

{TO BE TYPED ON FIRM LETTERHEAD}

For use in the Section 202, Supportive Housing for the Elderly Program and Section 811, Supportive Housing for Persons with Disabilities Program

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION**

GUIDE FOR OPINION OF OWNER’S COUNSEL

{INSERT CAPITAL ADVANCE INITIAL CLOSING DATE}

Re: Project Name: _____
Project Number: _____
Project Location: _____

**[OWNER]
[ADDRESS]**

**FEDERAL HOUSING COMMISSIONER
{INSERT APPROPRIATE FIELD OFFICE ADDRESS}**

Ladies and Gentlemen:

We are [I am] [general/special] counsel to {INSERT NAME OF OWNER} (the “Owner”), {INSERT TYPE OF ENTITY} organized under the laws of the State of {INSERT STATE, INCLUDES THE DISTRICT OF COLUMBIA AND PUERTO RICO} (the "Organizational Jurisdiction"), in connection with a first Mortgage (Deed of Trust) and Mortgage Note ("Capital Advance") in the amount of _____ Dollars (\$_____) from HUD to the Owner. Such Capital Advance is being made pursuant to a Capital Advance Agreement dated as of the date hereof, by and between HUD and the Owner and will be used to construct, rehabilitate or acquire and maintain the captioned 202 or 811 project (“Project”), commonly known as _____ and located in {INSERT COUNTY AND STATE} (said State to be referred to hereinafter as the “Property Jurisdiction”) on the property described on Exhibit ____ {ATTACH LEGAL DESCRIPTION} (together with all improvements and fixtures thereon) (the “Property”). The Capital Advance is being issued, pursuant to [Section 202 of the Housing Act of 1959, as amended, or Section 811 of the Cranston Gonzalez National Affordable Housing Act], a firm commitment dated and which expires on (“Commitment”). The Owner has requested that we [I] deliver this opinion and has consented to reliance by HUD in making the Capital Advance and has waived any privity between Owner and us [me] in order to permit such reliance by - HUD. We [I] consent to reliance on this opinion by HUD.

In our [my] capacity as [general/special] counsel to the Owner, we [I] have prepared and or reviewed the following Capital Advance Documents, Organizational Documents and Collateral Documents (will be collectively referred to as “the Documents” unless expressly limited to a group of the above referenced documents) (numerical references in parenthesis following the Documents listed below are to HUD form numbers):

CAPITAL ADVANCE DOCUMENTS:

A. BEFORE INITIAL CLOSING

1. Capital Advance Agreement (HUD-90167 CA).
2. Requisition for Disbursement of Capital Advance Funds (HUD-92403 CA).
3. Direct Deposit Sign -up Form (SF 1199A).
4. Project Rental Assistance Contracts (PRAC) documents:
 - a. Part I of Agreement to Enter into PRAC (HUD 90172A-CA);
 - b. Part II of Agreement to Enter into PRAC (HUD 90172B-CA);
 - c. Part I of the PRAC (HUD 90173A-CA); and
 - d. Part II of the PRAC (HUD 90173B-CA).

B. INITIAL CLOSING

1. Firm Commitment for Capital Advance Financing (HUD-92432 CA) including reissued, revised or amended commitment.
2. Owner's Certificate (HUD-92433 CA).
3. Evidence of Owner's Deposit (minimum capital investment) (escrow agreement, see 6(q)(1) of commitment) and ability to provide moveable furnishings and equipment not covered by capital advance, if necessary.
4. Agreement and Certification (HUD 93566 CA).
5. Mortgage Note (HUD-93432-CA).
6. Mortgage (Deed of Trust) (HUD-90165 CA).
7. Regulatory Agreement (HUD-92466 CA).
8. Use Agreement (HUD 90163-CA).
9. Owner's assurance of funds to cover costs over and above capital advance (if applicable).

ORGANIZATIONAL DOCUMENTS:

(Documents regarding Organization of Non-Profit Owner)

1. Approved and certified articles of organization (Certificate of Incorporation (HUD-91732A-CA).
2. Certificate of Good Standing.
3. By-laws.
4. Incumbency Certificate.
5. Owner's I.R.S. Tax-Exemption Ruling.
6. Corporate Resolution.

COLLATERAL AND OTHER DOCUMENTS:

("Collateral Documents")

1. Collateral Agreements, if any.
2. {INSERT THE NUMBER OF UCC'S TO BE FILLED} Uniform Commercial Code Financing Statements executed by the Owner as a debtor and naming HUD as secured party as its interest may appear, to be filed in _____, {INSERT LOCATION(S)} (the Filing Offices), upon the {DESCRIBE EVENTS} (the "Financing Statements");
3. The Security Agreement by and between Owner and HUD, granting a security interest under the Uniform Commercial Code, in those items of personalty described therein, dated _____, (the "Security Agreement");

4. A search conducted by _____ dated _____ {no earlier than 30 days before this opinion} of the financing records of the county and Property Jurisdiction} (the “UCC Search”).
5. A receipt from the insurance company providing flood insurance evidencing payment for the premium, dated _____, (the “Flood Insurance Receipt”).
6. The Title Insurance Policy issued by _____ {acceptable company under HUD’s regulations}, together with all endorsements, and naming HUD as insured, dated _____, (the “Title Policy”).
7. The Surveyor’s Plat OR Survey showing completed project, prepared by _____, dated _____, (the “Survey”).
8. The Surveyor’s Report (HUD-92457), executed by _____, dated _____, (the “Surveyor’s Report”).
9. The Following documents evidencing zoning compliance _____, {DESCRIBE ALL DOCUMENTS FULLY} (the “Zoning Certificate”).
10. The building permit(s) issued on _____, by _____ (the “Building Permit”).
11. The following permits, _____, {DESCRIBE PERMITS} which are required for the operation of the project, issued by _____ on _____ (“Other Permits”).
12. Construction Contract:
 - a. Lump Sum (HUD-92442 CA) or Cost Plus (HUD-92442A CA), as appropriate;
 - b. Contractor's Requisition (HUD 92448); and
 - c. Construction Contract, Incentive Payment (HUD-92443 CA), if applicable.
13. The Contractor’s and/or Owner’s Cost Breakdown (HUD 92328) executed by the General Contractor, dated _____, (the Cost Breakdown”).
14. Assurance of Completion:
 - a. Performance/Payment Bond 100% Dual-Obligee (HUD-92452 CA); OR
 - b. Performance Bond (FHA 2452-A) and Surety Company’s Telegram or Facsimile; OR
 - c. Completion Assurance Agreement (HUD-92450 CA);
15. Owner-Architect Agreement (AIA Document B181) (see attached to Capital Advance Agreement; HUD-90167 CA) and HUD Amendment (HUD-90169 CA). executed by _____ {INSERT DESIGN AND/OR CONSTRUCTION ARCHITECT} and Owner, dated _____, (the “Owner-Architect Agreement”).
16. Real Estate Tax Exemption (if applicable).
17. Lease (if mortgage is on leasehold) (Lease Addendum at Appendix 14 of HUD Handbook 4571.5).
18. Land-Dispositions Contract and Deed (required only for projects in urban renewal areas).
19. Insurance and fidelity bonds:
 - a. All applicable insurance policies per Property Insurance Requirements (HUD-90164 CA), including Property Insurance Schedule (HUD-92329); and
 - b. Blanket Fidelity Bond.
20. Assurance of Completion of Off-site Facilities, if applicable:
 - a. Off-site Bond (HUD 90177-CA); OR
 - b. Escrow Agreement for Off-site Facilities (HUD-90170 CA).
21. Fair Housing
 - a. FHEO Certification in Connection with the development and operation of the project (assurance of compliance with HUD regulations (HUD Form 915); and
 - b. Affirmative Fair Housing Marketing Plan (HUD will determine if administratively satisfied; Exhibit 3 to PRAC)
22. The following documents assuring water, electricity, sewer, gas, heat or other utility services (the “Assurance of Utility Services”): {DESCRIBE FULLY} _____.
23. The certificate executed by _____ {INSERT ARCHITECT OR OTHER PROFESSIONAL}, dated _____, (the “certificate”).

24. A search conducted by _____ dated {no earlier than 30 days before this opinion} of the public records of the federal District Court and State and local courts in (i) the jurisdiction where the Property is located; and (ii) the jurisdiction(s) where the Owner is organized, located and does business (“Docket Search”).
25. Additional Closing Requirements (State or local requirements).

In basing the several opinions set forth in this document on “our [my] knowledge,” the words “our [my] knowledge” signify that, in the course of our [my] representation of the Owner, no facts have come to our [my] attention that would give us [me] actual knowledge or actual notice that any such opinions or other matters are not accurate. Except as otherwise stated in this opinion, we [I] have undertaken no investigation or verification of such matters. Further, the words “our [my] knowledge” as used in this opinion are intended to be limited to the actual knowledge of the attorneys within our [my] firm who have been involved in representing the Owner in any capacity including, but not limited to, in connection with the Capital Advance. We [I] have no reason to believe that any of the documents on which we [I] have relied contain matters which, or the assumptions contained herein, are untrue, contrary to known facts, or unreasonable.

In reaching the opinions set forth below, we [I] have assumed, and to our [my] knowledge there are no facts inconsistent with, the following:

- (a) Each of the parties to the Documents, other than the Owner (and any person executing any of the Documents on behalf of the Owner), has duly and validly executed and delivered each such instrument, document, and agreement to be executed in connection with the Capital Advance to which such party is a signatory, and such party's obligations set forth in the Documents are its legal, valid, and binding obligations, enforceable in accordance with their respective terms.
- (b) Each person executing any of the Documents, other than the Owner (and any person executing any of the Documents on behalf of the Owner), whether individually or on behalf of an entity, is duly authorized to do so.
- (c) Each natural person executing any of the Documents is legally competent to do so.
- (d) All signatures of parties other than the Owner (and any person executing any of the Documents on behalf of Owner) are genuine.
- (e) All Documents which are submitted to us [me] as originals are authentic; all Documents which were submitted to us [me] as certified or photostatic copies conform to the original document, and all public records reviewed are accurate and complete.
- (f) All applicable Documents have been duly filed, indexed, and recorded among the appropriate official records, and all fees, charges, and taxes due and owing as of this date have been paid.
- (g) The parties to the Documents and their successors and assigns will: (i) act in good faith and in a commercially reasonable manner in the exercise of any rights or enforcement of any remedies under the Documents; (ii) not engage in any conduct in the exercise of such rights or enforcement of such remedies that would constitute other than fair and impartial dealing; and (iii) comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Documents.
- (h) The exercise of any rights or enforcement of any remedies under the Documents would not be unconscionable, result in a breach of the peace, or otherwise be contrary to public policy.
- (i) The Owner has title or other interest in each item of (i) real and (ii) tangible personal property (“Personalty”) comprising the Property in which a security interest is purported to be granted under the Documents [and, where Personalty is to be acquired after the date hereof, a security interest is created under the after-acquired property clause of the Security Agreement].

In rendering this opinion we [I] also have assumed that the Documents accurately reflect the complete understanding of the parties with respect to the transactions contemplated thereby and the rights and the

obligations of the parties thereunder. We [I] also have assumed that the terms and the conditions of the Capital Advance as stated in the Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Documents. After reasonable inquiry of the Owner, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions in this paragraph are not justified.

In rendering our [my] opinion in paragraph 13, we [I] also have assumed that: (i) all Personalty in which a security interest is created under the Documents (other than accounts or goods of a type normally used in more than one jurisdiction) is located at the Property and (ii) Owner's [Chief Executive Office] [only place of business] [residence] is located in _____. After reasonable inquiry of the Owner, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions in this paragraph are not justified.

In rendering this opinion we [I] have, with your approval, relied as to certain matters of fact set forth in the Owner's Opinion Certificate, the Certificate of Good Standing [and certain other specified Documents,] as set forth herein. After reasonable inquiry of the Owner as to the accuracy and completeness of the Owner's Opinion Certificate, the Certificate of Good Standing, [and such other Documents], and we [I] have no knowledge of any facts or information that would lead us [me] to believe that such reliance is not justified.

Based on the foregoing and subject to the assumptions and qualifications set forth in this letter, it is our [my] opinion that:

{TO BE USED IN CASES WHERE ORGANIZATIONAL DOCUMENTS WERE PREPARED BY OWNER'S ATTORNEY}

1. The Owner is a {INSERT TYPE OF ENTITY} [FOR 202, PRIVATE NON-PROFIT CORPORATION AND FOR 811, INSTITUTION - OR FOUNDATION], duly organized and validly existing under the laws of the Organizational Jurisdiction. The Owner is duly qualified to do business and, based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit _____, is in good standing under the laws of the Organizational Jurisdiction and is qualified to do business as a foreign entity _____ in the Property Jurisdiction based on a review of _____.

2. The Owner has the corporate power and authority and possesses all necessary governmental certificates, permits, licenses, qualifications, tax exempt status and approvals to own (including the authority to borrow the proceeds of the Capital Advance, to encumber the Property with the Security Instrument, to execute the Capital Advance Documents) and operate the Property and such other assets as is necessary to carry on its business and to carry out all of the transactions contemplated by the Capital Advance Documents and Collateral Documents as of the date of this opinion and to comply with all applicable statutes and regulations of the Federal Housing Commissioner in effect on the date of the Firm Commitment.

3. The execution and delivery of the Capital Advance Documents and Collateral Documents (where applicable) by or on behalf of the Owner, and the consummation by the Owner of the transactions contemplated thereby, and the performance by the Owner of its obligations thereunder, have been duly and validly authorized by all necessary corporate action by, or on behalf of, the Owner.

4. All authorization, consent, approval, or permits have been obtained from, appropriate actions have been taken by, and necessary filings have been made with all necessary Organizational and Property Jurisdictions or federal courts or governmental authorities, all disclosed on Exhibit _____, attached hereto, and as listed and set forth in Paragraphs and as listed and set forth in Paragraph _____ of this opinion [i.e., good standing certificate]. To the best of our knowledge, these represent all such authorizations, consents, approvals, permits, actions and filings that are required in connection with the execution and delivery by the Owner of the

Capital Advance Documents and Collateral Documents (where applicable) and the ownership [and operation] of the Property.

5. Each of the Capital Advance Documents and Collateral (where applicable) has been duly executed and delivered by the Owner and constitute the valid and legally binding promises or obligations of the Owner, enforceable against the Owner in accordance with its terms, subject to the following qualifications:

- (i) the effect of applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors generally;
- (ii) the effect of the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or of equity);
- (iii) certain remedies, waivers, and other provisions of the Documents may not be enforceable, but, subject to the qualifications set forth in this paragraph at (i) and (ii) above, such unenforceable will not preclude (a) the enforcement of the obligation of the Owner to make the payments as provided in the Mortgage and Note (and HUD's regulations), and (b) the foreclosure of the Mortgage upon the event of a breach thereunder.

[6. {TO BE INSERTED WHEN ANY OR ALL OF THE LOAN DOCUMENTS ARE NOT HUD APPROVED FORMS OR WHEN HUD APPROVED FORMS HAVE BEEN REVISED OR MODIFIED IN CONNECTION WITH THE LOAN} The execution and delivery of, and the performance of the obligation under, the Capital Advance Documents (where applicable), will not violate the Organizational Documents of the Owner or the applicable provisions of local or State law.]

[7. {INSERT FOR LOANS INVOLVING CONSTRUCTION OR REHABILITATION} To our [my] knowledge there are no proposed change(s) of the law, ordinance, or governmental regulation (proposed in a formal manner by elected or appointed officials) which, if enacted or promulgated after the commencement of construction/rehabilitation, would require a modification to the Project, and/or prevent the Project from being completed in accordance with the plans and specifications, dated _____ and executed by _____ {INSERT OWNER} and _____ {INSERT GENERAL CONTRACTOR}, and referred to in Construction Contract (the "Plan and Specification").]

[8. {INSERT IF THERE IS NO ZONING ENDORSEMENT INCORPORATED INTO THE TITLE POLICY} The attached Zoning Certificate states that the Property appears on the zoning maps of [Property Jurisdiction] as being located in a _____ zone. According to the zoning ordinance of the Property Jurisdiction, the use of the Property as a _____ is a permitted use in such zone.

Based solely on the Zoning Certificate, the Property may be used for _____ as a permitted use.]

[9. {USE FOR NEW CONSTRUCTION OR SUBSTANTIAL REHABILITATION IN CASES WHERE HUD DOES NOT RECEIVE A CERTIFICATE DIRECTLY FROM THE PROFESSIONAL} Based solely on the Certificate, construction/rehabilitation of the Project in accordance with the Plans and Specifications will comply with all applicable land use and zoning requirements.]

10. Based solely upon (a) our [my] knowledge and (b) the Owner's Opinion Certification, the execution and delivery of the Capital Advance Documents and Collateral Documents (where applicable) will not: (i) cause the Owner to be in violation of, or constitute a default under the provisions of, any agreement to which the Owner is a party or by which the Owner is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which the Owner is subject, and (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Owner, except as specifically contemplated by the Capital Advance Documents or Collateral Documents.

11. Based solely upon (a) our [my] knowledge, (b) the Owner's Opinion Certification and (c) the Docket Search; there is no litigation or other claim pending before any court or administrative or other governmental body or threatened in writing against the Owner, or the Property, [except as identified on Exhibit _____].

12. The Mortgage is in appropriate form for recordation in _____ {INSERT PROPER NAME OF LOCAL LAND RECORDS OFFICE} of _____ {INSERT COUNTY OR CITY} of the Property Jurisdiction, and is sufficient, as to form, to create the encumbrance and security interest it purports to create in the Property.

13. Filing of the Financing Statements in the Filing Offices will perfect the security interest in the Personalty of the Owner located in the Project Jurisdiction, but only to the extent that, under the Uniform Commercial Code as in effect in the Project Jurisdiction, a security interest in each described item of Personalty can be perfected by filing. The Filing Offices are the only offices in which the Financing Statements are required to be filed in order to perfect the security interest in the Personalty.

14. The Capital Advance does not violate the usury laws or laws regulating the use or forbearance of money of the Property Jurisdiction.

15. The laws of Property Jurisdiction govern the interpretation and the enforcement of the Capital Advance Documents and Collateral Documents (where applicable) notwithstanding that the Owner may be formed in a jurisdiction other than Property Jurisdiction. The Owner can sue and be sued in Property Jurisdiction, including without limitation, a suit on the Note or a foreclosure proceeding arising under the Mortgage may be had in Property Jurisdiction.

[16 {APPLIES TO CASES WHERE THE LAND IS BEING PURCHASED FROM A PUBLIC BODY} There is no default under the Public Entity Purchase Agreement, and construction in accordance with the Plans and Specifications and within the time frame specified in the Construction Contract will not lead to a default under the Public Entity Purchase Agreement. {RELIANCE IS PERMITTED ON THE BASIS OF KNOWLEDGE AND OWNER'S CERTIFICATE}]

[17. {APPLIES TO CASES WHERE THE PROJECT IS IN AN URBAN RENEWAL AREA} There is no default under the Land Disposition Contract between _____ and _____ dated _____ and the time within which construction must be completed under the Capital Advance Agreement is within the time specified for completion in said Land Disposition Contract.]

In addition to the assumptions set forth above, the opinions set forth above are also subject to the following qualifications: (i) The Uniform Commercial Code of the Property Jurisdiction requires the periodic filing of continuation statements with _____ [and _____] not more than _____ prior to and not later than the expiration of the _____ year period from the date of filing of the Financing statements and the expiration of each subsequent _____ year period after the original filing, in order to maintain the perfection and priority of security interests and to keep the Financing Statements in effect.

(ii) We express no opinion as to the laws of any jurisdiction other than the laws of the Property Jurisdiction and [and the Organizational Jurisdiction, if it is different,] and the laws of the United States of America. The opinions expressed above concern only the effect of the laws (excluding the principles of conflict of laws) of the Property Jurisdiction [and the Organizational Jurisdiction, if it is different] and the United States of America as currently in effect. We assume no obligation to supplement this opinion if any applicable laws

change after the date of this opinion, or if we become aware of any facts that might change the opinions expressed above after the date of this opinion.

We [I] confirm that:

(a) based on the Organizational Documents, the name of the Owner in each of the Capital Advance Documents and Collateral Documents (where applicable) and the Title Policy and Firm Commitment is the correct legal name of the Owner;

(b) the legal description of the Property is consistent in the Documents wherein it appears and in Exhibit hereto;

(c) we [I] do not have any financial interest in the Project, the Property, or the Capital Advance, other than fees for legal services performed by us, payment for which has been made; and we [I] agree not to assert a claim or lien against the Project, the Owner, the Capital Advance proceeds or income of the Project;

(d) other than as counsel for the Owner, we have no interest in the owner or any other party involved in the Capital Advance transaction and do not serve as [a director, officer or] [an] employee of the Owner. We have no undisclosed interest in the subject matters of this opinion;

(e) based solely upon the Surveyor's Certificate and the Surveyor's Plat, flood insurance [is OR is not] required pursuant to 12 U.S.C. 4012a(a). [INSERT IF FLOOD INSURANCE IS REQUIRED]: based solely on the Flood Insurance Receipt, flood insurance is in effect which satisfies the requirements of 12 U.S.C. 4012a(a).]

(f) we [I] do not represent any development team member (as defined in 24 CFR part 889 (section 202) or 24 CFR part 890 (811 program) or any other party or interest in connection with the above referenced housing project other than the Owner except for representation as the personal attorney for an individual associated with a development team member in matters not involving the housing project. If a dispute arises between the Owner and a development team member, my efforts will be directed exclusively towards serving the Owner. We [I] have submitted to HUD an Identity of Interest and Disclosure Certification; and

(g) to our knowledge, there are no liens or encumbrances against the Property which are not reflected as exceptions to coverage in the Title Policy.

The foregoing opinions are for the exclusive reliance of HUD; however, they may be made available for informational purposes to, but not for the reliance of, the assigns or transferees of the Owner, or prospective purchasers of the Project. We [I] acknowledge that the making, or causing to be made, of a false statement of fact in this opinion letter and accompanying materials may lead to criminal prosecution or civil liability as provided pursuant to applicable law, which may-include 18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802.

Sincerely

[Authorized Signature]

To be used in FHA Insured Transaction.

.....
**EXHIBIT A TO OPINION OF MORTGAGOR'S COUNSEL
CERTIFICATION OF MORTGAGOR**

This Certification of Mortgagor is made the _____ day of _____ 20____, by (the “Mortgagor”) for reliance upon by _____ (the “Mortgagor’s Counsel”) in connection with the issuance of an opinion letter dated of even date herewith (the “Opinion Letter”) by (“Mortgagor’s Counsel”) as a condition for the provision of mortgage insurance by the Department of Housing and Urban Development (“HUD”) of the \$ _____ loan (the “Loan”) from _____ (the “Mortgage”) to the Mortgagor. In connection with the Opinion Letter, the Mortgagor hereby certifies to Mortgagor’s Counsel for its reliance, the truth, accuracy and completeness of the following matters:

1. The Organizational Documents are the only documents creating the Mortgagor or authorizing the Loan, and the Organizational Documents have not been amended or modified except as stated in the Opinion Letter.
2. The terms and conditions of the Loan as reflected in the Loan Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Loan Documents.
3. All tangible personal property of the Mortgagor in which a security interest is granted under the Loan Documents [other than off-site construction materials and/or accounts or goods of a type normally used in more than one jurisdiction and/or additional collateral personalty] is located at the Property (as defined in the Opinion Letter) and the Mortgagor’s [Chief Executive Office] [only place of business] [residence] is located in _____.
4. The execution and delivery of the Loan Documents will not (i) cause the Mortgagor to be in violation of, or constitute a material default under the provisions of any agreement to which the Mortgagor is a party or by which the Mortgagor is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which the Mortgagor is subject, and (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Mortgagor, except as specifically contemplated by the Loan Documents.
5. There is no litigation or other claim pending before any court or administrative or other governmental body or threatened against the Mortgagor, the Property, or any other properties of the Mortgagor [except as identified on Exhibit ____, List of Litigation, in the Opinion Letter.]
6. There is no default under the Public Entity Agreement (as defined in the Opinion Letter) nor have events occurred which with the passage of time will result in a default under the Regulatory Agreement.

Note: All capitalized terms not defined herein shall have the meaning set forth in the Opinion Letter.

IN WITNESS WHEREOF, the Mortgagor has executed this Certification of Mortgagor effective as of the date set forth above.

MORTGAGOR:

For use in the Section 202 Supportive Housing for the Elderly Program

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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION**

INSTRUCTIONS TO GUIDE FOR OPINION OF OWNER’S COUNSEL

EXPLANATORY COMMENTS

The Guide for this opinion was originally prepared in 1994 in view of changes in opinion practices as reflected by the ABA Accord and various State law bar reports on opinion letters and has been revised to reflect approximately three years experience in using the Guide. The principal purpose of this Guide remains to achieve a uniform format which can be utilized throughout the nation and which will be familiar to HUD counsel in all jurisdictions. Such a standardized format is crucial in an era when less resources are available to the Department; however, it should be emphasized that certain limited changes can be authorized by HUD field counsel as required by local law or by the unique nature of the transaction. An effort has been made in these revised instructions to specify examples in more (but not all) of those areas where such changes can be authorized. Otherwise, the format of the Guide must be followed and is not open to negotiation. In this regard, revisions cannot be justified because of particular Opinion having by approved by another HUD field office. The exercise of discretion by one HUD field counsel in unique circumstances cannot become the basis for any modification to the Opinion. Any requested modification must be analyzed on its own merit and in a particular context. In these explanatory comments, the document may be referred to as the “Guide” or the “Opinion,” depending upon the context.

The Department regards the counsel to the Owner as the crucial, central figure in the process of preparing and executing the legal and administrative documents necessary to achieve a closing in connection with a first Mortgage (Deed of Trust) and Mortgage Note (“Capital Advance”) from HUD to the Owner. Pursuant to 24 CFR Part 24, 24.105(p), attorneys or others in a business relationship with the Owner are defined as “principals.” Even though the Guide is quite different than its predecessor (HUD 90166-CA), the substance is not intended to be substantially different and the revision does not in any fashion relieve the counsel to the Owner of its obligations to its client and the Department. In part, these responsibilities entail the exercise of due diligence to assure the accurate and timely preparation, completion and submission of the forms required by the Department in connection with the transaction. Further, the counsel to the Owner and any other attorneys involved in the transaction, should be thoroughly familiar with the regulations, procedures and directives of the Department pertaining to each transaction in which counsel participates. The Department takes seriously the preparation and completion of the various documents involved in the Capital Advance Program (most of which are HUD Form documents) and cannot overemphasize the importance of the following:

I/We, the undersigned, certify under penalty of perjury that the information provided above is true and correct. 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, 1014; 31 U.S.C. §3729, 3802)

With limited state law related exceptions, we expect that Owner’s counsel will be able to follow the Guide in rendering an opinion and HUD field counsel should not accept opinions that otherwise substantially or materially deviate from the Guide. Although we understand that attorneys and law firms may have evolved particular styles and forms of opinion, HUD field counsel do not have time to negotiate each and every opinion for stylistic changes and it is essential that the guide be followed in both style and substance in order to ensure a timely closing. The counsel to the Owner is expected to complete a draft Opinion for submission to HUD field counsel at least ten days prior to the closing along with the other closing documents. Any deviations should be

specifically identified (redlined or highlighted) and discussed with field counsel at that time. Any material deviation not required by State or local law must be brought to the attention of HUD's Office of General Counsel by field counsel along with an explanation as to the necessity for the deviation.

The Guide is not intended to serve as a closing checklist; therefore, HUD field counsel may update or modify existing closing checklists as necessary to meet constantly changing program needs and handbook instructions and directives.

Brackets continue to be used in the Guide to indicate alternate language, insertions, documents, or instructions depending on the applicable facts and underlining is used to indicate blanks that must be completed.

The Guide contains some instructions and definitions and is largely self-explanatory; however, the following instructions and clarifications should provide additional assistance to both private counsel and HUD counsel. The numbers and letters used below relate to the paragraph numbers and letters in the guide opinion unless page numbers are specifically designated.

Page 1 and Introductory Paragraph:

- Letterhead and date: The opinion must be typed on the firm or single practitioner's letterhead and dated the date of the Capital Advance by HUD.
- Reference: Data regarding the project (name, HUD project number, and location must be accurate and inserted in the appropriate blanks.
- Addressees: The opinion must be delivered to HUD to establish the explicit right to rely on the opinion.
- Description of the Capital Advance: The Capital Advance amount is the original principal amount of the Capital Advance unless a modification is necessitated in connection with the closing.

List of Documents:

- In General: If there are no brackets around a particular document, the document is one which is commonly used for capital advance closings; however, it should be emphasized that it is impossible to list every document for every capital advance. Some documents may not be utilized in particular transaction and should be deleted from the list in the actual Opinion. Brackets around the name of the document indicate that the document may or may not be used for every capital advance. If bracketed documents are not used in a particular capital advance transaction, then delete such documents from the list in the actual Opinion. Each document executed in connection with the Capital Advance must be listed by its correct title. It is imperative that care must be taken to compile a list that accurately and completely reflects the transaction prior to submission to HUD of the initial draft. After HUD review of the initial draft, the opinion may have to be modified, as necessary, to satisfy HUD.

All documents executed in connection with the Capital Advance must be listed regardless of whether the document is required by HUD. The appropriate HUD or FHA form number, if applicable, must be indicated in parens after each document.

All of the Documents must be reviewed. The following HUD guidelines should be followed in preparing or reviewing the Documents.

1. HUD Handbook 4571.5, Supportive Housing for the Elderly - Conditional Commitment - Final Closing, dated July 1992, should be followed. This Handbook provides copies of most of the Documents required by

HUD to be used in the 202 Program Closings. Until HUD publishes a similar Handbook for the Supportive Housing for Persons with Disabilities Program, Section 811 Capital Advance closings shall follow the 4571.5 Handbook.

2. All 202 and 811 Owners must adopt the model Certificate of Incorporation (HUD91732-A-CA) except for Field Counsel modifications related to State law or modifications required by the Internal Revenue Service. All other modifications must be approved by HUD.

3. The HUD field counsel have not been consistent in requiring HUD to be named in the Financing Statements as a secured party or as its interests may appear; consequently, the requirement that HUD be so named is now being standardized. This should be clarified through appropriate language in the Security Agreement. The purpose is to clarify that, under certain circumstances, HUD may assert some rights in the personalty arising under the Regulatory Agreement which would precede an assignment of the mortgage. This is desirable in the event HUD exercises some of its remedies under the Regulatory Agreement in cases where the mortgage has not been assigned to HUD. It will not be necessary for HUD to consent to every UCC termination, renewal, assignment, etc. until HUD's rights as a secured party are established. HUD is being named "as its interests appear" so that, for example, where HUD obtains a court order, HUD will be able to establish a paramount interest in the Project income stream, and other personalty pursuant to the Regulatory Agreement.

4. UCC searches: The UCC Search can be conducted by either the title insurance company, a reputable document search firm, the counsel to the Owner or any other attorney licensed in the jurisdiction. One or more UCC searches performed not more than 30 days prior to the date of the opinion of Owner's counsel must be made and retained by the field counsel in the Capital Advance file.

5. Flood insurance receipt: Arguments have been made that this document is not necessary. Flood plain maps change. HUD must know whether the property is located in an area where flood insurance is required and, if so, whether the insurance is in effect. HUD would not necessarily have the data on file, and it was determined that this is a matter which counsel could confirm near the end of the Guide. Note that no opinion is required, and the factual determination necessitated by the Guide are considered within the usual duties of counsel.

6. Title Insurance Policy: Currently the 1992 ALTA format (with appropriate endorsements) is required by HUD in most jurisdictions.

7. Evidence of zoning compliance: The evidence of zoning compliance will vary depending on the circumstances. The evidence should establish that the building, if constructed according to plans and circumstances, - will comply with all zoning requirements. The evidence may be in the form of a letter or certificate from the appropriate local official stating that, if the building is constructed according to the plans and specifications submitted for review, the building will comply with all zoning requirements. If the locality has no zoning ordinance, a letter should be submitted from the chief executive stating such. In those circumstances, it may be necessary to obtain a letter from the local planning body of the county in which the project is located, that the proposed development is compatible with the county's comprehensive plan. If the zoning approval is based upon a variance or other special action, the closing may have to be delayed until the time for appeals has run. In extremely complex cases, an opinion may need to be obtained from legal counsel specializing in local zoning matters. Such letter must be attached as an exhibit and referenced in the appropriate paragraphs of the Opinion.

8. Building permit(s): If no building permits is required, this document is not applicable and should be deleted from the Opinion. This would also be true with respect to occupancy permits unless permits are required under local law.
9. Permits required for the operation of the project: Several practitioners have argued that the documentation is unnecessary. HUD is concerned that any permits required for the continued operation of the project be proper and in place such that an opinion can be rendered. If no such permits are required, the Opinion should be amended accordingly. This is a matter which counsel to the Owner, as a specialist in the property jurisdiction, should be able to ascertain.
10. Surveyor's plat or survey: The survey must be signed, sealed and dated within 90 days of the closing.
11. Surveyor's Report: There needs to be a surveyor's certificate indicating that nothing has changed since last survey with respect to encroachments, lot line violations, construction activity, etc. As an alternative to the surveyor's certificate, the Owner's attorney could rely upon an appropriate certificate from a qualified architect and insert appropriate language in the Opinion.
12. Owner-architect Agreement: This document should only be indicated (where the Guide indicates "[Insert Design and or Construction Architect"] in cases involving new construction new substantial rehabilitation.
13. Certificate issued by architect or other professional: Normally such a document would not be necessary and should be deleted unless those circumstances mentioned under the last sentence in paragraph 11, above, make the certificate appropriate. Note that "Certificate" is a defined term and that the Certificate can come from "an architect or other professional." Consequently, there is no form for the Certificate and HUD field counsel should defer to HUD administrators specializing in architectural and engineering matters in determining the acceptability of the Certificate. It is referenced in Paragraph 9 of the Opinion and should not be confused with the Zoning Certificate which is also a defined term and is referenced in Paragraph 8.
14. Docket search: The Docket Search can be conducted by either the title insurance company, a reputable document search firm, the counsel to the Owner or any other attorney licensed in the jurisdiction.

Opinions

1. This paragraph requires an opinion regarding the organization of the Owner. Care should be taken to ensure that the requisite information is inserted correctly. Any Certificate of good Standing or equivalent document issued by the applicable governmental authority must be dated no more than 30 days prior to the date of the Opinion of Owner's counsel. If the Property jurisdiction is not the State of formation for the Owner, counsel must also opine that the Owner is qualified to transact business in the Property jurisdiction. Such opinion may be made solely on the basis of a certificate from the applicable governmental authorities of the Property jurisdiction, and if counsel is relying on such certificate(s), then the opinion must expressly identify those certificate(s) and they must be attached to the Opinion as an exhibit.
2. This paragraph provides, among other things, that the Owner possesses all the necessary governmental certificates, permits, licenses, qualifications and approvals to own and operate the Property. Field Counsel have discretion to permit a modification in which counsel to the Owner itemizes those local governmental requirements which have been evaluated and indicates that, after due diligence inquiry and insofar as the attorney is aware, these local requirements comprise the entire universe of such requirements. The Opinion

should further state that, based upon such itemized local requirements and compliance therewith (with all permits, certificate, etc. being itemized), the owner possess the power and authority necessary to own and operate the Property and to carry out all of the transactions required by the Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA commitment. In most instances involving new construction, a certificate of occupancy will not have been obtained by the time of closing. In such instances, field counsel have discretion to permit an appropriate clarification with respect to that particular instrument.

3. If the Owner or any principal of the Owner is involved in any litigation, all such litigation matter(s) must be disclosed in writing to HUD field counsel. If the litigation involves HUD's compliance with civil rights requirements, it must immediately be brought to the attention of appropriate Fair Housing and Equal Opportunity personnel.

4. If any UCC Financing Statements have been filed on the Personalty in conjunction with any transaction other than the Capital Advance, they must be identified to the HUD field counsel as well as details with respect to how such Financing Statements will be terminated at the time of closings. One or more UCC searches performed not more than 30 days prior to the date of the Opinion must be made and attached to the Opinion.

Acceptability of Counsel:

- Owner's counsel must opine as to the law of the Property jurisdiction and the state of Owner's organization, if different from the Property jurisdiction. HUD requires that Owner's counsel be admitted to practice law in each jurisdiction in which such admission is required by the laws or ethical considerations of the bar to be able to give the opinion. If multiple jurisdictions are involved, two opinions may be required: one with respect to the organization of the Owner and another with respect to the real property and Capital Advance issues. A combination of the Owner's regular counsel and special local counsel may be required to satisfy this requirement. If counsel's satisfaction of these requirements is not evident from the letterhead of the firm, the field counsel should include a written explanation in the Capital Advance Closing File. In all events, each provision in the Guide must be addressed whether one or more opinions are required to do so.

Signatures:

- The opinion may be signed by an authorized person of the law firm, in that person's name.

Owner's Certification:

- A form of Owner's Certification is attached. The form represents the minimum amount of information that should be obtained from the Owner (but additions, revisions and rephrasing are acceptable so long as the Owner is certifying as to factual matters and not legal conclusions). The Owner's Certification must be dated the same date as the Capital Advance Documents.

Identity of Interest

- Numerous issues have been raised with respect to the confirmation in (d) of the penultimate paragraph of the attorney signing the Opinion could not have an identity of interest with the Owner. No waivers are possible in such instance. In instances where other members of the firm have an interest in the Owner entity, such interest must be acceptable to field counsel based upon the ethnic rules of the applicable bar. Furthermore, any interest must be administratively acceptable to HUD and 2530 clearance must be

obtained. In addition, there appears to be an increasing trend wherein FHA mortgagees are insisting upon using counsel to the mortgagee to handle many aspects of the transaction even though the Opinion is being signed by a separate attorney. There have been some instances where counsel to the mortgagee has asked to represent the owner in whole or in part and to provide all or a part of the Opinion. Confirmation (d) I the penultimate paragraph has been clarified to reflect the intent of HUD from the inception of the Opinion that any such representation of both parties is not permitted.

Lien

- Paragraph (f), which is in the penultimate paragraph of the Opinion, contains a statement that there are no liens or encumbrances against the Property. Several attorneys have objected to making the statement because they indicate that, at the time of closing, there may be liens that have actually not been released even though the title company has received funds and/or release documents to do so and intends to process the release after the closing. Unless authorized by HUD, as in cases involving secondary loans, there cannot be any liens and encumbrances on the property when HUD makes a capital advance. As a result, there cannot be any liens outstanding which would prime the mortgage. Hence, Paragraph (f) should not be changed.

Reliance on Other Opinions

- The issue of proper wording and format has probably surfaced most often in cases where counsel to the Owner is relying on opinions issued by other attorneys. This has occurred most often in cases involving a separate opinion for property jurisdiction vs. organizational jurisdiction, zoning, etc. In this area, it is imperative that counsel to the Owner specifically reference and attach the additional opinion(s) and that such opinions track the language of the guide as close as is practical under the circumstances. HUD field counsel should exercise discretion in this area, taking the unique circumstances into account.

For use in the Section 202, Supportive Housing for the Elderly Program.

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**EXHIBIT A TO OPINION OF OWNER'S COUNSEL
CERTIFICATION OF OWNER**

This Certification of Owner is made the _____ day of _____ 20___, by (the "Owner") for reliance upon by _____ (the "Owner's Counsel") in connection with the issuance of an opinion letter dated of even date herewith (the "Opinion Letter") by ("Owner's Counsel") as a condition for the making of a capital advance by the Department of Housing and Urban Development ("HUD") in amount \$ _____ (the "Capital Advance") to the Owner. In connection with the Opinion Letter, the Owner hereby certifies to Owner's Counsel for its reliance, the truth, accuracy and completeness of the following matters:

1. The Organizational Documents are the only documents creating the Owner or authorizing the Capital Advance, and the Organizational Documents have not been amended or modified except as stated in the Opinion Letter.
2. The terms and conditions of the Capital Advance as reflected in the Capital Advance Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Capital Advance Documents.

3. All tangible personal property of the Owner in which a security interest is granted under the Capital Advance Documents [other than off-site construction materials and/or accounts or goods of a type normally used in more than one jurisdiction and/or additional collateral personalty] is located at the Property (as defined in the Opinion Letter) and the Owner's [Chief Executive Office] [only place of business] [residence] is located in _____.

4. The execution and delivery of the Capital Advance Documents will not (i) cause the Owner to be in violation of, or constitute a default under the provisions of any agreement to which the Owner is a party or by which the Owner is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which the Owner is subject, and (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Owner, except as specifically contemplated by the Capital Advance Documents.

5. There is no litigation or other claim pending before any court or administrative or other governmental body or threatened against the Owner, the Property, or any other properties of the Owner [except as identified on Exhibit___, List of Litigation, in the Opinion Letter.]

6. There is no default under the Public Entity Agreement (as defined in the Opinion Letter) nor have events occurred which with the passage of time will result in a default under the Regulatory Agreement.

Note: All capitalized terms not defined herein shall have the meaning set forth in the Opinion Letter.

IN WITNESS WHEREOF, the Owner has executed this Certification of Owner effective as of the date set forth above.

OWNER:

Public Reporting Burden for this collection is estimated to average 2 hours per response, including the time for reviewing, searching existing data sources, gathering and maintaining the data needed, and compiling and reviewing the collection of information. This information is required to obtain benefits and voluntary. HUD may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

This information 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 projects meet statutory requirements, 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.