Escrow Agreement For Operating Deficits

U.S. Department of Housing and Urban Development
Office of Housing

OMB Approval No. 2502-0598
(Exp. 06/30/2017)

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This ESCROW AGREEMENT FOR OPERATING DEFICITS (**"Agreement"**) made this _____ day of _____, 20____, by and between _____, (**"Lender"**), whose principal address is _____, and _____, (**"Borrower")**, whose principal address is _____, [and if applicable, _____ (**"Depository Institution"**), whose principal address is _____,] in connection with HUD Project No. _____, located in the City/County of _____, State of _____, which Project [has been, is being, or will be] [constructed, rehabilitated, purchased or refinanced] from the proceeds of a Loan insured by HUD and made by Lender. (The definition of any capitalized term or word used herein can be found in this Escrow Agreement for Operating Deficits, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument except that the term **"Program Obligations"** means (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)).

RECITALS:

A. HUD has issued a Firm Commitment to insure said Loan pursuant to § _____ of the National Housing Act, as amended, and Program Obligations, on which mortgage insurance Borrower is relying for financing of the Project.

B. The Firm Commitment is conditioned upon assurance that additional funds be

made available for Project purposes, primarily for the absorption of any deficits resulting from the operation of the Project during the initial period of occupancy.

AGREEMENT:

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:

1. At or before initial endorsement of the Note by HUD for mortgage insurance, Borrower shall deposit, or cause to be deposited with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, the sum of $_____ (**"Escrow"**). If the Project is insured pursuant to § 223(f) of the National Housing Act, and if the Firm Commitment so requires, the amount of the Escrow shall include a debt service reserve in accordance with Program Obligations, in the amount of $_____ (**"Debt Service Reserve"**).

2. It is agreed that the Lender at all times shall control the Escrow, and that the funds in the Escrow may be released or allocated for the purposes indicated in this Agreement and for no other purpose without the prior written approval of HUD. The Escrow shall take the form of [*specify as applicable*]:

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

3. Disbursements from the Escrow may be authorized monthly with written HUD approval to meet any Cash Deficit in the operation of the Project for the time frame set forth in the following paragraph. The term **"Cash Deficit"** means the shortfall between Rents and Reasonable Operating Expenses.

4. Any unused balance remaining in the Escrow will be released at Borrower's request and returned to Borrower at the later of twelve (12) months [____ {**insert different number of months if required by Program Obligations**}] after final endorsement or when the Project has demonstrated to HUD's satisfaction that the Project has achieved Break-Even Occupancy for each month of six (6) consecutive months [____ {**insert different number of months if required by Program Obligations**}]; except unused funds in the Escrow attributable to the Debt Service Reserve, if applicable, will be released once the Project has achieved Break-Even Occupancy for each month of six (6) consecutive months [____ {**insert different number of months if required by**

Program Obligations}]. Break-Even Occupancy is defined as 1.0 debt service coverage [___ {**insert different debt service coverage if required by Program Obligations**}], based on all sources of Project income including ancillary income.

5. The Escrow, when in the form of cash, shall be held by Lender or a depository institution satisfactory to the Lender and in accordance with Program Obligations. Lender may, at any time, for any reason or no reason, draw upon any letter of credit included in the Escrow and convert the same to cash, which cash shall then be held and disbursed pursuant to the terms of this Agreement. Fees charged by Lender and any interest earned on the Escrow shall be governed by Program Obligations.

6. The Escrow may, at HUD's direction, be subject to immediate application to the Indebtedness if an Event of Default by Borrower occurs at any time.

Each signatory below hereby certifies that each of their statements and representations contained in this Agreement and all their supporting documentation thereto are true, accurate, and complete. This Agreement has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

IN WITNESS WHEREOF, the parties have duly executed this Escrow Agreement for Operating Deficits as of the day and year first above written.

BORROWER:

_____

By_____

_____
Name and Title

LENDER:

_____

By _____

_____
Name and Title

DEPOSITORY INSTITUTION:

_____

By_____

_____
Name and Title

Attachment: Exhibit "A"

Warning:

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

EXHIBIT “A”

Form of Letter of Credit