

# **Energy Performance Contract**

## **Section 30**

### **Reviews and Approvals**

### **Guidebook**

**U.S. Department of Housing and Urban Development**  
**Public and Indian Housing - Office of Field Operations (PIH-OFO)**

**Last Updated: April 28, 2015**

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## Introduction

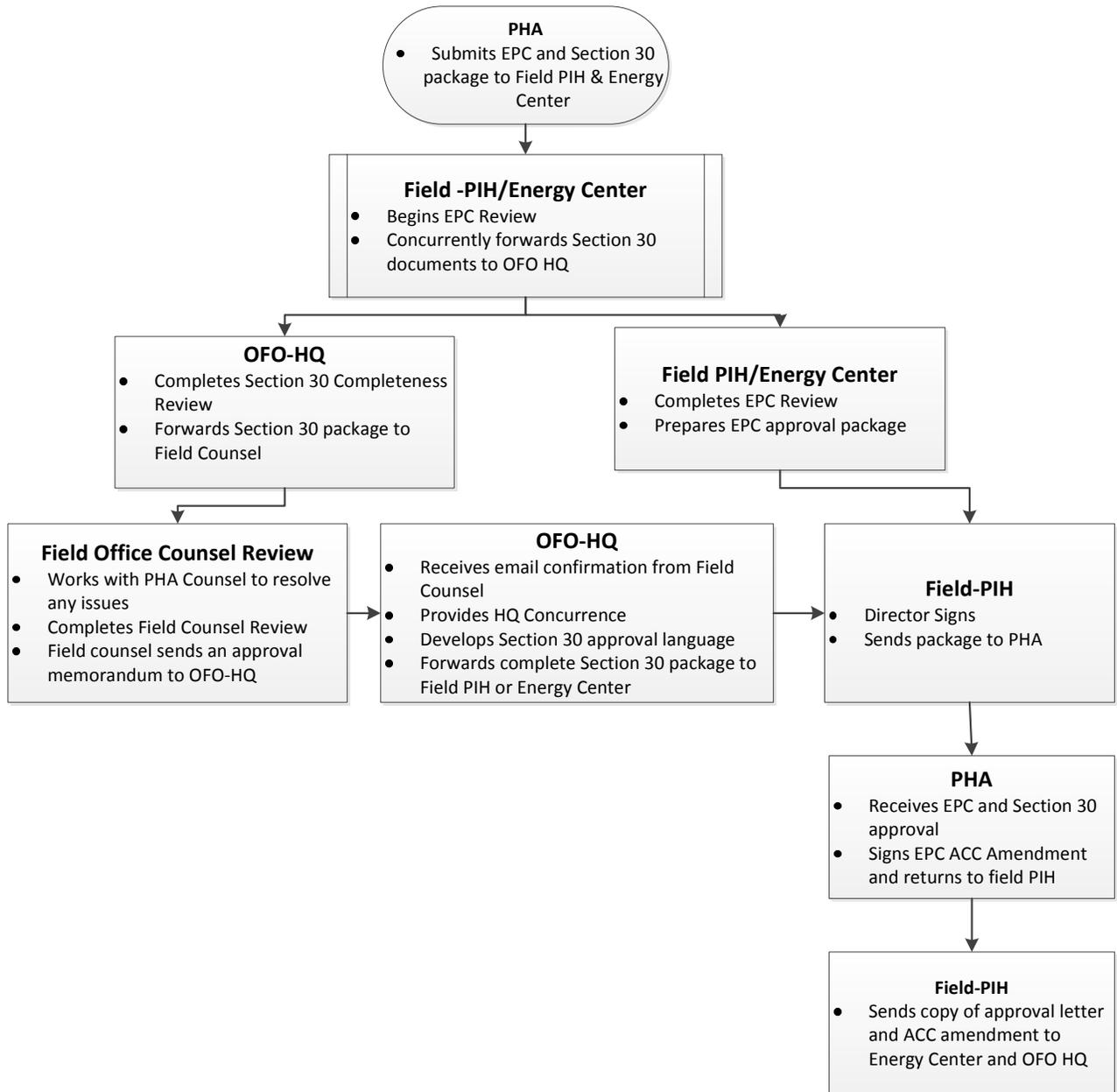
When a Public Housing Authority (PHA) requests an Energy Performance Contract (EPC) approval from the U.S Department of Housing and Urban Development (HUD), it can also be required to submit a Section 30 approval request. EPCs incentivize reductions in the costs of utilities through the financing of Energy Conservation Measures (ECMs). A PHA's EPC may require a financing of ECMs that involves a security interest or other encumbrance in public housing (real or personal property). In these cases, PHAs are required to obtain written approval from HUD for the security interest or encumbrance pursuant to Section 30 of the U.S. Housing Act of 1937 (1937 Act). In situations where ownership of the equipment resides with the PHA and a lien or other encumbrance is proposed or currently exists on the equipment, a Section 30 approval is necessary.

PHAs are required to send Section 30 proposals to Public and Indian Housing (PIH) Field Offices and the HUD Energy Center. PHAs are strongly encouraged to consider whether a Section 30 approval may be needed when at the start of the EPC process. Once the application material are received, Field-PIH or the Energy center will then forward the Section 30 package to HUD Office of Field Operations (OFO-HQ) program staff to review the contents of the proposal and coordinate concurrence from Field Office counsel. If the submission is approvable, OFO-HQ will either develop the EPC Section 30 approval language for inclusion in the EPC approval letter or develop a separate approval letter. OFO-HQ will also work to ensure that the Energy Performance Contract Amendment to the Consolidated Annual Contributions Contract (ACC) is executed by the PHA and Field Office Director. PHAs are encouraged to use PIH Notice 2011-36 as a resource.

HUD's Section 30 review focuses narrowly upon the security interest or encumbrance, and *does not evaluate or approve the financing*. HUD approval of EPCs and associated Energy Services Agreements do not constitute approval of the security interests and therefore a separate Section 30 approval must be obtained.

Under some lease-purchase agreements (otherwise known as municipal leases, the typical financing structure for an EPC), ownership of the equipment may reside with the third party, e.g., a bank, Energy Services Company (ESCO), etc. Under this scenario, where the ownership resides with a third party, a Section 30 approval is not required.

## Section 30 Process Chart



## Submission Procedure

### PHA Submission

To obtain Section 30 approval related to an EPC transaction, PHAs must submit Section 30 approval documents to both the appropriate HUD Field Office and the Energy Center.

1.  Create a Section 30 submission package that includes:
  - a. Copies of **current** (i.e., have not expired and will not expire during the term of the EPC) **and effective** (i.e., no liens or encumbrances prior to Declarations of Trust) Modernization Declarations of Trusts (DOTs)
  - b. Copies of **current and effective** Declarations of Restrictive Covenants (DRCs) (*as needed*)
  - c. PHA Section 30 Approval Request letter
  - d. PHA Legal counsel opinion on the transaction
  - e. Board Resolution authorizing EPC financing
  - f. Matrix describing details for each project for which the security interest is granted
  - g. Loan Schedule with details on the loan relative to the EPC
  - h. PHA counsel certification that the DOTs or DRCs **represent all proprieties subject to security interests or other encumbrances**
2.  Submit the Section 30 documents with the EPC submission or independently to the appropriate HUD PIH Field Office and the Energy Center
  - a. Email submissions to Anthony Misercola of the HUD Energy Center ([OFOEnergyCenter@hud.gov](mailto:OFOEnergyCenter@hud.gov)) and Shelia Bethea at Headquarters ([Shelia.M.Bethea@hud.gov](mailto:Shelia.M.Bethea@hud.gov))

### Section 30 Completeness Review

Once the package is received OFO-HQ will conduct a Section 30 Completeness Review of the submission to ensure that all required documentation is present and complete. Once this review is complete, the package will go to the appropriate field counsel for their review.

1.  All submission documents are accounted for and complete
  - a. Refer to Section 30 Required Submission Documentation list (page 10) for more information
2.  OFO HQ forwards Documents to field counsel office, in PHA's jurisdiction for concurrence

### Field Office Counsel Review

Field Office counsel shall review the DOTs and DRCs, and PHA counsel opinions, or in the alternative, a title report. Field counsel shall then provide a confirmation memo by email to Shelia Bethea OFO-HQ.

1.  Review the DOTs or DRCs and PHA counsel opinions for two things:

- a. The current DOTs or DRCs on all of the PHA's public housing real or personal property) subject to the EPC, cover the entire period of the financing and that there are no encumbrances ahead of the DOTs or DRCs
- b. The PHA counsel's opinion meets the requirements of Section 6 of the EPC ACC Amendment
2.  Provide approval in a memo to OFO-HQ and the Field Office PIH Director, or from whomever you received the request
  - a. Evidence of approval will be stated in the HUD Approval Letter

### HQ Concurrence and Approval

After the Field counsel has confirmed their concurrence, OFO-HQ will coordinate HUD HQ concurrence; develop approval language and the ACC amendment. ACC amendments must be approved by HUD HQ.

1.  Develop the approval language for approval letter. The language should approve only those security interests requested by the PHA and intended to be approved by the Field Office
2.  Develop ACC amendment
3.  Obtain internal concurrence with OGC HQ and the OFO GDAS
4.  Forward completed language to either the Field Office or to the Energy Center who will incorporate it into their final approval letter or develop final approval letter. Once the approval letter for both the EPC and Section 30 is complete, the approval letter, along with an updated ACC amendment, will go to the appropriate Field Office for the Public Housing Director's signature and then to the PHA for signature.
5.  Send Final Approval letter for EPC and Section 30 to Field Office Public Housing Director
6.  Field Office Public Housing Director signs the ACC amendments on behalf of HUD and sends signed documents to PHA.
7.  PHA Director signs ACC amendment and returns document to the Field Office
8.  FO sends one fully executed ACC amendment to the PHA, another is placed in the PHA's ACC amendment file, and another is sent to OFO-HQ

The OFO-HQ shall retain all other documents associated with the PHA's Section 30 review and approval.

## Contacts

If you have any questions or concerns regarding Section 30 proposals, please contact:

### [OFO-HQ Contact](#)

Shelia Bethea

(202) 402-8120

[Shelia.M.Bethea@hud.gov](mailto:Shelia.M.Bethea@hud.gov)

### [HQ-OGC Contact](#)

Vickie Longosz, Senior Attorney

(202) 402-5266

[Vickie.S.Longosz@hud.gov](mailto:Vickie.S.Longosz@hud.gov)

### [Energy Center Contact](#)

Anthony Misercola

(716) 551-5755

[OFOEnergyCenter@hud.gov](mailto:OFOEnergyCenter@hud.gov)

PIH Field Office Directory:

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/about/field\\_office](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/about/field_office)

OGC Field Managers:

[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/general\\_counsel/flldmanagers](http://portal.hud.gov/hudportal/HUD?src=/program_offices/general_counsel/flldmanagers)

## Section 30 Required Submission Documentation

Exhibit Draft Attachment	Required Documentation
A	<ul style="list-style-type: none"> <li>• Copies of <b>current</b> (i.e., have not expired and will not expire during the term of the EPC) and <b>effective</b> (i.e., no liens or encumbrances prior to the Declarations of Trust (DOT)) Modernization DOT (form HUD-52190-B) for Non-Mixed Finance public housing properties               <ul style="list-style-type: none"> <li>○ Project dates must be present in the HUD-52190-B forms:                   <ul style="list-style-type: none"> <li>Date the PHA entered into the overall public housing ACC, form box (3) and date of the last Capital Fund ACC Amendment (Annual ACC Amendments obligating a FY of Capital Funds), form box (4).</li> </ul> </li> </ul> </li> </ul>
(As required)	<ul style="list-style-type: none"> <li>• Copies of <b>current</b> (i.e., have not expired and will not expire during the term of the EPC) and <b>effective</b> (i.e., no liens or encumbrances prior to) Declarations of Restrictive Covenants (DRCs) for mixed finance properties</li> </ul>
B	<ul style="list-style-type: none"> <li>• PHA Section 30 Approval Request Letter describing financing and security interest or encumbrance and requesting HUD’s approval.</li> </ul>
C	<ul style="list-style-type: none"> <li>• PHA’s Legal counsel Opinion opining that:               <ul style="list-style-type: none"> <li>○ 1) The PHA and its partner have authority to enter into the transaction;</li> <li>○ 2) There are no liens or encumbrances prior to the DOTs and DRCs;</li> <li>○ The applicable EPC security interests or encumbrances have been or will be recorded on the property subject to the financing and are subject to the DOTs and DRCs;</li> <li>○ 3) The transaction complies with the requirements of the 1937 Act, as amended, federal regulations, and the ACC, as amended; and</li> <li>○ 4) The PHA will enter into an EPC ACC Amendment.</li> </ul> </li> </ul>
D	<ul style="list-style-type: none"> <li>• Board resolution authorizing:               <ol style="list-style-type: none"> <li>1. The PHA to:                   <ul style="list-style-type: none"> <li>○ Undertake the EPC financing;</li> <li>○ Enter into all financing documents; and</li> <li>○ Provide all security interests or encumbrances associated with EPC;</li> </ul> </li> <li>2. The Executive Director or authorized staff to negotiate/sign all legal documents.</li> </ol> </li> </ul>
E	<ul style="list-style-type: none"> <li>• Matrix for each project on which a security interest or encumbrance is requested listing:               <ul style="list-style-type: none"> <li>○ Project Name;</li> <li>○ Project Number;</li> <li>○ Address (building addresses and/or site descriptions); and</li> <li>○ Description of security interest or encumbrance being provided and identification of how/when security interest will be released.</li> </ul> </li> </ul>

F	<ul style="list-style-type: none"> <li>• Schedule that provides the following information for the loan relative to the term of the EPC: <ul style="list-style-type: none"> <li>○ Amount of the loan;</li> <li>○ Term of the loan (years);</li> <li>○ Interest rate;</li> <li>○ Interest rate fixed? (y/n);</li> <li>○ Loan fully amortizing? (y/n);</li> <li>○ Lockout period? (y/n); if lockout period, term (years); and</li> <li>○ Description of any yield maintenance provision.</li> </ul> <p>Please note that prepayment penalties cannot be paid with federal funds, see 2 CFR Part 225.</p> </li> </ul>
	<ul style="list-style-type: none"> <li>• And ONE of the following Certification options: <ul style="list-style-type: none"> <li>○ PHA counsel certification that the DOTs encumber all non-mixed financed public housing properties (subject to security interest or other encumbrances) and Modernization DOTs are recorded prior to all security interest including EPC related security interests, and the DOTs will be effective for the financing term;</li> <li>○ When PHA counsel certification is unavailable, PHA may submit title report with a certification from PHA that the DOTs and title report cover all public housing properties, both real and personal property, that DOTs are prior to all security interests or encumbrances including those related to the EPC; OR</li> <li>○ PHA counsel certification that DRCs represent all mixed finance public housing properties subject to security interest and DRCS are recorded prior to all security interests including EPC financing, and will be effective for the financing term.</li> </ul> </li> </ul>

## Exhibit A - Declarations of Trust Example

### COPIES OF MODERNIZATION DECLARATIONS OF TRUST (FORM HUD-52190-B)

<http://portal.hud.gov/hudportal/documents/huddoc?id=52190-b.pdf>

#### AUTHORITY'S COUNSEL CERTIFICATION

In regard to the Section 30 Approval Request of the Housing Authority of the **XXXX** (the "Authority") for its Energy Performance Contract ("EPC") with \_\_\_\_\_ (please see the opinion letter of even date herewith regarding same), the undersigned counsel for the Authority does hereby certify that a current (i.e., has not expired and will not expire during the term of the EPC) and effective (i.e., no security interests or encumbrances prior to the Modernization Declaration(s) of Trust) Modernization Declaration (s) of Trust (Form HUD-52190-B) is recorded at the [NAME OF RECORDING OFFICE] in [BOOK/PAGE #], against all currently held real estate and personal property for Projects numbered \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ of the Authority and that said Modernization Declaration(s) of Trust is prior to all security interests and encumbrances and that all security interests and encumbrances related to the EPC will be subject to said Declaration(s) of Trust and that such security interests and encumbrances are and will be subject to any future Modernization Declaration(s) of Trust during the term of the financing of the EPC.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2015.

[NAME OF FIRM]

## Exhibit B - Approval Request Letter Example

Chicago HUD Office  
Director, Office of Public Housing  
U.S. Department of Housing and Urban Development  
Chicago, IL

### Re: PHA Section 30 Approval for an EPC

Dear PIH Director,

Attached is the request for Section 30 approval for the **XXXX** Housing Authority (the "Authority") Energy Performance Contract (EPC).

We believe that the Section 30 submission is complete and satisfies HUD policies and requirements, specifically, HUD Notice PIH-2011-36 (HA) issued July 8, 2011 (the "Guidance") and the most recently published Section 30 Completeness Checklist and Section 30 Guidebook. See attachment A.

Accordingly, we request your approval of the security interest described in this submittal to enable the PHA to begin construction and installation of energy conservation measures.

In accordance with the requirements of the most recent guidance, this submittal is being made in electronic format.

Please let me know if you have any questions or require any additional information. My tenants, commissioners, staff, community and I will deeply appreciate your prompt attention to this matter. We look forward to hearing from you soon. Thank you very much for your assistance.

Sincerely,

Executive Director

Copy to:

Anthony Misercola, HUD – Energy Center  
HUD – Office of Field Operations

## Exhibit C - PHA Legal Counsel Opinion Example

[\*NOTE THIS AND OTHER TEMPLATES ARE FOR ESCo SUPPORTED EPCS, APPROPRIATE LANGUAGE CHANGES SHOULD BE USED FOR SELF-MANAGED EPCS]

### AUTHORITY'S COUNSEL OPINION LETTER

[TO BE PLACED ON AUTHORITY COUNSEL'S LETTERHEAD]

HUD Office  
Director, Office of Public Housing  
U.S. Department of Housing and Urban Development  
City, State,

Re: Housing Authority of the City of XXXX Section 30 Approval

Dear Mr. **XXXX**:

We have acted as counsel to Housing Authority of **XXXX** ("PHA") in connection with the Energy Performance Agreement ("EPA") transaction between PHA and **XXXX** (the "Transaction").

In rendering the opinions set forth below, we have examined and relied upon (a) the statutes of the State of **XXXX**; (b) Articles of Agreement and Bylaws of PHA; (c) Resolutions of PHA of at or near even date; (d) Certificate of Existence for PHA of at or near even date and issued by the XXXX Secretary of State; and (e) the "Transaction Documents" consisting of \_\_\_\_\_.

*(e.g., the Master Equipment Lease-Purchase Agreement duly executed by PHA, as Lessee which has been incorporated by reference into Equipment Schedule No. 01, each between the PHA, as Lessee and **XXXX** (PHA), as Lessor, the form of the Certificate of Acceptance and Payment Request attached to Equipment Schedule No. 01, the Custodial Agreement among **XXXX**, as Lessor, **XXXX** (PHA), as Lessee and Bank of **XXXX**, as custodian (hereinafter collectively referred to as the "Transaction Documents").*

In addition, we have examined such other certificates, documents and materials and have made such other investigation and inquiries as we have deemed necessary in connection with this opinion.

The opinions hereinafter expressed are qualified to the extent that the validity or enforceability of any provisions in the Transaction Documents, or of any rights granted pursuant thereto, may be subject to and affected by applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws affecting the rights or creditors generally. Furthermore, no opinion is expressed as to whether any provisions thereof are specifically enforceable in equity.

HUD Office  
Director, Office of Public Housing  
U.S. Department of Housing and Urban Development  
City, State  
Re: **XXXX** Housing Authority

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Based on the foregoing, and subject to the conditions, qualifications, limitations and exceptions set forth herein, we are of the opinion that:

1. **XXXX** (PHA) is a public body, corporate and politic, duly organized and validly existing under the laws of Illinois, with powers adequate to own its properties, and to carry on business as presently conducted by it.
2. **XXXX** (PHA) has full power and authority to authorize the execution and delivery of the Transaction Documents to which it is a party.
3. The Transaction Documents to which **XXXX** (PHA) is a party have been duly authorized by all necessary action and, when executed and delivered by **XXXX** (PHA), the Transaction Documents will constitute legal, valid, and binding obligations of **XXXX** (PHA) enforceable in accordance with their respective terms.
4. **XXXX** (PHA) has the authority to enter into the Transaction and provide a copy of the Transaction Documents, and the Transaction complies with the requirements of the U.S. Housing Act of 1937 (the 1937 Act), as amended, federal regulations, and the Annual Contributions Contract, as amended, between **XXXX** (PHA) and the Secretary of Housing and Urban Development.
5. The execution and delivery by **XXXX** (PHA) of the Transaction Documents and the performance by **XXXX** (PHA) of its obligations under the Transaction Documents will not constitute a default, or conflict with or violate the provisions of PHA's organizational documents or Bylaws, or to the best of our knowledge, any Declaration of Trust, Declaration of Restrictive Covenants, indenture, mortgage, deed of trust, contract, agreement, instrument, order of judgment to which **XXXX** (PHA) or any of its property is now bound.
6. Each Transaction Document constitutes a valid and legally enforceable agreement or contract under the laws of the PHA's state of formation and the commitments and/or agreements evidenced thereby can be carried out in accordance with their terms under state and local law, and conform to the provisions of Applicable Public Housing Requirements, including but not limited to the 1937 Act, HUD regulations, the ACC, including amendments, HUD notices, all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time and the HUD Approval Letter and the requirements of the HUD

EPC ACC Amendment, and that there is nothing in such documents that conflicts with, or is in consistent with, Applicable Public Housing Requirements, including the HUD Approval Letter and the HUD EPC ACC Amendment

7. To the best of our knowledge, other than HUD approval, under existing law, no approval, authorization or other action by, or filing with, any federal, state, municipal or other governmental commission, board or agency, is required in connection with the execution and delivery by **XXXX** (PHA) of the Transaction Documents, the borrowing of money pursuant to the Transaction Documents, or the performance of any other transaction contemplated by the Transaction Documents to be performed by **XXXX** (PHA).

8. There is no action, suit, proceeding or investigation pending, or, to the best of our knowledge, threatened, against **XXXX** (PHA) which if adversely determined would, in any single case or in the aggregate, materially and adversely affect its properties, existence, financial condition or business or materially impair its right to carry on its business substantially as now conducted or as contemplated to be conducted during the term of the Transaction Documents.

9. Nothing has come to our attention to indicate that there is or has been, up to the date hereof, any breach of any of the representations, warranties or agreements of **XXXX** (PHA) set forth in the Transaction Documents or any actual alleged occurrence or situation in any way inconsistent therewith.

The opinions above express the professional judgment of the attorneys participating in the EPC transaction as to the legal issues addressed herein. By rendering such opinions, the undersigned does not become an insurer or guarantor of that expression of professional judgment or of the transaction opined upon, nor does the rendering of this opinion guarantee the outcome of any legal dispute that may arise out of the transaction. The opinions expressed above are based upon such laws as are in effect on the date hereof, and we expressly disclaim any undertaking to advise you of any subsequent changes therein.

We are issuing this opinion solely for the benefit of the U.S. Department of Housing and Urban Development, and its successors and assigns. This opinion may not be relied upon by any other person or entity.

Very truly yours, Attorney LLP

## Exhibit D - Board Resolution Example

### AUTHORITY'S AUTHORIZING RESOLUTION

Board Resolutions are often specific to the PHA, the board of directors, and to the financial agreement in question. Please work with all involved parties to ensure that the resolution is satisfactory. Note that the resolution must authorize the PHA to:

- Undertake the EPC financing;
- Enter into all financing documents;
- Provide all security interests or encumbrances associated with EPC; and
- The Executive Director or authorized staff to negotiate/sign all legal documents

Please contact Shelia Bethea [Shelia.M.Bethea@hud.gov](mailto:Shelia.M.Bethea@hud.gov) if you need examples of previous board resolutions

### Exhibit E - Project Matrix Example

Project Name	Address	Project Number	Security Interest Impacts Entire Project?	Security Interest
XXXX	XXXX	## ##-#	Yes	See Below
XXXX	XXXX	## ##-#	Yes	See Below
XXXX	XXXX	## ##-#	Yes	See Below
XXXX	XXXX	## ##-#	Yes	See Below

#### DESCRIPTION OF THE SECURITY INTEREST

Under the terms of the Agreement, the Authority will grant a security interest in the following:

(a) A security interest in the energy conservation equipment financed pursuant to the EPC as well as any revenues or other proceeds from the equipment, which shall be subject to the Declaration of Trust covering the respective projects. The security interest includes any additions, attachments and substitutions to the Equipment, as well as any revenues or other proceeds from the Equipment. The Equipment will include:

(1) Project #####-### XXXX

- Upgrade # common area lighting fixtures and install # occupancy sensors
- Upgrade # apartment lighting fixtures
- Install # energy efficient refrigerators
- Replace # common area thermostats with new programmable thermostats
- Install # temperature-limiting thermostats

(2) Project #####-### XXXX

- Upgrade # common area lighting fixtures
- Upgrade # apartment lighting fixtures
- Install # energy efficient refrigerators
- Replace # common area thermostat with new programmable thermostat
- Convert common area HVAC from 1-zone to 2-zones
- Insulate # linear feet of piping

(3) Project #####-### XXXX

- Upgrade # apartment lighting fixtures
- Upgrade # common area lighting fixtures and install # occupancy sensors
- Upgrade # apartment lighting fixtures
- Convert # electric dryer hookups to gas
- Install # vending machine control
- Install # energy efficient refrigerators
- Replace # common area thermostats with new programmable thermostats

(4) Project #####-### XXXX

- Upgrade # common area lighting fixtures and install # occupancy sensors
  - Upgrade # apartment lighting fixtures
  - Install #energy efficient refrigerators
  - Replace # common area thermostats with new programmable thermostats
  - Install # temperature-limiting thermostats
- (b) The energy incentives received by the Authority from HUD with respect to the Performance Contract, as approved by HUD in a letter to the Authority dated\_\_\_\_\_.
- (c) Any amounts payable by the vendor to the Authority under the terms of the Performance Contract, including specifically any amounts payable with respect to the performant guaranty
- (d) A security interest in the favor of (name of bank against the name of fund), which would hold the proceeds of the loan in an amount not to exceed \$\_\_\_\_\_.

## Exhibit F - Loan Information Schedule Example

[\*NOTE THIS AND OTHER EXAMPLES ARE FOR ESCo SUPPORTED EPCS, APPROPRIATE LANGUAGE CHANGES SHOULD BE USED FOR SELF-MANAGED EPCS]

### Description of the Financing

The Authority is proposing to enter into a Master Equipment Lease Purchase Agreement, and Equipment Schedule No. 01 thereunder, both dated as of [DATE TO BE DETERMINED], (collectively, the "Lease Purchase Agreement"), as lessee, with \_\_\_\_\_, Inc., City, State, as lessor, (the "Lessor"). The Lease Purchase Agreement will be entered into by the Authority to finance the installation of certain energy conservation measures (the "Equipment") pursuant to that certain [Energy Performance Contract] (the "Performance Contract") between the Authority and \_\_ (the "Contractor"), dated as of \_\_\_\_\_, 20##, as amended.

Additionally, the Lease Purchase Agreement will be secured by a security interest in the Equipment, subject to the DOTs, as further described in Exhibit D "Description of the Security Interest."

Under the terms of the Lease Purchase Agreement, the Authority will hold title to the Equipment throughout the term of the financing. The principal amount of the financing will be an amount not in excess of \$\_\_\_\_ and the estimated interest rate of the financing will be a rate not to exceed \_\_\_\_\_% per annum.

The term of the financing will be \_\_\_\_ years plus the construction period (which is estimated to be \_\_\_\_\_ [months/year]).

Under the terms of the Lease Purchase Agreement, the security interest will be released upon payment in full of all amounts payable by the Authority under the Lease Purchase Agreement.

### Loan Summary

Loan Amount	\$
Term of the loan (years)	
Interest rate,	%
Fixed interest rate (indicate yes or no)	
Loan fully amortizing	
Lockout period (indicate yes or no)	# of years
Description of yield maintenance provisions (if applicable)	

## Exhibit G - PHA Counsel Certification Example

COUNSELORS AT LAW

DATE

HUD Office  
Director, Office of Public Housing  
U.S. Department of Housing and Urban Development City,  
State

Re: Equipment Lease Purchase Agreement  
between **XXXX** and **XXXX** Housing  
Authority

Dear **XXXX**:

We have acted as counsel to **XXXX** Housing Authority ("HA"), of (Address), somewhere, USA in connection with the above-referenced Energy Performance Contract Transaction ("EPC").

In rendering the opinions set forth below, we have examined the records available at the **XXXX** County Registry of Deeds, solely insofar as such records relate to Modernization Declarations of Trusts (Form HUD-52910-B) of record at said Registry for the period beginning from the date the PHA acquired the specific property through the date hereof, 8:00 a.m., with respect to the following Projects:

1	.	XXXX	Address
2	.	XXXX	Address
3	.	XXXX	Address
4	.	XXXX	Address
5	.	XXXX	Address
6	.	XXXX	Address
7	.	XXXX	Address

(collectively the "Projects"), which Projects represent all of the non-mixed finance public housing properties, both real and personal, of PHA that will be subject to the security interest or other encumbrance related to the EPC. We have also examined the statutes of the State of \_\_\_\_ with respect to the recording of instruments and documents which relate to or affect title to and interests in land and real estate. In addition, we have examined such other certificates, documents, and materials and have made such other investigation and inquiries as we have deemed necessary in connection with this opinion.

HUD Office  
 Director, Office of Public Housing  
 U.S. Department of Housing and Urban Development  
 City, State  
 August 26, 2013 Page Two

The opinions hereinafter expressed are qualified by the following matters:

1. Rights of persons or business entities in possession of the Premises, but not of record, whether under unrecorded instruments or otherwise.
2. Errors and omissions of the aforesaid Registry in indexing documents or other matters affecting or pertaining to the title to the Premises.
3. Various recorded easements for utilities, antennae and the like. Based on the

foregoing, and subject to the conditions, qualifications, limitations and exceptions set forth herein, we are of the opinion that:

1. The Modernization Declarations of Trusts (Form HUD-52910-B with legal descriptions for the Projects attached thereto have been recorded in the **XXXX** County Registry of Deeds as follows:

A.) Acquisition Date:

Project No.	Date of Recording	Book/Page of Recording
1. XXXX -Address,	1/12/12	Book #####, Page ###
2. XXXX -Address,	1/12/12	Book #####, Page ###
3. XXXX -Address,	1/12/12	Book #####, Page ###
4. XXXX -Address,	1/12/12	Book #####, Page ###

B.) Declaration of Trust Recording Date at the County Registry of Deeds:

1. XXXX	- Address	x/x/xx	Book #####, Page ###
2. XXXX	- Address	x/x/xx	Book #####, Page ###
3. XXXX	- Address	x/x/xx	Book #####, Page ###
4. XXXX	- Address	x/x/	Book #####, Page ###

HUD Office  
Director, Office of Public Housing  
U.S. Department of Housing and Urban Development  
City, State

August #, 20##  
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2. In each instance, the Modernization Declarations of Trust (Form HUD-52910-B) for the Projects have been duly executed and recorded in the County Registry of Deeds in accordance with the laws of the State of **XXXX**, prior to any security interest or other encumbrance including that security interest or encumbrance that will be recorded pursuant to the EPC. As such, the Modernization Declarations of Trust (Form HUD-52910-B) shall have priority over all security interest or other encumbrance including those that will be recorded pursuant to the EPC.

3. So long as PHA is obligated to operate the Projects in accordance with the Annual Contributions Contracts, as amended between PHA and the United States of America, Secretary of Housing and Urban Development ("HUD"), the Modernization Declarations of Trust (Form HUD-52910-B) will remain in full force and effect, and constitute valid and subsisting trusts for the purpose of securing the observance and performance of PHA's covenants and agreements not to sell, convey, lease, mortgage or otherwise encumber the Projects of any part thereof, except and in the manner provided in said Modernization Declarations of Trust (Form HUD-52910-B). Furthermore, the Modernization Declaration of Trust shall encumber the Projects and be effective for the term of the EPC financing.

4. Under the laws of the State of \_\_\_\_\_, said Modernization Declarations of Trust (Form HUD-52910-B) are recordable instruments and the recordation of same constitutes constructive notice to all persons, firms, corporations, and governmental agencies of the entire contents of said instrument, regardless of whether or not such persons, firms, corporations, or governmental agencies had actual notice of such contents.

This letter does not constitute a guaranty of title. We have prepared this letter for your sole use and benefit and, consequently, **XXXX** Law Firm, LLP reserves the exclusive right of reproduction.

Sincerely yours,

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## Appendix A - Section 30 Approval Language Template

**To be inserted into the EPC Approval Letter or issued as a separate letter if HUD is approving a security interest or encumbrance as part of the EPC.**

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### **Section 30 Financing**

Section 30 of the 1937 Act provides that the "Secretary may, upon such terms and conditions as the Secretary may prescribe, authorize a public housing agency to mortgage or otherwise grant a security interest in any public housing project or other property of the public housing agency." Pursuant to this authority, HUD hereby approves the following security interests relating to the EPC identified in the EPC Section 30 Proposal and associated with the EPC: ***(INCLUDE ONLY THOSE SECURITY INTERESTS WHICH THE PHA IS REQUESTING AND THE FIELD OFFICE IS APPROVING: (a, b, c AND/OR d)***

(a) "a security interest in the energy conservation equipment financed pursuant to the EPC , as well as any revenues or other proceeds from the equipment (Equipment)(HUD's approval is subject to a modernization DOT being recorded prior to any liens or encumbrances including those placed on the Equipment pursuant to the EPC)."

(b) "the energy incentives received by the Authority from HUD pursuant to this EPC approval."

(c) "any amounts payable to the Authority by the ESCo pursuant to the EPC." and

(d) "a security interest in the favor of (name of bank against the name of fund), which would hold the proceeds of the loan in an amount not to exceed \$\_\_\_\_\_."

The \_\_\_(name)\_\_\_ Field Office has approved the \_\_\_(name)\_\_\_ Housing Authority ("Authority") EPC proposal to finance the installation of additional Energy Conservation Measures ("ECMs") at \_\_\_(number)\_\_\_ public housing projects. The Authority is requesting an EPC Section 30 proposal in a total project cost amount of up to \$ \_\_\_(amount)\_\_\_.

**(IF PROPOSAL IS AN ADDEDUM TO A PREVIOUS EPC INCLUDE:** "The Authority proposal is an addendum to an existing Phase I Energy Performance Contract for the installation of additional ECMs and to extend or refinance with a new lender the EPC lender agreement term from \_\_\_(date) to \_\_\_(date) years." )

On \_\_\_\_\_(date), (name) , Attorney Advisor, HUD \_\_\_(name)\_\_\_ Field Office, issued notification stating that based on opinion and documentation provided by PHA Counsel that the Department's Declaration(s) of Trust ("DOT") of Declaration of Restrictive Covenants

("DRC") has been recorded and has first priority on affected housing projects (insert descriptions, e.g., provide the names of the public housing projects) and also has priority as to the EPC Projects.

As a further condition of this approval, the Authority must execute three copies of the EPC Annual Contributions Contract (ACC) Amendment. All three copies must be executed by the Authority and then delivered to the Field Office, where the Director of Public Housing will execute all copies on behalf of HUD. The Field Office will keep one copy for their use and return the other two copies to the Authority. The Authority should retain one copy, the other copy with two original signatures should be returned to the Office of Field Operations at HUD Headquarters. The closing binders and the required post approval documentation should be sent to:

Shelia Bethea  
U.S. Department of Housing and Urban Development  
Office of Field Operations  
451 7th Street, SW, Room 4108  
Washington, DC 20410

If you have any questions or concerns, please contact Shelia Bethea at (202) 402-8120 or by email at [Shelia.M.Bethea.gov](mailto:Shelia.M.Bethea.gov)

## Appendix B - HUD ACC Template

### ENERGY PERFORMANCE CONTRACT (EPC) ACC AMENDMENT TO CONSOLIDATED ANNUAL CONTRIBUTIONS CONTRACT XXX HOUSING AUTHORITY (XX001)

Section 1. This Energy Performance Contract (EPC) ACC Amendment to the Consolidated Annual Contributions Contract (“Financing Amendment”) covers the security interest for the EPC program undertaken by the \_\_\_\_\_, a housing authority which is a public body and body corporate and politic of the \_\_\_\_\_ (“Authority”) as the debtor (“Debtor” or “Authority”), with \_\_\_\_\_, or successors, or assigns as the lessor, (“Lessor”), and \_\_\_\_\_, as the Energy Services Company (“ESCO”) to be carried out pursuant to the EPC Program as authorized by Section 9(e)(2)(C) of the United States Housing Act of 1937 (“1937 Act”) and in accordance with Section 30 of the 1937 Act, together with the proceeds of the financing (“Financing”).

Section 2. This Financing Amendment is amendment number \_\_\_ to the Consolidated Annual Contributions Contract Form HUD-53012A and Form HUD-53012B Number: \_\_\_\_\_ dated \_\_\_\_\_, (together with any amendments thereto and modifications thereof, the “ACC”).

Section 3. The ACC is amended to evidence the approval by HUD of the security interests related to the EPC identified in Section 1 of this Financing Amendment, and as further defined in HUD’s EPC Section 30 Proposal Approval Letter. This Financing Amendment is part of the ACC.

Section 4. If, for reasons noted in the HUD Approval Letter, the Authority causes the HUD Approval Letter to lapse, then this ACC Amendment shall be null and void.

Section 5.

(A) By executing this Financing Amendment, the Authority represents, warrants and agrees that prior to terminating or amending any form of required insurance or seeking permission to self-insure in accordance with Section 4 of Attachment VII of Additional Terms and Conditions, constituting Part B of the ACC and the public housing requirements, it shall apply to HUD for a waiver of any form of required insurance or permission to self-insure, and it shall obtain written approval from HUD to amend its Section 30 approval and this Financing Amendment to explicitly permit such action.

(B) By executing this Financing Amendment, the Authority certifies to HUD and, as applicable, agrees that:

(1) it will immediately notify HUD of (a) any material change in any representations, statements, certifications or other matters contained in the Authority's Section 30 Proposal, this Financing Amendment and any Riders thereto, (b) any default of which it has notice under any agreement associated with the EPC, and; (c) any amounts paid to the Authority by the ESCo.

(2) it will ensure that the EPC transaction, including but not limited to any financing documents entered into by or on behalf of the Authority, including requirements for admission to public housing, continued occupancy of, management, and modernization or development of public housing unit funds from this transaction is in accordance with all requirements applicable to public housing, including the 1937 Act, HUD regulations thereunder (and, to the extent applicable, any HUD-approved waivers of regulatory requirements), the ACC, including amendments, HUD notices, all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time and this Financing Amendment, the HUD-approved Section 30 proposal, the Authority's standard public housing admissions and occupancy policies adopted in accordance with Federal law and described in the Authority's approved Public Housing Agency Annual Plan (the "Plan") if required, or any approved amendment to the Plan or, for Moving to Work ("MTW") Authorities, any contrary provisions in the MTW Agreement, as those requirements may be amended from time to time. The requirements set forth in subparagraph (2) of this Section 5(B) are hereafter to be collectively referred to as the "Applicable Public Housing Requirements."

(C) Excepting any of the Authority's assets arising under any program not administered by HUD under the 1937 Act, or as otherwise specifically approved in writing by HUD and described in Section 5(C)(1) below, that, all legal documents that are part of this transaction shall not and do not contain any guarantees, indemnifications, rights of set-off, or other pledges involving the assets of any public housing Project (as the term "Project" is defined in the Annual Contributions Contract) or any Housing Choice Voucher (HVC) related assets of the Authority.

(1) The Authority may provide a security interest or encumbrance in, and the Lessor or any third party may have recourse to the following without further HUD approval (unless explicitly indicated in this section, guarantees and indemnifications involving public housing funds are not permitted): (a) a security interest in the energy conservation equipment financed or refinanced pursuant to the EPC as well as any revenues or other proceeds from the equipment ("Equipment"); (b) the energy incentives received by the Authority from HUD; (c) any amounts payable to the Authority by the ESCo pursuant to the EPC; and (d) a security interest in the favor of (name of bank against the name of fund), which would hold the proceeds of the loan in an amount not to exceed \$\_\_\_\_\_."

(2) Other than as listed in Section 5(C)(1) above, the Authority acknowledges that it will not and has not provided any party with a pledge, encumbrance, guarantee, indemnification or legal right of recourse involving:

- (a) any of their public housing Projects;
- (b) any operating receipts (as the term "operating receipts" is defined in the ACC);
- (c) any of their HCV receipts;
- (d) any of their Capital Funds; or
- (e) Any of their public housing operating reserve reflected in the Authority's annual Operating Budget and required under the ACC.

(3) Should any assets of the Authority be identified, at a later date, as meeting the criteria set forth in Section 5(C), any guarantees, indemnifications, rights of set off, or other pledges involving those assets will be deemed null, void and unenforceable.

(4) Notwithstanding anything to the contrary herein, Sections 5 and 17 of the ACC apply should any financing proceeds be used for non-public housing purposes. The failure of the Authority to comply with the ACC may constitute a default and HUD reserves the right to enforce all remedies available to it under the ACC and any amendments thereto.

(5) The Authority recognizes and agrees that all obligations created pursuant to the transaction approved by HUD do not constitute a debt or liability of HUD or the United States of America, the full faith and credit of the United States is not pledged to the payment of the obligations, and payment of the obligations is not guaranteed by HUD or the United States. No action taken by these parties or in these documents shall result in any liability to the federal government.

(D) The Authority warrants that it will include, or cause to be included:

(1) in all its agreements or contracts with the participating parties to the transaction, and in all contracts with any party involving the use of Financing proceeds, a provision that nothing contained in the ACC or this Financing Amendment and any Riders thereto, nor in any agreement or contract between the parties, nor any act of HUD, the Authority, or any of the parties, will be deemed or construed to create any relationship of third-party beneficiary, principal and agent, limited or general partnership, joint venture, or any association or relationship involving HUD, and that the obligations created pursuant to this transaction do not constitute a debt or liability of HUD or the United States, the full faith and credit of the United States is not pledged to the payment of the obligations, payment of the obligations is not guaranteed by HUD or the United States, and no action taken by these parties or in these documents shall result in any liability to the federal government, and that any pledge of public housing funds by the Authority is subject to the availability of appropriations.

(2) in all its agreements or contracts with participating parties to the transaction, and in all contracts with any party involving the use of Financing proceeds, language that prohibits cross-default provisions between this financing transaction and any other financing transaction to which the Authority is a party.

## Section 6.

(A) Counsel must opine to the following for each requirement listed in Section 6 of this Financing Amendment:

(1) An examination of the authority of all parties to the Financing Documents and all persons executing the documents on behalf of the parties has been made and that the parties and said persons were authorized to enter into and execute the Financing Documents; and

(2) Each document constitutes a valid and legally enforceable agreement or contract under the laws of the Authority's state of formation and the commitments and/or agreements evidenced thereby can be carried out in accordance with their terms under state and local law, and conform to the provisions of Applicable Public Housing Requirements, including the HUD Approval Letter and the requirements of this Financing Amendment, and that there is nothing in such document that conflicts with, or is inconsistent with, Applicable Public Housing Requirements, including the HUD Approval Letter and this Financing Amendment. Counsel may rely upon the certification of other persons, or the written statements or opinions of other counsel, provided that a copy of each such certification, statement, or opinion must be attached to the opinion of that counsel.

(B) If counsel predicates an opinion upon "information and belief," then in all such cases the counsel's opinion must contain, or have attached thereto, a statement or description of all of the information upon which the belief of counsel is predicated.

In consideration of the foregoing covenants, the parties do hereby set forth their seals:

\_\_\_\_\_ **Housing Authority (#####)**

By (Signature of Executive Director)

(Name of Executive Director)

Executive Director

**UNITED STATES OF AMERICA**

**Secretary of Housing and Urban  
Development**

By (Signature of Public Housing Director)

(Name of Public Housing Director)

Director, Public Housing Office

HUD Office

Date:

### Appendix C - Acronyms List

ACC	Annual Contributions Contract
DRC	Declarations of Restrictive Covenants
DOT	Declarations of Trust
ECM	Energy Conservation Measure
EPC	Energy Performance Contract
ESCo	Energy Service Company
Field-PIH	Public and Indian Housing field offices located throughout the country
FY	Fiscal Year
HUD	U.S. Department of Housing and Urban Development
OFO	Office of Field Operations
OFO-HQ	Office of Field Operations, Headquarters staff
OGC	Office of General Counsel
PHA	Public Housing Authority
PIH	Public and Indian Housing