

THE HFA INSTITUTE 2021

Written Agreements

February 12, 2021



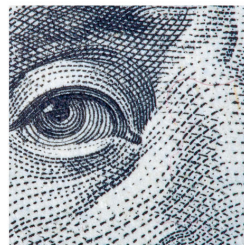
**MRBs and
Other Federal
Homeownership
Programs**
FEBRUARY 1 – 3



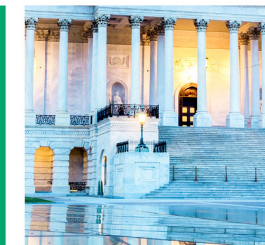
Housing Credit
FEBRUARY 3 – 5



**Section 8 and
Other Federally
Assisted
Multifamily
Housing**
FEBRUARY 8 – 10



**HOME and
Housing Trust
Fund**
FEBRUARY 10 – 12



Welcome & Introductions

- Sponsored by:
 - HUD's Office of Affordable Housing Programs
 - NCSHA
- Trainers:
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Goals

- Importance of the written agreement
- Things to avoid & best practices to consider
- Much of our focus will be on HOME/HTF rental transactions
- Strategic consideration of “business terms” that support compliance with regulatory obligations



Centrality of the Written Agreement

- HUD has the statute, regulation, and formal guidance
- HOME PJs/HTF Grantees required to develop and follow policies and procedures
 - Making choices within program's block grant nature
- Lower-tier participants (e.g. developers and owners) experience HOME/HTF through their written agreement(s)
 - Outlines specific policy choices
 - Defines day-to-day mechanics (e.g. draws, reporting, etc.)
 - May be more restrictive
 - Provides PJ with contractual basis for enforcement



Why Written Agreements

- (Not just) because HUD says so
- Also, because
 - HOME/HTF brings a complex and (usually) long-term relationship between the PJ/Grantee and its partners
 - Clarity is important for all concerned
 - What do I (PJ/Grantee) expect?
 - What am I (developer/owner) signing up for?
 - Public interest in accountability



Who Gets One?



- State recipient/subrecipient or HTF subgrantee running a program for you
- Developer receiving financing for rental or homebuyer
- Low income recipients of HOME DPA, TBRA, owner-occupied rehab

WARNING

- Not all agreements are the same, dependent on program role
 - Esp. State/subrecipient v. owner/developer v. LI beneficiary
 - Requirements vary – esp., applicability of 2 CFR 200
- There will be other docs, but agreement is always required
 - Note/mortgage are NOT the written agreement
 - Deed restrictions are NOT the written agreement

WARNING

- If you don't mean it, don't include it
 - PJ must “{ensure} that HOME funds are used in accordance with all program requirements **and written agreements**” [§92.504(a)]
 - Failure to enforce written agreement – even if provision is not per se a minimum HOME requirement – can be grounds for HUD findings and corrective actions
 - Same for HTF, see §93.404(a)

Making it Count

Ineffective Written Agreements

- One-size fit all
- Copied from other programs, with wrong citations, e.g. CDBG
- Overly vague... “comply with 24 CFR Part 92”
- Lawyers too involved/not involved enough
- Poorly written, hard to follow

IDA?
SSL1

Effective Agreements

- Different forms by role & project type
- HOME and HTF specific templates
- Provide concise and understandable summary not just citations
- Program staff and lawyers work together
- Consider your audience – written agreement as narrative



Slide 9

TDA2 can we add incorrect program requirements to the list (e.g. CDBG regulations cited)
Thompson, Diane A, 2/2/2021

SSL1 Reworked second bullet. That was the same point I intended.
Stephen S. Lathom, 2/2/2021

Brief Detour Before We Talk Rental

- Often two agreements – state/subrecipients will enter into agreements with LI households or even developers
 - PJ ultimately responsible for performance no matter how many layers
 - Agreements used by state/subrecipients should be
 - At minimum, reviewed (provide templates?) by PJ & provide PJ w/enforcement rights
 - May be multi-party agreement – owner, subrecipient, PJ
 - May be directly btw PJ & owner, w/out ongoing subrecipient role - e.g. agreement w/LI buyer
 - Same for agreements between developer (e.g. CHDO) and LI buyer
- Common finding – no “written agreement” with buyers of HOME-assisted units, PJs have relied exclusively on note/mortgage or deed restriction

IDA3
SSL2



Slide 10

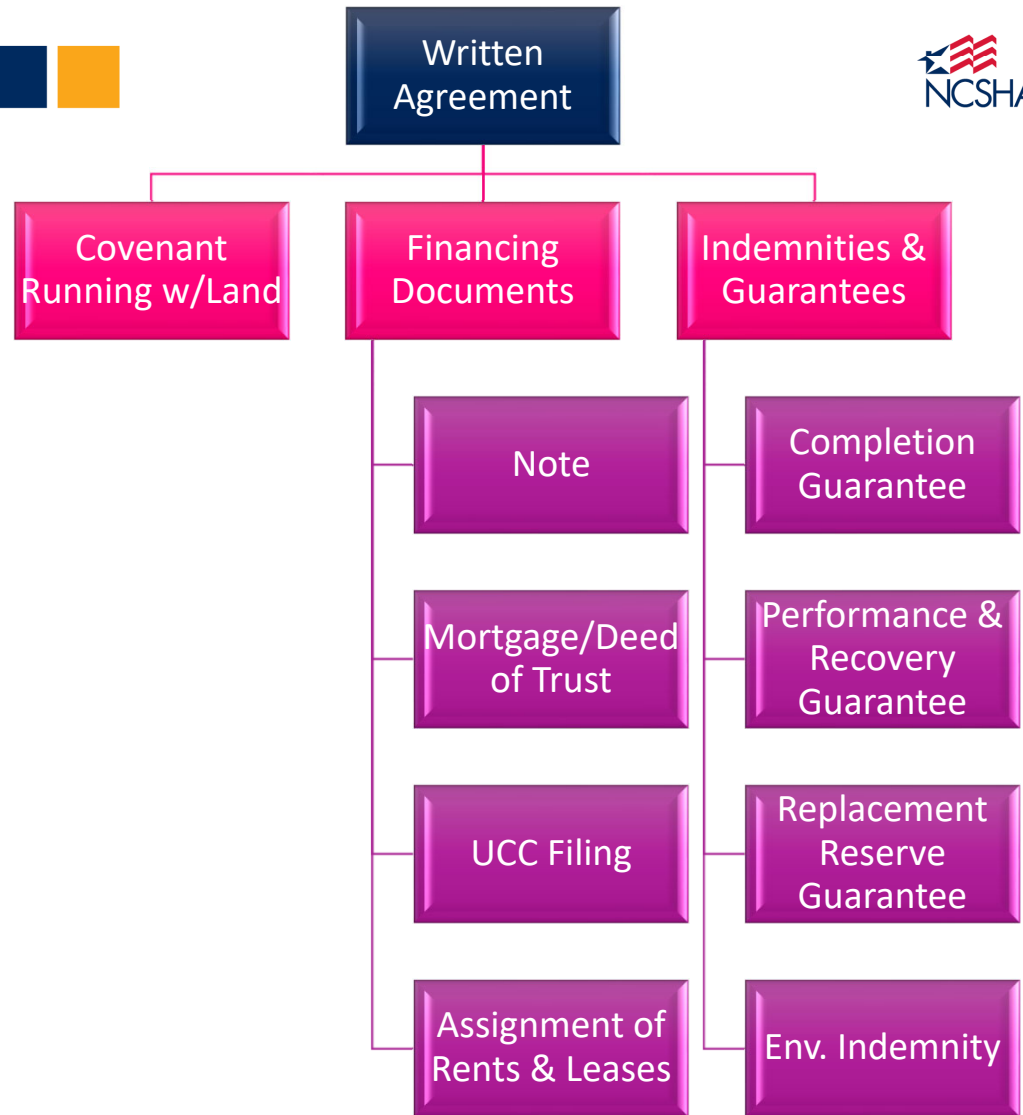
TDA3 This sub-bullet is under agreements used by state/subrecipient What is meant by the agreement may be in the name of the PJ? Do you mean the PJ may enter the written agreement with the buyer?

Thompson, Diane A, 2/2/2021

SSL2 Yes, that the PJ could require the recapture/resale agreement with the buyer be directly with the PJ, reworded

Stephen S. Lathom, 2/2/2021

Let's Talk Rental



Negotiating the Agreement: Lessons from the Field

- Regulatory provisions tend to be “easy”
 - Mostly technical; sometimes we quibble, but it is what it is
 - Remember, provide plain language description of requirements, not just citations
 - I should understand most of what’s needed WITHOUT reading the CFR
- “Business” terms are where we argue
 - **Repayment for failed projects is critical context**
 - Specific points may not be “required” by regulation, but ARE informed by it



Key Business Points

- Budget changes, change order(s), and disbursement issues
- Control over reserves – funding level, withdrawals
- Definition of surplus cash/cash flow and waterfall
- Sale/transfer of underlying ownership interests
- Relative priority of deed restriction/covenant
- Indemnities & Guarantees



Budget/Contract Changes & Disbursement

- PJ responsible for
 - Underwriting, including all sources/uses and cost reasonableness
 - Prior to commitment and “in response to any changes that may occur in the project budget”
 - Property standards, including review/approval of plans/specs
 - Change orders may affect both cost (is it reasonable, is the budget still balanced) AND compliance with property standards (does change remove essential element, e.g. broadband)
 - Disbursing only for eligible costs in an amount no more than needed at the time (i.e. reimbursement not advances)

TD4
SSL3



Slide 14

TDA4 Disbursement not discussed in slide content
Thompson, Diane A, 2/2/2021

SSL3 Added 3rd bullet
Stephen S. Lathom, 2/2/2021

Best Practice Agreement Provisions SSL5

- Reserve rights to review/approve budget or contract change
 - Acknowledge mutual approvals likely needed from all funders
- Reserve right to review/approve all disbursements, regardless of source
 - Often draw requests show unannounced budget changes
 - May need to manage good cost/bad cost issues



Slide 15

SSL5 I updated slide titles to reiterate that these aren't just policies but need to be implemented via the agreement
Stephen S. Lathom, 2/2/2021

Reserves

- Primary regulatory obligation – ongoing HOME/HTF compliance
 - Project cannot comply if it doesn't survive
 - Reserves support ongoing viability of the project
 - But generally cannot be directly funded with HOME/HTF
- Regulation requires
 - Ongoing property standards
 - Ongoing financial oversight (10+ HOME/HTF units)
 - Significant discussion of reserves in CPD 15-11 underwriting considerations



Best Practice Agreement Provisions

- Control disbursements from reserves
 - Range of options: hold reserves v. joint signatory account v. ongoing reporting
 - May require mutual consent of all permanent funders
- If used, require reserves be replenished prior to surplus cash disbursements
- Allow for periodic Capital Needs Assessments to reset replacement reserve requirements
- Maintain reserves through affordability period or loan term, whichever is longer
 - That is, do not allow release at LIHTC investor exit



Definition & Disbursements of Surplus Cash

- Regulatory context largely the same as reserves
 - Ensure ongoing viability by limiting excessive disbursements
 - Relates esp. to underwriting and subsidy layering considerations
 - Strong interaction with common “cash flow contingent” payment terms



Best Practice Agreement Provisions

- Clearly define surplus cash
 - Use uniform definition across programs and transactions
- Establish waterfall expectations
 - No distributions if
 - Reserves underfunded
 - Unresolved compliance issues
 - Payment to underlying owners exclusively from surplus cash
 - Fees for asset management, incentive management, GP management, etc.



Transfers – Title or Ownership Interests

- PJ/Grantee required to underwrite capacity of owner/developer prior to commitment
 - Why allow later change in counterparty without permission and similar review?
- In CHDO projects, expectation of continued CHDO control



Best Practice Agreement Provisions

- Only allow transfer of title with approval of PJ/Grantee
 - “in its sole discretion”
- Require pre-approval of any change in underlying ownership interests, including
 - General or limited partners; members
 - Designation of managing general partner or managing member
- Anticipate and plan for orderly investor exit
 - Preapproved transfers to underlying sponsor
 - Sale to other parties in PJ/Grantee’s sole discretion?



A Word on Deed Restrictions

- Distinct from written agreement
 - Separately required by regulation
 - Provide independent means of enforcing ongoing requirements
 - Overlapping protection - in addition to written agreement enforcement mechanisms
- *Far too many (most) HOME/HTF restrictions are inadequate to accomplish this purpose!*

IDA7
SSL4



Slide 22

TDA7 Should also discuss that the written agreement must provide the means of enforcement of the affordability restrictions

Thompson, Diane A, 2/2/2021

SSL4 added subbullet

Stephen S. Lathom, 2/2/2021

Effective Restrictions

- Remember, runs with the land, provides constructive notice to any future title holder of ongoing requirements
 - Restriction matters most following foreclosure, involuntary transfer, or other removal of original owner (*more in a minute*)
- Restriction should stand alone – provide adequate detail of **ALL** ongoing expectations
 - Not merely cite the written agreement (or high-level CFR citations)
 - Agreement not in the public record, and by time restriction is needed (e.g. post-foreclosure), agreement no longer exists in practice



Priority of Restrictions

- Regulation allows (*but does not require*) deed restriction (covenant, etc.) to be removed via foreclosure/deed in lieu
- **BUT**, removal of ongoing restrictions will require repayment of HOME/HTF
 - Whether or not PJ/Grantee can collect on any loan documents



Best Practice

- Require deed restrictions be recorded senior to all **financing**
 - Do not give up seniority via subordination
 - Include both regulatory imperatives **AND** business expectations in support of compliance
- Relative priority of HOME/HTF v. LIHTC LURA not material
 - Neither can remove the other
- HOME/HTF financing documents typically subordinate



Indemnities & Guarantees

- Most projects held by single-purpose/single-asset entities
 - Both for general liability reasons and for LIHTC reasons, as applicable
 - HOME/HTF loans are generally non-recourse, enforceable only against the real estate
- Much more complicated than this, but in LIHTC recourse loans mess everything up
- But, PJ/Grantee left holding the bag in the event of project failure
 - Repayment required whether or not PJ/Grantee collects on loan



Best Practice to Consider

- Various indemnities and performance guarantees can be required by underlying individuals/entities that own the owner
 - Critically, these are not guarantees of loan payment
- These can include:
 - Completion of construction
 - Replacement reserve deposits
 - Recovery of PJ/Grantee's obligations to HUD for failure to maintain compliance
 - Environmental liabilities



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Wrap-Up & Next Steps

- Questions, additional comments, your experiences/ideas
- HUD developing written agreement checklists and CPD Notice
 - Watch for eventual publication