐ FHA-insured financing
- ☐ Conventional financing
- ☐ Low-Income Housing Tax Credits
- ☐ Other

**Construction:**

- ☐ No Rehab
- ☐ Rehab
- ☐ New construction
- ☐ Davis Bacon applies

**Repairs:**

Estimated number of months for completion of all Work set forth in Exhibit B based on the Project Owner's rehab or construction schedule: \_\_\_\_\_ months after the effective date of this Agreement.

**Offsite Relocation:**

- ☐ Tenants will be relocated offsite for 12 months or more
- ☐ Tenants will be relocated offsite for less than 12 months
- ☐ Tenants will make a one-time move to a transfer of assistance site
- ☐ No offsite relocation anticipated

This Conversion Agreement (“Agreement”) to participate in the Rental Assistance Demonstration (“RAD”) and convert the assistance of the Converting Project named in the above table is entered into by and among [Name of Existing PRAC Ownership Entity], a [non-profit corporation or alternative entity type], organized and existing under the laws of [the State or Commonwealth of X] (“PRAC Owner”); [Name of Proposed Post-Conversion Ownership Entity], a [corporate entity type], organized and existing under the laws of [the State or Commonwealth of X] (“Project Owner”); and the United States Department of Housing and Urban Development, acting by and through the Secretary, his or her successors, assigns or designees (“HUD”), as of [Month and Day], 20[2 digits of Year] (“Effective Date”). If no date appears in this paragraph, the Effective Date shall be the recordation date of the Elderly Housing Use Agreement by and between the Project Owner and HUD.

## **TERMS AND CONDITIONS**

1. **Relationship of the Parties.** Unless otherwise agreed by HUD or identified specifically in this Agreement, in the case where the Project Owner differs from the PRAC Owner, all post-closing requirements and obligations contained herein apply to the Project Owner after the Closing. As used in this Agreement, “Closing” means execution of all binding legal instruments connected to the transaction contemplated by this Agreement (the “Transaction”) and, if applicable, recordation of such instruments.
2. **Applicable HUD Regulations and Requirements.** By converting assistance and entering into this Agreement, the Project Owner agrees to operate the Covered Project in accordance with all applicable law, including without limitation the Consolidated Appropriations Act, 2018 (Pub. L. No. 115-141) (“RAD Statute”); all applicable program requirements and guidance, including without limitation the Rental Assistance Demonstration – Final Implementation, Revision 4 Notice, H-2019-09 PIH-2019-23 (HA), issued September 5, 2019, as amended and revised from time to time (the “RAD Notice”) or any successor or additional statutes, regulations or guidance; and the terms and conditions set forth below (collectively, the “Program Requirements”). Any conflicts between this Agreement and any other HUD requirements shall be conclusively resolved by HUD. Any capitalized terms used herein but not defined have the meanings given them in the RAD Notice.
3. **Defined Terms.** All capitalized terms used but not defined in this Agreement shall have the meanings set forth in the RAD Notice.
4. **Termination of Capital Advance Obligations.** HUD hereby releases the PRAC Owner from any outstanding or ongoing obligations under the Section 202 Capital Advance Mortgage Note and the Converting Project(s) is released from any outstanding obligations under the 202 PRAC Project documents associated with the Converting Project(s), including, without limitation, the applicable Capital Advance Agreement, Capital Advance Mortgage Note, Capital Advance Program Regulatory Agreement, Capital Advance Program Use Agreement, and any other related or collateral documents associated with the 202 PRAC Project and the foregoing documents. In furtherance of the foregoing, HUD shall execute a Satisfaction of Note indicating cancellation of the Capital Advance Mortgage Note, HUD shall execute a Release of Mortgage and Regulatory Agreement, and HUD shall execute such other documentation as HUD determines is reasonably necessary or appropriate to effectuate the termination of the Capital Advance documentation.
5. **Implementation of Replacement Obligations.** Concurrent with the execution hereof, HUD and the Project Owner are entering into an Elderly Housing Use Agreement, which will be recorded as a restrictive covenant in first position on the Covered Project. The Elderly Housing Use Agreement restates any PRAC obligations that survive the conversion. The Elderly Housing Use Agreement has a term of 20 years plus the balance of the term left on the Capital Advance Program Use Agreement

at the time of conversion, and such term is identified as the Elderly Housing Use Agreement Term on page 1 of this Agreement.

6. **Elderly Housing Use Agreement Priority.** Unless otherwise approved by HUD, the Elderly Housing Use Agreement shall be superior to any and all liens and/or encumbrances against the Covered Project, including, without limitation, the lien evidenced by any and all mortgages, deeds of trust and other financing documents and regulatory documents related to the Covered Project (including any LIHTC use agreement). The Project Owner shall obtain consents or subordination agreements, and have such documents executed, as HUD may determine necessary to establish such priority.
7. **Expenses and Transaction Costs.** HUD is not responsible for any expenses or transaction costs incurred by or at the direction of the Project Owner in connection with the Transaction (including without limitation, fees for consultants, attorneys, environmental contractors, tax advisors and accountants; city, county and/or state taxes and/or fees; recording fees, prepayment penalties and/or premiums; costs for title insurance and title examination; surveys and appraisals) or the Work.
8. **Tax, Financial, and Legal Consequences.** HUD has not provided, nor shall it provide, any opinions, representations, warranties, or covenants to any party regarding any federal, state and/or local tax consequences, financial consequences, or legal consequences relative to the Transaction. The Project Owner acknowledge that funding of the contemplated Section 8 Housing Assistance Payment Contract (HAP Contract) is subject to appropriations.
9. **Rental Assistance.** The Project Owner shall enter into one or more HAP Contracts, as specified on page 1 of this Agreement, pursuant to which rental assistance will be provided to the number of units specified on page 1 of this Agreement. The Project Owner shall renew the HAP Contract throughout the full term of the Elderly Housing Use Agreement, as specified on page 1 of this Agreement.
10. **Sources and Uses of Funds.** HUD approval of this Transaction is based on the Sources and Uses attached as Exhibit A. Any changes to this Sources and Uses after the date hereof shall be disclosed to HUD and, if HUD determines that such changes are material, HUD may require additional review and approvals and/or amendment to this Agreement. Without in any way modifying the requirements of specific funding sources, HUD does not require tracking of specific funds to specific uses under RAD. HUD shall review the availability of sources and their application to uses in the aggregate upon completion of the Work. HUD approves the use of unrestricted funds or of construction period project income for both hard and soft costs reflected in an approved Sources and Uses and as working capital to bridge the availability of funds during the course of the implementation of the Work.
11. **Planned Construction and Rehabilitation.**
  - 11.1 **Description of the Work and Obligation to Complete.** Exhibit B sets forth the planned construction, repairs and/or rehabilitation for the Covered Project to be funded in accordance with the Sources and Uses (the "Work"). The Sources and Uses represent the Project Owner's determination of funds necessary to pay for the Work. Without regard to the adequacy of funds set forth in the Sources and Uses, the Project Owner shall ensure that the Work is completed in the time frame set forth in this Agreement and in accordance with applicable RAD Program Requirements at its sole cost and expense. The Work will be completed in accordance with the following requirements:

- 11.1.1 The more stringent of: (1) any applicable national building code, such as the Uniform Building Code, the Council of American Building Officials Code, or the Building Officials Conference of America Code; or (2) applicable state and local laws, codes, ordinances, and regulations;
- 11.1.2 Other applicable Federal requirements including any Federal fire-safety requirements and HUD minimum property standards (e.g., 24 CFR part 200, subpart S for FHA-insured properties);
- 11.1.3 The relevant requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-484 6), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-485 6), and implementing regulations at 24 CFR part 35, as applicable;
- 11.1.4 Section 504 of the Rehabilitation Act of 1973 and its implementing regulations at 24 CFR part 8, including but not limited to accessibility standards, as applicable in the event of any “substantial alterations” or other “alterations,” each as defined in such regulations;
- 11.1.5 The design and construction requirements of the Fair Housing Amendments Act of 1988 and its implementing regulations at 24 CFR Part 100.25, as applicable or, Title II of the Americans with Disabilities Act, the Department strongly encourages Project Owners to incorporate design standards that address fall prevention, visitability, universal design, and electronic communication mechanisms when developing or rehabilitating housing and community facilities;
- 11.1.6 Davis-Bacon prevailing wage requirements (prevailing wages, the Contract Work Hours and Safety Standards Act, and implementing regulations, rules, and requirements) **only to the extent that** construction or rehabilitation is performed on nine or more units that were not previously rent assisted or rent restricted and will be newly assisted as a result of the conversion transaction (including, without limitation, through transfer of assistance). Davis-Bacon prevailing wage requirements do not apply simply as the result of the execution of a HAP Contract through RAD that provides rental assistance to previously-assisted units.
- 11.2 General Contractor Requirement. To the extent the Work includes new construction or substantial rehabilitation, the Project Owner shall engage a qualified general contractor who shall obtain either (i) a payment and performance bond from a properly licensed surety, which bond and surety shall be acceptable to HUD, or (ii) a letter of credit, acceptable to HUD.
- 11.3 Reductions in Units. To the extent the Work includes a change in unit configuration in conjunction with conversion (e.g., converting efficiency units to one-bedroom units), the Project Owner must ensure the change in unit configuration:
- 11.3.1 Will not result in the involuntary permanent displacement of any resident;
- 11.3.2 Will not result in a reduction in accessible units below the minimum percentage;
- 11.3.3 Will not, except with HUD approval, result in a reduction in the number of assisted units by the greater of 5% or five units; and
- 11.3.4 Will not result in discrimination based on race, color, national origin, religion, sex, disability, or familial status.
- 11.4 Temporary Relocation of Residents to Accommodate Construction. The Project Owner shall ensure that neither the conversion under RAD nor the subsequent completion of the Work results in the involuntary permanent displacement of any resident. The Project Owner is responsible for ensuring that all relocation requirements are met and shall provide HUD with a certification regarding the residency and relocation history of residents upon completion of the Work.
- 11.5 Deadline for Completion of the Work. The Project Owner shall ensure that all of the Work, including any reconfiguration of units and any environmental mitigation measures, listed or

referenced in this Agreement is completed pursuant to the terms of this Agreement. Any material changes in the scope of the Work, including any reductions in the scope of the Work, must be approved in writing by HUD. The Project Owner shall be in breach of this Agreement if the Work is not completed by the last day of the month three months following the estimated completion date listed on page 2 of this Agreement unless such date is extended in writing by HUD.

12. **Supportive Services for the Elderly.** Each project will be required to demonstrate that the needs of residents are adequately met either through a service coordinator (full-time or part-time) funded through the annual project budget or through another service coordination/service provision arrangement. Upon conversion, the Project Owner must provide or have available supportive services that will meet the needs of the anticipated residents as they age, as such services are identified in the exhibit to the HAP Contract. The Project Owner must ensure that the identified supportive services will be provided or otherwise made available on a consistent, long-term basis to support residents.

13. **Reserves.**

- 13.1 **Reserve for Replacements.** The Project Owner shall establish a Reserve for Replacements, disbursements from which will be governed by the HAP Contract. No later than the date specified on the first page of this Agreement, unless such date is extended in writing by HUD, the Project Owner shall make an Initial Deposit to the Reserve for Replacements. If “Substantial Completion” is used in lieu of a specific date on the first page of this Agreement, “Substantial Completion” shall mean the date thirty (30) days following completion of those portions of the Work which represent 95% of the dollar amount of the Work, as such dollar amount may be adjusted by any change orders necessary to complete the Work.<sup>2</sup> The Initial Deposit to the Reserve for Replacements shall be in an amount equal to the greater of the amount set forth on the first page of this Agreement and the amount set forth in the Sources and Uses attached as Exhibit A. In addition, the Project Owner shall make monthly deposits into the Reserve for Replacements, each of which shall be equal to the greater of the amount set forth on the first page of this Agreement and the amount set forth in the HAP Contract, which monthly deposits shall commence no later than the date specified on the first page of this Agreement. After twelve months of monthly payments into the Reserve for Replacements, the monthly deposit shall be governed exclusively by the HAP Contract and shall be adjusted annually in accordance with the HAP Contract and Program Requirements.
- 13.2 **Operating Reserve.** The Project Owner shall establish and maintain a Project operating reserve account in an interest-bearing account to be used for project purposes. The Project operating reserve is separate and apart from the replacement reserve. An operating reserve required by a third-party source of financing (e.g., a lender or a LIHTC-motivated equity investor) may be used to satisfy this requirement. The Project Owner is not required to maintain a distinct operating reserve to satisfy the terms of this Agreement. Withdrawals from the operating reserve do not require HUD approval.

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<sup>2</sup> **Comment:** *Lenders and investors will often tie certain installment payments to a project reaching a “Substantial Completion” milestone. However, “Substantial Completion,” in that context, may or may not be defined consistent with HUD’s use of the term in this Commitment. Having to track multiple completion dates can be unduly burdensome. Accordingly, for ease of administration and monitoring, Project Owners should be able to propose that HUD adopt the definition of “Substantial Completion” used by other parties to their transaction(s).*



14. **Distributions.**

- 14.1 **Surplus Cash.** Distributions of surplus cash are governed by the HAP Contract. Notwithstanding the foregoing, surplus cash distributions are prohibited during any period when the balance in the Operating Reserve is less than \$250 per unit. Further, surplus cash distributions are prohibited until after completion of the Work, certification of the actual cost of the Work as specified in Section 10, certification of the status of residents as specified in Section 11.4, and acceptance by HUD of the post-completion certification.
- 14.2 **Net Proceeds from Refinance or Sale:** Page 2 of this Agreement sets forth the approved calculation of Net Proceeds and the portion thereof that are Restricted Proceeds, pursuant to the Program Requirements at the time of Closing. For all future sale or refinancing transactions shall be subject to the Program Requirements and the following provisions.
- 14.2.1 The proceeds from any refinance or sale of the Covered Project, net of funds described below, that occurs during the period equal to the remaining term of the original Capital Advance Use Agreement will be restricted to benefit the Covered Project or residents at the Covered Project (e.g., capital improvements, service delivery, or any uses set forth in a HUD-approved sources and uses statement other than acquisition) or to other Affordable Housing Purposes. All expenditures listed in a HUD-approved uses of funds are considered Affordable Housing Purposes.
- 14.2.2 For purposes of this section, proceeds of a refinancing include all commercial or subsidized loan proceeds, equity investments and grants received by or invested in the Project Owner after deduction of funds used for repayment of commercial first mortgage debt secured by the Covered Project and deduction of any HUD-approved uses of funds.
- 14.2.3 For purposes of this section, proceeds of a sale include all cash or other direct or indirect consideration paid to or on behalf of the seller of a Covered Project after deduction of funds used for repayment of commercial first mortgage debt secured by the Covered Project and deduction of any HUD-approved uses of funds. In addition, in the context of an arms-length sale to an unrelated third party, net proceeds of a sale shall be determined after deduction of the following:
- 14.2.3.1 The seller's payment of real estate or transfer taxes and fees, recording fees, real estate brokerage fees, and reasonable third-party transaction costs associated with the sale;
- 14.2.3.2 Any unrecovered (i.e., not previously drawn) seller equity in the Covered Project. Seller equity shall be calculated as a pro-rata portion of the original Capital Advance Note corresponding to the term of the Capital Advance Use Agreement that has elapsed; and
- 14.2.3.3 Paydown of any Identity of Interest (IOI) loans or advances that were used to address the needs of the project or residents of the project.
15. **Certifications, Representations and Warranties by the PRAC Owner.** Any statement, certification, representation or warranty made by the PRAC Owner to induce HUD to execute this Agreement was true and correct when given and remains true and correct as of the date hereof. In the event any such statement, certification, representation or warranty is no longer complete or correct, the PRAC Owner shall notify HUD in writing immediately upon becoming aware of such information. This notification requirement does not, in any way, limit HUD's rights and remedies. Without limiting the foregoing, the PRAC Owner hereby represents and certifies to HUD and warrants to maintain the veracity of the statements set forth below. Upon the request of HUD, the PRAC Owner shall provide HUD with evidence satisfactory to HUD relating to each of the foregoing certifications.

- 15.1 The PRAC Owner is duly organized, validly existing and in good standing under the laws of the applicable jurisdiction(s).
- 15.2 The PRAC Owner is the owner of the Converting Project.
- 15.3 The Converting Project is materially in compliance with the requirements of the PRAC program or has notified HUD of any material non-compliance.
- 15.4 The Converting Project continues to meet all RAD program eligibility requirements as stipulated in the RAD Notice.
- 15.5 The PRAC Owner has the requisite power and authority, and has secured all consents required, to consummate the Transaction.
- 15.6 Each of documents executed by or on behalf of the PRAC Owner in connection with the Transaction is a legally binding obligation of the PRAC Owner, duly executed and delivered on behalf of the PRAC Owner and enforceable in accordance with its terms.
- 15.7 There is no litigation or other claim pending or threatened against the PRAC Owner or the Covered Project which would have a materially adverse effect on the PRAC Owner's ability to comply with this Agreement [other than as disclosed to and consented to by HUD, (include if applicable)].<sup>3</sup>
- 15.8 The signatory for and principal officers of the PRAC Owner do not have actual knowledge of false statements, certifications or representations by the Project Owner.
16. **Certifications, Representations and Warranties by the Project Owner**.<sup>4</sup> Any statement, certification, representation or warranty made by the Project Owner to induce HUD to execute this Agreement was true and correct when given and remains true and correct as of the date hereof. In the event any such statement, certification, representation or warranty is no longer complete or correct, the Project Owner shall notify HUD in writing immediately upon becoming aware of such information. This notification requirement does not, in any way, limit HUD's rights and remedies. Without limiting the foregoing, the Project Owner hereby represent and certify to HUD and warrant to maintain the veracity of the statements set forth below. Upon the request of HUD, the Project Owner shall provide HUD with evidence satisfactory to HUD relating to each of the foregoing certifications.
- 16.1 The Project Owner is duly organized, validly existing and in good standing under the laws of the applicable jurisdiction(s).

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<sup>3</sup> Comment: These changes are necessary to align the Agreement's terms with the appropriate scope of the opinions expressed in PRAC Counsel's Opinion Letter. The language in the proposed Conversion Agreement is too broad and will sweep in all litigation of a PRAC Owner, which can be substantial through no fault of the PRAC Owner. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the PRAC Owner's ability to comply with RAD requirements. Any other litigation, commonly related to landlord-tenant disputes or minor slip-and-fall occurrences, should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant material litigation, such can be disclosed to HUD on an as needed basis.

<sup>4</sup> Comment: Most reps and warranties are appropriate for closing rather than HUD issuing a commitment that authorizes a project owner to begin the closing process. [We assume that Recap will follow the Component I timing for issuing the RCC.] We suggest moving these to a separate certification as in Component I, to be signed immediately prior to closing.

- 16.2 There have been no material changes in the nature of the Transaction as described in the Conversion Plan submission.
- 16.3 All notices required by Program Requirements relating to the Transaction have been timely provided to such persons and in a manner complying with applicable Program Requirements.
- 16.4 The Converting Project continues to meet all program eligibility requirements as stipulated in the RAD Notice.
- 16.5 The Project Owner has the requisite power and authority, and has secured all consents required, to consummate the Transaction.
- 16.6 Each of documents executed by or on behalf of the Project Owner in connection with the Transaction is a legally binding obligation of the Project Owner, duly executed and delivered on behalf of the Project Owner and enforceable in accordance with its terms.
- 16.7 There is no litigation or other claim pending or threatened against the Project Owner which would have a materially adverse effect on the Project Owner's ability to comply with this Agreement [other than as disclosed to and consented to by HUD, (include if applicable)].<sup>5</sup>
- 16.8 This Agreement, including, without limitation, the first two pages hereof and the Exhibits A through E attached hereto, accurately reflects the terms of the Conversion Plan and the final business terms of the Transaction. The Project Owner's execution of this Agreement constitutes acceptance of the final business terms reflected herein.
- 16.9 The sources of funds set forth in Exhibit A are sufficient to pay for the Work described in Exhibit B.
- 16.10 The Project Owner has disclosed to HUD all debt, secured and unsecured, associated with the Covered Project and the Project Owner.
- 16.11 The Elderly Housing Use Agreement is superior to the lien and/or encumbrance evidenced by any and all mortgages, deeds of trust and other financing documents and regulatory documents associated with the Transaction, otherwise known to the Project Owner, or that are recorded as of record on the Project.
- 16.12 All Transaction documents conform with the Program Requirements and any and all changes to HUD forms or sample language have been disclosed to HUD.
- 16.13 Except as specifically disclosed to and accepted by HUD in writing, the Project Owner (including, but not limited to Board Members, principals and executives of the Project Owner) does not have any knowledge that it (or any Board Members, principals and executives of the Project Owner in their official capacity as members, principals or executives of the Project Owner, as applicable) is

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<sup>5</sup> *Comment: These changes are necessary to align the Agreement's terms with the appropriate scope of the opinions expressed in PRAC Counsel's Opinion Letter. The language in the proposed Conversion Agreement is too broad and will sweep in all litigation of a Project Owner, which can be substantial through no fault of the Project Owner. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the Project Owner's ability to comply with RAD requirements. Any other litigation, commonly related to landlord-tenant disputes or minor slip-and-fall occurrences, should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant material litigation, such can be disclosed to HUD on an as needed basis.*

the current subject of, nor has received any pending notice of, any debarment, suspension or other administrative proceeding, audit or investigation by HUD, including without limitation by the Inspector General, the Departmental Enforcement Center, or the Office of Fair Housing and Equal Opportunity, or any other Federal or state government agency, whether or not sanctions have been imposed against such party.

- 16.14 No disclosed debarment, suspension or other administrative proceeding, audit or investigation would impact the Project Owner's ability to carry out its obligations as contemplated under this Agreement.
- 16.15 The signatory for and principal officers of the Project Owner do not have actual knowledge of false statements, certifications or representations by the PRAC Owner.
17. **Exhibits.** The following exhibits are a part of this Agreement and incorporated herein by this reference:
- 17.1 Exhibit A – Sources and Uses of Funds
- 17.2 Exhibit B– Scope of Work
- 17.3 Exhibit C – Addition Provisions to the Conversion Agreement
18. **Post-Closing Responsibilities.** The Project Owner agrees to follow the directions of the HUD Closing Coordinator with respect to post-Closing obligations. Without limiting the foregoing, the Project Owner will provide evidence of recording of the applicable Closing Documents and copies of any applicable executed HAP contract, recorded Elderly Housing Use Agreement, and other documents specified in the Escrow Letter within three (3) business days thereof and will provide copies of the remaining Closing Documents as directed within thirty (30) days of Closing. Upon completion of the Work in compliance with Section 11 of this Agreement, the Project Owner shall submit to HUD a completion certification which shall address such items as may be required by HUD to verify compliance with the terms of this Agreement including, without limitation, the Project Owner's certification of an updated Sources and Uses (which may include estimates of expenditures still outstanding at the time of submission) and a third party certification that the construction identified in the Work has been completed.
19. **Event of Default and Remedies.**
- 19.1 **Declaration of an Event of Default.** Upon breach of any of the terms of this Agreement, the enforcing party shall give the party in breach written notice of the breach. The party in breach shall have thirty (~~30~~60) calendar days after receipt of such notice to cure the breach provided that, if the breach cannot be cured pursuant to commercially reasonable efforts to do so within the prescribed thirty (~~30~~60) day period, the enforcing party may approve in writing an extension of ~~an additional~~ thirty (30) calendar days to cure the breach or such longer time as may be reasonably required by the circumstances, which approval shall not be unreasonably withheld, conditioned or delayed.<sup>6</sup> If the breach is not corrected within the prescribed cure period, the enforcing party may declare a default under this Agreement (an "Event of Default") without further notice.

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<sup>6</sup> *Comment: Despite best efforts of the parties, certain events of default may not be able to be cured within the set timeframes. Should such be deemed appropriate, parties should be provided the flexibility to extend the cure period as they see fit in order to avoid default when working in good faith to cure the breach.*

- 19.2 **Remedies.** Upon an Event of Default, the enforcing party shall have remedies available to it under statute, at law or in equity. The enforcing party shall have the right to seek specific performance of this Agreement and/or to enjoin any violation of this Agreement in Federal Court. The right to specific performance and injunction shall be in addition to all other remedies available under statute, at law or in equity. Without in any way limiting the forgoing, if HUD is the enforcing party, HUD may terminate the HAP Contract relating to the Covered Project. Termination of the HAP Contract shall have no impact on the continuing requirements under the Elderly Housing Use Agreement to serve very low-income or low-income persons and for such persons to pay rent based on their income. No person or entity, other than the parties hereto, has any rights or remedies under this Agreement.
20. **Notices.** All notices under this Agreement shall be in writing and shall be served by (a) personal service or receipted courier service, (b) by registered or certified first-class mail, return receipt requested, or (c) nationally-recognized overnight delivery service, addressed to the applicable party at the address set forth above. Any notice or other communication sent pursuant to clause (a) hereof shall be deemed received upon such personal service; if sent pursuant to clause (b) shall be deemed received seven (7) calendar days following deposit in the mail; and if sent pursuant to clause (c) shall be deemed received the next succeeding business day following deposit with such nationally recognized overnight delivery service. Any party may change its address by notice given in accordance with this Section.
21. **Successors and Assigns.** This Agreement and its attachments are binding upon the Project Owner and its successors and assigns. Unless otherwise provided herein, this Agreement may not be assigned, in whole or in part, except with the prior written consent of HUD.
22. **Consistency with Federal Law.** Nothing contained in this Agreement shall impose on HUD any duty, obligation, or requirement, the performance of which would be inconsistent with federal statutes, rules, or regulations in effect at the time of such performance.
23. **Corrections.** Notwithstanding anything to the contrary contained in this Agreement, the Project Owner agree <sup>7</sup>to execute, before or after the Closing, such documents, amendments or modifications as HUD deems necessary or appropriate to effectuate the intent of this Agreement or to complete or consummate the Transaction, including but not limited to instruments necessary to correct this Agreement or any of the Closing Documents.
24. **Entire Agreement; Survival.** The information listed on the chart on the first two pages of this Agreement and Exhibits A through C are all part of this Agreement. This Agreement and all exhibits attached constitute the entire agreement between the PRAC Owner, the Project Owner and HUD with respect to the Transaction. All prior and contemporaneous oral and written communications regarding the Transaction are merged herein and superseded hereby. This Agreement, and the responsibilities relating to each respective party, shall survive Closing of the Transaction.
25. **Governing Law.** This Agreement shall be governed, construed and interpreted in accordance with the laws of the state in which the Covered Project is located, and the parties shall submit to the jurisdiction and venue of the courts in the county where the Covered Project is located.
26. **Severability.** Should any provision of this Agreement be held by a court of law to be unenforceable, such determination shall in no way compromise the enforceability of the other provisions.

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<sup>7</sup> **Comment:** *Should be plural (agrees).*

27. **Counterparts**. This Agreement may be executed in counterparts. Electronic copies of signatures (such as those in portable document format (pdf)) shall be evidence of and treated as original signatures.

(signature page follows)

Signature Page to RAD Conversion Agreement

Referenced PRAC Contract(s):  
[Insert PRAC Contract Number(s)]

HUD: United States Department of Housing and Urban  
Development

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

PRAC Owner: [Insert PRAC Owner signature block]

Date: \_\_\_\_\_

Project Owner: [Insert Project Owner signature block]

Date: \_\_\_\_\_

Exhibit A  
Sources and Uses

Permanent Financing Sources:

SOURCES	AMOUNT	NOTES (List name of capital source and, for all debt, the amortization period, term and interest rate)
Residual Receipts		
Commercial Non-FHA Loan		
Commercial FHA-Insured Loan		
Seller Note / Take Back Financing		
Federal Home Loan Bank AHP		
HOME		
CDBG		
National Housing Trust Fund		
Other Federal Funds		
State or Local Funds		
Interim Income		
Accrued & Unpaid Interest		
Equity		
Tax Credit Equity		
Deferred Developer Fee		
General Partner Equity/Reinvested Capital		
Other Federal Funds (Identify)		
Sponsor or Partner Funds		
Philanthropic/Foundation		
Total Sources:		

Construction Financing Sources (to the extent not listed above):

[List or state "None"]



Exhibit A  
Sources and Uses - continued

Permanent Uses:

USES	AMOUNT
Acquisition Costs	
Building and Land Acquisition	
Other Acquisition Costs	
Payoff Existing Loans	
Construction Costs	
Relocation Costs	
Professional Fees	
Architecture	
Engineering	
Physical Condition Assessment	
Borrower's Legal Counsel	
Lender's Legal Counsel	
Feasibility Studies	
Environmental Reports	
Appraisal / Market Study	
Accounting	
Survey	
Other Professional Fees	
Loan Fees and Costs	
FHA MIP	
FHA Application Fee	
FHA Inspection Fee	
Financing Fee	
Organizational Costs	
Title Insurance/Exam Fee	
Recordation Fee	
Closing Escrow Agent Fee	
Prepayment Penalty/Premium	
Payables	
Construction Interest	
Construction Loan Fees	
Cost of Bond Issuance	
Other Loan Fees and Costs	

Reserves	
Initial Deposit to Replacement Reserve	
Initial Operating Deficit Escrow	
Operating Reserve	
Tax and Insurance Escrow	
Other Reserves	
Developer Fees	
Total Uses	

Exhibit B  
Scope of Work

Work Item (A)	Description of Improvements Work (B)	Quantity (C)	Unit Cost (D)	Budget (E)	Date of Bid Expiration (F)
Rehab Items (Code, Description)	Increase row height to fully display description text				

Exhibit C  
Additional Provisions to the Conversion Agreement

List any additional provisions or state “None”

Recording requested by:

[ 1 ]

When recorded mail to:

[ 2 ]

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(Space above this line for recorder's use.)

OMB Approval No. [\_\_\_\_]  
(Exp. [\_\_\_\_])

**Public reporting burden** for this collection of information is estimated to average [\_\_\_\_] 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, Paperwork Reduction Project (2577-0276), Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, D.C. 20410-3600. 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.

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**HOUSING FOR THE ELDERLY**  
**DECLARATION OF RESTRICTIVE COVENANTS AND USE AGREEMENT**

This Housing for the Elderly Declaration of Restrictive Covenants and Use Agreement (the “Use Agreement”), dated as of [ 3 ], by and between the U.S. Department of Housing and Urban Development, with an address of 451 Seventh Street, S.W., Washington, DC 20410, Attention: Office of Recapitalization, Office of Multifamily Housing, acting by and through the Secretary, his or her successors, assigns or designees (“HUD”), and [ 4 ], a non-profit charitable corporation, as required under the Rental Assistance Demonstration (“RAD”) by the Consolidated and Further Continuing Appropriations Act of 2012 (Public Law 112-55, approved November 18, 2011, as amended from time to time, the “**RAD Statute**”); and the corresponding RAD Notice REV-4 (Housing Notice 2019-09 and Public and Indian Housing Notice 2019-23), as amended from time to time, and any successor document and/or regulations (hereinafter called the “**RAD Notice**”) and duly organized under the laws of the [ 5 ] with an address of [ 6 ], and its successors or assigns (the “Owner”). [~~7~~] and [ 7 ], solely for the purpose of acknowledging the Use Agreement and agreeing not to disturb it during its Term (as such term is hereafter defined) (the “Fee Owner”)].

**RECITALS**

A. RAD provides the opportunity to test the conversion of housing for the elderly originally developed with a capital advance and then subsequently assisted by a project rental assistance contract under the provisions of Section 202(c) of the Housing Act of 1959 (the “Section 202 Program”), as amended, to long-term, project-based Section 8 rental assistance to achieve certain goals, including the preservation and improvement of these properties through access to private debt and equity to address immediate and long-term capital needs.

B. The ~~Owner~~ [Fee Owner/Owner] is the fee owner of the real property described in Exhibit A, attached hereto and incorporated herein (the “Property”). On the Property are or will be located improvements which will commonly be known as [ 8 ] (the “Project”). The Project contains or will contain [ 9 ] dwelling units, of which [ 10 ] (the “Assisted Units”) will be subject to a Housing for the Elderly Housing Assistance Payment contract, as the same may be renewed, amended or replaced from time to time (the “HFE HAP Contract”). The HFE HAP Contract is being executed on or about the date hereof and will become effective on [ 11 ].

C. The Assisted Units are the direct successor of units acquired, developed and/or operated with assistance provided by HUD pursuant to the Section 202 Program and pursuant to agreements by and between HUD and the Owner. Such agreements included one or more of a capital advance agreement, a firm commitment, a mortgage note, a mortgage or deed of trust, a security agreement, a regulatory agreement, a use agreement and other collateral agreements (collectively, the “Section 202 Documents”).

D. Pursuant to the RAD Statute and RAD Notice, which this Use Agreement incorporates by reference, the Owner has agreed to encumber the Property and to operate the Project in

accordance with this Use Agreement in exchange for HUD's agreement to execute or permit the execution of the HFE HAP Contract and the assistance provided thereby and to execute a termination and release of the Section 202 Documents.

E. In accordance with the RAD Statute and RAD Notice, except as otherwise agreed in writing by HUD, this Agreement is to be recorded superior to any liens or encumbrances on the Property and shall remain in effect for the Term, as defined below, even in the case of abatement or termination of the HFE HAP Contract .

## AGREEMENT

In consideration of the promises and covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as set forth below. The [aforesaid](#) Recitals are incorporated by reference.

1. Definitions. All terms used in this Use Agreement and not otherwise defined have the same meaning as set forth in the RAD Notice.

2. Term.

a. The term of this Use Agreement commences upon the effective date of this Use Agreement and shall run until [ 12 ] (the "Term"). This Use Agreement shall survive abatement of assistance or termination of the HFE HAP Contract unless otherwise approved by HUD.

b. Upon the expiration of the Term, ~~this~~ or as earlier terminated in accordance with the terms of this Use Agreement, the Use Agreement shall cease and terminate by its terms, and the Property shall be deemed released ~~of from~~ the restrictions contained in this Use Agreement without ~~the requirement of requiring~~ any further writing between the parties. Notwithstanding the foregoing, upon expiration of the Term, HUD agrees to execute and deliver to the Owner such documents as the Owner shall reasonably request releasing and confirming the release of this Use Agreement from title to the Property and clearing title to the Property from any cloud or encumbrances created by this Use Agreement.

3. Use Restriction and Tenant Incomes.

a. The Project shall be maintained and operated as rental housing for the Elderly. "Elderly" shall mean a household composed of one or more persons ~~at least one of whom is 62 years of age or more older~~, at the time of initial occupancy.

b. The Owner shall comply with all of the terms and conditions of the HFE HAP Contract, incorporated herein by reference. Without in any way limiting the foregoing, the Assisted Units shall be leased in accordance with the HFE HAP Contract, including any applicable eligibility and/or income-targeting requirements.

c. The "Transition Date" shall be the date which is twenty (20) years prior to the expiration of the Term. If, prior to the Transition Date, the HFE HAP Contract is transferred ~~away~~ from the Project in response to a breach by the Owner of the HFE HAP Contract ~~or~~ if the

HFE HAP Contract is terminated (by way of illustration and not limitation, for breach or non-compliance), then for the remainder of the Term, households leasing the Assisted Units (except if any of the Assisted Units is a HUD-approved manager unit) must be Elderly and must have incomes at or below fifty percent (50%) of the Area Median Income (“AMI”) at the time of admission (“50% Eligible Tenants”). Additionally, rents for such Assisted Units must not exceed 30% of 50% of the AMI for households of the size occupying an appropriately sized unit. “Area Median Income” and “AMI” shall mean the median gross income for a household, as calculated and published by the Secretary of HUD from time to time, based on household size and on the median income for the metropolitan statistical area or other statistical area in which the Property is located.

d. If, on or after the Transition Date, the HFE HAP Contract is transferred ~~away~~ from the Project in response to a breach by the Owner of the HFE HAP Contract or if the HFE HAP Contract is terminated, then for the remainder of the Term households leasing the Assisted Units (except if any of the Assisted Units is a HUD-approved manager unit) must be Elderly and must have incomes at or below eighty percent (80%) of the AMI at the time of admission (“80% Eligible Tenants”). Additionally, rents for such Assisted Units must not exceed 30% of 80% of the AMI for households of the size occupying an appropriately sized unit.

e. Any rent increase in excess of \$25 resulting from a transfer or termination of the HFE HAP Contract as set forth in the preceding two subsections shall be implemented in three (3) roughly equal annual increments with respect to any household legally in residence in an Assisted Unit at the time of such transfer or termination of the HFE HAP Contract.

f. The requirements of subsections (a) through (e) above are referred to as the “Use Restrictions.”

g. Notwithstanding the foregoing, in the event the Owner so requests and is able to demonstrate to HUD’s satisfaction that despite the Owner’s good faith and diligent efforts to do so, the Owner is unable either (1) to rent a sufficient percentage of Assisted Units to 50% Eligible Tenants or 80% Eligible Tenants, as applicable, in order to satisfy the Use Restrictions, or (2) to otherwise provide for the financial viability of the Project, HUD may, in its sole discretion, agree to reduce the number of units subject to the Use Restrictions or otherwise modify the Use Restrictions in a manner acceptable to the Owner and HUD. Any such modification of the Use Restrictions shall be evidenced by a written amendment to this Use Agreement executed by each of the parties hereto.

4. Exceptions to the Use Restriction. The following events shall not constitute a breach of the Use Restrictions:

a. Vacancy. If an Assisted Unit is left vacant for a reasonable period following the end of a resident’s tenancy to permit appropriate marketing, leasing, renovation or modernization, or otherwise with the approval of HUD.

b. Casualty. If the Property is damaged or destroyed by fire or other casualty and the use of the Property in conformance with the Use Restrictions ceases during a period of repairs and/or reconstruction.



c. Takings. If the Property is taken for any public or quasi-public use under governmental law, ordinance or regulation, or by right of eminent domain, or by private purchase in lieu thereof.

5. Ownership. Through and until the Transition Date<sup>1</sup>, a non-profit charitable corporation recognized as exempt pursuant to Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code, or a non-profit consumer cooperative, shall have one of the following roles:

a. One or more entities qualified as specified above shall own the Property and the Project.

b. A corporate entity in which all ownership shares (including, without limitation, stock, membership interests or partnership interests) are held, directly or through wholly-owned subsidiaries, by one or more entities qualified as specified above, shall own the Property and the Project.

c. One or more entities qualified as specified above shall own the Property, and the Project shall occupy the Property pursuant to a ground lease acceptable to HUD.

d. A single purpose for-profit limited partnership or limited liability company formed for the purpose of securing low-income housing tax credits, historic tax credits or other tax-preferred financing approved by HUD shall own the Property and the Project, provided that one or more entities qualified as specified above hold an ownership or control interest acceptable to HUD. Forms of acceptable ownership or control include the following:

- i) Ownership of 51 percent or more of the general partner interests in a limited partnership or 51 percent or more of the managing member interests in a limited liability company with all powers of a general partner or managing member, as applicable;
- ii) Ownership of a lesser percentage of the general partner or managing member interests accompanied by contractually specified control rights as approved by HUD, which contractual arrangements cannot be modified without approval by HUD; or
- iii) Ownership of 51 percent or more of all ownership interests in a limited partnership or limited liability company accompanied by contractually specified control rights as approved by HUD, which contractual arrangements cannot be modified without approval by HUD.

e. One or more entities qualified as specified above have the direct or indirect legal authority (via contract, partnership share, agreement of an equity partnership, voting rights, or

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<sup>1</sup> **Comment:** Per RAD Notice rev 4, non-profit ownership or control is required through the term of the converting Project's Capital Advance Use Agreement, which may differ from the Transition Date.

otherwise) to direct the financial and legal interests of the Project Owner with respect to the RAD units and such authorities cannot be modified without approval by HUD.

f. One or more entities qualified as specified above have other ownership and control arrangements approved by HUD.

6. Fair Housing and Civil Rights Requirements. The Owner and its agents, where applicable, shall ensure that the Project complies with applicable federal fair housing and civil rights laws, regulations, and other legal authorities, including those identified at 24 C.F.R. § 5.105.

7. Accessibility Requirements. The Owner and its agents, where applicable, shall ensure that the Project complies with all applicable federal accessibility requirements under the Fair Housing Act and implementing regulations at 24 CFR Part 100, Section 504 of the Rehabilitation Act of 1973 and implementing regulations at 24 CFR Part 8, and Titles II and III of the Americans with Disabilities Act and implementing regulations at 28 CFR Parts 35 and 36, respectively.

8. Housing Standards. The Owner agrees that throughout the Term, it shall (a) maintain the Project in good repair and condition in accordance with applicable regulations and local codes; (b) maintain the Project in accordance with the Uniform Physical Condition Standards set forth in 24 CFR Part 5, Subpart G as amended if the Project is governed by a PBRA HFE HAP Contract or in accordance with the Housing Quality Standards set forth in 24 CFR Part 982.101 as amended if the Project is governed by a PBV HFE HAP Contract; (c) maintain and operate the Assisted Units and related facilities to provide decent, safe and sanitary housing, including ~~the~~ through provision of all applicable services, maintenance and utilities; and (d) comply with the lead-based paint regulations set forth in 24 CFR Part 35, as amended.

9. Restrictions on Transfer.

a. Pursuant to this Use Agreement, HUD has been granted and is possessed of an interest in the Property. The Owner shall not convey, assign, transfer, lease, sublease, mortgage, pledge, hypothecate, encumber or otherwise dispose of the Property, any part thereof, or any interest therein or permit or suffer the conveyance, assignment, transfer, lease, sublease, mortgage, pledge, hypothecation, encumbrance or other disposal of the Property, any part thereof, or any interest therein, without the prior written approval of HUD.

b. If any transfer is approved by HUD at the time this Use Agreement is executed, the name of the transferee shall appear here: [13]. The letters "NA," a blank, or similar markings shall indicate that no transferee has been pre-approved.

c. Notwithstanding the foregoing, the Owner need not obtain the prior written approval of HUD for (i) the conveyance or dedication of land for use as streets, alleys or other public rights-of-way, (ii) the granting of easements for the establishment, operation and maintenance of public utilities, (iii) the documentation of residential lease or other occupancy arrangements in the normal course of operation of the Property and/or (iv) subordinate liens contemplated by and on the terms set forth in a RAD Conversion Agreement executed in connection with the Project, whether such liens are recorded substantially concurrent with the recordation of this Use

Agreement or recorded subsequent hereto (such as permanent financing to replace construction-period financing).

10. Events of Default. Upon breach ~~or threatened breach~~ of any ~~of the material~~ terms of this Use Agreement, HUD shall give the Owner written notice of the breach. The Owner shall have sixty (60) calendar days after receipt of such notice to cure the breach, or such longer time as may be reasonably required by the circumstances.<sup>2</sup> If the Owner uses commercially reasonable efforts to cure the breach within the prescribed sixty (60) day period and is unable to do so, HUD may approve in writing, which approval shall not be unreasonably withheld, conditioned or delayed, an extension of an additional thirty (30) calendar days to cure the breach. HUD shall have discretion to provide additional thirty (30) calendar day extensions of time to cure the breach as circumstances warrant.<sup>3</sup> If the breach is not cured to the satisfaction of HUD within the prescribed cure period, HUD may declare a default under this Use Agreement (an “Event of Default”) without further notice.

11. Remedies. Upon an Event of Default, the parties hereto may institute legal action to enforce performance of the terms of this Use Agreement, to enjoin any material acts in violation of this Use Agreement, to recover whatever damages can be proven, and/or to obtain whatever other relief may be available under statute, at law or in equity. In addition, and without in any way limiting the foregoing, remedies may include any or all of the following:<sup>4</sup>

a. HUD may take whatever reasonable investigative steps it deems necessary to ensure compliance.<sup>5</sup>

b. HUD may require the Owner to lease all units at the Project that become available, without regard to whether such units had previously been designated as Assisted Units and

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<sup>2</sup> **Comment:** Per the comparable Component One provisions and in order to be consistent across the different RAD programs, there must be flexibility to make allowances for circumstances that cannot be cured within 60 or 90 days.

<sup>3</sup> **Comment:** Additional extensions of the cure period may be necessary due to circumstances outside of the owner’s ability to control regardless of commercially reasonable efforts undertaken to cure.

<sup>4</sup> **Comment:** We strongly object to HUD’s attempted use of threats in order to circumvent the default process and institute legal action and other enforcement against Owners, especially for non-material violations. Threatened action is not enforceable and deprives the parties of their due process rights. If there has been a breach of the RAD Use Agreement, then, subject to all applicable notice and cure periods, the parties may seek appropriate remedies for such default. However, anything short of a breach should not be sufficient to trigger the sweeping enforcement remedies provided to HUD hereunder.

<sup>5</sup> **Such investigative powers should be subject to all due process protections and shall be reasonable. For example, access to the premises and to the Property’s books and records shall be made available during usual business hours following proper notice.**

without regard to the size or amenities of such units, to households meeting the requirements of the Use Restrictions until the Project and the Owner are in compliance with the Use Restrictions.

~~c. HUD may require the Owner to offer relocation assistance consistent with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and implementing regulations at 49 C.F.R. § 24, and other reasonable inducements to encourage households whose residency does not comply with the terms of the HFE HAP Contract or the Use Restrictions, as applicable, to vacate the Project in order to release the unit to households meeting the Use Restrictions.~~

c. 6.

d. HUD may apply to any court, State or Federal, for specific performance of this Use Agreement, for an injunction against any material violation of this Use Agreement, for the appointment of a receiver to take over and operate the Project in accordance with the terms of this Use Agreement, or for other relief as may be appropriate, since the injury to HUD arising from an Event of Default would be irreparable and the amount of damage would be difficult to ascertain. The right to specific performance and injunction shall be in addition to all other remedies available to HUD under statute, at law or in equity.

e. HUD may take possession of the Project and operate the Project in accordance with the terms of this Use Agreement until HUD in the reasonable exercise of its discretion determines that the Project is in compliance with the terms of this Use Agreement and the Owner is in a position to operate the Project in accordance with the terms of this Use Agreement, provided HUD's re-approval of the Owner shall not be unreasonably withheld, conditioned or delayed. HUD may collect all rents and charges in connection with the operation of the Project and use such collections to pay the Owner's obligations under this Use Agreement, and the necessary expenses of preserving the property and operating the Project.

f. Prior to the Transition Date and with the consent of all mortgage lienholders (with the exception of mortgage lienholders affiliated with or under common control with the Owner), HUD may require the Owner to transfer all of its right, title and interest in the Property and all Project assets to another ownership entity designated by HUD and qualified under the terms of this Use Agreement.<sup>7</sup>~~For this purpose, the Owner hereby constitutes and appoints HUD as its true and lawful attorney-in-fact, with full power of substitution in the premises, to transfer the~~

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<sup>6</sup> *Comment: Requiring the owner to offer relocation assistance goes well beyond the terms of the HFE HAP Contract and the RAD Notice.*

<sup>7</sup> *Comment: We strongly object to HUD's attempts to obtain what amounts to a pre-default confession of judgment from Project Owners by requiring the Owner to appoint HUD as its attorney in fact for such enforcement purposes. The proposed requirements conflict with HUD's established procedures to address instances of non-compliance, deprive Owners of due process protections, and accordingly are an abuse of authority by HUD.*

~~Property and all Project assets to such entity designated by HUD if the Owner fails or refuses to make such a transfer as required by HUD.~~

g. HUD may transfer the HFE HAP Contract and the rental assistance contemplated therein to another entity and/or Property and/or Project.<sup>8</sup> ~~The Owner has constituted HUD as its attorney-in-fact to effectuate any such transfer.~~

h. All remedies provided in this Use Agreement are distinct and cumulative to any other right or remedy under this Use Agreement, or afforded by law or equity, and may be exercised concurrently, independently, or successively.

12. Subordination; Successors and Assigns. Except as otherwise approved in writing by HUD, any lien on the Project and/or Property shall be subject and subordinate to this Use Agreement. This Use Agreement shall be binding upon the Owner and all future successors and assigns with respect to ~~any portion of~~ the Property or the Project. The benefits and burdens of this Use Agreement ~~touch and concern and~~ run with the land and are binding upon and shall inure to the benefit of the respective successors and assigns of the parties to this Use Agreement, including any HUD-approved transferee. This Use Agreement shall survive foreclosure of any subordinate lien and shall survive bankruptcy of any Owner of the Project and/or Property.

~~13. Books and Records. The Project books and records will be established and maintained in accordance with the requirements of HUD, and in such condition as to permit a speedy and effective audit. The Owner shall keep copies of all written contracts or other instruments that affect the Project. HUD and its agents shall have the right of entry and free access to the Project and the right to inspect all books, contracts, subcontracts and records of the Owner at any reasonable time.~~

13. Books and Records. The Project books and records shall be established and maintained in accordance with HUD requirements. The Owner shall furnish any information and reports pertinent to this Use Agreement as reasonably may be required from time to time by HUD. Following receipt of appropriate and reasonable notice, the Owner shall permit HUD or any of their duly authorized representatives to have access to the premises and, for the purpose of audit and examination, to have access to any books, documents, papers and records of the Owner that are pertinent to compliance with this Use Agreement.<sup>9</sup>

14. Lender Provisions.

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<sup>8</sup> *Comment: We strongly object to HUD's attempts to obtain what amounts to a pre-default confession of judgment from Project Owners by requiring the Owner to appoint HUD as its attorney in fact for such enforcement purposes. The proposed requirements conflict with HUD's established procedures to address instances of non-compliance, deprive Owners of due process protections, and accordingly are an abuse of authority by HUD.*

<sup>9</sup> *Comment: The proposed language is too broad and goes beyond the requirements of the HFE HAP Contract provisions.*

a. Nothing in this Use Agreement prohibits any holder of a mortgage or other lien against the Property or Project from foreclosing its lien or accepting a deed in lieu of foreclosure. Any lien holder shall give HUD, as a courtesy, written notice prior to declaring an event of default. Any lien holder shall provide HUD concurrent notice with any written filing of foreclosure filed in accordance with state law provided that the foreclosure sale shall not occur sooner than sixty days (60) days after such notice to HUD. The Notice to HUD may be personally delivered or sent by U.S. certified or registered mail, return receipt requested, first class postage prepaid, addressed as follows:

If the HFE HAP Contracts provides for project based rental assistance (“PBRA”):

U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 6106  
Washington, DC 20410  
Attention: Office of the Assistant Secretary for Housing – Office of Asset  
Management and Portfolio Oversight

If the HFE HAP Contracts provides for project-based voucher assistance (“PBV”):

U.S. Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 4100  
Washington, DC 20410  
Attention: Office of the Assistant Secretary for Public and Indian Housing –  
Office of Housing Voucher Programs

b. Notwithstanding any lienholder’s foreclosure rights, this Use Agreement survives foreclosure and any new owners of the Property or the Project take ownership subject to this Use Agreement.

c. Transfer of title to the Property or the Project may be grounds for termination of assistance under the HFE HAP Contract. However, HUD may permit, through prior written consent by HUD, the new owner of the Property or the Project to assume the HFE HAP Contract, subject to the terms included therein, or enter into a new HAP contract. Any HUD consent to continued HAP assistance is subject to the RAD Statute, RAD Notice and other RAD program requirements.

d. Each entity interested in purchasing the Property in a foreclosure sale administered under state foreclosure law may submit a written request to HUD to continue the HFE HAP Contract assistance in the event of such entity’s successful acquisition at the foreclosure sale. Such request shall be submitted by the latter of ten business days after first publication of the foreclosure sale or 60 days prior to such foreclosure sale.

15. Notices. All notices under this Use Agreement shall be in writing and shall be served by (a) personal service or receipted courier service, (b) by registered or certified first-class mail, return receipt requested, or (c) nationally-recognized overnight delivery service, addressed to HUD or the Owner, as appropriate, at the addresses for such parties set forth above. Any notice or other communication sent pursuant to clause (a) hereof shall be deemed received upon such



personal service, if sent pursuant to clause (b) shall be deemed received seven (7) calendar days following deposit in the mail, and/or if sent pursuant to clause (c) shall be deemed received the next succeeding business day following deposit with such nationally recognized overnight delivery service. Any party may change its address by notice given in accordance with this Section 8.

16. Amendments or Release. This Use Agreement may be amended only by a written instrument signed by HUD and by any other parties to this Use Agreement. There shall be no amendment, modification, rescission, revocation and/or termination of this Use Agreement without the prior written approval of HUD. Further, this Use Agreement is not subject to negotiation by the Owner or any Lender with a Secured Interest<sup>10</sup> in the Property.

17. Tenant Participation. The Owner agrees (a) not to impede the reasonable efforts of tenants to organize as detailed in 24 CFR Part 245, and (b) not to unreasonably withhold the use of any community room or other available space appropriate for meetings which is part of the Project when requested by (i) a resident tenant organization in connection with the representational purposes of the organization, or (ii) tenants residing in the Project who seek to organize or to consider collectively any matter pertaining to the operation of the Project.

18. Conflicts. Any conflicts between this Use Agreement and the HFE HAP Contract or any other applicable HUD program requirements shall be conclusively resolved by the Secretary.

19. Execution of Other Use Agreements. The Owner covenants and agrees that it has not and shall not execute any other agreement with provisions contradictory ~~of~~<sup>to</sup>, or in opposition to, the provisions of this Use Agreement, and that in any event, the provisions of this Use Agreement are paramount and controlling as to the rights and obligations set forth herein, and supersede any conflicting requirements.

20. Subsequent Statutory Amendments. If revisions to the provisions of this Use Agreement are necessitated by subsequent statutory amendments, the Owner agrees to execute modifications to this Use Agreement that are needed to conform to the statutory amendments. At HUD's option, HUD may implement any such statutory amendment through rulemaking.

21. Third Party Beneficiaries. No person or entity, other than the parties to this Use Agreement, has any rights or remedies under this Use Agreement.

22. Waivers. No waiver, forbearance, or failure to enforce any term of this Use Agreement by HUD shall be deemed a waiver or forbearance in future instances.

23. Governing Law. This Use Agreement shall be governed, construed and interpreted in accordance with the laws of the state in which the Property is located, and the parties shall submit to the jurisdiction and venue of the courts in the county where the Property is located.

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<sup>10</sup> Comment: The terms "Lender" and "Secured Interest" are undefined in the Use Agreement and the RAD Notice.

24. Severability. The invalidity or unenforceability of any clause, part or provision of this Use Agreement shall not affect the validity or enforceability of the remaining portions thereof.

25. Counterpart Signatures. This Use Agreement may be executed in any number of original counterparts, all of which evidence only one agreement, and only one of which need be produced for any purpose.

*Remainder of this page intentionally left blank.*



IN WITNESS WHEREOF, the parties hereto, by their respective duly authorized representatives, have caused their names to be subscribed hereto, on the date first written above.

11

~~The Owner hereby certifies that the statements and representations contained in this instrument and all supporting documentation are true, accurate, and complete and that each signatory has read and understands the terms of this Use Agreement. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD as a true statement of facts contained therein.~~

Owner: [ 14 ], a non-profit<sup>12</sup> charitable corporation

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

A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

[ 15 ]

[ 16 ]

ss.

On \_\_\_\_\_, 20\_\_\_\_, before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under penalty of perjury under the laws of this State or Commonwealth that the foregoing paragraph is true and correct. Witness my hand and official seal.

<sup>11</sup> **Comment:** The proposed certification language is new, does not exist in the Component One Use Agreement(s), and should be removed from the Use Agreement. We strongly object to the second sentence in particular because it effectively permits HUD to bypass portions of its legally-required standards of proof in order to bring claims against Owners, in violation of due process protections.

<sup>12</sup> **Comment:** The term "charitable" should be removed because Section 501(c)(4) corporations and nonprofit consumer co-operatives are not charities and are qualified to serve in ownership capacities.

\_\_\_\_\_  
Notary Public

Print Name: \_\_\_\_\_

My commission expires: \_\_\_\_\_

DRAFT

HUD: U.S. Department of Housing and Urban  
Development

By: \_\_\_\_\_  
Thomas R. Davis  
Director, Office of Recapitalization

*A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.*

District of Columbia | ss.

On \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_, Notary Public, personally appeared Thomas R. Davis, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his authorized capacity, and that by his/her/their signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under penalty of perjury under the laws of the District of Columbia that the foregoing paragraph is true and correct. Witness my hand and official seal.

\_\_\_\_\_  
Notary Public  
Print Name: \_\_\_\_\_  
My commission expires: \_\_\_\_\_

Warning:

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in any matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

**EXHIBIT A**  
**LEGAL DESCRIPTION OF THE PROPERTY**

**Address:** [ 17 ]

Real property in the City of \_\_\_\_\_, County of \_\_\_\_\_,  
State/Commonwealth of \_\_\_\_\_, described as follows:

[ 18 ]

DRAFT

## INSTRUCTIONS:

1. Insert the name and address of the Owner or of their attorneys.
2. Insert the name and address of the Owner or of their attorneys.
3. Insert the month, day, and year.
4. Insert the legal name of the Owner. If the pre-conversion Owner is a tax credit partnership and not a non-profit corporation, modify the text appropriately.
5. Insert the place of legal formation, e.g., Commonwealth of Virginia or State of Nebraska.
6. Insert the Owner's legal address.
7. If the Owner is not the owner of the fee estate, include appropriate language incorporating the owner of the fee estate, either as a party to the agreement or consenting to the agreement and ensuring non-disturbance of the agreement.
8. Insert the name of the project.
9. Insert the total number of all dwelling units in the Project, including unrestricted units, affordable units not previously part of the Section 202 contract and Section 202 units being converted under RAD.
10. Insert the number of dwelling units being converted under RAD.
11. Insert the anticipated effective date of the HAP contract.
12. Insert the date which is 20 years after the maturity of the current Section 202 mortgage use agreement.
13. Insert the name of the post-conversion ownership entity if different from the PRAC ownership entity. If an LIHTC transaction is contemplated in conjunction with the RAD conversion, the PRAC (non-profit) ownership entity should be named as the Owner in this Use Agreement, in the Note forgiveness document, and in the Mortgage release document and the LIHTC entity should be identified here.
14. Insert the legal name of the Owner.
15. Insert the name of the State or Commonwealth where the document is signed.
16. Insert the name of the County where the document is signed.
17. Insert street address and any other tax map identification.
18. Insert complete metes and bounds legal description or other legal description (such as a reference to a plat map) which is legally sufficient in the State or Commonwealth.

<sup>1</sup>Public reporting burden for this collection of information is estimated to average 15 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to determine that the claims made by the owners can be relied upon. There are no assurances of confidentiality.<sup>1</sup>

**INSTRUCTIONS: The existing Section 202 Project Rental Assistance Contract (PRAC) Owner (Existing Owner) and the Proposed Section 202 Rental Assistance Demonstration (RAD) PRAC Owner (Proposed Owner) must select competent counsel acceptable to HUD counsel, and in a manner that satisfies the applicable rules of professional conduct. Counsel to the Existing Owner and the Proposed Owner, if different, must provide the HUD form of legal opinion(s) and any other matters reasonably requested by HUD**

**This form contains HUD-required language which must be included in any Opinion of Existing Owner Counsel and Proposed Owner Counsel in a Section 202 RAD PRAC program transaction. HUD-required Opinion language may not be changed. Additional Assumption and Qualification language needed for individual transactions may be added only with prior written approval of HUD, must not so substantially differ as to thwart the HUD-required language and must be in bold typeface in the space provided. Enter all transaction relevant information within the bold bracketed spaces provided and provide Schedule 1 and ~~Exhibits A and B~~ Exhibit A.**

OPINION OF [EXISTING OWNER OR PROPOSED OWNER'S] COUNSEL

[LAW FIRM LETTERHEAD]

[DATE]

U.S. Department of Housing  
and Urban Development

<sup>1</sup> Comment: We note that this document and others proposed for use in RAD Component Two were posted for public comment with track changes and other margin comments still embedded (see above comments by Micah J. Lemons and Katonia L. Jackson). It is unclear whether this is the final version of the document that HUD intended to release for public comment pursuant to this Notice of Proposed Information Collection. Accordingly, we would encourage HUD to re-publish the final form of this Opinion and all other documents to which this global comment applies for an additional sixty (60) day comment period.

Commented [LMJ1]: Non-Concur: A PRA burden statement is required by 5 CFR 1320.8(b)(3).

Commented [JKL2R2]: Noted and change accepted.

451 Seventh Street SW  
Washington, D.C. 20410

Re: *[COVERED PROJECT NAME, WITH PROJECT NUMBER IDENTIFIED IN 202 RAD PRAC CONVERSION AGREEMENT, IF ANY]*

Ladies and Gentleman:

We represent *[FULL NAME OF EXISTING OWNER]*, a *[STATE OR COMMONWEALTH ORGANIZED] [LEGAL STRUCTURE OF EXISTING OWNER, A LIST OF MULTIPLE ENTITIES IS ACCEPTABLE]* (singly, or if more than one entity listed, collectively the “Existing Owner”) and *[FULL NAME OF PROPOSED OWNER]*, a *[STATE OR COMMONWEALTH ORGANIZED] [LEGAL STRUCTURE OF PROPOSED OWNER]* (the “Proposed Owner”, and, together with the Existing Owner, the “Owners”), in connection with the conversion of one or more Project Rental Assistance Contracts (PRAC) under Section 202(c)(2) of the Housing Act of 1959 pursuant to the Rental Assistance Demonstration (“RAD”) and provision of *[RAD Project-Based Vouchers (PBV) or Project-Based Rental Assistance (PBRA)]* rental assistance to the project located at *[ADDRESS OF THE COVERED PROJECT]* and commonly known as *[COVERED PROJECT NAME]* (the “Covered Project”).

We have been requested by the *[Existing Owner and/or Proposed Owner]* to deliver this opinion in accordance with and pursuant to the RAD requirements issued by the United States Department of Housing and Urban Development (“HUD”) and the associated RAD Section 202 PRAC Conversion Agreement entered into by and among HUD, the Existing Owner and the Proposed Owner (said document is hereafter referred to as the “Conversion Agreement.” **[IF NOT REPRESENTING BOTH THE EXISTING AND PROPOSED OWNERS SIMULTANEOUSLY, ADJUST THE TEXT AS NECESSARY TO DELETE ONE PARTY FROM THE REPRESENTATION.]**

#### Instruments and Loan Documents Examined

In preparing this opinion, we have prepared or reviewed executed originals or true and complete copies of the instruments and documents, all of which are dated the date hereof (unless otherwise indicated), as set forth in Schedule 1 attached hereto and incorporated herein by this reference. Items under Heading A *[and B (if ~~Mixed-Finance~~ conversion of a mixed finance public housing property<sup>2</sup>)]* of Schedule 1 are collectively referred to as the “*[Existing Owner and/or Proposed Owner Documents]*” and all of the items listed on Schedule 1 are collectively

<sup>2</sup> [Comment: Revised wording for the avoidance of confusion.](#)

referred to as the “Documents.” The Documents represent all of the material, legally binding agreements entered into by the *[Existing Owner or Proposed Owner]* in association with the RAD conversion of Section 202 PRAC assistance approved by HUD pursuant to its execution of the Conversion Agreement.

### Assumptions

The Opinions expressed herein are subject to the following Assumptions, in addition to the Assumptions and Qualifications set forth elsewhere herein:

1. ~~1.~~ All Documents submitted to us as originals are authentic, and all copies of the Documents, and all records and letters examined by us are accurate, true, complete, and correct copies of the originals thereof and all factual warranties, representations, and statements made by the parties in the Documents are accurate, true, and correct.
2. ~~2.~~ Each of the individuals executing the *[Existing Owner and/ or Proposed Owner]* Documents has the requisite legal capacity and all the signatures, other than those of the *[Existing Owner and/ or Proposed Owner]* on *[Existing Owner and/ or Proposed Owner]* Documents, are genuine.
3. ~~3.~~ The *[Existing Owner and/ or Proposed Owner]* Documents have been duly authorized, executed, and delivered by all parties other than the *[Existing Owner and/ or Proposed Owner]* and constitute legal, valid, and binding obligations of each such other party enforceable in accordance with their terms.
4. Each *[Existing Owner and/ or Proposed Owner]* Document or other document submitted for review is accurate and complete. Each *[Existing Owner and/ or Proposed Owner]* Document that is an original is authentic, each *[Existing Owner and/ or Proposed Owner]* Document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of any *[Existing Owner and/ or Proposed Owner]* Document submitted as an unexecuted copy does not differ in any respect relevant to this Opinion Letter from the form and content of such *[Existing Owner and/ or Proposed Owner]* Document as executed and delivered.<sup>3</sup>
5. ~~4.~~ Each party to any of the *[Existing Owner and/ or Proposed Owner]* Documents, other than the *[Existing Owner and/ or Proposed Owner]*, is a duly organized corporation, general partnership, limited partnership, limited liability company, national banking association, authority, agent, public body, branch of the government of the United States of America, or other duly organized entity, as the case may be, under and pursuant to the

<sup>3</sup> Comment: When opining on the Existing Owner and/ or Project Owner Documents, in many cases, fully executed original versions of each document may not be available. Accordingly, this assumption is required in order to provide Opinion #5. This is a standard assumption set forth in the ABA Illustrative Opinion, published in the Real Property, Trust and Estate Law Journal (Fall 2018/Winter 2019 edition).



laws of each such party's organizational jurisdiction and, to the extent necessary for the delivery of the opinions set forth herein, is in good standing under the laws of, and authorized to transact business in, the State or Commonwealth in which the Covered Project is located ("State").

6. ~~5.~~ Each party to any of the *[Existing Owner and/or Proposed Owner]* Documents, other than the *[Existing Owner and/or Proposed Owner]*, has all requisite certifications of authority, licenses, permits, consents, qualifications, and documentation, and all requisite organizational power and authority, to execute such of the *[Existing Owner and/or Proposed Owner]* Documents to which it is a party, to perform its obligations under such of the *[Existing Owner and/or Proposed Owner]* Documents to which it is a party, and to enforce such of the *[Existing Owner and/or Proposed Owner]* Documents to which it is a party.
7. ~~6.~~ There are no oral or written modifications or amendments to the Documents and there has been no waiver of any of the provisions of the Documents by actions or conduct of the parties or otherwise.

[ENTER ALL HUD-APPROVED ADDITIONAL ASSUMPTIONS HERE OR MARK N/A]

7.

8.

9.

10.

11.]

We have made no investigation of the facts of law underlying the foregoing ~~Assumptions but nothing has come to our attention that would provide us with knowledge that we are not justified in making such~~ Assumptions.<sup>4</sup> We have made no investigation regarding the accuracy or

<sup>4</sup> Comment: Under customary opinion practice, outside of the securities context, negative assurances are not appropriate. Attorneys are not permitted to assume facts that they have reason to know are not accurate or do not

completeness of any documents, records, instruments, letters, or other writings examined by us, or the accuracy of any warranties, representations, and statements of fact contained therein, and we express no opinion regarding the same. No opinion is expressed regarding the existence or nonexistence of, or the effect of, any form of fraud, misrepresentation, mistake duress, or criminal activity upon the legality, validity, binding effect, or enforceability of the [**Existing Owner and/or Proposed Owner**] Documents, and we have made no investigation of the facts or law pertaining to such conduct, ~~but nothing has come to our attention which would provide us with actual knowledge of the existence of any such conduct.~~<sup>5</sup>

## Opinions

Based upon, and subject to, the Assumptions set forth above and subject to the Assumptions, Qualifications, exceptions, and limitations set forth in this opinion, we are of the opinion that:

1. ~~The~~ Based on the [Certificate of Existence or Certificate of Good Standing],<sup>6</sup> the [**Existing Owner and/or Proposed Owner**] is a [**TYPE OF ENTITY AND STATE OR COMMONWEALTH WHERE [Existing Owner and/or Proposed Owner] IS ORGANIZED AND EXISTING**]] and duly organized, validly existing [if recognized by the jurisdiction; and in good standing]<sup>7</sup>, and authorized to transact business in the State. The [**Existing Owner and/or Proposed Owner**] has the requisite power and authority to execute and deliver the [**Existing Owner and/or Proposed Owner**] Documents to which it is a party and to perform its obligations thereunder.
2. The [**Existing Owner and/or Proposed Owner**] Documents have been duly executed and delivered by the [**Existing Owner and/or Proposed Owner**]. In addition, those parties executing the [**Existing Owner and/or Proposed Owner**] Documents on behalf of the [**Existing Owner and/or Proposed Owner**], and the consummation by the [**Existing**

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warrant reliance under the circumstances. The American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, Real Estate Opinion Letter Guidelines, 38 Real Prop. Prob. & Tr. J. 241, 245 (2003) [hereinafter referred to as the Opinion Letter Guidelines], as affirmed in Joint Drafting Committee, Real Estate Finance Opinion Report of 2012, 47 Real Prop. Tr. & Est. L.J. 213, 220-221, 232-233 (2012) [hereinafter referred to as the 2012 Opinion Report]. Accordingly, attorneys should not be asked to confirm their lack of knowledge of particular factual matters. Opinion Letter Guidelines 255. We recognize that a few well-known opinion recipients such as Fannie Mae include negative assurances in their forms of Opinion of Borrower's Counsel, however, unlike HUD these opinion recipients allow opinion givers to deviate from their opinion forms and accept opinions that do not include the negative assurance language.

<sup>5</sup> Comment: Id.

<sup>6</sup> Comment: It is customary for opinions regarding the existence of an entity to be based on a Certificate of Existence or Certificate of Good Standing from the jurisdiction of formation. 2012 Opinion Report 231-232, 237-238. These recommended revisions have been accepted by HUD Field Counsel on past RAD transactions and ought to be incorporated in HUD's form of Opinion.

<sup>7</sup> Note that the good standing concept is not recognized in all jurisdictions. HUD should only require this language to be included when the jurisdiction recognizes it. 2012 Opinion Report 237.

**Owner and/or Proposed Owner**] of the transactions contemplated thereby, have been duly authorized by all necessary partnership, company, corporate or other actions, as applicable.

3. Based upon the certification of **[Existing Owner and/or Proposed Owner]** attached hereto as **[Exhibit A-1 for Existing Owner and Exhibit A-2 for Proposed Owner]**, there is no litigation or other claims pending or threatened against the **[Existing Owner and/or Proposed Owner]** or the Covered Project ~~other than as disclosed to and consented to by HUD. The, the~~ resolution of ~~any litigation or other claim disclosed to HUD which~~ would ~~not~~ have a materially adverse effect on ~~the~~ **[Existing Owner's and/or Proposed Owner's]** ability to comply with the RAD requirements, ~~including those set forth in the Conversion Agreement. [if applicable: other than as disclosed to HUD on Exhibit [A-1 for Existing Owner and/or A-2 for Proposed Owner]]~~.<sup>8</sup>

4. Intentionally Omitted.<sup>9</sup>

4. ~~Based solely on the pro forma title policy no. \_\_\_\_\_ issued by [NAME OF TITLE INSURANCE COMPANY] attached hereto as Exhibit B and reviewed and approved by HUD and assuming recordation of the documents listed therein in the order listed therein, and except as otherwise reflected in such policy, the Elderly Housing Use Agreement is superior to the lien and/or encumbrance of any mortgage, deed of trust, financing document or regulatory agreement relating to the Covered Project. To our knowledge, we have no reason to believe that the title policy issued will differ substantively with respect to the listing of liens and/or encumbrances from the pro forma reviewed and approved by HUD or that the documents will be recorded in an order different than the recording order previously submitted to HUD for review.~~

<sup>8</sup> Comment: The requested change reverts this language to that used in HUD's 2014 RAD Component One Form of Opinion. The language in the proposed form of opinion is too broad and will sweep in all the litigation of an Existing Owner and/or Proposed Owner, which can be substantial through no fault of the Existing Owner and/or Proposed Owner. It can be very expensive and time-consuming to properly compile the disclosures, and it is rarely worth the effort because the litigation seldom impacts the Existing Owner's and/or Proposed Owner's ability to comply with RAD requirements. Therefore, this disclosure should be limited to only those issues that would have a materially adverse effect on the ability to comply with the requirements of the RCC as any other litigation should be irrelevant to HUD's determination of whether to allow the RAD conversion to proceed. If there is relevant litigation, such can be disclosed to HUD through the certification at Exhibit A-1 and/or Exhibit A-2.

<sup>9</sup> Comment: This is neither a legal opinion nor a confirmation of fact. The opinion requests that the opinion giver read the pro forma title policy for HUD and adds nothing beyond the information stated in the pro forma title policy upon which the opinion relies. Because of the availability of title insurance, opinions regarding the status of title or encumbrances on real property are inappropriate. Opinion Letter Guidelines 252. In addition, conduit opinions, which add nothing beyond the documentation cited and may be misconstrued by the opinion recipient as adding evaluation of the source when none is, in fact, given, are disfavored under customary opinion practice. Opinion Letter Guidelines 246. To the extent HUD intends for the opinion giver to do more than recite what the proforma title policy already says, the request is for broad guidance and counsel to HUD that is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. The pro forma title policy is submitted to HUD for programmatic and legal review. HUD counsel has ample opportunity to review and confirm that the RAD Use Agreement will be recorded in a manner that complies with RAD program requirements. Accordingly, this opinion should be deleted.

5. The [*Existing Owner and/or Proposed Owner*] Documents constitute valid and legally enforceable agreements and/or contracts of the [*Existing Owner and/or Proposed Owner*], enforceable in accordance with their respective terms under the laws of the State and local law, subject to the Qualifications that the enforceability of any [*Existing Owner and/or Proposed Owner*] Document may be limited or affected by customary principles governing equitable relief generally and by bankruptcy, insolvency, reorganization, rearrangement, moratorium, liquidation, fraudulent conveyance, receivership, conservatorship, and other laws affecting the rights of creditors or the collection of debtors' obligations generally and a court may refuse to grant an order for specific performance or any other principles of equity which may limit the availability of certain equitable remedies.

~~6. Based on the foregoing and subject to the Assumptions and Qualifications set forth in this letter, it is our opinion that each of the [*Existing Owner and/or Proposed Owner*] Documents conforms to the legal requirements of the Conversion Agreement and that there is nothing in any of such [*Existing Owner and/or Proposed Owner*] Documents that conflicts with, or is inconsistent with, the legal requirements of the Conversion Agreement or exhibits thereto.~~

~~6. Intentionally Omitted.<sup>10</sup>~~

~~7. Intentionally Omitted.<sup>11</sup>~~

~~8. Intentionally Omitted.<sup>12</sup>~~

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<sup>10</sup> **Comment:** An opinion requesting opinion gives to determine whether the Existing Owner and/or Proposed Owner Documents conform to the Conversion Commitment requires opinion givers not to evaluate discrete legal issues, but instead to give broad guidance and counsel to HUD that the documents are legally adequate for HUD's intended purpose. Such guidance and counsel is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. Accordingly, this opinion should be deleted.

<sup>11</sup> **Comment:** For reasons described below, this is not an opinion, but rather a qualification and has been relocated within this letter accordingly.

<sup>12</sup> **Comment:** This is not a legal opinion but simply a requested certification that is inappropriate for inclusion in the legal opinion. Because of the lengthy HUD review process and the constant negotiations that take place in every affordable housing transaction, it is simply not realistic and would be unduly burdensome to require re-submission to HUD every time the date on a document or a stray scrivener's error requires change. We instead encourage HUD to look toward the process used in RAD Component One transactions, which rely on a Certification and Assurances document instead of the Legal Opinion and permit the following changes and modifications to be made to documents following HUD's review:

"It is understood that changes and modifications do not include (1) the insertion or correction of execution dates, typed names/addresses, formatting, typographical corrections, cross-reference information and similar non-substantive additions and corrections, or (2) attachment of approved exhibits or riders or making changes authorized by HUD. Changes or modifications made to the RAD Project Documents unrelated to the RAD required provisions after HUD review are shown on the blacklined pages attached at Exhibit A of this Certification and Assurances."

9. Intentionally Omitted.<sup>13</sup>

Qualifications

The Foregoing opinion is subject to the following Qualifications:

1. ~~7.~~ To the extent that we have relied upon the certifications of other persons in preparing this opinion, or the written statements or opinions of other counsel, we have attached to this opinion a copy of each such certification, statement, or opinion.<sup>14</sup>

~~8. Draft Documents submitted for due diligence review have been executed in the form submitted to HUD and approved by HUD counsel.~~

~~9. All Documents conform with the legal requirements set forth in the Conversion Agreement and any and all changes to HUD forms or sample language have been disclosed to HUD and its counsel.~~

Qualifications

The Foregoing opinion is subject to the following Qualifications:

2. ~~4.~~ We express no opinion as to the truth or accuracy of any warranties, representations, or statements of fact contained in any documents examined by us, including, but not limited to, the [*Existing Owner and/or Proposed Owner*] Documents listed in Heading A of Schedule 1.
3. ~~2.~~ We express no opinion as to:
- (a) the effect of bankruptcy, insolvency, reorganization, receivership, moratorium, fraudulent transfer, conveyance, and other similar laws affecting the rights and remedies of creditors generally; or
  - (b) the effect of general principles of equity, whether applied by a court of law or equity.

<sup>13</sup> Comment: As described in fn. 10, an opinion requesting opinion givers to determine whether the documents conform to the Conversion Agreement or have been modified from HUD's template form requires opinion givers not to evaluate discrete legal issues, but instead to give broad guidance and counsel to HUD that the documents are legally adequate for HUD's intended purpose. Such guidance and counsel is inappropriate for a legal opinion, and is instead a determination for HUD Closing Coordinators and HUD Field Counsel to make as part of their programmatic and legal review of the evidentiary submission. Opinion Letter Guidelines 243-244. Accordingly, this opinion should be deleted.

<sup>14</sup> Comment: This language was previously included as Opinion #7; however, it is best suited as a qualification, as it is simply a qualifying statement of fact and not a legal opinion.

4. ~~3.~~ We express no opinion as to the enforceability of any provisions in any of the Documents purporting to:
- (a) preclude the modification thereof through conduct, custom or course of performance, action, or dealing;
  - (b) waive equitable, statutory, or constitutional rights or remedies;
  - (c) require the payment or reimbursement of fees, costs, expenses or other amount which are unreasonable in nature or amount;
  - (d) limit the liability of the recipient of this opinion, or require indemnification of recipient of this opinion, for its own action or inaction; or
  - (e) specify the forum or venue where disputes shall be settled.
5. ~~4.~~ No opinion is given herein as to any laws regulating the business of any the parties other than the [*Existing Owner and/or Proposed Owner*], including without limitation: (a) the types of investments that can be made by any of the parties other than the [*Existing Owner and/or Proposed Owner*]; or (b) the legal lending limit of any of the parties other than the [*Existing Owner and/or Proposed Owner*].
6. ~~5.~~ Whenever our opinion herein is qualified by the phrases “to our knowledge,” “known to us,” “our attention,” or words of similar import, it is intended to indicate that the current actual knowledge of the attorneys within this firm engaged in the representations of the [*Existing Owner and/or Proposed Owner*] (and not to the knowledge of the firm generally) is not inconsistent with that portion of the opinion which such phrases qualify. We have made no independent investigation with respect to such matters.
7. ~~6.~~ The opinions set forth are based solely upon the laws and regulations of the State and federal law, and the state of facts in effect on the date hereof. Nothing herein shall be construed to be an opinion as to the applicability or effect of the laws of any other jurisdiction.
8. ~~7.~~ This opinion speaks only as of the date of its delivery. We have no obligation to advise the recipients of this opinion, or anyone else, of any matter of fact or law thereafter occurring, whether or not brought to our attention, even though that matter affects any analysis or conclusion of this opinion.
9. ~~8.~~ The opinion is limited to the matters expressly set forth herein, and no opinion is to be inferred or may be implied beyond the matters expressly so stated.

[ENTER ALL HUD-APPROVED QUALIFICATIONS HERE OR MARK N/A]

~~7~~10.

~~8~~11.

~~9~~12.

~~10~~13.]

This opinion letter has been provided solely for the benefit of the addressee, at its request, and no other person or entity shall be entitled to rely hereon without the express written consent of **[LAW FIRM PROVIDING OPINION]** This opinion letter shall not be quoted in whole or in part, used, published, or otherwise referred to or relied upon in any manner, including, without limitation, in any financial statement or other document.

Sincerely,

**[LAW FIRM PROVIDING OPINION]**

By:

**[NAME]**

**[TITLE]**

#### Schedule 1

- A. Proposed Owner Documents:
1. **[Conversion Agreement]**
  2. **[Elderly Housing Use Agreement]**

3. *[HAP Contract]*

4. *[Ground Lease, if applicable]*

~~5. *[LIST ALL OTHER PROPOSED OWNER DOCUMENTS]*~~

5. *[List all other documents executed by the Proposed Owner and Submitted to HUD for review as part of the RAD Conversion]*<sup>15</sup>

B. Mixed Finance Documents (if applicable):

1. *[Termination of Mixed-Finance]*

2. *[Full Release or Partial Release from Restrictive Covenants]*

3. *[Termination of the Regulatory Agreement]*

~~4. *[Other documents as applicable]*~~

4. *[List all other Mixed Finance Documents executed by the Existing Owner and/or Proposed Owner and submitted to HUD for review as part of the RAD conversion]*<sup>16</sup>

C. Other Documents

1. *[Pro Forma Title Insurance Policy]*

2.. *[Certifications and Assurances]*

4. *[Certification of Existing Owner and/or Proposed Owner, attached as Exhibit A]*

5. *[Consolidated Owner's Certification]*

6. *[Existing and/or Proposed Owner Organizational Documents]*

i. *[Amended and Restated Agreement of Limited Partnership]*

ii. *[Certificate of Limited Partnership]*

iii. *[Certificate of Existence]*

iv. *[Other documents used to support the opinions with respect to the Existing Owner or Proposed Owner documents (e.g. bylaws and articles of incorporation)]*

<sup>15</sup>Comment: The request to list all other "Proposed Owner Documents" without defining that term or providing additional detail is circular. Opinions should be limited to only those documents that are reviewed and approved by HUD as part of the RAD conversion process.

<sup>16</sup>Comment: The request to list "other documents as applicable" without defining that term or including additional detail is ambiguous.



OMB Approval 2502-0612  
(Exp. xx/xx/xxxx)

**Exhibit A**

**CERTIFICATION OF [EXISTING OWNER OR PROPOSED OWNER]**

This Certification of ~~Project~~ [Existing Owner or Proposed Owner] (“Certification”) is made the \_\_\_\_ day of \_\_\_\_\_, 202\_, for reliance upon by [LAW FIRM PROVIDING OPINION] (“Counsel”) in connection with the issuance of an opinion letter dated of even date herewith as a condition for conversion of Section 202 PRAC assistance pursuant to the Rental Assistance Demonstration by the Department of Housing and Urban Development (“HUD”). ”). In connection with the opinion letter, [Existing Owner and/or Proposed Owner] hereby certifies to the best of its knowledge to Counsel for its reliance, the truth, accuracy and completeness of the following matter:

- There is no litigation or other claims pending or threatened against [Existing Owner and/or Proposed Owner] or the Covered Project, the resolution of which would have a materially adverse effect on the [Existing Owner’s and/or Proposed Owner’s] ability to comply with the requirements of the RCC, except for: [LIST on ATTACHED SCHEDULE A-1 OR IF NONE, STATE “NONE” HERE]

~~• ——— The resolution of any such pending or threatened litigation or claims will not have a materially adverse effect on the ability of [Existing Owner and/or Proposed Owner] to comply with the RAD requirements, including those set forth in the Conversion Agreement.~~

The [Existing Owner and/or Proposed Owner] and its authorized representative who executes this Certification, each certifies that the statements and representations contained in this Certification and all supporting documentation hereto are true, accurate, and complete. This Certification has been made, presented, and delivered for the purpose of influencing an official action of HUD, and may be relied upon by HUD and Counsel as a true statement of the facts contained therein.

[INSERT SIGNATURE BLOCK, SUCH AS  
[NAME OF EXISTING OWNER OR PROPOSED OWNER]

a [STATE AND LEGAL STRUCTURE OF ENTITY]

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

[NAME OF ITS GENERAL PARTNER]

its General Partner

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

[NAME OF ITS MANAGING MEMBER]

its Managing Member]

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

[NAME OF ITS PRESIDENT]

**SCHEDULE A-1**

*Litigation or other Claims Pending or Threatened against Existing Owner or the Covered Project*

***SCHEDULE A-2***

OMB Approval 2502-0612  
(Exp. xx/xx/xxxx)

*Litigation or other Claims Pending or Threatened against Proposed Owner or the Covered Project*

**Exhibit B**

***PRO-FORMA TITLE INSURANCE POLICY***

**RAD Relocation Checklist (12/2019)**

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

**(Reviewed by Recap Transaction Manager except where indicated that review will be done by FHEO or both TM and FHEO)**

1. **Please** ~~if there will be relocation at the project, please~~ provide a narrative describing the relocation plan.<sup>1</sup> The following should be included: estimated timeline, a description of the temporary or permanent relocation, steps that have been or will be taken to inform residents of the process, and system for handling unexpected changes to the relocation plan.

2. **Has** ~~if applicable,~~<sup>2</sup> **has** the PHA issued a General Information Notice to residents?<sup>3</sup> ☐ YES ☐ NO

<del>Date</del> <u>if yes, date</u> of General Information Notice Issuance (GIN):	(XX/XX/XXXX)
Date of <del>RAD application</del> <u>Commitment to Enter into a HAP Contract (CHAP)</u> : <sup>4</sup>	(XX/XX/XXXX)

3. **If applicable,** ~~provide~~ the following dates:

Date of application of HOME Funds:	(XX/XX/XXXX)
Date of application of CDBG Funds:	(XX/XX/XXXX)
Date of application of HTTF Funds:	(XX/XX/XXXX)

4. **Has** ~~Except as authorized under Section 7 of Notice H 2016-17 PIH 2016-17 or as otherwise approved by HUD,~~ **has** any resident relocation occurred following issuance of the CHAP?<sup>5</sup> ☐ YES ☐ NO

<sup>1</sup> **Comment:** Not all projects will include relocation. HUD should either revise the form as proposed above or clarify that this form will only be required when projects involve RAD relocation.

<sup>2</sup> **Comment:** Note, GINs are only required to be provided "to any person scheduled to be displaced for the project" and will not be required in all situations (see PIH 2016-17, Section 6.6(B)). For example, under the URA, a person is not displaced when they are temporarily relocated for a period of less than twelve (12) months.

<sup>3</sup> **Comment:** HUD already asks this information on the proposed RAD Application. In order to streamline the process and reduce the burden placed on respondents, we encourage HUD to delete this question. However, should HUD be unwilling to do so, then lieu of removing the question altogether, we would suggest the edits as depicted above.

<sup>4</sup> **Comment:** When a GIN is required, it must be provided to residents "as soon as feasible" or "no later than 30 days following the issuance of the CHAP." Accordingly, this follow-up question should reference the date of the CHAP, not the date of the RAD Application.

<sup>5</sup> **Comment:** As originally drafted, this question is far too broad. HUD permits certain relocations to occur when such are unrelated to the RAD transaction (see Notice H 2016-17 PIH 2016-17, Section 6.8 and Section 7). Requiring PHAs or other Project Owners to routinely disclose permissible relocations that occur as part of normal public housing and/or HCV operations is an unduly burdensome requirement that will take significant time and resources. Accordingly, these permissible relocations ought to be excluded from the question. In addition, because relocation protections and others do not apply to residents until after issuance of a CHAP (see Notice H 2016-17 PIH 2016-17, Section 6), the question should be limited in time to only those relocations that may have occurred after issuance of a CHAP.

## RAD Relocation Checklist (12/2019)

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

5. Has a resident log been maintained in accordance with Section ~~6.6~~ 6.9<sup>6</sup> of Notice H 2016-17 PIH 2016-17? *Rental Assistance Demonstration (RAD) Notice Regarding Fair Housing and Civil Rights Requirements and Relocation Requirements Applicable to RAD First Component – Public Housing Conversions.* ☐ YES ☐ NO
6. ~~Does~~ If applicable, does the relocation planning include the coverage of moving expenses?<sup>7</sup> ☐ YES ☐ NO
7. ~~Does~~ If applicable, does your relocation planning include consideration of inconveniences such as noise, dust, convenience of entrance/exits, availability of common areas, etc., and ways to mitigate those inconveniences if appropriate (e.g., hospitality suites, communication)?<sup>8</sup> ☐ YES ☐ NO
8. ~~Does~~ If applicable, does the relocation planning include a method to receive and address resident concerns due to construction, rehabilitation or renovation? ☐ YES ☐ NO
9. ~~Does~~ If applicable, does the relocation planning include a method to receive and process reasonable accommodation requests for persons with disabilities during construction, rehabilitation or renovation? ☐ YES ☐ NO
10. ~~Will~~ If applicable, will any households be relocated a) within the same building or complex of buildings or b) to an off-site location for 12 months or less or onsite? ☐ YES ☐ NO
- ➔ If yes, ~~has the 30-Day Notice been issued or is it going to~~ will the 90-Day or 30-Day RAD Notice of Relocation, as applicable, be issued to affected households?<sup>9</sup> ☐ YES ☐ NO
11. ~~Will~~ If applicable, will there be offsite relocation of households for over 12 months that is not the result of a transfer of assistance? ☐ YES ☐ NO

<sup>6</sup> Comment: The original citation is incorrect. HUD requires the Resident Log to be maintained pursuant to Section 6.9 of Notice H 2016-17 PIH 2016-17. The originally cited section, Section 6.6, covers resident relocation notices.

<sup>7</sup> Comment: See fn. 1.

<sup>8</sup> Comment: Id.

<sup>9</sup> Comment: As originally drafted, this sub-question is inconsistent with RAD Requirements and poses a timing issue. First, when residents of a project are required to relocate within the same building or complex of buildings, they are entitled to a 90-day notice, not a 30-day notice (see Notice H 2016-17 PIH 2016-17, fn. 83, "Recipients of the 90-day notice would include those residents who have voluntarily accepted a permanent relocation option as well as those residents who are relocated within the same building or complex of buildings."). Second, HUD requires this RAD Fair Housing, Civil Rights, and Relocation Checklist to be submitted for review before a PHA can submit its financing plan (see Notice H 2019-09 PIH 2019-23 (HA), Attachment 1A). However, PHAs generally do not issue a RAD Notice of Relocation until after this Checklist and the Financing Plan are submitted for review and a RAD Conversion Commitment has subsequently been issued as the Notice of Intent to Acquire ("NOIA") is infrequently used (see Notice H2016-17 PIH 2016-17, Section 6.6(D)).

**RAD Relocation Checklist (12/2019)**

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

➔ If yes ~~has~~, will the 90-Day RAD Notice ~~been issued or is it going to~~ of Relocation be issued to affected households?<sup>10</sup>

☐ YES ☐ NO

**12. Complete the below table.**

	Total Families	No Relocation or relocation of 12 months or less	Temporary Relocation More Than 12 Months	Voluntary Permanent Relocation Intentionally Omitted. <sup>11</sup>
# of Families				

**13. Does the transaction involve the use of LIHTC?**

☐ YES ☐ NO

➔ If Yes, explain whether the use of LIHTC will impact the ability of current households to return. Specifically explain how the PHA will ensure the right to return of residents that do not qualify under typical LIHTC income limits (i.e. over 60% of AMI), for example, through the use of income averaging, offering Alternative Housing Options (to which the resident has voluntarily agreed), or not including the occupied unit for tax-credit basis.

**14. Does the transaction involve any of the following features, including as a result of a transfer of assistance?**

- i. ☐ a reduction or reconfiguration of units
- ii. ☐ an adoption of a preference that will change the occupancy of the site

<sup>10</sup> Comment: As noted in fn. 9, HUD requires this RAD Fair Housing, Civil Rights, and Relocation Checklist to be submitted for review before a PHA can submit its financing plan (see Notice H 2019-09 PIH 2019-23 (HA), Attachment 1A). However, PHAs generally do not issue a RAD Notice of Relocation until after this Checklist and the Financing Plan are submitted for review and a RAD Conversion Commitment has subsequently been issued as the Notice of Intent to Acquire ("NOIA") is infrequently used (see Notice H2016-17 PIH 2016-17, Section 6.6(D)).

<sup>11</sup> Comment: See fn. 10. In addition, although households can be surveyed to get a general sense of whether there is interest in voluntary permanent relocation options, residents may not provide written consent to an alternative housing option and, consequently, cannot consent to voluntary permanent relocation, until after the earlier of the effective date of the RAD Conversion Commitment ("RCC") or the issuance of the NOIA (see Notice H 2016-17 PIH 2016-17, Section 6.10(d)). Furthermore, when a resident consents to an alternative housing option, that consent is only valid for a period of 180 days. Accordingly, at this early stage in the RAD conversion process, it is very unlikely that it would be known, with any degree of certainty, how many families will elect voluntary permanent relocation as an option.

## RAD Relocation Checklist (12/2019)

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

15. Will any of these features impact the ability of households to return to the project?

☐ YES ☐ NO

➔ If yes, did the families identified in the FHEO review as not returning to the project accept an offer of Alternative Housing Options?<sup>12</sup>

☐ YES ☐ NO

16. ~~Will~~ Is it anticipated that any households ~~not be returning~~ may elect voluntary permanent relocation and waive their right to return to the Covered Project?<sup>13</sup> ☐ YES ☐ NO

➔ If yes, answer the questions below. If no, skip to Question 16.

- a. ~~How~~ Approximately, how many households ~~will not be returning~~ are anticipated to waive their right to return to the property? \_\_\_\_
- b. ~~Has~~ Will the PHA ~~provided~~ provide each family that will not be returning to the project pursuant to voluntary permanent relocation with a written offer of Alternative Housing Options that meets the requirements of Section 6.10.D of the RAD, Fair Housing, Civil Rights, and Relocation Notice? ☐ YES ☐ NO
- i. ~~his or her right to return;~~
- ii. ~~his or her right to comment on and/or object to plans which would preclude the resident from returning to the Covered Project;~~
- iii. ~~\_\_\_\_\_ the requirement that if the resident objects to such plans, the PHA or Project Owner must alter the project plans to accommodate the resident in the Covered Project; and~~
- iv. ~~\_\_\_\_\_ a description of both the housing option(s) and benefits associated with the right of return and the alternative housing options and benefits being offered.~~
- c. Describe the alternative housing options that ~~these~~ will be offered to households ~~have voluntarily accepted.~~
- d. ~~Has the PHA received a written acceptance of Alternative Housing Options for each household that will not be returning to the Covered Project? (Reviewed by both TM and FHEO. TM only sees relocation data (not demographic information))~~

<sup>12</sup> Comment: See fn. 11.

<sup>13</sup> Comment: See fn. 11. Accordingly, we have revised this section so that it prospectively inquires about a project's planned conversion instead of focusing on notices and actions that have yet to take place.



**RAD Relocation Checklist (12/2019)**

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

☐YES ☐NO

**17. Does the transaction involve a transfer of assistance (TOA)?** ☐YES ☐NO

If yes, complete the questions below.

Provide date which the project was officially identified for receiving assistance under TOA	(XX/XX/XXXX)
---	--------------

- a. Can the site that will contain RAD units after conversion appropriately accommodate the residents of the Converting Project so that there are provided with appropriately sized units and units with comparable major features as in the Converting Project? (i.e. appropriate bedroom sizes, availability of accessible units, etc.) ☐YES ☐NO

If no, provide an explanation below.

☐YES ☐NO

- b. If the Converting Project is occupied, is this transfer of assistance part of a broader conversion plan of the original public housing property that will result in assistance at more than one location (including on the original public housing site)? ☐YES ☐NO **(Reviewed by FHEO)**
- ➔ If yes, provide the name and addresses of the sites (including the original public housing site, if applicable) that will receive RAD units, the number and bedroom distribution of RAD units (including accessible units) that will be at each site, and provide a description on how residents chose/were selected for each location of assistance.
- c. Is the distance from the Converting Project to the site of the Covered Project significant, such that it would impose a significant burden on residents' access to existing employment, transportation options, schooling or other critical services? ☐YES ☐NO
- ➔ If yes, describe what affordable housing options the PHA has offered residents an assisted unit within a reasonable distance of the site of the Converting Project or have residents been offered or accepted an alternative housing option?

**18. Persons with Limited English Proficiency** *(Complete this section only if the project will involve relocation lasting more than 12 months, including relocation in connection with a transfer of assistance; ~~a note~~. Note*

**RAD Relocation Checklist (12/2019)**

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

*that while FHEO is only required to review relocation more than 12 months, LEP requirements apply to all relocation activities.)* **(Reviewed by FHEO)**

a. Are there any LEP persons at the project? ☐ YES ☐ No If yes, please answer the following [questions 18.B-18.D](#):

b. Provide the number of LEP families and the languages spoken by each.

c. ~~b. For~~ To the extent each of the notices/documents listed below apply to the project, provide the language(s) which they were or will be translated. If any of the notices/documents listed below do not apply to the project, please note such accordingly.<sup>14</sup> If any of the applicable notices/documents listed below were not or will not be translated into a language identified in Question 15(a), please explain.  
☐ YES ☐ NO

- i. RAD Information Notice (RIN)
- ii. General Information Notice (GIN)
- iii. Notice of Intent to Acquire
- iv. RAD Notice of Relocation
  - 1. 30-Day Notice (for relocation less than 12 months)
  - 2. 90-Day Notice (for relocation more than 12 months)
- v. URA Notice of Relocation Eligibility (for residents whose temporary relocation exceeds one year)
- vi. Notification of Return to the Covered Project

d. ~~c.~~ What language assistance has been or will be provided to residents during advisory counseling and resident meetings ~~describing to describe~~ the RAD conversion and the resident relocation process?

**19. Persons with Disabilities** *(Complete this section only if the project will involve relocation lasting more than 12 months, including relocation in connection with a transfer of assistance)* **(Reviewed by FHEO)**

a. Are there persons with disabilities at the project? ☐ YES ☐ No

<sup>14</sup> Comment: See fn. 10. In addition, the original question does not account for the fact that some notices may not be required. The required notices will vary considerably from project to project depending on the planned relocation and not all notices will apply to all projects.

## RAD Relocation Checklist (12/2019)

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

- ➔ If yes, please provide the number of disabled families that require Section 504 accessible units by bedroom size and sensory/ mobility unit type required. If no persons with disabilities at the project require Section 504 accessible units, please indicate such here and proceed to Question 19.f.<sup>15</sup>
- b. For each family identified above describe the anticipated relocation housing options that will be provided, including whether they will be relocated to an appropriate bedroom size and accessible unit type.
- c. If a family identified above will be provided a Housing Choice Voucher, describe how the PHA will identify an appropriate bedroom size and accessible unit type that will accept the voucher?<sup>?</sup>
- d. Describe the steps the PHA has taken or plans to take to maintain existing reasonable accommodations during relocation (e.g. larger unit for live in aid, accessible features etc.).
- e. ~~Were all~~ If required by households, were RAD conversion process and relocation rights meetings and advisory counseling held in accessible locations? ☐ YES ☐ NO
- ➔ ~~If no yes,~~ describe the accommodations the PHAs made to ensure that persons with disabilities have equal access to the information provided in these meetings. If no persons with disabilities at the project require accommodations to ensure equal access to information presented in meetings, please indicate such here and skip Questions 19(f) and 19(g).<sup>16</sup>
- f. Were or will the following documents and notices be made available in an accessible format ~~and?~~ If yes, what the format ~~that was/~~ was or will be used (e.g., Braille)? If no, please explain. If any of the notices/documents listed below do not apply to the project, please note such accordingly.<sup>17</sup>
- i. RAD Information Notice (RIN)
  - ii. General Information Notice (GIN)
  - iii. Notice of Intent to Acquire
  - iv. RAD Notice of Relocation
    1. 30-Day Notice (for relocation less than 12 months)

<sup>15</sup> Comment: As originally drafted, HUD's questions assume that all individuals with disabilities will require a Section 504 unit. Although some individuals with disabilities may require those features, not all individuals with disabilities will need a sensory or mobility unit as a reasonable accommodation.

<sup>16</sup> Comment: As originally drafted, HUD's question assumes that all individuals with disabilities will require accommodations to have equal access to the information provided in meetings. Although some individuals with disabilities may require those features, not all individuals with disabilities will need them as a reasonable accommodation.

<sup>17</sup> Comment: See fn. 14.

**RAD Relocation Checklist (12/2019)**

Please review RAD Relocation requirements as outlined in Notice H 2016-17 PIH 2016-17 (HA) before completing this form.

2. *90-Day Notice (for relocation more than 12 months)*

- v. *URA Notice of Relocation Eligibility (for residents whose temporary relocation exceeds one year)*
- vi. *Notification of Return to the Covered Project*

- g. ~~Describe~~ To the extent applicable, describe any auxiliary aids or services that have been available during resident meetings or advisory counseling (e.g., assistive listening devices, sign language interpreters).

**Transaction Manager Approval**

Checklist Complete ☐

Checklist Incomplete\* ☐

**\*TM may need to consult with staff who specialize in relocation/resident rights before finalizing checklist.**

# Addendum to the HAP Contract— Labor Standards

U.S. Department of Housing  
and Urban Development

OMB Approval No.  
2502-0612  
(Exp. xx/xx/xxxx)

**Public reporting burden** for this collection of information is estimated to average 6 minutes 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 collection of information is required to apply to the Rental Assistance Demonstration program as authorized by the Consolidated and Further Continuing Appropriations Act of 2012 and subsequent appropriations. Requirements for RAD were established in PIH 2012-32 and subsequent notices. The information will be used to apply certain labor standard requirements for all construction or repair work on projects that are initiated within eighteen (18) months after the effective date of the HAP contract. There are no assurances of confidentiality.

## Addendum to the HAP Contract—Labor Standards<sup>1</sup>

This addendum is used for both the Project-Based Voucher HAP Contract and the Project-Based Rental Assistance (“PBRA”) HAP Contract under the Rental Assistance Demonstration and is applicable for all construction or repair work on projects that are initiated within eighteen (18) months after the effective date of the HAP contract. For PBRA HAP Contracts, it is “Exhibit 4” to the HAP Contract.

### 1. HUD-FEDERAL LABOR STANDARDS PROVISIONS

The owner is responsible for inserting the entire text of section 1 of this Addendum in all construction contracts for construction or repair work on the project that is initiated within eighteen (18) months of the effective date of the HAP contract and, if the owner performs any rehabilitation work on the project, the owner must comply with all provisions of section 1. (Note: Sections 1(b) and (c) apply only when the amount of the prime contract exceeds \$ 100,000.)

(a)(1)(i) Minimum Wages. 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

<sup>1</sup> [Comment: This form should receive a HUD form number in addition to an OMB control number so that it is easily identifiable as the 2502-0612 OMB control number will contain multiple different information collections therein.](#)

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 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<sup>2</sup> ~~[12514]~~ 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; (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.

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<sup>2</sup> **Comment:** Note, these bracketed page numbers reflect the pagination of the original publication of this Notice in the Federal Register on March 9, 2015, as Docket No. FR-5242-N-03 at 80 FR 12511. When using this document outside of that context, they ought to be deleted..

(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.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (a)(1)(ii)(B) or (C) of this paragraph, 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 determinations 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.

(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

contractors 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.

(3)(i) Payrolls and Basic Records. 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.

(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), except that full social security numbers and home addresses shall not

be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request 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 them to the applicant, sponsor, or owner, as the case may be, for transmission to HUD or its designee, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a



violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

(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 provided under 29 CFR 5.5(a)(3)(ii), the appropriate information is being 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<sup>3</sup> ~~[12515]~~ 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 paragraph (a)(3)(ii)(B) of this section.

(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 3801 et seq. of Title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section 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)(i) Apprentices and Trainees. 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

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<sup>3</sup> [Comment: Id.](#)

Training, Employer and Labor Services or with a State Apprenticeship Agency recognized by the 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 the 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 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 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 this part 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 Addendum.

(6) Subcontracts. The contractor or subcontractor will insert in any subcontracts the clauses contained in section 1(a)(1) through (11) and such other clauses as HUD or its designee may by appropriate instructions require, 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 the contract clauses in this section 1(a).

(7) Contract Terminations; 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 and 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)(i) Certification of Eligibility. By entering into this Addendum, 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.<sup>4</sup>

~~[12516]~~

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

11. Complaints, Proceedings, or Testimony by Employees. No laborer or mechanic to whom the wage, salary, or other labor standards provisions of this Addendum are applicable shall be discharged or in any other manner discriminated against by the Contractor or any subcontractor because such employee has filed any complaint or instituted or caused to be instituted any proceeding or has testified or is about to testify in any proceeding under or relating to the labor standards applicable under this Addendum to his employer.

(b) Contract Work Hours and Safety Standards Act. The provisions of this paragraph (b) are applicable only where the amount of the prime contract exceeds \$ 100,000. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) 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.

(2) Violation; Liability for Unpaid Wages; Liquidated Damages. In the event of any violation of the clause set forth in subparagraph (1) of this paragraph, 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 the clause set forth in subparagraph (1) of this paragraph, 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

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<sup>4</sup> *Comment: Id.*

payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

(3) 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 monies payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or 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 (2) of this paragraph.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs (1) through (4) of this paragraph 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 subparagraphs (1) through (4) of this paragraph.

(c) Health and Safety. The provisions of this paragraph (c) are applicable only where the amount of the prime contract exceeds \$ 100,000.

(1) 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.

(2) The contractor shall comply with all regulations issued by the Secretary of Labor pursuant to 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.

(3) The contractor shall include the provisions of this paragraph 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.

## 2. WAGE AND CLAIMS ADJUSTMENTS

The owner shall be responsible for the correction of all violations under section 1 of this Addendum, including violations committed by other contractors. In cases where there is evidence of underpayment of salaries or wages to any laborers or mechanics (including apprentices and trainees) by the owner or other contractor or a failure by the owner or other contractor to submit payrolls and related reports, the owner shall be required to place an amount in escrow, as determined by HUD sufficient to pay persons employed on the work covered by the Addendum the difference between the salaries or wages actually paid such employees for the total number of hours worked and the full amount of wages required under this Addendum, as well as an amount determined by HUD to be sufficient to satisfy any liability of the owner or other contractor for liquidated damages pursuant to section 1 of this Addendum. The amounts withheld may be disbursed by HUD for and on account of the owner or other contractor to the respective employees to whom they are due, and to the Federal Government in satisfaction of liquidated damages under section 1.

## 3. EVIDENCE OF UNIT(S) COMPLETION; ESCROW

(a) The owner shall evidence the completion of the unit(s) by furnishing the Contract Administrator a certification of compliance with the provisions of sections 1 and 2 of this Addendum, and that to the best of the owner's knowledge and belief there are no claims of underpayment to laborers or mechanics in alleged violation of these provisions of the Addendum. In the event there are any such pending claims to the knowledge of the owner, the Contract Administrator, or HUD, the owner will place a sufficient amount in escrow, as directed by the Contract Administrator or HUD, to assure such payments.

(b) The escrows required under this section and section 2 of this Addendum shall be paid to HUD, as escrowee, or to an escrowee designated by HUD, and the conditions and manner of releasing and approving such escrows shall be approved by HUD.