BUILDING LOAN AGREEMENT

Dated \_\_\_\_\_\_\_\_\_\_\_, 20\_\_

BETWEEN

[INSERT LENDER]

AND

[INSERT BORROWER]

LOCATION OF LAND AND IMPROVEMENTS:

Street Address:

County of:

State of: New York

Block:

Lots:

After filing, please return to:

[Insert Lender’s Counsel]

THIS **BUILDING LOAN AGREEMENT** (“Agreement”) is made this \_\_\_\_ day of **\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_**, by and between **[INSERT LENDER],** a national bank organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_whose principal address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Lender”), and **[INSERT BORROWER]**, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_organized and existing under the laws of the State of New York whose principal address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Borrower”) in connection with HUD Project No. \_\_\_\_\_\_\_\_\_\_\_ located in the City/County of \_\_\_\_\_\_\_, State of \_\_\_\_\_\_\_\_\_\_, which Project has been **[**rehabilitated, purchased, or refinanced**]** from the proceeds of a Loan insured by HUD and made by Lender.

R E C I T A L S

 WHEREAS, Borrower is the owner of fee title to the land described in Exhibit A annexed hereto and made a part hereof (the “Premises” or the “Project”); and

WHEREAS, the Borrower has requested that Lender lend to Borrower and Lender has agreed to lend to Borrower a loan in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Loan”); and

WHEREAS, HUD has issued a Firm Commitment to insure said Loan pursuant to § 232 pursuant to § {223(f) or 223(a)(7)} of the National Housing Act, as amended, and Program Obligations, on which mortgage insurance Borrower is relying for financing of the Project; and

WHEREAS, Borrower and Lender are entering into the Loan subject to, and on the terms and conditions set forth in a note insured by FHA (the “Note”), a mortgage securing the Note (the “Mortgage”), the HUD Healthcare Regulatory Agreement (the “Regulatory Agreement”), and the other documents each executed or to be executed by Borrower in connection with the Loan (hereinafter referred to as the “Loan Documents”), copies of which Loan Documents have been provided to each of the parties hereto; and

WHEREAS, the Firm Commitment is conditioned upon assurance that adequate funds be available for the completion of the Repair Work deferred until after endorsement of the Note including all amounts identified in Articles 2.1, 2.2, and 2.3 of this Agreement.

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

ARTICLE 1

THE LOAN

Article 1.1. Definitions. The definition of any capitalized term or word used herein but not defined can be found in the Regulatory Agreement, the Note, and/or the Mortgage[s]. As used herein:

1. “Closing” shall mean the date on which the Loan shall have closed and the Note shall have been endorsed by HUD for mortgage insurance.
2. “Completion Date” shall mean the date that is \_\_\_\_\_ months following Closing.
3. “FHA” shall mean the Federal Housing Administration.
4. “HUD” shall mean the U.S. Department of Housing and Urban Development.
5. “Indebtedness” shall mean the principal of, interest on, and all other amounts due at any time under the Note, the Mortgage**[**s**]** or any other Loan Document, including prepayment premiums, late charges, default interest, and advances under Section 13 of the Mortgage**[**s**]** to protect the security of the Mortgage**[**s**]**.
6. “Program Obligations” shall mean (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)).

Article 1.2. Loan. The Lender shall make and the Borrower shall obtain a Loan in the principal sum of $\_\_\_\_\_\_\_\_\_\_\_\_ to bear interest from the date of each advance at the rate of \_\_\_\_\_\_\_\_\_\_\_\_% per annum, of which sum $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ are available, together with an additional cash deposit of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to be disbursed pursuant to the terms hereof to finance the Repair Work.

Article 1.3. Note and Security. Said Loan shall be evidenced by the Note, shall be payable in monthly installments and shall have a maturity date of not later than \_\_\_\_\_\_\_\_\_\_\_\_. Said Note shall be executed by the Borrower and be payable to the Lender, and shall be secured by the Mortgage**[**s**]**, of even date herewith, on the Premises. The Mortgage**[**s**]** shall constitute **[**a first mortgage lien**] [**first mortgage liens of equal priority**]** on the Premises and the improvements erected thereon and the only lien thereon except other liens acceptable to the Lender and HUD.

ARTICLE 2

REPAIR AND IMPROVEMENT OBLIGATIONS

Article 2.1. Repairs Deposit.

1. Borrower has deposited loan proceeds with the Lender in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Repair Work Escrow”) for the improvements and repairs described in Exhibit B (the “Repair Work”), receipt of which is hereby acknowledged by the Lender. This amount represents one hundred percent (100%) of the estimated cost of the Repair Work. The Lender shall hold and disburse the Repair Work Escrow in accordance with Program Obligations and this Agreement.
2. The Borrower agrees to complete the Repair Work, free of all liens, on or before the Completion Date. Borrower shall remedy or cause to be remedied 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 12 months from completion of the Repair Work to the satisfaction of HUD (“Latent Defects”).

Article 2.2. Additional Deposit Amount.

1. Borrower has deposited an additional $\_\_\_\_\_\_\_\_\_\_\_\_\_with the Lender (“Additional Deposit Amount”), consisting of not less than twenty percent (20%) **{INSERT DIFFERENT PERCENTAGE IF PERMITTED BY PROGRAM OBLIGATIONS}** of the estimated cost of the Repair Work, receipt of which is hereby acknowledged by the Lender. The Lender shall hold and disburse the Additional Deposit Amount in accordance with Program Obligations and this Agreement, in the form of

 🞏 cash, and/or

🞏 one or more unconditional irrevocable letter(s) of credit issued to Lender by a banking institution, attached hereto as Exhibit C. The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations.

Article 2.3 Cash Out Deposit.

1. In the event of a cash out refinancing under § 223(f) of the National Housing Act, a further additional cash amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Cash Out Proceeds”), equal to fifty percent (50%) of the cash out proceeds, has been withheld by Lender from the proceeds of the Loan. The Lender shall hold and disburse the Cash Out Proceeds in accordance with Program Obligations and this Agreement.

ARTICLE 3

LOAN DISBURSEMENTS AND INSPECTIONS

Article 3.1. Disbursements.

1. Subject to Article 3.1(b), Lender may release funds from the Repair Work Escrow for completed work pursuant to the estimated amounts set forth in Exhibit B. Prior to any release hereunder, the Lender may require Borrower to obtain from the contractor, subcontractors and materialmen acknowledgements of payment and releases of liens down to the date covered by the disbursement, and concurrently with the final payment for the Repair Work. Such acknowledgements and releases shall be in the form required by New York Lien Law and shall cover all work done, labor performed and materials (including equipment and fixtures) furnished for the Repair Work.
2. Disbursements from the Repair Work Escrow shall be made only upon prior written approval of HUD, with the exception of those amounts expended by Lender pursuant to Article 3.3 of this Agreement, to meet any established cost for which the Repair Work Escrow was intended. To request approval, Lender shall submit HUD Form 92464-ORCF, Request for Approval of Advance of Escrow Funds, to HUD accompanied by supporting documentation, including a report on the status of title confirming that no mechanic’s liens have been filed.

Article 3.2. Inspection. Lender and its agents and HUD shall, at all times during the completion of the Repair Work, have the right of entry and free access to the Project and the right to inspect all work done, and materials, equipment and building components and fixtures furnished, installed or stored either on or off the Premises, and to inspect all books, subcontracts and records of Borrower. Lender and HUD have no obligation to make any such inspections. Any and all such inspections by the Lender or its agents shall solely be for the benefit of Lender and HUD. Any and all inspections by HUD or its agents shall solely be for the benefit of HUD. Neither Borrower, not any third party shall have any claims against the Lender, HUD or their respective agents as a result of such inspections. Neither HUD, nor the Lender, nor any of their respective agents assumes any obligation of the Borrower or any other person or entity with respect to the quality of the Repair Work or any defects in said Repair Work.

Article 3.3. Incomplete Repairs. If Borrower has not completed 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 Repair Work 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 Repair Work 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, 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 Repair Work Escrow, and if that amount is insufficient, Lender will be under no obligation to proceed further with the Repair Work. 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.

Article 3.4. Default. The Repair Work Escrow, Additional Deposit Amount and Cash Out Proceeds may, at HUD’s sole direction, be subject to immediate application to the Indebtedness if an Event of Default by Borrower occurs at any time.

ARTICLE 4

REQUIREMENTS UPON COMPLETION OF REPAIRS

Article 4.1. Remaining Funds. In cases where the actual cost of the Repair Work is less than estimated, any resulting excess funds in the Repair Work Escrow that were funded from Loan proceeds may be used for the following purpose(s), subject to HUD approval: (a) 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; (b) to reduce the outstanding Loan balance; (c) to deposit in the Reserve for Replacement.

Article 4.2. Release to Borrower. Subject to Article 3.3, provided that an Event of Default does not then exist,

(a) any balance remaining that is attributable to the Additional Deposit Amount, the Cash Out Proceeds Amount, and any portion of the Repair Work Escrow funded by Borrower separate from Loan proceeds, may be released to Borrower when: (i) all Repair Work has been satisfactorily completed, as determined by HUD, (ii) evidence of clear title has been provided to HUD, and (iii) Latent Defects assurances that are compliant with Program Obligations have been provided in the form of a cash escrow, letter of credit, or a surety bond from a surety on the accredited list of the U.S. Treasury, in an amount equal to two and one-half percent (2 ½ %) of the Repair Work Escrow (“Latent Defects Deposit”). Said sums may be used for the correction of Latent Defects in the event Borrower fails to make such corrections; and

(b) any balance remaining on account of the Latent Defects Deposit shall be released to Borrower, upon the later of (i) fifteen (15) months from the completion of the Repair Work, or (ii) at such time as the Latent Defects have been corrected to the satisfaction of HUD.

ARTICLE 5

REPRESENTATIONS, WARRANTIES AND COVENANTS

Article 5.1. Compliance with Lien Law. In compliance with Section 13 of the Lien Law of the State of New York, the Borrower will receive the disbursements secured by this agreement and will hold the right to receive such disbursements as a trust fund to be applied first for the purpose of paying the cost of the improvement, and that it will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. In compliance with Section 22 of the Lien Law of the State of New York, a Lien Law Affidavit is attached as Exhibit D.

Article 5.2. Borrower Liability. To the extent not inconsistent with applicable State law, Borrower’s liability under this Agreement shall be limited to the same extent as set forth in the Note. Nothing herein shall release the Borrower from liability under any other instrument or agreement.

Article 5.3. Borrower Obligations.

1. The Borrower agrees that the Repair Work shall be performed strictly in accordance with all applicable ordinances and statutes, and in according with the requirements of all regulatory authorities, and any rating or inspection organization, bureau, association or office having jurisdiction. Borrower further agrees that the Repair Work shall not encroach upon any easement or right-of-way, or the land of others and that the Repair Work shall be wholly within the building restriction lines however established, and shall not violation applicable use or other restrictions contained in prior conveyances, zoning ordinances or regulations. Borrower shall furnish from time to time such evidence with respect thereto as may be required by Lender or HUD.
2. Borrower shall provide or cause to be provided workers compensation insurance and public liability and other insurance required by applicable law or by the Mortgage**[**s**]**. All such policies shall be issued by companies approved by the Lender and shall be in form and amounts satisfactory to the Lender and HUD. Such policies shall be endorsed with standard Lender clauses making loss payable to Lender, its successors and assigns. Lender shall have the right to hold the original policies or duplicate original policies.

ARTICLE 6

GENERAL PROVISIONS

Article 6.1. Lien Law. This Agreement is subject to the trust fund provisions of the Lien Law, including, without limitation, Section 13 thereof.

Article 6.2. Borrower Default. Any failure by the Borrower to comply with any provision of this Agreement shall be considered a Violation pursuant to Section 35 of the Regulatory Agreement. In the event of a Violation, HUD shall have all the remedies provided for in the Regulatory Agreement in addition to the remedies provided herein.

Article 6.3. Written Modifications Only. Neither this Agreement nor any portion or provision hereof may be amended, altered or changed other than in writing signed by the Lender and the Borrower.

Article 6.4. Governing Law. This Agreement and the rights and obligations of the parties hereto shall be governed and construed in accordance with federal law and the laws of the State of New York without giving effect to conflict of laws provisions.

Article 6.5 Jury Trial Waiver. Borrower and Lender each (a) agree not to elect a trial by jury with respect to any issue arising out of this Agreement or the relationship between the parties as Lender and Borrower that is triable of right by a jury, and (b) waive any right to trial by jury to respect to such issue to the extent that any such right exists now or in the future. This waiver of right to trial by jury is separately given by each party, knowingly and voluntarily with the benefit of competent legal counsel.

Article 6.6. Notices. Any notice or other communication in connection with this Agreement shall be in writing, mailed (registered or certified mail, return receipt requested and postage pre‑paid), hand‑delivered with signed receipt, or sent by nationally recognized overnight courier (receipt of which to be evidenced by a signed receipt for overnight delivery service) and shall be deemed to have been properly given if given in the manner indicated above and to the addresses provided herein. All notices shall be sent to the following addresses:

If to Borrower:

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

If to Lender:

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]

If to HUD:

Secretary of Housing and Urban Development

Office of Residential Care Facilities

451 7th Street SW

Washington, DC 20410

with a copy to:

**{PLEASE SELECT APPROPRIATE HUD COUNSEL OFFICE ADDRESS}**

**{New York Regional Office}**

U.S. Department of Housing and Urban Development
Office of Regional Counsel for New York/New Jersey
Attn: Regional Counsel
26 Federal Plaza, Room 3500
New York, NY 10278

**{Buffalo Field Office}**

U.S. Department of Housing and Urban Development

Attn: Chief Counsel465 Main Street

Lafayette Court, 2nd Floor

Buffalo, NY 14203

## Article 6.7. Invalidity. If any part of this Agreement is contrary to, prohibited by, or deemed invalid under applicable laws or regulations, such provision shall be inapplicable and deemed omitted to the extent so contrary, prohibited or invalid, but, unless the invalid provisions shall be material to this Agreement, the remainder hereof shall not be invalidated thereby and shall be given effect so far as possible.

## Article 6.8. Benefit of Agreement. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. Borrower shall not, however, assign or delegate any of its and/or their rights or obligations under this Agreement without the prior written consent of Lender and HUD. Any such assignment without such consent shall be void. No other party shall be entitled to any benefits hereunder, whether as a third‑party beneficiary or otherwise.

Article 6.9. Parties to the Agreement. HUD is not a party to this Agreement and has no obligation to the Borrower or Lender pursuant to this Agreement. HUD, pursuant to the Contract of Insurance and the Loan Documents, has reserved the right to approve or disapprove certain actions in this Agreement to protect the mortgage insurance fund.

## Article 6.10. Captions. The captions of the various sections and paragraphs of this Agreement have been inserted only for the purpose of convenience; such captions are not a part of this Agreement and shall not be deemed in any manner to modify, explain, enlarge or restrict any of the provisions of this Agreement.

## Article 6.11. No Waiver. No waiver by the Lender of any default under this Agreement will be effective unless such waiver is in writing and signed by the Lender and HUD. No waiver from the Lender of any default under this Agreement will operate as a waiver of any other default or of the same default on future occasion. The Lender may delay in exercising or omit to exercise any right or remedy available under this Agreement or any other Loan Document or by law or equity provided without waiving that or any part, present or future remedy. All rights and remedies of the Lender in this Agreement and other Loan Documents are cumulative, and none of these rights or remedies are exclusive or any other right or remedy allowed by law or in equity or in any other Loan Documents, and all of these rights and remedies may be exercised and enforced concurrently.

## Article 6.12. Entire Agreement; Survival. This Agreement and the Loan Documents represent the entire agreement between the Lender and the Borrower with respect to the subject matter of this Agreement and supersede all previous agreements, negotiations and understandings with respect to the subject matter of this Agreement. All warranties, representations, covenants and agreements of Borrower herein and in the Loan Documents shall survive the making of the Loan, and shall be deemed made and restated by Borrower at and as of the time of the making of each advance thereunder.

## Article 6.13. Preservation of HUD Authority. Nothing in this Agreement will have the effect of diminishing or otherwise modifying the authority of HUD to supervise the Borrower under the Loan Documents, Sections 232 and {223(f) or 223(a)(7)}of the National Housing Act, 12 U.S.C. § 1715w and 12 U.S.C. § {1715n(f) or 1715n(a)(7)}, and regulations promulgated thereunder.

Article 6.14. Purpose of the Loan. The parties acknowledge and agree that the Loan is being made for the express purpose of refinancing the Project and is not in consideration of an express promise of an owner to make an improvement upon real property. The parties further acknowledge and agree that any improvement to the Premises is incidental to the Loan and that the filing of this Agreement in the Office of the Clerk of {Insert Property Jurisdiction}County, New York does not in and of itself render the Mortgage to be a “building loan mortgage” as defined in §§ 14 of § 2 of the Lien Law of the State of New York.

[SIGNATURES ON FOLLOWING PAGE]

 IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

**[LENDER]**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

            Name:

            Title:

STATE OF NEW YORK )

COUNTY OF NEW YORK ) ss:

 On the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, in the year 20\_\_, before me the undersigned, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Notary Public

**[BORROWER]**

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Name:

 Title:

STATE OF NEW YORK )

COUNTY OF NEW YORK ) ss:

 On the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_, in the year 20\_\_, before me the undersigned, personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Notary Public

**EXHIBIT A**

Description of the Land

**EXHIBIT B**

Repair Work

**EXHIBIT C**

Letter of credit, if applicable

**EXHIBIT D**

Lien Law Affidavit

*[Attach Lien Law Affidavit]*