

# Capital Advance Agreement

Under Section 202 of the Housing Act of 1959 or Section 811 of the National Affordable Housing Act

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

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This information collection is necessary to ensure that viable projects are developed. It is important to obtain information from applicants to assist HUD in determining if nonprofit organizations initially funded continue to have the financial and administrative capacity needed to develop a project and that the project design meets the needs of the residents. The Department will use this information to determine if the project meets statutory requirements with respect to the development and operation of the project, as well as ensuring the continued marketability of the projects. This information is required in order to obtain benefits. This information is considered non-sensitive and no assurance of confidentiality is provided.

Section 202  Section 811

**This Agreement**, made the \_\_\_\_\_ day of \_\_\_\_\_, by and between the United States of America, Secretary of Housing and Urban Development (hereinafter called "HUD") and a nonprofit corporation organized and existing under and by virtue of the laws of the State of \_\_\_\_\_ (hereinafter called the "Owner").

**Whereas**, the Owner has made application for a capital advance to assist in financing a rental housing project to house  elderly persons or  persons with disabilities (hereinafter called the "Project") in accordance with the provisions of Section 202 of the Housing Act of 1959 (12 U.S.C. 1701g) (hereinafter called "Section 202") or Section 811 of the National Affordable Housing Act (42 U.S.C. 8013) (hereinafter called "Section 811"), and the appropriate regulations.

**Whereas**, the Project will be located at \_\_\_\_\_

**Now, Therefore**, in consideration of the mutual promises hereinafter set forth and of the valuable considerations, the parties hereto do covenant and agree as follows:

1. HUD, subject to the terms of this Agreement, will make a capital advance to the Owner, to be advanced as hereinafter provided, in an amount not to exceed \_\_\_\_\_ Dollars (\$ \_\_\_\_\_). The amount of the capital advance may not exceed the total estimated development cost of the project (as determined by HUD), less the incremental development cost associated with excess amenities and design features to be paid for by the Sponsor. The capital advance shall bear no interest and is not required to be repaid so long as the housing remains available to eligible very low income households for a period of 40 years and in accordance with Section 202 or Section 811. The capital advance shall be secured by a \_\_\_\_\_ (hereinafter called the "Mortgage") on the property described in Exhibit "A." For Section 202 projects, structures (existing housing and related facilities) without rehabilitation may only be acquired from the Resolution Trust Corporation under Section 21A(c) of the Federal Home Loan Bank Act. Section 811 projects may be acquired from the Resolution Trust Corporation or other sources. The Mortgage shall constitute a valid first lien on said property and the improvements to be erected thereon and the only lien thereon except for liens for taxes and assessments not yet payable and other liens acceptable to HUD. The Owner shall execute or cause to be executed a Use Agreement restricting use of the project to rental housing for eligible households as approved by HUD for a 40-year period.
2. The Owner shall complete on the aforesaid project in accordance with drawings and specifications filed with and approved by HUD and designated \_\_\_\_\_ Project Number \_\_\_\_\_ dated \_\_\_\_\_. Such drawings and specifications, which include "General Conditions of the Contract for Construction" except for all paragraphs concerning arbitration in AIA Document A201 and "Supplementary Conditions of the Contract for Construction" (HUD Form No. 2554) as amended, have been identified by the Owner, the Design Architect, the Architect administering the Construction Contract (hereinafter called the "Architect"), the Contractor and the Contractor's Surety.

3. Changes in the Drawings and Specifications, or changes by altering or adding to the working contemplated, or orders for extra work have the prior written approval of the Architect and HUD under such conditions as HUD may establish.
4. (a) The Owner shall make monthly applications on Form Number HUD-92403-CA for portions of the capital advances by HUD. Such applications for construction items shall be for amounts equal to (i) the total value of classes of the work acceptably completed; plus (ii) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (iii) 10 percent (holdback) and less prior disbursements. The "values" of both (i) and (ii) shall be computed in accordance with the amounts assigned to classes of the work in the "Contractor's and/or Mortgagor's Cost Breakdown," attached hereto as Exhibit "B" and made a part hereof. Each application shall be filed at least \_\_\_\_\_ days before the date desired, and the owner shall be entitled thereon only to such amount as may be approved by HUD.  
(b) Upon completion of the improvements, including all landscape requirements and off-site utilities and streets, the Owner shall furnish HUD satisfactory evidence that all work requiring inspection by municipal and other governmental authorities having jurisdiction has been duly inspected and approved by such authorities and by the rating or inspection organization, bureau, association or office have jurisdiction; and that all requisite certificates of occupancy and other approvals have been issued. The balance due the Owner hereunder shall be payable at such time after completion as HUD releases the holdback, after the expiration of any period which mechanics and materialmen may have for filing liens.  
(c) The Owner agrees that any funds required for the completion of the project over and above the amount of the capital advance shall be deposited in the Construction Account prior to disbursement of proceeds of the capital advances.  
(d) The Owner covenants that it will deposit the proceeds of the capital advance and the additional funds to be furnished by the Owner in order to assure the payment of all Project costs into separate interest bearing account(s) called the "Construction Account" established by it in depository or depositories which are members of the Federal Deposit Insurance Corporation, Savings Association Insurance Fund, or National Credit Union Share Insurance Fund. Any portion of the capital advance not insured by a Federal insurance organization shall be fully (100%) and continuously collateralized with specific and identifiable U.S. Government or Agency securities prescribed by HUD

and as set forth in the General Depository Agreement prescribed by HUD. Moneys in the Construction Account shall be expended only for the purposes for which capital advance funds were requested and approved. The same requirements shall be applicable to any escrow deposit agreements required by HUD.

(e) The Owner agrees that the capital advance shall at all times remain in balance. HUD shall, in accordance with the provisions of this Agreement, continue to provide to the Owner funds from the capital advance as long as the capital advance remains in balance and the Owner is not in default hereunder or under the Note or Mortgage. The capital advance deemed to be in balance only when the undistributed capital advance (after provision for reserve, fees, expenses and other deposits required by HUD) equal or exceed the amount necessary (based on HUD's estimate of the cost of construction (including rehabilitation)) to pay for all work completed and all materials delivered, for which payment has not been made, and the cost of completing construction of the project in accordance with the Drawings and Specifications.

(f) Owners which incur actual development costs that are less than the amount of the capital advance may be entitled to retain 50 percent of the savings in the replacement reserve account. Such percentage shall be increased to 75 percent for owners which add energy efficiency features which exceed the energy efficiency standards promulgated by the Secretary in accordance with section 109 of the National Affordable Housing Act; substantially reduce the life-cycle cost of the housing; reduce gross rent requirements and enhance tenant comfort and convenience. These funds shall be used only for the specified purposes of the replacement reserve or for such other purposes as determined by the Secretary. Even though an Owner does not qualify to share in the savings, funds remaining in the project contingency after cost certification shall be placed in the replacement reserve account.

5. HUD shall provide capital advance fund, to the Owner for the charges or items enumerated below, but only to the extent that such charges have accrued and the owner is otherwise entitled to payment on account of such items:

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|---|----|
| (a) Real Estate taxes during development                  | \$ |
| (b) Insurance during development                          | \$ |
| (c) Preliminary expense (including )                      | \$ |
| (d) Land and rights-of-way                                | \$ |
| (e) Architect/Engineering services                        | \$ |
| (f) Legal expenses including title and recording expenses | \$ |
| (g) Administrative expenses                               | \$ |
| (h)   | \$ |
| (i)   | \$ |

6. The Owner shall cause either this instrument or the construction contract under which the improvements are to be erected to be filed in the public records, if the effect thereof will be to relieve the mortgaged property from mechanics' and materialmen's liens. Before any disbursement of capital advance funds hereunder, HUD may require the Owner to obtain from the contractor and all subcontractors and materialmen dealing directly with the principal contractor, acknowledgements of payment on and release of lien down to the date covered by the last disbursement, and concurrently with the final payment for the entire project. Such acknowledgements and release shall be in the form required by local lien laws and shall cover all work done, labor performed and materials (including equipment and fixtures) furnished for the project.

7. The Owner shall, as a condition precedent to the first disbursement hereunder, furnish HUD with a certified, current survey of the mortgaged property and a mortgagee's title policy (or other evidence of title) in form, substance and amount satisfactory to HUD. Said policy shall be extended so as to cover each and every disbursement of said capital advance at the time of payment thereof and shall show no mechanics' or materialmen's liens against the mortgaged property.

8. The Owner agrees that said project shall be constructed strictly in accordance with all applicable ordinances and statutes, and in accordance with the requirements of A regulatory authorities, and any rating or inspection organization, bureau, association or office having jurisdiction. The Owner further agrees that said project shall be constructed entirely on the aforesaid property and will not encroach upon any easement or right-of-way, or the land of others; and that the buildings when erected shall be wholly within the building restriction lines, however established and will not violate applicable use or other restrictions contained in prior conveyances, zoning ordinances or regulations. The Owner shall furnish from time to time such evidence with respect thereto as may be required by HUD, and, upon completion of construction, shall furnish a survey, certified by a registered surveyor, which shows the project to be entirely on said property and to be free from any such violations.

9. If the Owner at any time prior to the completion of the project abandons the same or ceases work thereon for a period of more than 20 days or fails to complete the erection of the project strictly in accordance with the Drawings and Specifications, or makes changes in the Drawings and Specifications without first securing the written approval required by paragraph 3 hereof, or otherwise fails to comply with the terms hereof, any such failures shall be a default hereunder, and HUD, at its option, may terminate this Agreement. If HUD so elects to terminate this Agreement, it may use and apply any funds deposited within by the Owner, regardless of the purpose for which such funds were deposited, in such manner and for such purposes as it may prescribe. If HUD elects not to terminate this Agreement, it may enter into possession of the premises and perform any and all work and labor necessary to complete the improvements substantially according to the Drawings and Specifications, and employ watchmen to protect the premises from injury. All sums so expended by HUD shall be deemed to have been paid to the Owner and secured by the Mortgage. For this purpose, the Owner hereby constitutes and appoints HUD its true and lawful attorney-in-fact, with full power of substitution on the premises, to complete the project in the name of the Owner. The Owner hereby empowers said attorney as follows: (a) To use any funds of the Owner, including any balance which may be held in escrow and any funds which may remain disbursed hereunder for the purpose of completing the project in the manner called for in the Drawings and Specifications; (b) to make such additions, changes and corrections in the Drawings and Specifications as shall be necessary or desirable to complete the project in substantially the manner contemplated by the Drawings and Specifications; (c) to employ such contractors, subcontractors, agents, architects and inspectors as shall be required for said purposes; (d) to pay, settle or compromise all existing bills and claims which may be liens against the mortgaged property, or as may be necessary or desirable for the completion of the project, or for clearance of title; (e) to execute all applications and certificates in the name of the Owner which may be required by any of the contract documents; (f) to prosecute and defend all actions or proceedings in connection with the mortgaged premises or the construction of the project and to take such action and required such performance as he deems necessary under the accepted guaranty of completion; (g) to do any and every act which the Owner might do in its own behalf. It is further understood and agreed that this power of attorney, which shall be deemed to be a power coupled with an interest, cannot be revoked. The Owner hereby assigns and quit claims to HUD all sums undischarged under the Mortgage and all sums in escrow conditioned upon the use of said sums for the completion of the project, such assignment to become effective only in case of the Owners default.

10. The Owner shall provide or cause to be provided workmen's compensation insurance and public liability and other insurance required by applicable law or by the general conditions included in the Specifications. The Owner further agrees to purchase and maintain fire insurance and extended coverage on the mortgaged property. All such policies shall be issued by companies approved by HUD and shall be in form and amounts satisfactory to HUD. Such policies shall be endorsed with standard mortgagee clauses making loss payable to HUD or its assigns; and may be endorsed to make loss during

construction payable to the Contractor, as interest may appear. Certified duplicates of such policies shall be deposited with HUD.

11. HUD and its agents shall, at all times during construction, have the right of entry and free access to the project and the right to inspect all work done, all materials, equipment and fixtures furnished, installed or stored in and about the project, and to inspect all books, subcontracts and records of the Owner.
12. The Owner shall execute and deliver to HUD, prior to final closing, a security agreement and financing statement, or other similar instrument, covering all property of any kind whatsoever purchased with the capital advance and concerning which there may be any doubt as to such property's being subject to the lien of the Mortgage under the laws of the State in which the project is situated.
13. The Owner shall furnish to HUD assurance of completion of the project in the form specified in the applicable Regulations in effect on the date of this Agreement. Such assurance of completion shall run to HUD as obligee.
14. (a) The Owner understands that the wages to be paid laborers and mechanics employed in the construction of housing assisted under Section 202 and consisting of 12 or more units or housing assisted under Section 811 and designated for dwelling use by 12 or more persons with disabilities required by the provisions of Section 2020(5) of the Housing Act of 1959, as amended and Section 811 0)(6) of the National Affordable Housing Act to be not less than the prevailing wage rates for corresponding classes of laborers and mechanics employed on a construction of a similar character in the locality in which the work is to be performed, as determined by the Secretary of Labor with respect to this project. The Owner hereby states that it has read the aforesaid determination by the Secretary of Labor and is fully familiar with the same.  
(b) The Owner shall, as a condition precedent to any advance hereunder, submit to HUD (i) with each application for advance prior to the final application, certifications, in form approved by HUD, that all laborers and mechanics employed in the construction of the project whose work is covered by that or any previous application and who have been paid in whole or in part of account of said employment, have been paid at rates not less than the said prevailing wage rate, if applicable, and (ii) with the final application for advance, certifications, in form satisfactory to HUD, that the project has been fully constructed in accordance with the provisions of this agreement and that all laborers and mechanics employed in the construction of the completed project have been paid not less than the said prevailing wage rates, if applicable. The Secretary's prevailing wage determination shall be construed to include every amendment to or modification of the determination which may be made prior to the beginning of construction.  
(c) The Owner agrees that should any portion of the capital advance hereunder be ineligible for disbursement by reason of (i) the nonpayment of the prevailing wage rates, or (ii) violation of any of the applicable labor standards provisions of the Regulations of the Secretary of Labor, HUD may withhold from the Owner such amounts

payable to the Owner hereunder until the Owner establishes to the satisfaction of HUD that all laborers and mechanics or other persons employed in the construction of the project have been paid the applicable wages rates and that such violation of the said Labor Standards provisions no longer exists. The written statement by HUD declining to make available any portion of the capital advance hereunder by reason of such nonpayment or violation shall be deemed conclusive proof that such amounts are ineligible for disbursement.

(d) The Owner shall insert the labor standards provisions of the aforesaid Supplementary Conditions of the Contract for Construction in any contract, if applicable (see paragraph 14(a) above) made by him for the construction of the project, or any part thereof, and shall require the Contractor to insert similar provisions in each subcontract relating to the construction of the project.

15. The Owner shall furnish such records, papers and documents relating to the project as HUD may reasonably require from time to time.
16. The Owner shall not transfer, assign or pledge any right or interest in, or title to, any capital advance funds deposited in the Construction Account without the approval of HUD.
17. Prior to the disbursement of any portion of the capital advance, the Owner shall present evidence satisfactory to HUD that it is able to finance from other than capital advance funds or Project revenues the applicable minimum capital investment required under the Regulations.
18. The Owner covenants and agrees that it will attempt to obtain and maintain in effect exemption of the Project from State and local real and personal property taxes.
19. The Owner shall, on or before substantial completion of the Project, provide from sources other than the capital advance hereunder, if necessary, and from sources and in a manner which will not jeopardize the security for the capital advance, the furnishings and movable equipment necessary to the full enjoyment of the use and occupancy of the Project.
20. Prior to the disbursement of any portion of the capital advance the Owner shall obtain from the Internal Revenue Service a tax exemption ruling under Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code if it is a nonprofit organization or is organized in the Commonwealth of Puerto Rico and exempt from income taxation under Puerto Rico law, or a consumer cooperative that is tax exempt under State law, has never been liable for payment of Federal income taxes, and does not pay patronage dividends, may be exempt from the requirement set out in the previous sentence if they are not eligible for tax exemption.
21. No member of or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising therefrom.
22. By execution of this Agreement the Owner represents that it has not paid, and, also, agrees not to pay, any bonus, commission, or fee for the purpose of obtaining an approval of its application for the capital advance hereunder.

By:

(Name of Owner)

(Signature & Date)

Date

(Seal)  
Attest

Secretary

By: President

UNITED STATES OF AMERICA  
Secretary of Housing and Urban Development

By: