



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

November 8, 2022

MEMORANDUM FOR: All Regional Directors, Operations Officers, Production Division Directors, Asset Management Division Directors, and Satellite Office Asset Management Division Directors/Satellite Office Coordinators

Digitally signed by: Thomas R. Davis
Date: 2022.11.08 18:12:59 -05'00'

FROM: Thomas R. Davis, Director, Office of Recapitalization, HTC

SUBJECT: Multifamily Regional Office review of Post Mark-to-Market (“PM2M”) transactions on a property (“M2M Property”) restructured under the Mark-to-Market program (“M2M”) when no HUD-held M2M Debt will remain after closing

Purpose and Scope

This Memorandum, with the attached Table provides guidance to facilitate the review, consideration, and execution of the documents associated with:

- (a) PM2M transaction requests when the M2M originated debt is no longer held by the Secretary, either because the debt has been paid in full or because the debt is held by another party;
- (b) PM2M transaction requests when, upon conclusion of such transaction, all remaining Secretary-held M2M debt will be paid in full;
- (c) Modification of the M2M Use Agreement (“M2M UA”) to extend its term when HUD has approved a request by a Purchaser or Owner for the early termination and subsequent renewal of the Full Mark-to-Market Renewal Contract (“HAP Contract”); and
- (d) Release of an Accommodation Agreement upon the expiration of the transfer restriction period established in the Accommodation Agreement and documentation of such release in the public land records.

To date, in the instances referenced above, the Office of Recapitalization has provided project-specific guidance to permit the Account Executive in the Multifamily field office to review the proposed transaction in conjunction with the Account Executive’s asset management review and to allow for Field Office Directors to execute the assumptions and modifications of the M2M UA.

The purpose of this Memorandum is to standardize this guidance, allowing the Account Executive to complete their asset management review and for the Regional Director to sign documents at the field office level without the need for project-specific guidance.

The transactions referenced above may include a sale, transfer, and/or refinancing of a M2M Property. **This guidance does not apply if there is or will be M2M Secretary-held debt on**

the M2M Property after the sale, transfer, or refinance. For these cases, please refer to [Notice H 2021-02](#) (“PM2M Notice”) or a successor notice or guidance for instructions.

Background

For a M2M rent and debt restructuring (“M2M Debt Restructuring”), the Owner must commit in a recorded M2M UA to maintain certain affordability and use restrictions on the M2M Property for a minimum term of thirty (30) years. This commitment is required by both statute and the M2M regulations.¹ If the M2M Property is later sold, the new Owner (“Purchaser”) must expressly assume all obligations and duties under the M2M UA, including the obligation and duty to maintain the affordability and use restrictions for its remaining term. All new and existing financing for such sale, transfer and/or a refinancing must be or remain subordinate to the M2M UA. To facilitate the sale, transfer, and/or refinancing of the M2M Property, the Purchaser or Owner may request the early termination and subsequent renewal of the HAP Contract with a term of up to twenty (20) years. If HUD grants the request, the Purchaser or Owner must agree to a Preservation Exhibit, which must be attached to the renewal contract, that provides for the automatic renewal of the HAP contract, upon expiration, with a term equal to at least the number of years that remained on the terminated HAP Contract at termination. For projects that received market rents at closing, HUD further requires an extension to the term of the M2M UA to make it coterminous with the subsequent renewal of the HAP Contract. If the term of the M2M UA is extended, all new and existing financing must be or remain subordinate to the M2M UA, as extended. Regardless of the nature of the PM2M transaction, all parties must ensure that the M2M UA remains in first priority position on title and in full force and effect for the duration of its term.

Legal Review Required

Please note that HUD Office of General Counsel (OGC) field counsel must review the PM2M documents that will be used to assume and/or modify a M2M UA and other documents that may be required for the PM2M transaction, in addition to the non-PM2M transactional documents (e.g., to effectuate a Transfer of Physical Assets (TPA) and/or assignment and assumption of the HAP Contract). The OGC field counsel review will ensure legal sufficiency of the documents and compliance with this guidance.

Required Documents and Considerations for Each Transaction Type

This Memorandum addresses key PM2M considerations and requirements for transactions that are not covered by the PM2M Notice². It complements other program requirements that must be satisfied by an Owner or Purchaser in such transactions. All documents for transactions covered by this Memorandum are subject to the review and approval of the Multifamily field office with jurisdiction over the M2M Property.

Considerations for Maintaining the Priority of the M2M UA by PM2M Transaction Type

At the closing of a M2M Debt Restructuring, the M2M UA is always recorded among the land records prior to the documents that secure the new and restructured M2M financing. To maintain this priority and thus avoid being vulnerable to a foreclosure, the M2M UA must never be subordinated or become subordinate to any financing, new or old, or other liens that may

¹ Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) § 514(e)(6); 24 C.F.R. 401.408.

² Housing Notice 2021-02 (<https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-02hsgn.pdf>).

encumber the M2M Property. For any PM2M transaction covered by this Memorandum, HUD field counsel should review the title to the M2M Property (e.g., a title abstract, commitment, pro-forma policy, etc.) to confirm the M2M UA will continue to remain superior on title to all mortgages and liens. Additional guidance for the specific types of PM2M transactions contemplated under this Memorandum is outlined below.

A. *Sale/Transfer/TPA without new financing.*

Upon the sale or transfer of the M2M Property during the term of the M2M UA, the Purchaser must assume the M2M UA. For such assumption, the form Assignment and Assumption of Mark-to-Market Use Agreement is attached as Exhibit 1. The Assignment and Assumption of Mark-to-Market Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property, without any intervening mortgage or lien, unless a legal determination is made by HUD that such mortgage or lien does not change the original priority of the M2M UA after it is assumed by the Purchaser.

B. *Sale/Transfer/TPA with new financing.*

Upon the sale or transfer of the M2M Property during the term of the M2M UA, the Purchaser must assume the M2M UA. However, when new financing is part of the transaction, additional due diligence is required to ensure the M2M UA will maintain its original priority over all mortgages and liens. Additionally, either (i) the Assignment and Assumption of Mark-to-Market Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property, prior to all new financing, or (ii) the Purchaser must obtain from each mortgagee a subordination agreement satisfactory to HUD that subordinates such mortgage(s) to the M2M Use Agreement. A form Subordination Agreement is attached as Exhibit 2.

C. *Assignment/Renewal of HAP Contract.*³

In some PM2M transactions, the Owner or Purchaser may request the early termination and subsequent renewal of the HAP Contract with a term of up to twenty (20) years, typically to facilitate a refinancing. As a policy matter, HUD treats such a request from the Owner or Purchaser of a project that closed with market rents differently from one that closed with exception rents. For market rent projects, HUD may grant the request only if the Owner agrees to an extension of the term of the M2M UA if an extension is necessary to make it coterminous with the subsequent renewal of the HAP Contract. HUD further requires a Preservation Exhibit for a term equal to at least the number of years that remained on the HAP contract at the time it was terminated.⁴ (See Exhibits 3A. and 3B., respectively, for sample forms for the Modification of M2M Use Agreement for an Owner and the Assumption and Modification of M2M Use Agreement for a Purchaser, with provisions to extend the term.) To prevent the unnecessary payment of

³ The appropriate form of the Full Mark-to-Market Renewal Contract is form HUD-9642 (REV 03-15-2012) (or successor revision or form).

⁴ See Table: “HAP Assignment/Renewal with no M2M Debt & Modification of the M2M Use Agreement” for M2M Use Agreement requirements when a M2M project was originally restructured with Exception Rents vs. Non-Exception Rents. The Table also details when and how a Preservation Exhibit may be used to satisfy lender requirements in Exception Rent scenarios.

exception rents beyond the statutorily required minimum 30-year term of the M2M UA, HUD limits the term of the subsequent renewal of the HAP Contract for exception rent projects to the number of years remaining on the 30-year M2M UA. The Owner or Purchaser must also agree to a Preservation Exhibit for a term equal to at least the number of years that remained on the HAP Contract at the time it was terminated. In cases in which an overall twenty (20) year term is a condition of financing for an exception rent project, the Preservation Exhibit may be completed to require a term equal to the number of years needed, when added to the renewal term of the HAP Contract, to comprise a 20-year commitment.

At the sale or transfer of the M2M Property, the Assumption and Modification of M2M Use Agreement must be recorded among the appropriate land records immediately after the Purchaser obtains title to the M2M Property and must be recorded prior to the recording of any new mortgages and liens (“New Mortgage(s)”). If any existing mortgages or liens (“Existing Mortgages”) will remain as an encumbrance on the M2M Property and/or if any of the New Mortgages will be recorded prior to the recording of the Assumption and Modification of M2M UA, then the Purchaser must obtain from the mortgagee(s)/lienholder(s) of each Existing Mortgages and New Mortgage(s), a subordination agreement satisfactory to HUD that subordinates such Existing Mortgages and New Mortgage(s) to the Assumption and Modification of M2M UA. A form Subordination Agreement is attached as Exhibit 2.

D. Release of an Accommodation Agreement.

Certain PM2M transactions involve the assignment of the M2M originated and Secretary-held loans⁵ to a Purchaser in exchange for a twenty-year extension to the term of the M2M UA and an agreement (the “Accommodation Agreement”) made by the Purchaser to forgo selling the M2M Property for a period of time (the “Lockout Period”), which is fifteen (15) years under the PM2M Notice and was ten (10) years under prior HUD notices. Upon the expiration of the Lockout Period under an Accommodation Agreement, the Accommodation Agreement may be released utilizing the form Release from Land Records of Accommodation Agreement attached as Exhibit 4.

For questions regarding this Memorandum, please contact Kara Williams-Kief, Housing Senior Advisor in the Office of Recapitalization’s Affordable Housing Transaction Division at (202) 402-5454 or kara.s.williams-kief@hud.gov.

⁵ MAHRA § 517(a)(5) provides that: “The Secretary may modify the terms of the second mortgage, assign the second mortgage to the acquiring organization or agency, or forgive all or part of the second mortgage ... if the project is acquired ... by a tenant organization or tenant-endorsed community-based nonprofit or public agency.”

Attachments:

Table:	HAP Assignment/Renewal with no M2M Debt & Modification of the M2M Use Agreement
Exhibit 1:	Assignment and Assumption of Mark-to-Market Use Agreement
Exhibit 2:	Subordination Agreement – Mortgage/Deed of Trust Loan to Mark-to-Market Use Agreement
Exhibit 3 A:	Modification of Mark-to-Market Use Agreement
Exhibit 3 B:	Assignment, Assumption, and Modification of Mark-to-Market Use Agreement
Exhibit 4:	Release from Land Records of Accommodation Agreement

TABLE: HAP ASSIGNMENT/RENEWAL WITH NO M2M DEBT & MODIFICATION OF THE M2M USE AGREEMENT

Scenarios	M2M Rents	HAP Contract Status	Changes to M2M Use Agreement	Subordination Agreement and Recordation Requirements
Sale/Assumption with Renewal	Non-Exception Rents	Purchaser requests early termination and subsequent renewal of the HAP Contract with a term that exceeds the term of the M2M UA.	Yes – M2M Use Agreement must be <u>assumed and modified to extend the term to be coterminous with the HAP Contract</u> using Exhibit 3B.	1) Use Exhibit 2 for each mortgage loan, new and existing, or 2) Record the Assumption and Modification of M2M Use Agreement in front of new mortgage loan and use Exhibit 2 for existing mortgage loans if determined necessary to ensure the preservation against foreclosure of the M2M Use Agreement as extended.
Sale/Assumption with No Renewal	Non-Exception Rents	Purchaser assumes the existing HAP Contract.	Yes - M2M Use Agreement must be <u>assumed</u> by the Purchaser using Exhibit 1.	Ideally, the Assumption of M2M Use Agreement should be recorded before the new financing; however, because the Use Agreement is only being assumed as-is, subject to state law, it is unlikely a subordination agreement will be required. If a subordination agreement is required, Exhibit 2 may be used.
Refinance with Renewal	Non-Exception Rents	Owner requests early termination and subsequent renewal of HAP Contract with a term that exceeds the term of the M2M UA.	Yes – M2M Use Agreement must be <u>modified</u> using Exhibit 3A	1) Use Exhibit 2 or 2) Record the Modification of M2M Use Agreement in front of the new mortgage loan.
Refinance with No Renewal	Non-Exception Rents	The existing HAP Contract remains in place.	No – M2M Use Agreement (should be) on record and have a term of (at least) 30 years.	N/A – the M2M Use Agreement is recorded in front of the new financing and without an assumption and/or modification of use agreement a subordination agreement should not be required.
Sale/Assumption with Exception Rents	Exception Rents	Purchaser requests early termination and subsequent renewal of HAP Contract, the term of which may not exceed the remaining term of the M2M UA. Preservation Exhibit required with a term equal to at least the term that remained on the HAP Contract at the time of termination. If lender requires an overall 20-year term (including the term of the Preservation Exhibit), the Preservation Exhibit may be given a term equal to the number of years needed, when added to the term of the subsequent renewal, to comprise a 20-year term.	Yes - M2M Use Agreement must be <u>assumed</u> by the Purchaser using Exhibit 1	Ideally, the Assumption of M2M Use Agreement should be recorded before the new financing, but because the Use Agreement is only being assumed as-is, subject to state law, it is unlikely a subordination agreement will be required. If a subordination agreement is required, Exhibit 2 may be used.
Refinance if Exception Rents	Exception Rents		No – M2M Use Agreement (should be) on record and have a term of 30 years.	N/A - the M2M Use Agreement is recorded in front of the new financing and without an assumption and/or modification of use agreement a subordination agreement is not needed.

{insert name of property}
{insert location of property}
{insert FHA#}

I

{EXHIBIT 1}

ASSIGNMENT AND ASSUMPTION OF M2M USE AGREEMENT

THIS ASSIGNMENT AND ASSUMPTION OF M2M USE AGREEMENT (“Agreement”) is made as of the ____ day of _____, _____, by and between ____ **{INSERT NAME AND STATE OF ORGANIZATION OF SELLER}** _____, a _____ (“Seller”), _____ **{INSERT NAME AND STATE OF ORGANIZATION OF ENTITY ACQUIRING THE SUBJECT PROPERTY}** _____, a _____ (the “Purchaser”), and **SECRETARY OF HOUSING AND URBAN DEVELOPMENT**, Washington D.C. (the “Secretary” or “HUD”).

WITNESSETH:

WHEREAS, Seller was the owner of certain improved real property located in the city of _____, the county of _____, in the State/Commonwealth of _____ as more particularly described in Exhibit A, on which is constructed a rental apartment project known as _____ (collectively, “Property”);

WHEREAS, Seller (which term includes a predecessor to Seller in title to the Property) and HUD entered into that certain Use Agreement for Multifamily Projects Participating in the Mark-to-Market Program Under the Multifamily Assisted Housing Reform and Affordability Act of 1997” (as amended through the date of this Agreement “M2M Use Agreement”), dated {insert date of M2M Use Agreement} _____, 20__ , and recorded on _____ {insert date M2M Use Agreement was recorded} in {insert deed book and page or equivalent reference} in the Office of the {insert name of office where deeds and mortgages are recorded} (the “Land Records”);

WHEREAS, the M2M Use Agreement sets forth certain obligations requiring the use of the Property, affordability of the units rented, and similar restrictions, pursuant to section 514(e)(6) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Pub. L. No. 105-65, 111 STAT. 1384), and the Restructuring Commitment between the Seller (or a predecessor-in-title) and HUD (“Restructuring Commitment”);

WHEREAS, the Seller and Purchaser entered into a contract (“Purchase and Sale Agreement”) pursuant to which Seller agreed to sell, and Purchaser agreed to purchase the Property;

{insert name of property}
{insert location of property}
{insert FHA#}

WHEREAS, pursuant to the Purchase and Sale Agreement, the Full Mark-to-Market Renewal Contract (“HAP Contract”) is being assigned (“Assignment”) to Purchaser and the Purchaser has agreed to assume the obligations under the HAP Contract and M2M Use Agreement; and

WHEREAS, the Seller desires, with the consent of the Secretary, to assign all its rights and obligations in and to the M2M Use Agreement as herein provided, effective upon the recording among the Land Records of the deed to the Property into the Purchaser (“Effective Date”).

NOW, THEREFORE, in consideration of the Assignment, the mutual agreements contained herein and other good and valuable consideration, it is agreed as follows:

1. The foregoing recitals are hereby incorporated by reference as if fully set forth herein.
2. Seller and the Secretary hereby agree to the assignment of the undertakings and obligations contained in the M2M Use Agreement from the Seller to the Purchaser and its successors and assigns. Nothing in this Agreement shall waive, compromise, impair, or prejudice any right HUD may have against Seller for any violation of the M2M Use Agreement that may have occurred prior to the Effective Date.
3. Purchaser hereby assumes all duties, obligations and restrictions set forth in the M2M Use Agreement and shall be responsible for all such duties, obligations and restrictions arising thereunder from and after the Effective Date. Purchaser further agrees to require any successor parties in interest to the subject property to explicitly assume all duties, obligations and restrictions set forth in the M2M Use Agreement throughout the Expiration Date of the M2M Use Agreement.
4. The Seller made a binding commitment with the Secretary in the HAP Contract and/or the Restructuring Commitment to accept renewals of the HAP Contract, if offered by the Secretary. Purchaser acknowledges and agrees that such binding commitment continues hereafter, and agrees to accept offers from the Secretary to renew such HAP Contract(s) if (a) such renewal(s) do not extend the term of such contract beyond the Expiration Date (either defined herein or in the M2M Use Agreement), and (b) each such renewal offer is consistent with the terms and conditions of the then-expiring contract and such renewal offer is at the contract rents in effect on the contract expiration date, as adjusted annually by an operating cost adjustment factor determined by HUD. Any such renewal contract shall only be made from budget authority appropriated by the Congress and available for this purpose.
5. This Agreement shall be governed by all applicable federal laws and the laws of the state in which the Property is located.

{insert name of property}
{insert location of property}
{insert FHA#}

6. This Agreement may be executed in counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one and the same Agreement.

7. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective successors and/or assigns.

8. Except as amended herein, the M2M Use Agreement shall be and remains in full force and effect in accordance with its terms.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year written above.

(SIGNATURES AND ACKNOWLEDGMENTS ARE ON THE FOLLOWING PAGES)

{insert name of property}
{insert location of property}
{insert FHA#}

SELLER:

**{INSERT NAME AND STATE OF
ORGANIZATION OF ENTITY
SELLING THE SUBJECT
PROPERTY}**

By:

By: _____

Name:

Title:

{ Add Acknowledgment }

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

PURCHASER:

**{INSERT NAME AND STATE OF
ORGANIZATION OF ENTITY
ACQUIRING THE SUBJECT
PROPERTY}**

By:

By: _____

Name:

Title:

{ Add Acknowledgment }

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

HUD:

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By: _____

Authorized Agent

Title: _____

{ Add Acknowledgment }

{insert name of property}
{insert location of property}
{insert FHA#}

Exhibit A

[Legal Description]

{insert name of property}
{insert location of property}
{insert FHA#}

{EXHIBIT 2}

**SUBORDINATION AGREEMENT
(MORTGAGE LOAN TO MARK-TO-MARKET USE AGREEMENT)**

THIS SUBORDINATION AGREEMENT (this "Agreement") is made, as of _____, 20__, by and among _____, a _____ (the "Mortgagee"), _____, a _____ ("Owner"), and SECRETARY OF HOUSING AND URBAN DEVELOPMENT, WASHINGTON (the "Secretary" or "HUD").

RECITALS:

A. Owner owns all of that certain real property located in the City of _____, in the County of _____, in the State of _____, as more particularly described in Exhibit A attached hereto and made a part hereof (the "Real Property"), on which is constructed that certain rental apartment project known as _____ Apartments, FHA Project No/IREMS No. ____ - _____, if applicable (the "Project" and, together with the Real Property, the "Property").

B. The Property is or will be encumbered by that certain mortgage loan (the "Loan") made to or assumed by the Owner, which Loan is evidenced by that certain {select appropriate Deed of Trust/Mortgage} Note dated _____, _____, in the original principal amount of _____ and _____/100 Dollars (\$_____) (as amended and/or assigned through the date hereof, the "Mortgage Note"), and is secured by that certain {select appropriate Deed of Trust/Mortgage} of even date therewith recorded on _____, _____ among the land records of the jurisdiction in which the Property is located (the "Land Records") as Instrument No. _____ (as amended and/or assigned through the date hereof, the "Mortgage"), and certain other instruments executed in connection with the Loan (the documents evidencing the Loan, including without limitation the Mortgage Note and the Mortgage, hereinafter shall be referred to collectively as the "Loan Documents").

C. Owner, or the Owner's predecessor in title to the Property, and HUD entered into that certain Use Agreement for Multifamily Projects Participating in the Mark-to-Market Program Under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (as amended through the date hereof, "M2M Use Agreement"), dated {insert date of M2M Use Agreement} _____, 20__, and recorded {insert date} in {insert deed book and page or equivalent reference} in the Land Records;

{insert name of property}
{insert location of property}
{insert FHA#}

D. The M2M Use Agreement sets forth certain obligations requiring the use of the Property, affordability of the units rented, and similar restrictions, pursuant to section 514(e)(6) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Pub. L. No. 105-65, 111 STAT. 1384), which obligations must remain in full force and effect for the full term of the M2M Use Agreement.

E. With respect to the Owner's obligations to HUD, Owner has requested that the Mortgagee confirm that the Loan and Loan Documents are, and will remain, subordinate to the M2M Use Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, the sum of Ten Dollars (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which is 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. Subordination. The liens, encumbrances, charges, operations and effects of the Loan and Loan Documents are hereby fully subordinated to the charge, operation and effect of the M2M Use Agreement and shall at all times hereafter be and remain inferior to the M2M Use Agreement. The parties hereto agree to enter into such further subordination instruments as may be reasonably requested from time to time.

3. Other Agreements. The Mortgagee represents and warrants that it has not and will not execute any other agreements with provisions contradictory or in opposition to the provisions of this Agreement and that, in any event, the provisions of this Agreement are paramount and controlling as to the rights and obligations set forth herein and supersede any other conflicting requirements.

4. Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and/or assigns.

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

6. 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

{insert name of property}
{insert location of property}
{insert FHA#}

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.

7. Headings. The headings and titles to the sections of this Agreement are inserted for convenience only and shall not be deemed a part hereof nor affect the construction or interpretation of any provisions hereof.

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

9. Counterparts. This Agreement may be executed in counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one and the same Agreement.

(SIGNATURES AND ACKNOWLEDGMENTS ARE ON THE FOLLOWING PAGES)

{insert name of property}
{insert location of property}
{insert FHA#}

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

MORTGAGEE:

By:_____

Name:_____

Title:_____

{Add Acknowledgment}

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

OWNER:

By: _____

Name: _____

Title: _____

{Add Acknowledgment}

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

HUD:

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By: _____

Authorized Agent: _____

(Printed) Name: _____

Title: _____

{ Add Acknowledgment }

{insert name of property}
{insert location of property}
{insert FHA#}

{insert name of property}
{insert location of property}
{insert FHA#}

{EXHIBIT 3A}

MODIFICATION OF MARK-TO-MARKET USE AGREEMENT

THIS MODIFICATION OF MARK-TO-MARKET USE AGREEMENT (“Agreement”) is made as of the ____ day of _____, _____, by and between ____ **{INSERT NAME AND STATE OF ORGANIZATION OF OWNER}**_____, a _____ (“Owner”), and **SECRETARY OF HOUSING AND URBAN DEVELOPMENT**, Washington D.C. (the “Secretary” or “HUD”).

WITNESSETH:

WHEREAS, Owner owns certain improved real property located in the city of _____, county of _____, State/Commonwealth of _____ as more particularly described in Exhibit A, on which is constructed a rental apartment project known as _____ (collectively, “Property”);

WHEREAS, Owner (which term includes a predecessor to Owner in title to the Property) entered into that certain Use Agreement for Multifamily Projects Participating in the Mark-to-Market Program Under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (as amended through the date of this Agreement “M2M Use Agreement”), dated *{insert date of M2M Use Agreement}* _____, 20____, and recorded *{insert date M2M Use Agreement was recorded}* in *{insert deed book and page or equivalent reference}* _____ in the Office of the *{insert name of office where deeds and mortgages are recorded}* (the “Land Records”);

WHEREAS, the M2M Use Agreement sets forth certain obligations requiring the use of the Property, affordability of the units rented, and similar restrictions, pursuant to section 514(e)(6) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Pub. L. No. 105-65, 111 STAT. 1384), and the Restructuring Commitment between the Owner or Owner’s predecessor in title and HUD (“Restructuring Commitment”);

WHEREAS, Owner and HUD have agreed to 1) an early termination of the Full Mark-to-Market Renewal Contract (“Terminated HAP Contract”), 2) a renewal of the Terminated HAP Contract that benefits the Property (“HAP Renewal Contract”), and 3) extend the term of the M2M Use Agreement so it becomes coterminous with the HAP Renewal Contract.

{insert name of property}
{insert location of property}
{insert FHA#}

NOW, THEREFORE, in consideration of the recitals, the mutual agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed as follows:

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

2. Owner hereby acknowledges and agrees that the Expiration Date, as defined and used in the M2M Use Agreement, is hereby extended to and hereafter means _____, 20__.

3. Owner made a binding commitment with the Secretary in the Terminated HAP Contract and/or the Restructuring Commitment to accept renewals of the HAP Renewal Contract, if offered by the Secretary. Owner acknowledges and agrees that such binding commitment continues hereafter, and agrees to accept offers from the Secretary to renew such HAP Renewal Contract(s) if (a) such renewal(s) do not extend the term of the M2M Use Agreement beyond the Expiration Date (as defined herein), and (b) each such renewal offer is consistent with the terms and conditions of the then-expiring contract, and (c) such renewal offer is at the contract rents in effect on the contract expiration date, as adjusted annually by an operating cost adjustment factor determined by HUD. Any such renewal contract shall only be made from budget authority appropriated by the Congress and available for this purpose.

4. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective successors and/or assigns. Owner hereby agrees to require any such successors and/or assigns to explicitly assume all duties, obligations and restrictions set forth in the M2M Use Agreement throughout the Expiration Date, as may be extended from time to time.

5. This Agreement shall be governed by all applicable federal laws and the laws of the state in which the Property is located.

6. This Agreement may be executed in counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one and the same Agreement.

7. Except as amended herein, the M2M Use Agreement shall be and remains in full force and effect in accordance with its terms.

(SIGNATURES AND ACKNOWLEDGMENTS ARE ON THE FOLLOWING PAGES)

{insert name of property}
{insert location of property}
{insert FHA#}

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year written above.

OWNER:

By:

By: _____

Name:

Title:

{ Add Acknowledgment }

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

HUD:

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By: _____
Authorized Agent
Title: _____

{ Add Acknowledgment }

{insert name of property}
{insert location of property}
{insert FHA#}

Exhibit A

[Legal Description]

{insert name of property}
{insert location of property}
{insert FHA#}

{EXHIBIT 3B}

ASSIGNMENT, ASSUMPTION AND MODIFICATION
OF MARK-TO-MARKET USE AGREEMENT
(Not QNP)

THIS ASSIGNMENT, ASSUMPTION AND MODIFICATION OF M2M USE AGREEMENT (“Agreement”) is made as of the ____ day of _____, _____, by and between ____ ***{INSERT NAME AND STATE OF ORGANIZATION OF SELLER}***_____, a _____ (“Seller”), _____ ***{INSERT NAME AND STATE OF ORGANIZATION OF ENTITY ACQUIRING THE SUBJECT PROPERTY}***_____, a _____ (the “Purchaser”), and **SECRETARY OF HOUSING AND URBAN DEVELOPMENT**, Washington D.C. (the “Secretary” or “HUD”).

WITNESSETH:

WHEREAS, Seller was the owner of certain improved real property located in the city of _____, county of _____, State/Commonwealth of _____, as more particularly described in Exhibit A, on which is constructed a rental apartment project known as _____ (collectively, “Property”);

WHEREAS, Seller (which term includes a predecessor to Seller in title to the Property) and HUD entered into that certain Use Agreement for Multifamily Projects Participating in the Mark-to-Market Program Under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (as amended through the date of this Agreement “M2M Use Agreement”), dated {insert date of M2M Use Agreement} _____, 20__ , and recorded {insert date M2M Use Agreement is recorded} in {insert deed book and page or equivalent reference} in the Office of the {insert name/location in jurisdiction where deeds and mortgages are recorded} (the “Land Records”);

WHEREAS, the M2M Use Agreement sets forth certain obligations requiring the use of the Property, affordability of the units rented, and similar restrictions, pursuant to section 514(e)(6) of the Multifamily Assisted Housing Reform and Affordability Act of 1997 (Pub. L. No. 105-65, 111 STAT. 1384), and the Restructuring Commitment between the Seller and HUD (“Restructuring Commitment”);

WHEREAS, the Seller and Purchaser entered into a contract (“Purchase and Sale Agreement”) pursuant to which Seller agreed to sell, and Purchaser agreed to purchase the Property;

WHEREAS, Purchaser and HUD have agreed to 1) an early termination of the Full Mark-to-Market Renewal Contract (“Terminated HAP Contract”), 2) a renewal of

{insert name of property}
{insert location of property}
{insert FHA#}

the Terminated HAP Contract that benefits the Property (“HAP Renewal Contract”), and 3) extend the term of the M2M Use Agreement so it becomes coterminous with the HAP Renewal Contract.

WHEREAS, pursuant to the Purchase and Sale Agreement, the Full Mark-to-Market Renewal Contract (“HAP Contract”) is being assigned (“Assignment”) to Purchaser and the Purchaser has agreed to assume the obligations under the HAP Contract and M2M Use Agreement, and extend the term of the M2M Use Agreement so it becomes coterminous with the HAP Contract; and

WHEREAS, the Seller desires, with the consent of the Secretary, to assign all its rights and obligations in and to the M2M Use Agreement as herein provided, effective upon the recording among the Land Records of the deed to the Property into the Purchaser (“Effective Date”).

NOW, THEREFORE, in consideration of the Assignment, the mutual agreements contained herein and other good and valuable consideration, it is agreed as follows:

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

2. Seller and the Secretary hereby agree to the assignment of the undertakings and obligations contained in the M2M Use Agreement from the Seller to the Purchaser and its successors and assigns subject to the extension to the Expiration Date as provided hereinbelow. Nothing in this Agreement shall waive, compromise, impair, or prejudice any right HUD may have against Seller for any violation of the M2M Use Agreement that may have occurred prior to the Effective Date.

3. Purchaser hereby assumes all duties, obligations and restrictions set forth in the M2M Use Agreement and shall be responsible for all such duties, obligations and restrictions arising thereunder from and after the Effective Date. Purchaser further agrees that the Expiration Date, as defined in the M2M Use Agreement is hereby extended to and hereafter means _____, 20___. Purchaser further agrees to require any successor parties in interest to the subject property to explicitly assume all duties, obligations and restrictions set forth in the M2M Use Agreement throughout the Expiration Date of the M2M Use Agreement, as may be extended from time to time.

4. The Seller made a binding commitment with the Secretary in the Terminated HAP Contract and/or the Restructuring Commitment to accept renewals of the HAP Renewal Contract, if offered by the Secretary. Purchaser acknowledges and agrees that such binding commitment continues hereafter, and agrees to accept offers from the Secretary to renew such HAP Renewal Contract(s) if (a) such renewal(s) do not extend the term of the M2M Use Agreement beyond the Expiration Date (as extended herein), and (b) each such renewal offer is consistent with the terms and conditions of the then-

{insert name of property}
{insert location of property}
{insert FHA#}

expiring contract and such renewal offer is at the contract rents in effect on the contract expiration date, as adjusted annually by an operating cost adjustment factor determined by HUD. Any such renewal contract shall only be made from budget authority appropriated by the Congress and available for this purpose.

5. This Agreement shall be governed by all applicable federal laws and the laws of the state in which the Property is located.

6. This Agreement may be executed in counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one and the same Agreement.

7. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective successors and/or assigns.

8. Except as amended herein, the M2M Use Agreement shall be and remains in full force and effect in accordance with its terms.

(SIGNATURES AND ACKNOWLEDGMENTS ARE ON THE FOLLOWING PAGES)

{insert name of property}
{insert location of property}
{insert FHA#}

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year written above.

SELLER:

**{ INSERT NAME AND STATE OF
ORGANIZATION OF ENTITY
SELLING THE SUBJECT
PROPERTY }**

By:

By: _____

Name:

Title:

{ Add Acknowledgment }

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

PURCHASER:

**{INSERT NAME AND STATE OF
ORGANIZATION OF ENTITY
ACQUIRING THE SUBJECT
PROPERTY}**

By:

By: _____

Name:

Title:

{ Add Acknowledgment }

(SIGNATURES CONTINUED ON NEXT PAGE)

{insert name of property}
{insert location of property}
{insert FHA#}

HUD:

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By: _____
Authorized Agent
Title: _____

{ Add Acknowledgment }

{insert name of property}
{insert location of property}
{insert FHA#}

Exhibit A

[Legal Description]

{insert name of property}
{insert location of property}
{insert FHA#}

{EXHIBIT 4}

RELEASE FROM LAND RECORDS OF ACCOMMODATION AGREEMENT

BE ADVISED THAT,

I, the Secretary of Housing and Urban Development, of Washington, D.C., certify that the Accommodation Agreement, more particularly described herein below, is hereby discharged and released from the official records (the “Release”). The aforesaid Accommodation Agreement being more particularly described as follows:

DATE:	[date of Accommodation Agreement]
PURCHASER:	[the party designated as the Purchaser in the Accommodation Agreement and the party that was obligated and is certifying compliance to get this release from the Secretary]
BENEFICIARY/HUD:	Secretary of Housing and Urban Development
RECORDED:	[when and other requisite recording information]

The Purchaser joins herein to request this Release and hereby certifies that there has been no conveyance of the Project (capitalized terms used and not defined in this Release are defined in the Accommodation Agreement) or a transfer of any interest in the Purchaser (including any entities which comprise the Purchaser), directly or indirectly, beneficial, or otherwise. The Purchaser furthermore affirms the truth and accuracy of the foregoing statement.

Notwithstanding this Release, the Purchaser specifically acknowledges, reaffirms and agrees to the obligation(s) contained in the Full Mark-to-Market Renewal Contract (“HAP Contract”) assigned to the Purchaser and/or the Restructuring Commitment assumed by the Purchaser in the Accommodation Agreement, to accept renewal(s) of the HAP Contract(s), if offered, for renewal periods of one year (or such other period determined by HUD), provided that (i) such renewals do not extend the term of such HAP Contract(s) beyond the term of the use and affordability restrictions in the Mark-to-Market Use Agreement that encumbers the Project, and (ii) each such renewal offer is at the contract rents in effect on the contract expiration date, as adjusted annually by an operating cost adjustment factor determined by the Secretary.

This Release may be executed in counterparts, each of which, when so executed and delivered, shall be an original, but all of which together shall constitute one and the same instrument.

WARNING: This warning applies to all certifications made in this document

Anyone who knowingly makes, presents or submits a false, fictitious or fraudulent statement, representation or certification is subject to criminal, civil and/or administrative sanctions, including fines, penalties and imprisonment. (18 U.S.C. §§ 287, 1001, 1010, 1012; 31 U.S.C. §§ 3729, 3802).

IN WITNESS WHEREOF, on this ____ day of _____, 20____, the Purchaser has executed and delivered this Release and thereby further acknowledges that the aforesaid certification by Purchaser has been made, presented, and delivered for the purpose of influencing an official action of HUD and may be relied upon by HUD as a true statement of the facts contained therein.

PURCHASER:

[Insert – full name and signature block(s) of the party designated as the Purchaser in the Accommodation Agreement and the party that was obligated and is certifying compliance to get this release from the Secretary]

By:

By: _____

Name: _____

Title: _____

{ ADD ACKNOWLEDGMENT }

**[HUD SIGNATURE AND ACKNOWLEDGMENT
CONTAINED ON THE FOLLOWING PAGE]**

IN WITNESS WHEREOF, HUD has caused this Release to be executed and delivered by its duly authorized agent as of the _____ day of _____, 20____, and thereby further acknowledges and agrees that the release is without recourse to or claim upon the Project and/or any successive owner of the Project, but with reservation of rights and remedies available to HUD for a false or misleading claim or certification.

SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By: _____
Authorized Agent

Name: _____

Title: _____

{ADD ACKNOWLEDGMENT}

This instrument drafted by: