

Agreement and Certification

For use in Insurance of Advances Cases

U.S. Department of Housing
and Urban Development
Office of Housing
Federal Housing Commissioner

This Agreement made this _____ day of _____, by and between the _____, a _____ *(hereinafter called Mortgagor), and _____,

a _____ corporation (hereinafter called Mortgagee), and the Secretary of Housing and Urban Development, acting by and through the Federal Housing Commissioner (hereinafter called Commissioner);

Whereas, Mortgagor has applied to Mortgagee for a mortgage loan for the purpose of erecting a housing project to be located at _____

and identified as HUD Project No. _____; and the Mortgagee has applied to the Commissioner for insurance of said mortgage loan under Section _____ of the National Housing Act; and

Whereas, the Commissioner has issued a commitment to insure said mortgage loan in the amount of \$ _____, subject to reduction of said amount as provided in the National Housing Act and the Regulations promulgated pursuant thereto; and

Whereas, under the provisions of the National Housing Act and the Regulations promulgated pursuant thereto, this agreement is required;

Now therefore this agreement witnesseth:

1. That in consideration of the agreement by the Mortgagee to make, and of the Commissioner to insure, said loan, Mortgagor agrees to submit to the Commissioner prior to the receipt of the final advance under the mortgage, and within the period fixed in the building loan agreement for completion of the project or any extension of such period approved in writing by the Commissioner, a fully completed and executed Mortgagor's Certificate of Actual Cost and, if required, a fully completed and executed Contractor's Certificate of Actual Cost on forms prescribed by the Commissioner and/or the HUD form for Contractor's, Subcontractor's and Mortgagor's Certifications. The Mortgagor understands and agrees that each of the certificates of cost shall be supported by the certificate of an independent public accountant in form acceptable to the Commissioner.

2. The Mortgagor and Mortgagee agree that the total advances of mortgage monies shall not exceed the amount permitted by the National Housing Act and the Regulations promulgated pursuant thereto.

3. The Mortgagor agrees that if it receives from the Mortgagee monies in excess of that permitted under the National Housing Act and the Regulations promulgated pursuant thereto, it will pay upon demand forthwith to the Mortgagee any such excess for application to the reduction of the then outstanding principal balance of the mortgage. Mortgagee agrees that upon its receipt of such excess the contract of mortgage insurance is reduced by the amount of such excess.

The Mortgagor further agrees that if the Commissioner, for cost certification purposes, accepts estimates for any items, the Mortgagor will, at final endorsement, establish a cash escrow to pay all the "to be paid in cash items" identified in its Certification of Actual Cost and debts to third parties who made the original disbursement for an item listed as paid on the Mortgagor's Certification of Actual Cost, unless documentation, satisfactory to the Commissioner, is submitted evidencing that these amounts were paid by the Mortgagor after the submission of its Certification of Actual Cost. The Mortgagor

understands that the items covered by this cash escrow must be paid within 45 days of the date of final endorsement, except for those items in dispute or involved in litigation. If the Mortgagor's actual cost was less than the estimates accepted for cost certification purposes and the Commissioner determines that this difference plus the net amount (total receipts less expenses of perfecting claims) of settlement of claims against bonding companies would have required a reduction of the insured mortgage, the Mortgagor understands that prepayment of the mortgage in an amount equal to the scheduled monthly principal payments, to the extent possible, is required and any remaining balance shall be deposited to the Reserve Fund for Replacements.

4. Mortgagor certifies that the financial interests or family relationships which exist between Mortgagor or any of its officers, directors, stockholders with the Architect and with the General Contractor, subcontractors, suppliers, or equipment lessors are: (Please complete page three stating the name, title, interest, and relationship.) (If none, so state).

5. Mortgagor agrees to notify the Commissioner, in writing, of any changes in relationship subsequent to the execution of this agreement which results in an identity of interest of the Mortgagor with the General Contractor or any subcontractor, supplier, or equipment lessor within 10 working days from the date the change occurred, in which case the Mortgagor's certification of actual cost will be accompanied by the Contractor's certification of actual cost in form prescribed by the Commissioner and, if required by the Commissioner, certification of actual cost by such subcontractor, supplier, or equipment lessor. It is agreed that the absence of such notice may be treated by the Commissioner as a representation that no change in relationship has occurred which creates any such identity of interest.

6. Mortgagor agrees to maintain and keep adequate records of all costs referred to in (1) above, and to make such records available for examination by the Commissioner upon request.

* Insert type of mortgagor, e.g. "Individual", "Partnership", "(State) Corporation"

7. Mortgagor agrees that, where this agreement and certification reveals any identity of interest between the Mortgagor and the General Contractor, the Mortgagor will include in the contract for the performance of the construction of the project a provision requiring the General Contractor, upon completion of the project, to submit to Mortgagor for delivery to the Commissioner its certificate of all actual costs of labor and materials and necessary services as required by paragraph (1) hereof. Mortgagor further agrees to include in the construction contract the requirement that the Contractor shall maintain adequate records of all such costs, and make such records, documents, contracts and accounts available for review upon request by the Federal Housing Commissioner.
8. Mortgagor agrees that it will require in the general contract and in all agreements with subcontractors (which term for the purposes of this paragraph shall also include material suppliers and equipment lessors) a provision that if there is, or comes into being, any identity of interest between the Mortgagor and any Subcontractor, or (in those cases where the General Contractor is required to certify his actual costs) between the General Contractor and any Subcontractor, then (a) such Subcontractor will agree to submit to the Commissioner (unless specifically waived in writing by the Commissioner) a certificate of the actual cost of providing the material and/or services after deduction of all kickbacks, rebates, adjustments, discounts, or any other arrangements in the nature thereof, and (b) such Subcontractor will join in the execution and submission of the HUD form for Contractor's, Subcontractor's and Mortgagor's Certifications. The Subcontractor's certificates of actual cost will be supported by the certification of an independent Certified Public Accountant in a form acceptable to the Commissioner. For purposes of determining actual cost, no profit or general overhead may be included in the subcontract unless the Commissioner has in advance granted approval in writing of the subcontract and has approved a specific dollar amount or a specific percentage for profit and/or general overhead.
9. Mortgagor agrees that if there comes into being any identity of interest between the Mortgagor and the Architect or between the General Contractor and the Architect, the Architect will immediately be relieved of inspection duties and the maximum Architect's fees allowable for cost certification purposes will be \$ _____ * for design services only. No fees will be allowed to the identity of interest Architect for supervision.
10. For those cases which include a Builder's and Sponsor's Profit and Risk Allowance (Sections 220, 221(d)(3) and (4), 231, and 236), the Mortgagor and General Contractor agree that:
- (a) If there is any identity of interest between the Mortgagor and the General Contractor, the construction contract will be on a cost plus fee basis with a maximum upset price, provided, however, that in lieu of the contractor's fee, the Mortgagor shall be entitled to include in its certificate of actual cost an allowance for Builder's and Sponsor's profit and risk. The allowance for Builder's and Sponsor's profit and risk shall be determined by applying the profit and risk percentage, provided for in Section 227 of the National Housing Act and the Regulations adopted pursuant thereto and which was in effect on the date the Commitment was issued, to the actual cost, as accepted by the Commissioner, of those items which, under the provisions of the National Housing Act, shall be included in computing the allowance. Mortgagor further agrees that for the purpose of determining actual cost, no general overhead expense in excess of \$ _____ * will be allowed by the Commissioner as actual cost.
- (b) In the event there is no identity of interest between the Mortgagor and the General Contractor, the Builder's and Sponsor's profit and risk allowance provided for in paragraph 10.(a) herein shall not be applicable, but the Mortgagor shall be entitled to include in its certificate of actual cost a Sponsor's profit and risk allowance which shall be determined by applying the profit and risk percentage, provided for in Section 227 of the National Housing Act and the Regulations adopted pursuant thereto and which was in effect on the date the Commitment was issued, to the actual cost, as accepted by the Commissioner, of those items which, under the provisions of the National Housing Act, shall be included in computing the allowance. (The National Housing Act specifically excludes, among other items, the amount of the construction contract in computing the allowance.)
- (c) If there is any identity of interest between the Mortgagor and the General Contractor and more than 50 percent of the actual cost of construction is subcontracted with any one contractor, or subcontractor, or more than 75 percent with three or less contractors or subcontractors, the Builder's and Sponsor's profit and risk allowance provided for in paragraph 10.(a) herein shall not be permitted as an actual cost and the Mortgagor shall be limited to the inclusion of the Sponsor's profit and risk allowance, provided for in paragraph 10.(b) herein, on its certificate of actual cost.
11. For those cases which do **not** include a Builder's and Sponsor's Profit and Risk Allowance, the Mortgagor and General Contractor agree that the construction contract will be on a cost plus fee basis with a maximum upset price if there is any identity of interest between the General Contractor, or under any other circumstances where the Commissioner requires the use of such a contract, and that for the purpose of determining the actual cost of physical improvements on the mortgaged property, the allowance for the Contractor's fee shall not exceed \$ _____ * and the general overhead expense shall not exceed \$ _____ *; provided, however, that in the event more than 50 percent of the actual cost of construction is subcontracted with any one contractor or subcontractor, or more than 75 percent with three or less contractors or subcontractors, the Contractor's fee provided for herein shall not be allowed as an actual cost.
12. The Mortgagor and General Contractor agree that for the purpose of paragraphs 10.(c) and 11: (i) the terms contractor and subcontractor include material suppliers and equipment lessors, and (ii) any two or more contractors or subcontractors

*Enter amounts from appropriate items on HUD-92264.

having an identity of interest or common ownership shall be considered as one contractor or subcontractor. It is understood that the 50-75 percent rule is **not** applicable to manufacturers of industrialized housing, trade items performed by persons on the general contractor's payroll, mobile home park program, supplemental loan program, or rehabilitation programs other than gut rehabilitation.

13. Mortgagor further agrees that if there comes into being an identity of interest between the Mortgagor and General Contractor following the execution by the parties of a lump sum contract, the allowable costs to the Mortgagor of the construction contract and profit and risk allowance shall be determined in accordance with the applicable provisions of paragraphs 10.(a) through 10.(c) or 11 and 12 herein.

14. The Mortgagor agrees to submit with this form signed duplicate copies of any collateral agreement(s) and/or side deal agreement(s) executed by the Mortgagor or any principals of the Mortgagor evidencing any secured or unsecured borrowing made in association with the construction of the project. The Mortgagor further agrees to obtain the approval of the Commissioner before entering into any such agreement after executing this form.

15. The foregoing agreements and certifications by the Mortgagor, Mortgagee, and General Contractor are made and delivered for the purpose of influencing an official action of the Federal Housing Commissioner and are to be relied upon by the Commissioner as true.

In Witness Whereof the parties hereto have duly executed this agreement the day and year first above written.

Identity of Interest

(from paragraph four -- must be completed on each individual entity)

Name _____

Title _____

Address _____

Relationship to Mortgagor _____

Interest (financial, in-kind service, etc.) _____

Specify _____

Attach separate sheets if necessary.

| | |
|---------------------------------------------------------------------------------------------------------|-----------------------|
| Attest: | (Mortgagor) |
| | By |
| | (General Contractor) |
| | By |
| | (Mortgagee) |
| | By |
| Secretary of Housing and Urban Development Acting by and Through the Federal Housing Commissioner | By (Authorized Agent) |