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CHAPTER 3. INITIAL CLOSING

- 3-1. PREPARATION FOR INITIAL CLOSING. The Manager shall notify all parties, and arrange the closing date and place. Once a closing date is set, postponement should not be permitted unless absolutely necessary. Among the matters to be considered when scheduling the initial closing are the following:
- A. All closing documents should be submitted, reviewed and approved by Field Office Counsel (Counsel), Mortgage Credit and the Manager prior to the closing date.
  - B. Closing should be held in the city within the Field Office's jurisdiction which is most convenient, taking into consideration the fact that the presence of the land owner and others may be required to obtain clear title, record the mortgage and satisfy other requirements prior to releasing the first disbursement.
  - C. If a Field Office attorney is unavailable, the Regional Counsel should be notified. The Regional Counsel may authorize travel by either an attorney from another Field Office or a Regional Office Attorney to handle the closing.
- 3-2. RESPONSIBILITIES OF FIELD OFFICE MANAGER AND CHIEF COUNSEL. Compliance with the conditions of the Firm Commitment is the responsibility of the Manager. The legal sufficiency of any document in connection therewith is the responsibility of the Chief Counsel.
- 3-3. ADDITIONS OR DELETIONS TO STANDARD FORMS. The forms discussed in this Handbook are to be used without change, except as follows:
- A. The Chief Counsel has the authority to approve changes to any legal form, provided such changes are (1) not of a substantive nature or (2) are required by local law or procedures.
  - B. The Manager has the same responsibility with respect to administrative forms.
  - C. All requests for substantive changes proposed must be submitted to the Assistant General Counsel for Assisted Housing in Headquarters if a legal form is involved, or to the Office of Elderly and Assisted Housing if an administrative form is involved.

- D. The transmittal must include a written recommendation from the Chief Counsel (legal forms) or Manager (administrative forms) for such requests referred to Headquarters.
- 3-4. DOCUMENTS REQUIRED AT INITIAL CLOSING. The documents generally required at initial closing are listed in Legal Requirements for Closing (Appendix 9) and are self-explanatory, except as discussed in the paragraphs below. Additional documents may be required because of special circumstances of an individual project.
- NOTE: The Mortgage Note (Form HUD-93432-CA) maturity date shall be 40 years from the first of the month following the projected date of construction completion. The interest rate used shall be the same as the annual interest established under the formula set forth in CFR Part 885.
- 3-5. TITLE POLICY. Title evidence responsibilities are divided between the Manager, who determines the acceptability of the title company, and the Counsel, who determines the acceptability of title. The Counsel must bring to the attention of the Manager any restrictions or covenants affecting the title. The Manager, in turn, must assure that the proposed project, when completed, will not violate the restrictions and covenants cited. If the Manager cannot clearly determine that a title exception does not affect adversely the value or marketability of the project, the matter must be referred with a recommendation to the Director, Office of Elderly and Assisted Housing, HMEE.
- 3-6. CONTROL OVER OWNER. The Owner must execute a Regulatory Agreement, Form HUD-92466-CA, and a Use Agreement, Form HUD-90163-CA.
- 3-7. CONSTRUCTION CONTRACT.
- A. The Date. Unless prior written approval of a later date is obtained from the Director, Office of Elderly and Assisted Housing in Headquarters, the date to be inserted in Article 2 will not be later than a date which is derived by adding to the date of the contract the number of months specified on Line 52, Part G, of Form HUD-92664. If the Owner and the general contractor agree on an earlier date, such earlier date may be inserted.
- B. The Manager is responsible for assuring that there has not been a change in the construction contract which affects the amount shown on Line 4 of Form HUD-92283

and that the contract construction period does not exceed of the number of months shown on Line 52, Part G, Form HUD-92264.

- C. An incentive payment provision may be included in the construction contract so that the general contractor may share the benefits of any savings in taxes and insurance as a result of completing the project earlier than the completion date specified in the construction contract. When the parties choose to use the incentive payments rider, the construction contract shall be modified in the manner specified in Form HUD-92443-CA, Construction Contract Incentive Payment.
  - D. At initial closing, a copy of the Contractor's and/or Mortgagor's Cost Breakdown, Form HUD-2328, must be an exhibit attached to the contract.
- 3-8. MATERIALS STORED OFF-SITE. For instructions concerning the handling of capital advances disbursements for certain materials stored off-site, see Handbook 4430.1 and Subparagraph 4-1.B7 of this Handbook.
- 3-9. ASSURANCE OF COMPLETION. HUD standardized requirements set forth below, are minimum requirements imposed primarily for HUD's own protection. Nothing in these instructions shall be construed to limit or restrict the absolute right of the Owner to impose additional or stricter requirements, but the HUD requirements will not vary from the amounts prescribed below:
- A. For all types of structures, Performance/Payment Bond (Dual Obligee), Form HUD-92452-CA, or a Performance Bond, Form FHA-2452, and Payment Bond, Form HUD-2452A (each in the amount of 100 percent of the construction cost) shall be provided.
  - B. In lieu of the performance-payment bond, a Completion Assurance Agreement shall be executed and the contractor must furnish a cash escrow equal to 25 percent of the construction cost to be held in an approved depository.
  - C. The amount of the bond or escrow shall be based on the construction cost (line 50, Form HUD-92264, less architects fees).
  - D. The Puerto Rico statute requires the use of separate wage payment guarantee in the form of a third bond form. The form customarily used in Puerto Rico by the surety industry will be acceptable.

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3-10. ACCEPTABLE SURETY AND AMOUNT OF BOND.

- A. Acceptable Surety. Any surety on the accredited list of the U.S. Treasury (which is published annually in the Federal Register) is acceptable up to the surety's bonding limit.
- B. Responsibilities of Chief Counsel and Managers. The Manager will determine the acceptability of the surety and the amount of the bond. The Chief Counsel shall determine the legal sufficiency and form of bond and that HUD is included as an obligee on the performance-payment bond or performance and payment bonds. The latter should also confirm with the surety firm the authority of the surety company's agent and the validity of the bond.

3-11. REQUIRED OFF-SITE IMPROVEMENTS.

- A. Installation of required off-site facilities will be covered by Form HUD-90177-CA, Off-Site Bond (which is self-explanatory), or by Form HUD-90170-CA, Escrow Agreement of Off-Site Facilities. In the latter case, the cash escrow shall be established with the depository in an interest-bearing account (at the option of the owner) in an amount equal to the greater of the owner's or HUD's estimate of the off-site facilities cost. The original HUD-90170-CA shall be forwarded to the RAD for safekeeping until such time as advised by the Field Office as to its disposition. A copy shall be retained in the Field Office Docket.
- B. Regardless of the form of assurance, the Manager will determine that it provides for completion and installation of the off-site facilities simultaneously with completion of improvements on the project site, without cost to, or assessment against, the Owner.

3-12. PROPERTY INSURANCE REQUIREMENTS. At the initial closing the Manager will verify that the required insurance coverage has been obtained in accordance with the Property Insurance Requirements, Form HUD-90164-CA, and Form HUD-92329, Property Insurance Schedule. The Counsel shall confirm with the surety firm as to the authority of the surety company's agent and the validity of the fidelity bond. Subsequently, certified duplicate copies of all required insurance policies and the fidelity bond shall be forwarded to Management Branch, Office of Elderly and Assisted Housing, HMEEM.

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Processing) for the project shall also be included in the transmittal. The Management Branch will examine the policies for adequacy and compliance with the required insurance coverage, approve and retain the policies. The Management Branch shall maintain an expiration date file for all policies and fidelity bonds and all renewal policies and bonds shall be forwarded directly to the Branch in Headquarters.

NOTE: On the Form HUD-92329, for any building containing a boiler, a notation shall be made stating whether it is a steam boiler or a hot water heating boiler (see Handbook 4480.1, Multifamily Underwriting Reports and Forms Catalog.

- 3-13. LEASEHOLDS. To be acceptable, the lease must conform to the wording of the Lease Addendum (Appendix 14). The terms of the lease addendum may be varied to conform to the law of the jurisdiction in which the project is located, but such changes must be approved by the Chief Counsel. Any other changes must have been approved by the Director, office of Elderly and Assisted Housing, HME.
- 3-14. REQUIRED MINIMUM CAPITAL INVESTMENT. See Handbook 4571.3 for HUD's policy relative to the Minimum Capital Investment (MCI).
- A. Prior to initial closing, the owner must establish an escrow account with a banking institution acceptable to HUD. At the option of the Owner, the escrow may be established in an interest-bearing account, with the interest accruing to the Owner. Letters of credit are not acceptable. At the initial closing, the Owner must present evidence in the form of a letter from a bank officer that the required amount has been deposited for the period specified above and that such funds, including interest, may not be withdrawn without prior HUD approval. After initial rent-up and any vacancy payments are utilized, HUD will require the owner to use the MCI and any accrued interest to off-set any operating deficits.
- B. The Owner may request the Field Office Manager to hold all or a portion of its land draw as undisbursed funds until final closing. Under this option, Mortgage Credit shall enter such amount to be withheld from the

land draw on Form HUD-92451, Financial Record of Mortgage Loan Transaction, and designate it as "Not Available During Construction." At initial occupancy, the Owner shall submit a requisition and place in

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escrow with a local banking institution the portion of the land draw which was originally designated for the MCI.

NOTE: If the project involves substantial rehabilitation and the rehabilitation is being done on a phased basis with some occupancy occurring immediately or scheduled to occur within less than two-thirds of the construction period, the Manager shall extend the escrow period, as deemed necessary.

- 3-15. COLLATERAL AGREEMENTS. If any collateral agreements are necessary with respect to any unusual conditions encountered at initial closing, executed duplicate copies of any documents in connection therewith must be submitted by the owner. The Counsel shall determine the acceptability of any collateral agreements prior to disbursing any capital advance funds.
- 3-16. OWNER'S ATTORNEY'S CLOSING OPINION. At closing, the Owner's attorney must submit a comprehensive opinion, using HUD-90166-CA, Owner's Attorney's Closing Opinion, addressed to HUD, as to the legality and adequacy of the contractual instruments.
- 3-17. FIDELITY BOND DURING CONSTRUCTION PERIOD.
- A. Basic Requirement. The Owner shall purchase a Blanket Fidelity Bond covering all officials and employees based upon an amount equal to the average anticipated disbursements of capital advance funds during the construction period. The minimum limit shall be determined by dividing the total mortgage amount by the estimated number of months in the construction period plus 2 and rounding the quotient to the nearest \$50,000, not to exceed \$500,000.
- B. Exceptions. Projects using modular components and projects for which the average disbursements are expected to exceed \$500,000 shall establish an escrow with a title company to handle all disbursements during the course of construction. In such cases, no fidelity bond is required for the owner until the project is in initial occupancy. Funds normally in the loan to cover

fidelity bond during construction may be used, as necessary, to offset the title company fee.

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- 3-18. CONSTRUCTION FUNDS PROVIDED BY-OWNER. The Owner may have been required to deposit in the Construction Account funds necessary to complete the project. These funds are apart from the capital advance proceeds and must be used before any capital advances become available. The Capital Advance Agreement, Form HUD-90167-CA, contains the foregoing requirements. The Manager will make certain that all such funds (except off-site) have been paid out for the several authorized purposes before approving any capital advance disbursements.
- 3-19. CUSTODY OF ORIGINAL DOCUMENTS. Immediately following initial closing, the MHR shall transmit to the Regional Accounting Division the following original documents:
- Mortgage Note;
  - the Mortgage or Deed of Trust (using Form HUD-90165-CA);
  - Capital Advance Agreement (if not previously provided);
  - Use Agreement; and
  - Regulatory Agreement.
- 3-20. INITIAL CAPITAL ADVANCE DISBURSEMENT. The Treasury check ordered for the initial disbursement shall be delivered to the Field Office and shall be released to the Owner only after the mortgage has been recorded and all other initial closing requirements have been satisfied. (See Paragraph 4-1 for procedures for processing disbursements.)
- 3-21. CLOSING MEMORANDUM. After initial closing, a Closing Memorandum, Form HUD-290, must be prepared and distributed as follows:
- A. Headquarters, Attention: Development Branch, HMEED
  - B. Field Office Docket
- 3-22. REVISION OF INSTRUMENTS. After initial closing, no revision of the terms or conditions of the mortgage will be permitted which will result in any change in its principal amount without Headquarters authorization.
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