

Sample

**Mark-to-Market
Rehabilitation Escrow Deposit Agreement**

Form 7.10

_____ Apartments
_____, _____ County
State/Commonwealth of _____
FHA Project No. _____

REHABILITATION ESCROW DEPOSIT AGREEMENT

THIS REHABILITATION ESCROW DEPOSIT AGREEMENT (this "Agreement") is made, as of _____, _____, by and among _____, a _____ { limited/general partnership}[corporation] (the "Owner"), _____, a _____ corporation (the "Escrow Agent"), and _____, acting on behalf of the DEPUTY ASSISTANT SECRETARY OF THE OFFICE OF AFFORDABLE HOUSING PRESERVATION (the "DAS") and the SECRETARY OF HOUSING AND URBAN DEVELOPMENT (the "Secretary"), WASHINGTON, D.C..

RECITALS:

A. The Owner is the owner of { all of/a leasehold interest in } that certain real property located in the { City/Town/Village } of _____, in the County of _____, in the { State/Commonwealth } of _____ (the "Real Property"), on which is constructed a certain rental apartment project known as _____ Apartments [[if FHA insured or HUD-held, add: FHA Project No. _____]] [[if Conv. Refi or Payoff add: formerly FHA Project No. _____]] (the "Project" and, together with the Real Property, the "Property").

B. In connection with, as a condition to and in consideration for the Owner's participation in the Mark-to-Market Program, as authorized by the Multifamily Assisted Housing Reform and Affordability Act of 1997, title V Pub. L. 105-65 (approved on 10/27/97), as amended, 42 U.S.C. 1437fnote (MAHRA) the Owner and the Secretary have entered into that certain Restructuring Commitment dated _____, _____, as amended through the date hereof, pursuant to which the parties have agreed, among other things, that the Owner shall cause certain repairs and/or

improvements to be made to the Project which shall be funded by depositing into escrow pursuant to this Agreement the following funds which are not loan proceeds from a mortgage refinancing: (a) [[if all or a portion of Replacement Reserve escrowed, add: { a portion/all } of the funds held in the Project's reserve for replacements account as of the date hereof]], (b) [[if all or a portion of Residual Receipts Account escrowed, add: { a portion/all } of the funds held in the Project's residual receipts account as of the date hereof,]], (c) [[if state or local Grant add: the proceeds from a Grant/Loan for Repairs/Rehabilitation made by a unit of state or local government in the original principal amount of \$_____, and (d)[[if Section 236(s) Grant add: the proceeds of that certain Section 236(s) Grant (the Rehabilitation Grant) made by HUD to the Owner in the original principal amount of \$_____.]]

NOW, THEREFORE, in consideration of the foregoing premises, the sum of Ten Dollars (\$10.00) in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, for themselves and for their respective successors and assigns, hereby agree as follows:

1. Incorporation of Recitals. The foregoing recitals are hereby incorporated by reference as if fully set forth herein.

2. Deposits into Escrow. The Escrow Agent agrees that the deposits described in this Section 2 (the "Funds") shall be held by the Escrow Agent, in an escrow account (the "Escrow Account") for the benefit of the Owner, in accordance with the terms of this Agreement. The Escrow Agent agrees that the Funds shall be invested in obligations of, or fully guaranteed as to principal by, the United States of America, at the sole direction and discretion of the Escrow Agent. Any and all interest earned on the Funds shall be credited to the Escrow Account.

Initial Deposit. The Owner and the DAS agree that (a) the sum of _____ and ___/100 Dollars (\$_____), representing the 20% contribution made by the Owner (one-half of which constitutes a contingency reserve); (b) the sum of _____ and ___/100 Dollars (\$_____), representing the proceeds of any repair loans or repair grants made to the Owner for Repairs; (c) [[if all or a portion of new first mortgage proceeds escrowed, add: the sum of _____ and ___/100 Dollars (\$_____), representing that portion of the proceeds from a new first mortgage that are intended for repairs and/or rehabilitation;]] (d) [[if all or a portion of Replacement Reserve escrowed, add: the sum of _____ and ___/100 Dollars (\$_____), representing { a portion/all } of the funds currently held in the Project's reserve for replacements account;]] and (e) [[if all or a portion of Residual Receipts Account escrowed, add: the sum of _____

_____ and ____/100 Dollars (\$_____), representing { a portion/all } of the funds currently held in the Project's residual receipts account;]] shall be deposited with the Escrow Agent to be held in the Escrow Account.

3. Agreement to Complete Repairs. The Owner covenants and agrees to complete certain repairs and/or improvements in the aggregate amount of _____ and ____/100 Dollars (\$_____) (the "Repairs"), as set forth in Exhibit A (*the detailed work write-up/cost estimates from the PCA and Restructuring Commitment*) attached hereto and made a part hereof, in accordance with the time schedule set forth therein (the "Schedule"). The Schedule or any part thereof may be extended only with the prior approval of the DAS/Secretary. The Owner agrees to pay all costs necessary for completion of the Repairs without regard to the sufficiency of funds in the Escrow Account. If the cost of completing the Repairs exceeds the amount available in the Escrow Account including the contingency reserve, the Owner may use surplus operating cash flow of the Project to complete the Repairs, otherwise the Owner must use funds from non-project sources. If the amount available in the Escrow Account exceeds the cost of completing the Repairs, any such excess Funds may be used by the Owner to complete additional repairs and/or improvements to the Project that are approved by the DAS; or, if no such approval is granted, such excess Funds that were advanced by HUD shall be remitted to the DAS/Secretary as an additional payment on the principal balance outstanding on the Mortgage Restructuring Note

4. Withdrawals from Escrow Account.

a. Applications for Advances. The Owner may make applications for advances of the Funds from the Escrow Account no more frequently than once in each calendar month. Each application shall be made at least [~~use ten (10) days unless otherwise specified~~] _____ business days prior to the date the advance is desired, and the Mortgagor shall be entitled to only such amounts as may be approved by the Escrow Agent in accordance with the provisions hereof. Each application shall identify (i) the contractors, materialmen and/or suppliers providing services covered thereby, (ii) any "identity of interest" relationship (as that term is defined by the DAS) with the Owner and such contractors, materialmen and/or suppliers, and (iii) such other information as the DAS and/or the Escrow Agent may reasonably request.

b. Conditions Precedent to Advances. At such times as the Owner requests an advance, the completed Repairs shall be inspected by a Physical Inspector who, must meet the qualification requirements specified in Section 4-5 of the Mark-to-Market Operating Procedures Guide, that is retained by the PAE, or the DAS/Secretary (the "Engineer"). The PAE or the DAS/Secretary shall require the Owner to obtain from any contractor, subcontractor or materialman an acknowledgment of payment and release of lien down to the date covered by the last advance of Funds. Such acknowledgement and release shall be prepared in the form required by local lien laws and shall cover all work done, labor

performed and materials (including equipment and fixtures) furnished for the Project. In addition, if the effect of filing, in the public records of the county in which the Project is located, this Agreement and/or the construction contracts or subcontracts under which the Repairs are to be completed will be to relieve the Project from mechanics' and materialmen's liens, the Owner shall cause such instrument(s) to be so filed.

c. **Advances.** The Funds shall be advanced from the Escrow Account based on the actual invoices of contractors, materialmen and suppliers for materials and equipment or services actually provided, less a ten percent (10%) holdback (the "Holdback Amount"). In lieu of the foregoing, if the Owner and the Escrow Agent may agree upon a schedule of the estimated cost of the various categories of work to be completed under this Agreement, Funds shall be drawn from the Escrow Account based on such estimated costs multiplied by the percentage of work completed (as determined by the Engineer), less the Holdback Amount, until all of the Repairs are completed. The Escrow Agent, at its option, may issue joint checks payable to the Owner and to the supplier, materialman, mechanic, subcontractor or other party to whom payment is due in connection with the Repairs. If any contractors, materialmen or suppliers have any "identity of interest" with the Owner, any fees paid to such parties must be reasonable, not in excess of fees payable to non-identity of interest materialmen or suppliers and approved by the Escrow Agent. The Holdback Amount shall be held in the Escrow Account until all of the Repairs have been completed to the satisfaction of the Escrow Agent pursuant to the terms of this Agreement. The Escrow Agent must first disburse all escrowed funds contributed by the Owner, then second from the proceeds of any grants or loans, then third from the proceeds of a new first mortgage.

5. Condition of Repairs. The Owner covenants and agrees that all Repairs shall be done in a good and workmanlike manner, shall be completed free and clear of any mechanics' liens and encumbrances, shall be made strictly in accordance with all applicable ordinances and statutes and in accordance with the requirements of all regulatory authorities and any rating or inspection organization, bureau, association or office having jurisdiction over the Project. The Owner represents and warrants that it has obtained or will, prior to commencement, obtain all necessary permits and approvals from such agencies or authorities necessary for the commencement and completion of the Repairs.

6. Costs and Fees. The Owner shall pay all costs charged by the Physical Inspector under this Agreement when there is a new first mortgage. The PAE [[if not PAE, substitute: DAS]] shall pay to the Escrow Agent simultaneously with the deposit of the Funds a servicing fee equal to { _____ percent (____ %) of the amount of the Funds\$ _____ } to cover the Escrow Agent's costs of administering this Agreement. The Owner shall pay all applicable fees and charges of all agencies or authorities required to issue permits or approvals prior to commencement and/or completion of the Repairs.

7. Right of Entry. The Escrow Agent, the Physical Inspector, and its and their agents shall, at any and all reasonable times, have the right to enter and free access to the Project and the right to inspect all Repairs done, and materials, equipment and fixtures furnished, installed or restored in or about the Property, and to inspect all books, subcontracts and records of the Owner.

8. Events of Defaults; Remedies. It shall be deemed a default by the Owner under this Agreement if, at any time prior to the completion of the Repairs, the Owner (i) abandons the same or ceases work thereon for a period of more than _____ (____) consecutive calendar days {insert appropriate time period, based on type/extent of repairs}, (ii) fails to complete or prosecute the Repairs in a workmanlike manner and in accordance with the Schedule, (iii) allows a mechanic's lien to be filed against the Project (unless such mechanic's lien is promptly bonded off or its payment is otherwise assured to the satisfaction of the Escrow Agent), (iv) otherwise fails to comply with the terms of this Agreement, or (v) is in default, beyond any applicable cure period, under the terms of that certain Use Agreement by and between the Owner and the DAS on behalf of the Secretary of even date herewith or any other agreement between the Owner and the DAS in connection with the Project. If any of the foregoing events occurs, the Escrow Agent shall, within ten (10) calendar days after receipt of notice from the DAS/Secretary pay to the PAE all Funds held in the Escrow Account. In the event of a default by the Owner under this Agreement, the PAE shall proceed to complete said work in accordance with the Drawings and Specifications, if applicable, and pay the cost thereof from the Funds tendered to it by the Escrow Agent and for this purpose the Owner hereby irrevocably authorizes and empowers the PAE [[if not PAE, substitute: DAS]] to do and perform for it, the said Owner and in its name, place and stead, with full powers of substitution, all matters and things which the said PAE [[if not PAE, substitute: DAS]] shall in its judgment deem necessary and proper to be done to effectuate the completion of the said repairs and/or rehabilitation in accordance with the Drawings and Specifications, if applicable and to apply the moneys herewith deposited to the payment of debts contracted or incurred for work done or for materials furnished therefor, or either, in and about said work and for all expenses, costs and charges in connection therewith, and this power of attorney shall be the PAE's [[if not PAE, substitute: DAS']] full and sufficient authority, and the orders given and signed by the PAE as attorney-in-fact for the Owner shall be good and sufficient vouchers for all payments made by virtue thereof. Further, in such event the Owner hereby irrevocably authorizes and empowers the PAE [[if not PAE, substitute: DAS]] to enter into and upon the said Project and take charge thereof together with all materials and appliances thereunto belonging, and in the name of the Owner, as attorney-in-fact, to call upon and require the several contractors for work to be done and for materials to be furnished in and about the completion of said improvements to proceed to complete the said improvements in accordance with the Drawings and Specifications, if any, and to do whatsoever in the PAE's judgment shall be necessary to be done to secure the completion of the said improvements according to the Drawings and Specifications, if any, and in accordance with the instructions of OAH/ HUD. In the event the work is completed by the PAE [[if not PAE, substitute: DAS]] in accordance with provisions hereof, any unexpended balance of the sum deposited with the Escrow Agent shall be used as an additional payment on the Mortgage Restructuring Note. The PAE [[if not PAE,

substitute: DAS]] shall in no event be responsible for the completion of the said work beyond the expenditure of the sum herewith deposited and if said sum is insufficient for such purpose the PAE [[if not PAE, substitute: DAS]] shall be under no obligation to proceed further or to demand or obtain additional sums from the Owner. This power of attorney is granted with full power of substitution and the Owner hereby specifically agrees that all powers granted to the PAE hereunder may be assigned by it to OAH/HUD.

9. Obligations and Liability of Escrow Agent. The Escrow Agent shall not be required to take any action hereunder without compensation or indemnity provided to the Escrow Agent with respect to such action. The Escrow Agent shall be entitled to request the advice of the DAS/Secretary with respect to any matter or issue arising hereunder concerning which the Escrow Agent requires final determination and shall not be required to take any action hereunder before receiving such advice of the DAS/Secretary. The Escrow Agent shall be entitled to rely on the authenticity, truth and accuracy of all documents transmitted to it in connection with the performance of its duties hereunder and shall not be required to undertake any independent due diligence to determine such authenticity, truth or accuracy. The Escrow Agent shall have no liability for the performance of its duties hereunder except with regard to its own negligence or default.

10. PAE as Escrow Agent. In the event that the PAE acts as the Escrow Agent, the name Escrow Agent wherever used herein shall be construed as referring to said PAE acting in the capacity of Escrow Agent.

11. Amendment. This Agreement may not be modified except by an instrument in writing executed by each of the parties hereto.

12. Severability. Notwithstanding anything herein contained, if any one or more of the provisions of this Agreement shall for any reason whatsoever be held to be illegal, invalid or unenforceable in any respect, such illegality, invalidity or unenforceability shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such illegal, invalid or unenforceable provision had never been contained herein.

13. Governing Law. This Agreement shall be governed by all applicable federal laws and the laws of the state in which the Project is located.

14. Counterparts. This Agreement may be executed in any number of counterparts, all of which counterparts shall be construed together and shall constitute but one agreement.

[Remainder of Page Intentionally Left Blank

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Deposit Agreement to be executed and made effective as of the date first above written.

WITNESS:

OWNER:

a _____ [limited/general
partnership][corporation]

By: _____

Name: _____

Title: _____

WITNESS:

PARTICIPATING ADMINISTRATIVE ENTITY:

a _____ corporation

By: _____

Name: _____

Title: _____

WITNESS/ATTEST:

ESCROW AGENT:

a _____ corporation

By: _____

Name: _____

Title: _____

WITNESS:

DEPUTY ASSISTANT SECRETARY OF OFFICE
OF AFFORDABLE HOUSING PRESERVATION:

BY: _____

Authorized Agent

**EXHIBIT A
REPAIRS**

Items to Completed during First Year

Estimated Cost

Items to Completed during Second Year

Estimated Cost

Items to Completed during Third Year

Estimated Cost