

**Escrow Agreement for
Non-critical, Deferred
Repairs**

**U.S. Department of Housing
and Urban Development**
Office of Residential
Care Facilities

OMB Approval No. 2502-0605
(exp. 11/30/2022)

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Warning: Anyone who knowingly submits a false claim or makes a false statement is subject to criminal and/or civil penalties, including confinement for up to 5 years, fines, and civil and administrative penalties. (18 U.S.C. §§ 287, 1001, 1010, 1012; 31 U.S.C. §3729, 3802).

This ESCROW AGREEMENT FOR NON-CRITICAL, DEFERRED REPAIRS

(Agreement) made this _____ day of _____, 20____, by and between _____, **(Lender)**, whose principal address is _____, and _____, **(Borrower)**, whose principal address is _____, [and if applicable, _____ **(Depository Institution)**, whose principal address is _____,] in connection with FHA Project No. _____, located in the City/County of _____, State of _____, which Project [has been, is being, or will be] [rehabilitated, purchased or refinanced] from the proceeds of a Loan insured by HUD and made by Lender. (The definition of any capitalized term or word used herein can be found in this Escrow Agreement for Non-critical, Deferred Repairs, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument, except that the term **Program Obligations** means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Agreement rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on HUD's official website: (<http://www.hud.gov/offices/adm/hudclips/index.cfm> or a successor location to that site)).

RECITALS:

- A. HUD has issued a Firm Commitment to insure said Loan pursuant to § _____ of the National Housing Act, as amended, and Program Obligations, on which mortgage insurance Borrower is relying for financing of the Project.
- B. The Firm Commitment is conditioned upon assurance that funds in the amount of \$_____ be available for the completion of non-critical repairs and/or borrower elective repairs deferred until after endorsement of the Note (**Escrow**), including all amounts identified in sections 1, 2 and 3 of this Agreement.
- C. The non-critical energy conservation retrofits and/or borrower elective repairs, deferred repair cost estimate and list of repairs itemized in Exhibit "A" (Repair Work) are attached to and made part of this Escrow Agreement for Non-critical, Deferred Repairs. (If applicable, Exhibit A must delineate, separate and apart from any other repairs, those repairs related to eligibility for energy-related reduced Mortgage Insurance Premium. Such energy-related repairs must include all repairs identified by the energy design professional). For purposes of this Agreement, energy conservation retrofit or a borrower elective repair shall be treated identically to a non-critical repair.
- D. As used herein, "Completion Date" means _____, the date that is twelve (12) months following endorsement of the Note by HUD for mortgage insurance.

AGREEMENTS:

In consideration of the mutual promises and undertakings contained herein, and for the purpose of inducing the Lender to make and HUD to insure the Loan, the parties acknowledge and agree as follows:

1. Cash in the amount of \$_____, equal to one hundred percent (100%) of the estimated cost of the Repair Work (**Repair Estimate Amount**), has been withheld by Lender from the proceeds of the Loan, or deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow. A letter of credit may not be substituted for this amount. The amount withheld or deposited is in the form of:

cash, from Loan proceeds, in the amount of \$_____,
and/or

cash, from Borrower, in the amount of \$_____.

2. An additional cash amount of \$_____, consisting of not less than twenty percent (20%) [_____ {**insert different percentage if permitted by Program Obligations**}]

of the estimated cost of the Repair Work (**Additional Deposit Amount**) has been deposited by Borrower with Lender or made subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow, in the form of:

cash, from Borrower, and/or

Letter of Credit: one or more unconditional irrevocable letter(s) of credit issued to Lender by a banking institution, attached hereto as Exhibit "B". The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations. The letter(s) of credit is attached for informational purposes only. It is expressly agreed and understood that HUD assumes no responsibility for reviewing the letter(s) of credit for sufficiency or enforceability.

3. Borrower shall complete the Repair Work, free of all liens, on or before the Completion Date. In cases where the actual cost of the Repair Work is more than the amount of the Escrow, additional funds required to complete the Repair Work will be provided by Borrower and may not be taken from the Reserve for Replacement account. Borrower shall remedy or cause to be remedied, to the satisfaction of HUD, all defects in the Repair Work due to faulty materials or workmanship, defective materials, or damage to the Project resulting from such defects, which defects, or damage become apparent within fifteen (15) months from completion of the Repair Work (**Latent Defects**). Such remedial work may not be done using funds from the Reserve for Replacement.

4. Upon completion of the Repair Work, if the total actual cost of the repairs, including any additional funds required to complete the Repair Work above the Repair Estimate Amount and any additional costs resulting from revisions to the scope of the required repairs (**Total Actual Cost**) equals or exceeds \$1,000,000, a **Latent Defects Deposit** shall be established in an amount equal to two and a half percent (2.5%) of the Total Actual Cost. The Latent Defects Deposit shall be in the form of a cash escrow, irrevocable letter of credit, or a surety bond from a surety on the accredited list of the U.S. Treasury, and shall be held by Lender to be released to Borrower upon the later of: (i) 15 months from the completion of the repair work, or (ii) at such time that all of the Latent Defects have been corrected to the satisfaction of HUD.

5. **[Applicable if HUD is administering the non-critical repair escrow]** Subject to the prior written approval of HUD, Lender may disburse funds from the Escrow for completed work pursuant to the estimated amounts set forth in Exhibit "A" Repair Work. With the exception of those amounts expended by Lender pursuant to Paragraph 6 of this Agreement, any and all disbursements from the Escrow shall be made only upon prior written authorization by HUD, using HUD-92464-ORCF, to meet any established cost for which the Escrow was intended.

OR

[Applicable if Lender is administering the non-critical repair escrow] As Lender has been approved and delegated the authority by HUD to administer the Escrow, Lender may disburse funds from the Escrow for completed work pursuant to the estimated amounts set forth

in Exhibit “A” Repair Work. With the exception of those amounts expended by Lender pursuant to Paragraph 6 of this Agreement, any and all disbursements from the Escrow shall be made to meet any established cost for which the Escrow was intended.

6. If Borrower has not completed all the Repair Work by the Completion Date, Lender will have the right, subject to HUD approval, to complete the Repair Work, and to pay the cost thereof, including all costs and a reasonable fee of the Lender, from the Escrow. For this purpose, Borrower irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to do and perform for Borrower in Borrower’s name, place and stead, all matters and things which Lender shall in its judgment deem necessary and proper to effectuate the completion of the Repair Work, and to apply the amount deposited under the Escrow to the payment of debts, expenses, costs and charges of any kind contracted or incurred in connection therewith. The orders given by Lender as attorney-in-fact for Borrower shall be good and sufficient vouchers for all payments made by virtue thereof. In this connection, this power of attorney shall provide Lender with full and sufficient authority to enter into and upon the Project and take charge thereof, together with all materials, appliances, fixtures and other improvements and to call upon and require contractors to complete the Repair Work. Except for intentional misconduct or gross negligence on the part of Lender, Borrower shall indemnify, hold harmless and defend Lender from and against claims of third parties arising from Lender’s performance under this paragraph. Lender shall have the right to obtain any property and/or liability insurance coverage which Lender shall in its judgment deem necessary or appropriate in connection with Lender’s performance under this paragraph. Subject to written HUD approval or as otherwise allowed by HUD, Lender may extend the Completion Date. Lender will not be responsible for performance of the Repair Work beyond the expenditure of the amount available from the Escrow, and if that amount is insufficient, Lender will be under no obligation to proceed further with the work or to demand or obtain additional sums from the Borrower. The power granted herein is coupled with an interest, and Borrower acknowledges and agrees that all powers granted herein to Lender may be assigned to HUD.

7. Provided that an Event of Default does not then exist, when (i) all Repair Work has been satisfactorily completed, as determined by HUD, or Lender if the Lender is administering the Escrow, (ii) evidence of clear title has been provided to HUD, or Lender if the Lender is administering the Escrow, and (iii) a Latent Defect Deposit has been established, if required by this Agreement, then:

- (a) Any balance remaining in the Escrow that is attributable to the portion of the Repair Estimate Amount funded from Loan proceeds may be used for the following purpose(s):
 - i. to pay for additional repairs approved by Lender and HUD, the funds for which shall continue to be subject to this Agreement, in addition to further cost certification if Program Obligations so require,
 - ii. to reduce the outstanding Loan balance, or
 - iii. to deposit in the Reserve for Replacement.
- (b) Any balance remaining in the Escrow that is attributable to the Additional Deposit Amount or to any portion of the Repair Estimate Amount funded by Borrower separate from Loan proceeds, may be released to Borrower.

8. The Escrow, when in the form of cash, shall be held by Lender or a depository institution satisfactory to the Lender and in accordance with Program Obligations. Lender may, at any time, for any reason, draw upon any letter of credit included in the Escrow and convert the same to cash, which cash shall then be held and disbursed pursuant to the terms of this Agreement. Fees charged by Lender and any interest earned on the Escrow shall be governed by Program Obligations.

9. The Escrow may, at HUD's direction, be subject to immediate application to the Indebtedness if an Event of Default by Borrower occurs at any time.

Each signatory below hereby certifies that each of their statements and representations contained in this Agreement and all their supporting documentation thereto are true, accurate, and complete. This Agreement has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

IN WITNESS WHEREOF, the parties have duly executed this Escrow Agreement for Non-critical, Deferred Repairs as of the day and year first above written.

BORROWER:

LENDER:

By: _____

By: _____

Print Name and Title

Print Name and Title

DEPOSITORY INSTITUTION:

By: _____

Print Name and Title

Attachment: Exhibit "A"
Exhibit "B"

EXHIBIT "A"

Repair Work

EXHIBIT “B”

Form of Letter of Credit