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CHAPTER 6. FINAL CLOSING

6-1. GENERAL.

- A. Introduction. When cost certification processing is completed and the Owner accepts the final capital advance amount, final closing must occur as soon as possible.
- B. Acceptability of Title. Final closing cannot take place until:
1. The title company issues a title policy free of liens, and
  2. The Closing Attorney has determined the acceptability of title and whether there are:
    - a. Junior Liens. The Field Office must not close the capital advance with outstanding junior liens unless previously approved by Headquarters. Where such liens are involved, all facts together with the Field Counsel's opinion must be submitted to the Director, Office of Elderly and Assisted Housing, Attention: HMEED. The latter will seek a legal analysis, if necessary, and will advise the Field Office Manager of the final administrative decision.
    - b. Exceptions to the Title. The Closing Attorney must closely examine any exception to title, not shown in the title evidence accepted at initial closing and which affects the use or marketability of the project. If a clear determination cannot be made that the exception does not adversely affect property value, the question should be submitted to the Office of Elderly and Assisted Housing, HMEED, for resolution.
- C. Preparation for Final Closing.
1. Definition of completion. For purposes of final closing, completion means that the project must be:

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- a. Completed according to the drawings and specifications (except for approved items of delayed completion covered by an acceptable escrow agreement).
  - b. Acceptable for occupancy by the local government having jurisdiction.
2. When agreement has been reached on the final capital advance amount, the Field Office Counsel must advise the Owner of the instruments and requirements for final closing.
  3. Date of final closing. Upon determination that all closing documents are in order, a mutually agreeable date is established for final closing.

6-2. PROPERTY INSURANCE REQUIREMENTS. (See Form HUD-90164-CA for a description of property insurance requirements.)

- A. Changes in Insurance Coverage. Immediately before execution of Form HUD-92403-CA, Requisition for Disbursement of Capital Advance Funds, for a final disbursement, the Housing Development Division Director must ascertain whether any changes in drawings and specifications, or any appreciable change in the cost of construction of the project, have occurred during the course of construction which require a revision of Property Insurance Schedule, Form HUD-92329.
- B. Required Actions. If a revision of Form HUD-92329 is necessary:
  1. Field Office must advise the Owner to substitute the revised Form HUD-92329 (identifying the revised form by date) for the previously-approved Property Insurance Schedule.
  2. File copies of revised Form HUD-92329 and related correspondence in the Field Office Docket.
  3. Forward copies of the following to Office of Elderly and Assisted Housing, Attention: Management Branch, HMEEM, which has custody of and is responsible for monitoring the property insurance documents:
    - a. Revised Form HUD-92329, and

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- (6-2)                    b.    Certified copies of all required permanent insurance policies and fidelity bond.

6-3.    INCOMPLETE ON-SITE FACILITIES.

- A.    Conditions for Approval.    Circumstances may make it necessary or desirable to proceed with the final closing before 100 percent completion of on-site construction.    This will be done only in those cases for which:
1.    All on-site items in the entire project are completed, except those which qualify as delayed-completion items, as set forth in underwriting architectural procedures;
  2.    All off-site utilities such as sewer, water, electrical, and gas facilities are installed and connected, and the buildings are served by safe and adequate all-weather facilities (either permanent or temporary) for the ingress and egress of pedestrians and vehicular traffic, including fire apparatus, and all other construction requirements have been acceptably accomplished or acceptably assured;
  3.    The Housing Development Division Director recommends that an escrow be established for the completion of minor items because weather or other conditions beyond the contractor's control make immediate completion inadvisable or impossible; and
  4.    The aggregated estimated cost of completing the above items does not exceed two (2) percent of the capital advance amount.
- B.    Escrow for Completion.
1.    Amount held in escrow for items of delayed completion must be at least one and one-half (1-1/2) times the estimated cost of completion and of sufficient amount to provide an incentive to complete the work.
  2.    The escrow will be held in a HUD-approved depository in accordance with the terms of the Escrow Deposit Agreement, Form HUD-90176-CA.

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(6-3) 3. Itemized list of incomplete items must be attached to Form HUD-92403-CA.

C. Escrow for Interior Painting. In order to enhance rentability, an escrow may be established to cover the cost of final interior painting of the entire facility, without regard to the two (2) percent capital advance amount limitation mentioned above. This is conditioned upon the contractor's having been found to have completed or can complete all other work covered by the approved plans and specifications, as follows:

1. Within a fixed time period (not to exceed one year from the date of final closing), and
2. Without any additional charge either to the Owner or to the incoming tenants.

6-4. ASSURANCES AND ADVANCES FOR OFFSITE FACILITIES. See Chapter 7 of Handbook 4470.1 for information regarding acceptable assurances for the installation of offsite public utilities and streets and instructions for requesting disbursements.

6-5. NONREALTY ITEMS AND ALTERNATIVE SECURITY INSTRUMENTS

A. Nonrealty Items. Easily movable items (such as refrigerators, washers, dryers, venetian blinds, lobby and office furniture) must be covered by a mortgage lien, whether or not paid for with capital advance funds, as long as such items are required in the operation of the project.

B. Alternative Security Instruments.

1. The capital advance commitment required the Owner at final closing to obtain either:
  - a. An attorney's opinion that the so-called nonrealty items are covered by the lien of the real estate mortgage; or
  - b. A chattel mortgage or other appropriate security instrument covering such items.
2. The Field Office Counsel must obtain either an acceptable opinion from the Owner's attorney or the chattel mortgage or other security instrument.

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- (6-5) 3. Under the Uniform Commercial Code (UCC), the Security Agreement is accompanied by a Financing Statement. In jurisdictions where the Code is in effect, copies of both will be obtained.

C. Continuation Statement. UCC requires the filing of a Continuation Statement during the six months immediately before the five-year expiration date of the existing Statement. The filing should occur as soon as possible after expiration of four and one-half years. Procedures relating to Continuation Statements are set forth in the HUD-Held Servicing Handbook 4360.1, Chapter 7, Section 2. When the executed Continuation Statement is received from the Owner, the Housing Management staff must forward a copy to RAD.

The following procedures shall be used to assure that the Owner files a new Financing Statement in order to maintain the Government's security:

1. In order for the RAD to maintain a tickler system for UCC Continuation Statements, the Field Office Counsel (including Regional Counsel for co-located offices), shall determine the date for renewal at the initial closing and furnish the RAD information as to the required filing date for each project. The RAD will advise the Loan Management Branch at least six months in advance of the date when the Continuation Statement must be filed.
2. Within sixty days of notification by RAD, the Loan Management Branch must advise the Owner of the need and time to file the Continuation Statement.
3. Additional information on filing of Continuation Statements may be obtained in a joint Office of General Counsel, Housing, and Office of Finance and Accounting memorandum, dated February 22, 1990, addressed to all Regional and Field Office Counsel, RADs and Loan Management Branches.

6-6. REQUEST FOR FINAL CLOSING AND CAPITAL ADVANCE DISBURSEMENT.

A. Required Submission by Owner.

1. HUD-92403-CA, Requisition for Disbursement of Capital Advance Funds.

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2. HUD-92448, Contractor's Requisition, only if retainage was not previously disbursed.
  3. Final "as-built" survey.
  4. HUD-90175-CA, Request for Final Closing.
  5. HUD-90176-CA, Escrow Deposit Agreement (if necessary).
- B. Final Survey.
1. Must show exact location of all buildings, water, sewer, gas and electric mains, and all easements for such existing utilities.
  2. Must be certified by a registered professional land surveyor within 90 days of the final closing.
  3. Surveyor must certify that project is erected entirely on land covered by the mortgage and within the building restriction lines, if any, and does not overhang or encroach upon any easement or right-of-way of others.
- C. Review of Final Disbursement Submission. The Field Office must determine whether:
1. Any on-site construction items are incomplete;
  2. Any off-site facilities are incomplete;
  3. Any revisions are required in connection with hazard insurance; and
  4. The necessary security instrument or Owner's attorney's opinion has been submitted to cover the nonrealty items (see Paragraph 6-6).
- D. Incomplete On-site Construction Items.
1. If no items are incomplete, the work "none" must be entered in the "Certificate of Approval" block on Form HUD-92403-CA.
  2. If on-site construction items are incomplete and an escrow deposit is required (see Subparagraph 6-3B):

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- a. Attach itemized list of incomplete items on HUD-92403-CA.
  - b. Type the amount of the escrow deposit required to complete the listed items in the "Certificate of Approval" block.
- E. Review of Form HUD-90175-CA.
- 1. Disbursement amount.
    - a. Mortgage Credit will check the total on line 1 of HUD-90175-CA against previously approved HUD-92403-CA to determine that it is correctly stated and that it equals the total of all disbursements.
    - b. If any error is found, the form will be returned to the Owner with an explanation of the correction required.
  - 2. Certificates of Owner and general contractor.
    - a. Requires full disclosure by both the Owner and general contractor of all outstanding unpaid obligations in connection with the acquisition of land, purchase of property, construction of the project, or the capital advance transaction.
    - b. Unpaid obligations of the Owner listed under (b) and (c) or paragraph 2 of the Certificate of Mortgagor must not exceed the amount of the final disbursement. Where an excess is shown, the Owner must be advised that the difference must be liquidated by cash payment or through issuance of a promissory note on a HUD-prescribed form. A corrected HUD-90175-CA must then be submitted.
    - c. Where the total of unpaid obligations certified by the general contractor exceeds the amount certified as due the general contractor by the Owner, the Field Office must urge the prompt payment of such excess obligation.

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- d. Field Office staff must examine the title

evidence submitted prior to final closing to confirm the certification by the Owner as to items of outstanding indebtedness.

- e. In cases where strong evidence of slow payment or nonpayment by the Owner or the general contractor exists, sufficient funds must be escrowed to settle all unpaid obligations disclosed on the HUD-90175-CA. (See Paragraph 11-14 of Handbook 4470.1 REV-2.) Such escrowed funds can be released only when simultaneous acknowledgement of payment by the general contractor and/or applicable subcontractor or materialman is received.

- F. Ordering Final Disbursement Check. The approved HUD-92403-CA must be sent to RAD for processing to obtain the Treasury check for the final disbursement. Such transmittal must be made at least 15 days prior to the scheduled final closing to permit sufficient time for processing the requisition. Also, the request must specify the date of scheduled closing for the purpose of dating the Treasury check.

6-7. SCHEDULING FINAL CLOSING. When the application for final disbursement has been processed and approved, the final closing conference should be scheduled. The credit instrument will be finally closed in an amount equal to the full amount of all disbursements to the Owner, as shown by the applicable Form HUD-90175-CA. Where final closing is delayed for more than 10 working days from the scheduled closing date due to unforeseen reasons, the Treasury check must be returned to the RAD for cancellation. A replacement check must be requested when the capital advance closing date is rescheduled.

6-8. GUARANTEE FOLLOWING COMPLETION.

- A. Assurances of Performance under Guarantee. The Construction Contract (Form HUD-92442-CA or Form HUD-92442A-CA) contains a guarantee against any defects due to faulty materials or workmanship which appear within a period of one year following completion. The date of completion is defined as the date on which the HUD representative signs the final inspection report. The Field Office Manager must avoid any action that might invalidate or limit the contractor's guarantee.

1. Release of cash escrow. If a Completion Assurance Agreement, Form HUD-92450-CA, was used at initial closing, the Field Office may, after cost certification, release the escrow funds except for the following:
  - a. An amount equal to any overpayment to the contractor (as evidenced by cost certification) which has not been refunded previously to the Owner; and
  - b. An amount equal to two and one-half (2-1/2) percent of the total amount of the construction contract.
2. Other provisions.
  - a. The two and one-half (2-1/2) percent escrow must be retained for the one-year guarantee period as specified on the Form HUD-92450-CA.
  - b. Contractor's liability for correction of defects during the guarantee period is not limited by the amount of the escrow.
  - c. The above funds are to be kept separate from any escrow that may have been provided to assure completion of any incomplete construction items.

C. Other Assurances. If either Form HUD-92452-CA, Performance/Payment Bond (Dual Obligee) or Forms FHA-2452, Performance Bond, and HUD-92452A, Payment Bond, were used, no action is required at final closing.

6-9. ITEMS TO BE PAID IN CASH. The Owner must set up at final closing a cash escrow to pay all "to be paid in cash items" identified on Form HUD-92330, Mortgagor's Certificate of Actual Cost, and debts to third parties who made the original disbursements for an item listed as paid on Form HUD-92330. See Handbook 4470.1.

Sixty days after final closing, the Field Office must:

- A. Prepare a new Form FHA-2331A, Cost Certification Review Worksheet.

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(6-9) B. Compute a new Maximum Capital Advance Mortgage, Form

HUD-92580-CA, or its equivalent based on the total of the "Disallowed Column," Form FHA-2331A above. If this computation produces an amount less than the mortgage amount finally closed:

1. Notify the Housing Development Director and the Housing Management Director by memorandum that a mortgage reduction is required.
  2. If payment has been delayed because of a dispute or litigation, retain funds to pay the amount pending resolution of the dispute.
  3. Notify the escrow agent of the required payment.
  4. Control the remaining balance in a special account as a reserve for unpaid construction costs.
- 6-10. RECALCULATION OF SAVINGS. At final closing, if the maximum capital advance amount changes, the Field Office must determine if any additional savings should be deposited in the Replacement Reserve Account. (See Subparagraph 5-4.A of this Handbook.)
- 6-11. RELEASE OF MINIMUM CAPITAL INVESTMENT (MCI).
- A. If final closing occurs within six months after construction completion, any MCI funds remaining that have not been used to cover operating deficits during the first three years of operation, are to be released to the Owner.
  - B. If final closing does not occur within six months after project completion (unless extended by the Field Office for up to two months due to justifiable delay), any MCI funds that have not been used for operating deficits will not be returned and are to be deposited in the Replacement Reserve Account at the end of the first three (3) years of operation.
- 6-12. CLOSING MEMORANDUM. After final closing, a Closing Memorandum, Form HUD-290, must be prepared and distributed as follows:
- A. Headquarters Loan Management Docket (see Paragraph 6-13 below).
  - B. Field Office Docket.

6-13. DISPOSITION OF CLOSING DOCUMENTS AND VARIOUS FILES.

- A. Headquarters Loan Management Docket. Subsequent to final closing, a Loan Management Docket, which includes copies of the following documents, must be prepared and transmitted to the Office of Elderly and Assisted Housing, Attention: Management Branch, HMEEM:
1. Regulatory Agreement;
  2. Mortgage (or deed of trust);
  3. Use Agreement;
  4. Project Rental Assistance Contract; and
  5. Closing Memorandum.

NOTE: This is the only Headquarters Docket. Do not send a file such as is sent to Headquarters for all mortgage insurance projects.

- B. Capital Advance Transcript. Immediately after final closing, the Regional/Field Office must hand deliver or send to the RAD by certified mail, all documents listed in Appendix 15 not already provided, including modifications of any documents. The memorandum to RAD must account for all items, noting those submitted earlier.
- C. Preparation of Field Office Docket. After preparing the Capital Advance Transcript, file chronologically the remaining original and duplicate documents (including copies of those sent to RAD) in the Field Office Docket. No documents in the docket may be destroyed until the mortgage is terminated. After final closing, transfer the docket to the Loan Management Division.

6-14. MANAGEMENT REVIEW.

- A. On-site Review Within Six Months After All Units Available.

An appropriate management team must make an on-site management review within six months after all units (bedrooms if group home) are available for occupancy. The team must review:

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1. Physical condition of project;
  2. Maintenance program;
  3. Implementation of management plan;
  4. Samplings of tenant certifications and PRAC vouchers;
  5. Adequacy of bookkeeping system;
  6. Deposits to escrow accounts; and
  7. Indications of developing problems.
- B. This team review will be in addition to the regular Latent Defects Inspection. Submit a written report covering the results of that inspection, including the remedies being taken, to the Housing Management Division Director, with a copy to Field Office Manager and the Office of Elderly and Assisted Housing, HMEEM.