



*cc: Hensberg*

Special Attention of:  
 All Regional Administrators; All **Notice** 9-22  
 Regional Counsel; All Chief Counsel;  
 Directors of Regional Housing; Issued.  
 Directors of Regional Offices of Expres. 3-14-91  
 Administration (Regional Accounting  
 Divisions); Managers, Category A, Cross References: 4350.1, 4350.3, 4370.2,  
 B, and C Offices; Directors, Housing Mortgagee Letter 88-22,  
 Management Divisions; Loan Management and Notice H 91-3  
 Assisted Housing Management Branch Chiefs

Subject: **COMPREHENSIVE MULTIFAMILY SERVICING PROGRAM**

**PURPOSE:** To clarify and provide guidance on the Department's position concerning HUD's national portfolio of insured and assisted housing.

**POLICY:** The Department's primary priority with respect to HUD insured and assisted housing is to provide adequate housing and services to the resident. This goal is carried out within the context of the Department's contractual relationship with the owner as set forth in the regulatory agreement and/or subsidy contracts. The focus is based on Congressional mandates and Departmental commitments to provide decent, safe, and sanitary housing and related services to all residents. In order to better achieve these goals, the Department will concentrate its efforts on the following two objectives:

- 1) to encourage the owners/agents of HUD insured and assisted housing, including projects with HUD-held mortgages and direct loans, to recognize the partnership which exists between themselves, residents, and resident organizations;
- 2) to ensure compliance of owners/managers with the regulatory requirements of HUD programs, especially regarding the physical condition and management of properties.

**EFFECTIVE DATE:** Effective immediately, all Field Office employees will acknowledge and enforce the policy and procedures herein. Problems or impediments in implementation should be immediately referred to the Regional Director of Housing for assistance and/or remedial action. In those instances where additional clarification is required, the Regional Director of Housing should contact the Headquarters Office of Multifamily Housing Management.

## IMPLEMENTATION:

### A. RESIDENTS

With regard to the partnership between owners, residents, and resident organizations, Field Offices must encourage increased communication between residents and owners/agents; afford greater accessibility for residents to owners/managers; ensure that consideration is given by owners to valid resident comments; and increase understanding and prompt resolution of resident concerns.

Field Offices should ensure that owners give residents proper consideration at all times. Areas such as rent increases and major capital additions require a tenant comment period (see 24 CFR Part 245). Owners/agents are encouraged to go beyond the minimum regulatory requirements and to assure that comments received from residents are considered and that residents' problems are resolved as quickly and efficiently as possible.

Residents and resident association leaders are invaluable allies to the owners, and should be given the opportunity to voice their interests. Owners/agents should request constructive comments and suggestions from residents. For example, owners often face situations in which resources are immediately available for only a portion of needed repairs. In such cases, the residents may have ideas which could assist the owner/agent in prioritizing the expenditure of the limited resources. One way owners might provide for resident input regarding such choices might be to implement a program of regular meetings with the residents at which residents are given the opportunity to review budgets and work plans.

HUD staff must be more active in monitoring owners and agents to ensure that they are sensitive to resolving resident problems. Headquarters is currently developing an automated Early Warning System which will aid in monitoring and follow up. Until then, Field Offices should have a system in place whereby the project managing agent and/or owner's representative are formally notified when a complaint is received, and should follow up to ensure that appropriate and timely steps are taken by the owner/manager to resolve problems. Repetitive complaints should be viewed as an indicator that the project may be in trouble.

When Field Offices conduct project reviews, owners/managers should be held to a high standard in their dealings with residents and in their response to and handling of resident concerns and problems. The management review includes a rating in the area of "Resident/Management Relations."

Owners who do not show that they are responding effectively to legitimate resident concerns should be rated lower on this section of the management review, and should receive a correspondingly lower rating on the overall management review. Such lack of consideration for resident concerns can affect owner/agent participation in HUD programs.

The owner/manager and resident should resolve all significant or recurring problems. In the event that the HUD Field Office believes the owner/agent is not responsive to resident complaints, the Field Office should conduct an on-site review to determine the nature of the situation and should take the appropriate action outlined in this Notice to ensure that owners resolve any identified problem(s).

This policy does not envision the Field Office becoming intricately involved in the area of routine complaint resolution. For example, the Field Office is not expected to appear in tenant-landlord court to oversee evictions, as this activity is clearly the purview of the court system. The Field Office should review complaints with the goal of identifying patterns of complaints or recurring difficulties which might indicate a larger operational problem. A great deal of judgment is involved in separating the routine from the non-routine complaint. The Chief of Loan Management and Housing Management Director in the Field Office should be consulted if staff require guidance in this area.

As always, Field Office staff should refrain from involvement in certain types of problems such as those regarding disputes with third parties, suits brought by residents against owners/managers or vice versa, eviction matters, and interpretations of local laws and ordinances.

#### B. PHYSICAL CONDITION OF PROJECTS

The physical condition and maintenance of housing is important to all parties. HUD will not accept deteriorating, run down, and poorly maintained housing as a part of its portfolio. It is the Department's objective that all housing under its regulatory control be properly maintained to assure that the residents residing in such housing receive adequate housing and services.

This section outlines procedures for a comprehensive physical inspection program for HUD's Multifamily Insured, HUD-Held, Direct Loan, and Assisted portfolio. Objective B3 of Housing's 1991 Management Plan is to "monitor and improve the physical and financial status of HUD-related Multifamily Housing." The first step in achieving this goal is a thorough evaluation of HUD's portfolio through the use of physical inspections and management reviews. It is

essential, for the quality of life of residents and the integrity of the Insurance Fund, that reliable physical inspections be carried out so that problems can be identified and addressed before further deterioration occurs.

The physical inspection program outlined in this Notice includes five major components: (1) the identification and inspection of troubled and potentially troubled projects; (2) the inspection of non-insured assisted housing where HUD is the Contract Administrator and has primary responsibility for physical inspections; (3) an initial inspection of the insured portfolio to ensure the quality of mortgagee physical inspections and subsequent year increased monitoring of the mortgagee physical inspection process; (4) the requirement of current physical inspections prior to the approval of various actions; and (5) the requirement that all HUD staff, when in the proximity of HUD-held, direct loan, insured, or assisted housing projects, become involved in drive-by/walk-through reviews which might indicate that further inspection is required.

1. Identify and prioritize projects for physical inspection.

Within your respective jurisdictions, identify properties which are troubled or potentially troubled. Use indicators, such as mortgagee inspections, management review reports, physical inspection reports, and resident complaints to help in identification of these projects. The list of indicators on Attachment 1 provides further guidance on the characteristics which might lead to the project's being considered troubled or potentially troubled. Later directives on the Early Warning System will clarify and systematize these indicators.

Each Field Office will develop a schedule for the inspection of all multifamily projects in its portfolio. The schedule should include both HUD staff and contractors as specified below. Field Offices should use the priority list below for scheduling. Insured assisted troubled projects will receive inspections and remedial attention first. Other categories of projects will follow.

Even though assisted projects will be inspected first, all housing under HUD's regulatory control, including market rate properties, should eventually be scheduled and inspected. Non-insured assisted projects where HUD is not the Contract Administrator or where HUD does not, according to regulations, have primary

responsibility for physical inspections, should continue to be inspected by the appropriate entity, such as the state agency, FmHA, or a PHA. Further instructions for the remote monitoring of these inspections will be developed and distributed in later directives.

The Field Offices should plan to start performing inspections based on their schedule no later than forty five days after the effective date of this Notice. Exceptions to this physical inspection requirement can only be given as specified in Part B(2) below of this Notice.

The following priority list should be utilized by Field Offices in scheduling for physical inspections. ["Assisted" properties include those that are insured and non-insured, but are receiving mortgage assistance (221(d)(3) BMIR, 236 Interest Reduction Payments, direct loan) and/or rental assistance (Section 8, Rent Supplement and Rental Assistance Payments).]:

- a. Insured assisted troubled
- b. HUD-Held assisted troubled
- c. Non-insured assisted troubled
- d. Insured unassisted troubled
- e. HUD-Held unassisted troubled
- f. Insured assisted potentially troubled
- g. HUD-Held assisted potentially troubled
- h. Non-insured assisted potentially troubled
- i. Insured unassisted potentially troubled
- j. HUD-Held unassisted potentially troubled
- k. Insured assisted
- l. HUD-Held assisted
- m. Non-insured assisted
- n. Insured unassisted
- o. HUD-Held unassisted

The schedule must contain a resource utilization strategy which includes both Field Office staff and third party contractors (for projects with insured and HUD-held mortgages only). Field Office staff shall schedule their time in such a way as to complete, within a year, physical inspections (1) on 100% of the insured projects identified as troubled; (2) on a target number of insured projects not identified as troubled (the aggregate total of the inspections of insured and HUD-held projects performed by HUD staff is not expected to exceed 25% of the Field Office's

Insured/HUD-Held portfolio); (3) on 100% of non-insured former PD projects which were sold with Section 8 where HUD is the Contract Administrator; and (4) on 100% of other noninsured assisted projects where HUD is the Contract Administrator.

That portion of the insured and HUD-held portfolio which was not inspected by HUD staff will be inspected during the year by contractors compensated with fee money from the PHA Insurance Fund. Projects with Purchase Money Mortgages will also be inspected by contractors. Guidelines on the contracting requirements and procedures will be distributed to Field Offices when they are finalized. Field Offices should be sure to include in their resource utilization strategy the staff required to oversee and review contract physical inspections.

This comprehensive review of the insured and HUD-held portfolio is essential to the protection of the insurance fund, as well as to verifying the quality of housing provided to residents. In future years, Field Offices must inspect only the portion of the portfolio necessary to monitor the reliability of mortgagee inspections and to follow-up where a mortgagee physical inspection or other indicator identifies a project as troubled or potentially troubled. Thus, the contractor and HUD physical inspections in the first year must be used to judge the reliability of mortgagee physical inspections. HUD Field Offices must ensure that mortgagees comply with the procedures outlined in Mortgagee Letter 88-22, which sets forth the requirements for completion of mortgagee physical inspections. As is required in Notice 91-3, entitled "Field Office Control and Monitoring of Mortgagee Physical Inspections of HUD-Insured Projects," Field Offices must establish a tracking and quality control system for these inspections.

Field Offices must also ensure that a physical inspection has been carried out prior to the approval of actions with funding components, such as additional subsidy approvals and workouts. This inspection requirement is not to be bypassed unless:

- A physical inspection performed in conformance with this Notice has been completed within the last year; or,

- If a physical inspection in conformance with this Notice has not been performed within the last year, the project operations will be imperiled without approval of the requested assistance.

Finally, when HUD staff from all programs are on travel for any reason, if time permits, they should plan to drive by any HUD assisted and insured projects located nearby their travel route or destination. Their objective will be to observe the physical condition of the project with a quick walk through or drive by to assess whether the project seems to be acceptably maintained, or whether it requires further inspection. This is a sound management practice that will make prudent use of scarce travel funds. The Regional Administrator and Field Office Manager are responsible for ensuring the adoption of this practice, and for seeing that appropriate training is provided to all staff who travel. The traveler should be provided with a list of projects to be visited during his or her travel and must provide a report to the Loan Management Branch Chief within five (5) working days of the completion of the travel and reviews.

2. Inspect properties to ensure sound physical condition.

No later than forty five (45) days after the effective date of this Notice, Field Offices should begin the physical inspections they have scheduled. Physical inspections of troubled projects should be conducted by the servicer, a construction analyst, or an engineer capable of determining the cost of the required repairs. If this type of resource is not readily available to the Loan Management Branch, the Director of Housing Management and the Field Office Manager shall coordinate to provide either in-house resources or a third-party contractor to produce the needed cost estimate.

Within each priority category, projects identified as being in the worst condition should be targeted for physical inspection first, with other projects to follow. Field Offices need not inspect projects that have been inspected, by HUD or the mortgagee, within the last six months, if the inspection was documented and meets the criteria for a detailed report set forth in B(3) below. Where deficiencies were identified in previous inspections, however, the specific notification and follow-up procedures described below must still be followed. In these cases, the Director

of Housing Management may grant exceptions to re-review in writing on a case-by-case basis only where substantial steps are currently being taken to address past deficiencies. If the owner fails to correct the deficiencies, he/she will be required to submit a plan in accordance with Part B(5) of this Notice and will be subject to all the monitoring and enforcement actions in Parts B(6) and (7) of this Notice.

HUD staff and contractors shall inspect the inside and outside of projects' housing units, buildings, grounds, commercial space, and common areas for physical condition and maintenance. For assisted units, the absolute minimum level of acceptability is dictated by a combination of Housing Quality Standards (HQS) and local housing codes, whichever are most stringent in the locale of the project. However, for all projects, conditions above these minimum standards which demonstrate the proper maintenance of the project should be expected.

A minimum of 10% of the occupied units and all vacant units will be inspected. The Chief of Loan Management may authorize or require a lesser or greater number of units to be inspected based on the size of the project. For example, it may not be beneficial for HUD to inspect 10% of a very large project. Instead, the Chief will set a minimum number of units based on past inspections and reviews of large projects. Likewise, it would not be appropriate to inspect 10% of a small project as the sample of the units may not be adequate. The Chief may again require a minimum number of units to be inspected. All common areas, such as equipment rooms, laundries, and storage rooms, must be inspected.

Following the inspection of the project, the servicer or contractor must meet with the site manager or owner/agent representative to discuss in general terms the observations made at the project. Through this "close out" meeting, owners should be informed of the major areas of concern so they can begin to develop strategies for addressing the problems. Field Office staff should stress at the meeting that the areas of concern identified are not necessarily all-inclusive. The final physical inspection report may include additional findings of deficiency based on the analysis of the overall inspection.

### 3. Document physical inspection.

Each physical inspection will be documented in writing with detailed deficiency explanations, recommended or required actions and time frames, and conclusions. The prescribed format for this documentation will be HUD Form 9822, "Physical Inspection Report." The report must be signed and dated, and must specify the expected actions as outlined in Part B(5) of this Notice. For physical inspections completed by HUD staff, the report should be issued within thirty (30) days of the completion of the field work. For contractor physical inspections, the report must be delivered to the Field Office within the contracted time frame.

Inspectors will record all deficiencies noted at the project (including the location of the deficiency). Detailed descriptions of deficiencies and locations will be retained in the project files, while the report to the owner may be summarized. For example, the notes of the inspector may show dozens of instances of broken windows. The report, however, may state that throughout the project broken windows were observed and require the owner's plan to repair or replace all broken windows. The cost estimate will be based on a composite of the observed deficiencies (e.g. 45 window panes @ \$10). In addition, where practicable, photographs will be taken and provided as part of the Form HUD-9822 documentation. Care should be taken to assure that photos are cross referenced to location and provide a description of the deficiency. Photos should be used to capture both good and bad conditions.

### 4. Notification of owner/manager.

As discussed earlier in Part B(2) of this Notice, site managers or owner/agent representatives should be notified of possible findings at the close out meeting immediately following the physical inspection. The Field Office must send the completed physical inspection report to the owner within two (2) working days of the completion of the report by HUD staff or contractors. A copy of the report must also be sent to the managing agent and/or other contact identified by the owner, and to the mortgagee for properties with insured mortgages. It is not required that the Field Office send any photos with the report unless such pictures are specifically referenced in the report. Photos are primarily for use by Field Offices.

5. Expectation of action by owner/agent.

Where serious deficiencies are identified in the physical inspection report (see discussion of "serious" deficiencies below), owners must: 1) meet with the Field Office staff within ten (10) working days from the date of issuance of the report to discuss the deficiencies identified during the inspection; 2) at this meeting, provide a written report on all actions taken since the report was issued to correct the deficiencies noted; and 3) within twenty (20) working days of the meeting, provide a written plan detailing how and when the remaining deficiencies will be corrected. The Management Improvement and Operating (MIO) Plan format, including a budget identifying the source of funds, may be used to provide the plan. For deficiencies which are not identified as serious, owners are not required to meet with the Field Office. However, in these cases, owners/agents must submit a plan within thirty (30) calendar days of the date of receipt of the report, and are subject to all of the monitoring and enforcement actions outlined in this Notice.

In determining whether a deficiency should be considered "serious" or "non-serious," Field Offices must develop criteria for application to the physical inspection findings. Field Offices may use criteria such as whether the repair need was judged as "immediate," the health and safety threat of the repair need, and the cost of the required corrections. Field Counsel should review the documentation to make an initial determination as to whether "waste" is present or if a failure to maintain the property in good repair has been displayed. Field Counsel should provide the program office with guidance on the documentation which should be retained. Attachment 2 provides further instructions on the Field Counsel review.

Corrective plans for insured projects, including those submitted for non-serious deficiencies, must be formalized and trackable, and monitored in the Field Offices. The plans should be reviewed by Field Counsel as specified in Attachment 2. As Part I of the Attachment explains, the role of the Field Counsel in reviewing the designation of "serious" deficiencies and the corrective plans is to advise program staff on the legal issues involved in these actions. For HUD-held projects, corrective plans will be included in and made part of a workout. If the owner refuses to cooperate

(i.e. fails to produce a plan to correct the deficiencies or will not modify the workout), then enforcement action by the Field Office in conformance with this Notice is required.

It is not acceptable for an owner to respond that the cash flow generated by the project is not enough to make the corrections. Field Offices should expect to receive well thought-out plans specifying the level and source of funds necessary to bring the physical plan to an acceptable condition. Where an owner is requesting increased HUD funding (such as additional subsidized units or Flexible Subsidy) to pay for all or part of the required repairs, he/she must present a certification and supportive documentation that he/she has made every effort to secure funding from all possible funding sources. Field Offices shall not approve plans unless they provide for the final resolution of the deficiencies.

#### 6. Monitoring Corrective Actions.

If a monitoring system is not in place, each Field Office will develop a system to monitor planned and completed corrections. The Early Warning System, when implemented, may aid in the tracking of corrective plans. Where serious deficiencies were identified during the physical inspection, the Field Office shall schedule a follow-up inspection within thirty (30) days or less of the meeting to assure satisfactory completion of all corrections that the owner indicated were completed from the date of the inspection through the meeting. Follow up inspections on completed tasks may be performed by permanent staff or by contract inspectors (for projects with insured and HUD-held mortgages only). All follow-up inspections must be documented either through a memorandum to the file, or on a HUD Form-9822, clearly marked to show that the inspection is a follow-up.

Field Office staff shall notify the owner in the case of noncompliance with the plan. The owner must take remedial action immediately upon receipt of notification, and must provide an explanation of any noncompliance. Also, the owner must develop and provide to the Field Office proposed revisions to the plan of corrections. The Field Office will analyze any suggested modifications to determine their feasibility and their effect on the continued viability of the plan. If the Field Office determines that a good faith

effort is not being made to bring the project into acceptable condition or if the plan, as revised, is no longer feasible, then the action(s) described below should be taken.

7. Action by Field Office in the event of noncompliance, nonresponse or nonperformance by owners of projects with HUD Insured or HUD-held mortgages.

(a) If the owner fails to:

- meet as requested with the Field Office,
- cooperate with the Department;
- provide the requested reasonable corrective action plan;
- perform the agreed upon corrective actions contained in the approved plan;
- or
- make appropriate revisions to a plan which has not been carried out according to the agreed upon timetable;

then the Field Office must determine whether to recommend a declaration of default under the waste provision of the mortgage, or to recommend a declaration of default under the Regulatory Agreement, or to initiate litigation against the owner.

(b) Technical Defaults.

If the owner has failed to perform the actions listed above and the physical condition of the property has deteriorated to an unsatisfactory level, the Field Office must determine whether the administrative record supports a finding of violation of the waste provision of the mortgage or a declaration of default under the Regulatory Agreement. The Field Counsel should provide guidance on the legal issues and necessary documentation associated with either determination. Attachment 2 includes a discussion of the role of the Field Office Counsel in developing a recommendation and on the criteria which should be used in the determination.

If the Field Office Manager determines that a declaration of default under either the mortgage or the Regulatory Agreement is appropriate, he/she must recommend a declaration of default to the Regional Administrator. The Regional Administrator or his/her designee shall have the authority to approve or disapprove the Field Office determination.

If the Regional Administrator accepts the Field Office recommendation, the Field Office must notify the owner of the intended action by certified mail with return receipt requested, and must send a copy of the notification to the managing agent. The notification must be reviewed by Regional Counsel and signed by the Regional Administrator before being sent to the owner. The Field Office must inform owners in the notification that they will be given thirty (30) calendar days to show sufficient cause why the default should not be declared, or to otherwise provide the plan, or feasible revised plan, or carry out the previously approved plan of action. The Director of Housing Management may extend the time frame for specific cause on a case-by-case basis. He/she must document such cause for the record.

If the owner does not satisfactorily show cause or comply with the Field Office and Regional Administrator's requests regarding corrective actions within thirty days (or within the approved time frame), the default declaration should proceed with a request to the mortgagee to accelerate the principal balance of the mortgage. (See Attachment 2, Part V.) This letter should be prepared by the Regional Counsel and concurred on by the field and regional program offices. The letter should require that, under the authority provided the Secretary contained in 24 CFR Part 207.257, the mortgagee declare a Covenant Default and accelerate the principal balance of the mortgage. For projects with HUD-held mortgages, the Director of Housing Management must request the Office of Mortgage Insurance Accounting and Servicing to accelerate the principal balance of the mortgage and to declare the balance immediately due and payable.

After the mortgagee has prepared the election to assign and the processing of the claim is under way (or MIAS has completed the necessary steps for HUD-held mortgages), the Regional Counsel, upon instruction by the program office, should move to obtain mortgagee-in-possession status, either voluntary or involuntary. (See Attachment 2, Parts VI and VII.) Field Offices should follow the outstanding instructions regarding the process for achieving mortgagee-in-possession status.

When the Department is awarded the mortgagee-in-possession status, the Director of Housing Management should authorize the managing agent to begin making the needed repairs as quickly as possible to restore the project to acceptable living standards. The repairs should be paid for out of project income and the Insurance Fund.

(c) Initiation of Litigation.

If the situation is such that the housing is below acceptable levels, but the documentation or problem would not support a default based on the regulatory agreement or the "Waste" provision of the mortgage, a determination should be made as to the advisability of initiating immediate litigation against the owner. Civil money penalties should also be utilized where appropriate to ensure compliance with the procedures outlined above.

- (d) The Director of Housing Management may recommend the removal of a previously cited technical default to the Regional Administrator or his/her designee. The recommendation should be documented and in writing and should explain the circumstances surrounding the recommendation.

IMPORTANT! The Field Office must request/start foreclosure concurrently with the commencement of MIP status. This is imperative and MUST be adhered to in all cases.

REGIONAL COUNSEL must review and concur on ALL notices of intent to declare a technical default and ALL subsequent correspondence to the owner.

C. PROPERTY MANAGEMENT

Another integral step the Department takes to ensure compliance with the regulatory requirements of HUD programs is the performance of management reviews. Owners and the management agents/entities they hire are expected to fulfill all requirements and functions under the Regulatory Agreement and Mortgage. They must also provide management services and oversight of operations in accordance with good management practice and industry standards of excellence. Careful and diligent Field Office monitoring and evaluation of the performance of these tasks are necessary.

1. Identify Projects to be reviewed.

Field Offices should schedule management reviews in the order of priority specified earlier in Part B(1) of this Notice. Assisted projects which are physically or fiscally troubled will receive first priority with other projects to follow. As with physical inspections, for non-insured assisted projects where HUD is not the Contract Administrator or where HUD does not have primary responsibility for monitoring the project, the appropriate entity, such as the state agency, FMMMA, or the PHA, must continue to perform the necessary reviews. Further instructions for the remote monitoring of these reviews will be developed and distributed in later directives. Projects shall be reviewed immediately, outside of the normal review plan, where any serious problems exist or surface, or where significant complaints are received. The schedule of these reviews will, to the extent possible, coincide with the project physical inspection so as to minimize impact on the project operations.

In preparing for these reviews, Field Offices should examine the past several years of management review reports, physical inspection reports (both HUD and mortgagee reports), tenants complaints and comments. Exceptions to re-review may be granted in writing by the Director of Housing Management on a case by case basis. For example, a re-review may be bypassed where substantial steps are currently being taken to address past deficiencies.

Each Field Office and its Regional Office shall agree on the minimum number of reviews to be performed in a given fiscal year. Such determination will take into account factors such as staffing, level of staff skills, field office input, geographic constraints, number and type of projects, ratio of assisted to

unassisted projects, number of known troubled projects, level of difficulty of troubled projects, and other identifiable factors considered pertinent. Field Offices may use contractors for completion of management reviews for projects with HUD insured and HUD-held mortgages which are not identified as troubled. Instructions for contracting out management reviews will be distributed in later directives.

2. Management Reviews.

All projects marked as troubled, physically or fiscally, will receive a comprehensive review covering all aspects of property operations. Exceptions to the comprehensive review format may be granted in writing by the Director of Housing Management on a case by case basis. Documentation of the exception shall be maintained. The scope of all other reviews and follow up reviews will be determined by the Field Office Loan Management Branch Chief.

3. Documentation of the Management Review.

Each review of a project will be documented on Form HUD-9834, Management Review Report. Reports will contain a summary of any identified deficiencies, recommended or required corrective actions and time frames, and conclusions. Field Office records shall contain a detailed description of any deficiency noted along with documentation to support the deficiency finding. If materials referenced in the report are not physically attached to it, Field Office staff should ensure proper documentation of the location of such materials. For example, the review may have included a review of past Financial Statements or Monthly Reports. Rather than copying and attaching the Financial Statements as background, a note in the documentation regarding location should be included, (e.g. 1987 Annual Financial Statement, p.12).

4. Notification to owners/managers.

The Field Office or contract employee, upon completion of the management review, must conduct the required close-out at the project and then must send a written report to the owner. Reports for reviews carried out by HUD staff will be completed within thirty (30) days from the completion of the field work. Reports for contractor reviews will be completed within the contracted timeframe. A copy will be sent to the

project managing agent and/or contact identified by the owner, and to the mortgagee for projects with insured mortgages, within two (2) working days of the completion of the report.

5. Owner/Manager Action.

Owners must provide the Field Office with a plan for correction of the noted deficiencies within thirty (30) days of the date of notification. Such response will not be delayed by the owner's option to appeal. The correction of valid deficiencies which were not appealed shall not be delayed during an appeal. The plan may utilize the MIO plan format.

6. Monitoring.

HUD staff must ensure that owners are carrying out the required corrective actions. If a follow-up system is not in place, the Field Office shall establish a follow-up and reporting system which monitors the actions taken by the owner to cure existing deficiencies.

As long as the deficiencies are being corrected in a timely and professional manner, the monitoring shall continue by the Field Office. If new deficiencies are revealed as a result of routine monitoring or as a result of a subsequent review of operations then the Field Office will repeat all steps necessary to assure owner compliance.

7. Action by Field Office in the event of noncompliance, nonresponse, or nonperformance.

Field Office staff shall notify the owner in the case of noncompliance with the plan. The owner must take remedial action immediately upon receipt of notification, and must provide an explanation of any noncompliance. If the noncompliance is caused by the management entity, then sanctions against the management entity must be undertaken. These may include:

- a. Requiring the owner to replace the management agent;
- b. Filing a report under 2530, Previous Participation;
- c. Instituting limited denial of participation or other administrative sanctions;

- d. Applying civil money penalties as outlined in 24 CFR Part 30;
- e. Taking legal action, such as filing a lawsuit to address a specific infraction.

Also, the owner must develop and provide to the Field Office proposed revisions to the plan of corrections within ten (10) days of the notification. The Field Office will analyze any modifications to determine their feasibility and their effect on the continued viability of the plan. For properties with insured and HUD-held mortgages, if the Field Office determines that a good faith effort is not being made to correct deficiencies noted in the management review report, if a plan is not received, or if the plan, as revised, is no longer workable, then the Field Office should pursue a declaration of default, under either the waste provision of the mortgage or under the Regulatory Agreement. Field Offices must follow the specific determination, documentation, notification, and assignment/foreclosure procedures outlined in Part B(7) of this Notice.

#### D. HUD ASSISTANCE

In all transactions concerning any project where additional HUD assistance is requested (for example, Flexible Subsidy, Capital Improvement Loan Program, Section 8 Loan Management Set-Aside, Section 241 Equity Take-out Loan, Work Outs, Partial Payment of Claims), or approvals are sought (such as TPAs), the Field Office shall:

1. Ensure that the physical condition of the property is satisfactory or will be returned to satisfactory condition upon delivery of such requested assistance or approvals, and that all project services and management are reliably and competently delivered;
2. Ensure that, based on Field Office records, the project operation is generally free of significant or repetitive resident complaints or that the cause of the complaint would be rectified by such assistance; and
3. Ensure that, where a problem exists, HUD does not provide or negotiate any transactions or assistance until the owner: a) submits a plan to correct and remedy any deficiencies documented by the Department,

and b) certifies and documents that he/she has taken steps to secure funding from all possible sources. The owner's plan must constitute a final solution to the problems and to the deficiencies.

E. PLANNING AND USING AVAILABLE RESOURCES

Field and Regional Offices shall simultaneously review the resources currently available and develop an estimate of in-house and contracted resources required to accomplish the tasks outlined in this Notice. For projects with insured or HUD-held mortgages, contracted resources should be utilized for completion of the inspections and reviews detailed here, as well as for completion of normal Field Office responsibilities such as financial analyses. An estimate of available resources is an integral part of scheduling of reviews and inspections, and should be a part of the review and inspection schedule already in place in each Field Office. Field Offices will continue to follow their schedule while developing plans to accomplish the broader tasks set forth here. Reviews should not be postponed or cancelled while scheduling and research is going on. An exception may be made where selected, planned reviews are cancelled in order to free staff members for the purpose of developing the longer term plan called for in this Notice.

A determination must be made by each Field Office as to what functions will be or can be delayed, cancelled, or moved to a lower priority. The provisions outlined in this Notice will take a great deal of time and resources. However, many of the functions that are already carried out by the field office are part of this effort. For example, as part of a management review the financial reports of a project are examined.

Many Field Offices have taken and continue to take quick and decisive action in cases where a regulatory breach has occurred. These offices should continue their direction in compliance with this notice. Offices which have not taken such aggressive stances in the past are required by this Notice to review their procedures and directions to assure that the intent of this Notice is carried out.

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Acting Assistant Secretary for Housing-  
Federal Housing Commissioner

## Attachment 1

INDICATORS FOR TROUBLED/POTENTIALLY TROUBLED PROJECTS

A multifamily project may be considered troubled when it requires assistance in order to meet its obligations and/or to provide the quality of housing and services to which its owner committed in the subsidy contracts and/or regulatory agreement. Potentially troubled projects are those where (1) critical information regarding the operation of the project is not available or (2) where the project's situation is such that it may soon require assistance if action is not taken to address existing or emerging difficulties. Indicators that such a situation may exist include:

1. The project has a high or increasing vacancy rate.
2. A major system in the project requires replacement, major repair, or repair beyond existing or potential project resources.
3. The project has persistent physical problems of a serious nature (such as health and safety problems, security problems, deferred maintenance, or lack of janitorial services or routine maintenance).
4. There have been improper or unauthorized distributions, as defined in HUD Handbook 4370.2, Financial Operations and Accounting Procedures for Insured Multifamily Projects, or unauthorized diversion of project assets.
5. The Management Review or other financial analysis determined that annual or monthly operating expenses exceed income potential and will more than likely continue.
6. Project expenses are abnormally high or low compared to previous years or comparable projects.
6. Project rents are abnormally low or in excess of authorized limits.
7. The owner/sponsor has threatened or has declared bankruptcy.
8. There has been more than one request from the owner(s) to use Reserve for Replacement Account money for the mortgage payment, fuel, utilities, insurance, security or for routine expenses for which the account was never intended.
9. The Management Review reveals management policies or procedures that jeopardize the project, as indicated by a rating of below satisfactory in one or more categories.

10. There are persistent, validated tenant complaints of a serious nature, including but not limited to harassment, leasing irregularities, improper certification, discrimination, or fraud by the project management or owner.
11. The owner/agent have not met their contractual, statutory and/or managerial obligations and have not developed programs to address them.
12. Annual financial statements disclose significant irregularities, such as qualified auditor's opinions; negative cash throw-offs; line items that are inconsistent with each other, with the prior years, or with similar projects; under funded General Operating Reserves (GOR), Replacement for Reserves, or escrow accounts; or increasing accounts payable, receivables, or bad debts.
13. Failure to provide required or requested data with respect to fiscal items for significant matters involving the management/operation of the project.
14. Physical inspection indicates serious emergency health and safety hazards for which there is no acceptable plan of correction.
15. Section 8 units do not meet HQS and project funds are not available to immediately correct the deficiencies.
16. Serious drug problems prevail in the complex or in the neighborhood.
17. In the case of a non-profit, the Board does not meet the criteria used when it was originally constituted.
18. Owner has threatened to abandon or has abandoned the complex.
19. Commercial space is unrentable or is being rented at uneconomic rents, causing a cash drain on the project, or commercial space detracts from project liveability.
21. The mortgage is in default.

## Attachment 2

ROLE OF FIELD AND REGIONAL COUNSEL IN  
COMPREHENSIVE MULTIFAMILY SERVICINGI. Introduction

The primary role of Field Counsel (counsel other than Regional Counsel) will occur in the initial stages of the comprehensive servicing process and will be one of reviewer for legal sufficiency. The primary role of Regional Counsel will occur in the later stages of the servicing policy and will primarily be one of reviewing for Regional consistency as well as preparation for litigation. The Field Counsel review will occur at several stages. The first review will occur when the program office designates a multifamily project physical deficiencies as "serious". The second will occur when the corrective plan is established and monitored. The third level will occur when the project is targeted for a technical default where Field Counsel will be available to assist the Regional Counsel with respect to the declaration of default and any related litigation.

We will go over each of these stages. It is important to remember that the program office is responsible for the decision-making and that counsel's role is to advise the program office of any legal issues and to implement the program decision.

II. Designation of deficiencies as "serious"

Page 10, paragraph 1 of the proposed notice discusses the designation of deficiencies noted in the physical inspection as "serious" or "non-serious". The notice requires the field office to establish its own criteria and suggests factors such as the immediacy of the need for repair, its impact upon health and safety, etc. Because this initial designation of a physical defect is material to HUD later being able to declare a technical default, it is important that a legal policy review occur at this stage. Although the eventual technical default may occur as a failure to correct the Regulatory Agreement contractual obligation or to maintain the mortgaged premises in good repair - we believe HUD will be in a stronger position if the waste provision of the mortgage is violated. Accordingly, the standard for legal review should be: Is the physical deficiency of such a material nature as to constitute waste.

There is no Federal law on what constitutes waste. Accordingly, state law must be researched because that is the law to be applied in any litigation. Once you have completed the legal research on this point, a review of the documentation must be conducted to determine if the evidence in this case meets the

legal standards. In the event that your review indicates that this situation does not constitute waste, you must advise the program office of 1) any additional documentation you may need to determine if waste is present or 2) if the problem is not one of documentation but rather is one of the degree of the physical defects, you should advise the client of the result of your review. Because the legal standard of waste is more difficult to meet, if waste is present the legal standard to show a breach of the Regulatory Agreement will be met. However, if waste is not present, you must determine if the documentation would support a finding of "failure to maintain in good repair". In the event that this standard is not met, you must advise the client of your determination and prepare a written recommendation supporting your decision not to regard the deficiencies as "serious".

In all reviews, any written opinions are privileged communications and all documents should be marked "Privileged-Prepared in Anticipation of Litigation" and the program office should be instructed not to waive their privilege by releasing this work product.

### III. Establishing and Monitoring the Corrective Action Program

Again, because the establishment of an acceptable corrective action program may result in the initiation of litigation, a legal review by the Field Counsel's office is necessary at this stage. The notice states that the fact that the project does not generate sufficient cash flow is not a justification for not infusing such resources. While this fact when examined in isolation is correct, if surrounded by facts that indicate substantial government complicity, such as HUD written acceptance of physical deficiencies, this may impair or affect HUD's present decisions on how best to proceed.

The decisions of the program office must be reviewed to ensure that they are not arbitrary and capricious. In some circumstances, the proposed corrective action may not be an appropriate position for the program office to take. This issue is an administrative law issue and we have prepared some case law guidelines which are attached as Supplement A hereto. Beyond the issue of arbitrary and capricious government action, when reviewing the program office's actions and decision, be attentive to the classification of the mortgagor to determine if it falls into a "suspect classification" making the Department vulnerable to discrimination claims. It is imperative that your legal review assures fair and even-handed treatment of all mortgagors.

In addition, at this stage, you should review the administrative record for accuracy. Is the name of the mortgagor correct? What's the financial status of mortgage payments? Have there been any unauthorized transfers of physical assets? Make certain that all information necessary to declare a technical default is accurate and able.

#### IV. Declaration of Technical Default Under the Regulatory Agreement

Part 7, page 22 of the proposed notice details the stages on which the field office may notify the mortgagor of its intent to declare a technical default. In the event the legal review in the stage where the physical defect is determined to be "serious" has resulted in Field Counsel's opinion that waste is present, the legal review will simply turn on the issues of whether there is evidence of non-response or non-compliance. In the event that waste is not present, the Field Counsel must review the proof of the breach of the Regulatory Agreement provision requiring the owner to maintain the project in good repair.

The program office decision to declare a technical default under the Regulatory Agreement for failure to maintain the property in good repair must be reviewed by the Field Counsel. This review must result in either the recommendation in favor of the determination or a recommendation against the determination for failure to meet the legal standards necessary in that jurisdiction. As discussed before, the Regulatory Agreement standard is a lesser standard than that of the mortgage covenant default for waste. Field Counsel should review all documentation utilized by the program office in making its determination that the project is not in good repair. Field Counsel must be assured that there is sufficient documentation and that this data is specific, contains specific detail and maintains a level of objectivity and consistency which would support a determination of lack of repair. In the event Field Counsel does not believe that there is sufficient evidence of disrepair, Field Counsel should make one of the following recommendations:

1. Recommendation to redesignate the project - identify physical deficiencies as non-serious and remove from consideration. This recommendation should set forth the reasoning that there is insufficient evidence to meet the legal test for disrepair.
2. Recommendation for further information. Field Counsel believes that further documentation is necessary prior to designation as troubled. Field Counsel should prepare a recommendation of the type of documentation necessary for a thorough review to be conducted.

3. Recommendation to redesignate because of HUD's actions. In the event there is sufficient evidence to declare a technical default, a 30-day demand letter must be sent to the mortgagor describing the contract violation and allowing the mortgagor a 30-day time period to correct. At this stage, the Regional Counsel's Office must review the demand letter that should be signed by the Regional Administrator. We have attached as Supplement B, sample 30-day demand letters for your assistance.

V. Instruction to Mortgagees Requesting the Acceleration of the Mortgage Indebtedness due to Regulatory Agreement Violation

We have attached as Supplement C, a letter to the mortgagee requesting acceleration of the full mortgage indebtedness due to the mortgagor's failure to comply with its contractual obligation to maintain the premises in good repair. This letter should be prepared by the Regional Counsel with the necessary concurrences from the field and regional program offices. At this point, Regional Counsel should work with the program office to determine when the mortgagee has notified the mortgagor of the debt acceleration and determine when the mortgagee has prepared the election to assign. Regional Counsel should communicate with the Office of Multifamily Mortgage Insurance (OGI) and the Office of Insured Multifamily Housing Development to ensure that any elections to assign as a result of technical default, are processed in an expeditious manner.

VI. Attempt to Obtain Voluntary Mortgagee-in-Possession Status

During the processing of the claim for mortgage insurance benefits, Regional Counsel should, upon instruction by the appropriate program office, approach the mortgagor to obtain a voluntary mortgagee-in-possession status once HUD is in the legal position to exert its right as mortgagee. A sample format has been attached as Supplement D.

VII. Involuntary Mortgagee-In-Possession Status

If the mortgagor indicates a reluctance or refusal to sign a voluntary mortgagee-in-possession agreement, Regional Counsel should prepare for mortgagee-in-possession as an affirmative right. Regional Counsel must prepare a complaint, memorandum of law, and all supporting affidavits. We have attached as Supplement E, sample pleadings for guidance to Field Counsel;

however, the law in every jurisdiction must be reviewed and the facts of each case must be specifically spelled out. Once the proposed pleadings are prepared, Field Counsel should send them to the appropriate U.S. Attorneys Office with copies to:

J. Christopher Kohn  
Director, Commercial Litigation Branch  
Department of Justice  
P. O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044

Herbert L. Goldblatt, Assistant General Counsel  
ATTN: Nancy Christopher  
Department of Housing and Urban Development  
Room 10270  
451 7th Street, S.W.  
Washington, D.C. 20410

SUPPLEMENT A

Because HUD has not previously implemented a policy such as the Comprehensive Multifamily Servicing policy, we must review HUD's decisions in light of the case law already established. Because this policy may ultimately result in a "taking" of property interest, it is imperative to examine HUD's determinations with a critical eye. A decision by HUD to foreclose is subject to limited judicial review under the "arbitrary and capricious" standard of the Administrative Procedure Act (APA). U.S. v. Victory Highway Village, Inc., 662 F.2d 488, 494 (8th Cir. 1981), citing U.S. v. Winthrop Towers, 628 F.2d 1028 (7th Cir. 1980). Section 706(2) of the APA authorizes a reviewing

court to hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Hence, when APA review is available, the scope of judicial review is limited to analysis of the administrative record to determine whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Camp v. Pitts, 411 U.S. 138 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In the case of the designation of troubled project and particularly the determination that a technical default is warranted, the Field Counsel should identify and review the full contents of the administrative record.

## STANDARD OF REVIEW

In applying the arbitrary and capricious standard, judicial review is limited to whether the agency action was "rational, based on relevant factors within the agency's statutory authority." Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983) <sup>1/</sup>; Frisby v. U.S. Dept. of HUD, 755 F.2d 1052 (3rd Cir. 1985) <sup>2/</sup>. The ultimate standard of review of an agency is a narrow one. Citizens, 401 U.S. at 416. See also,

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<sup>1/</sup> National Highway Traffic Safety Administration's (NHTSA's) rescission of motor vehicle passive restraint standard was held arbitrary and capricious. In 1977, the NHTSA issued a motor vehicle safety standard pursuant to the National Traffic and Motor Vehicle Safety Act that required newly sold cars to be equipped with either air bags or detachable/nondetachable seat belts as of 1982 or 1984 model year. But before that date, the agency issued a final rule rescinding the passive restraint requirement in the standard, the agency stating that the requirement was no longer reasonable or practical in view of the minimal safety benefits and the costs of implementing the requirement. On certiorari, the Supreme Court, held NHTSA's rescission arbitrary and capricious since the agency failed to present an adequate basis and explanation, and failed to supply the requisite reasoned analysis for its action.

<sup>2/</sup> Class action suit was brought to enjoin sale of multifamily housing project by HUD to a private developer without rehabilitation requirements and Section 8 certificates being attached to sale. The U.S. District Court of New Jersey refused to grant the injunction and appeal was taken. The Court of Appeals held that Congress has vested Secretary of HUD with discretion in deciding, with regard to disposition of a multifamily housing project, which statutory goals are to be furthered and that sale of the project without rehabilitation requirements and without Section 8 certificates was not arbitrary, capricious, or an abuse of discretion since Secretary balanced cost-effectiveness of disposing of project against competing goals of furthering housing-related objectives and reached a reasonable decision.

Anderson v. HUD, 701 F. 2d 112, 113-15 (10th Cir. 1983) <sup>3/</sup>;

Roberts v. HUD, 473 F. Supp. 52, 54-5 (N.D. Miss. 1979). <sup>4/</sup>

Thus, where a decision is committed to agency discretion, a court in reviewing that decision, is limited to the standard for review set forth in 5 U.S.C. Section 706(2)(A).

Therefore, the Court is to decide only whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. Federal Nat. Mortg. Ass'n v. Rathgens, 595 F. Supp. 552, 555, (S.D. Ohio 1984). In considering

whether agency action was based on relevant factors, the reviewing court normally must determine whether the agency relied on factors Congress intended it to consider. If the Court determines that the agency relied on factors that Congress intended it to consider. If the Court determines that the agency relied on factors that Congress did not intend for it to consider, or has failed to consider an important aspect of the problem, the action should be set aside as arbitrary and capricious. Frisby, 755 F.2d at 1055.

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<sup>3/</sup> Mortgagor brought action for declaratory and injunctive relief and for review of HUD's decision denying request for acceptance of a mortgage assignment. U.S. District Court of Colorado denied relief and mortgagor appealed. Court of Appeals held that HUD's denial was not arbitrary, capricious, or abuse of discretion because controlling test is whether record facts supporting agency action are adequately adduced and rationally applied.

<sup>4/</sup> Court concluded that HUD's administrative decision with respect to application of national flood insurance program to the city of Aberdeen, Mississippi, based on known historical flood data, was not arbitrary and capricious, but rather, procedural steps required by statute and applicable regulations were followed with meticulous care. Hence, because fact finding procedures were considered adequate, the receipt of additional evidence on a de novo hearing before district court was unnecessary.

If HUD's fact finding procedures in a particular case would be inadequate and civil penalties were imposed upon a mortgagee or lender by an administrative law judge, the mortgagee or lender would be entitled to a trial de novo. Otherwise, any judicial review would be based on the administrative record.

As the case law indicates, courts are reluctant to intervene where Congress has granted an agency discretion, and resulting decisions are subject to judicial review only to determine whether an agency has exceeded statutory authority or has acted arbitrarily. Further, the agency action is entitled to a presumption of regularity and the burden of proof rests with the non-governmental party. More importantly, agency action will not be set aside on grounds that it is arbitrary and capricious if the action is rational, based on relevant factors, and within the agency's statutory authority. As a safeguard, it would be wise to keep in mind that a reviewing court must determine whether the agency considered relevant data and articulated an explanation establishing a rational connection between the facts found and the choice made. <sup>3/</sup>

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<sup>3/</sup> Frisby, 755 F.2d at 1055, citing Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed. 2d 207 (1962).

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr.

RE: Violation of Regulatory Agreement

Dear Mr.

This letter will constitute formal notice by the Secretary of the Department of Housing and Urban Development that you are in default of the Regulatory Agreement executed between yourself and HUD. You have violated the Regulatory Agreement contract which requires you to maintain the mortgaged premises, accommodations, and grounds in good repair and condition. By your failure to so maintain the Navajo Apartments project, you have violated the mortgage's contractual obligation that you not commit waste upon the mortgaged premises. By letter of 1985,

Chief of Loan Management in HUD's field office, informed you of your violation of the Regulatory Agreement and mortgage. To date, you have failed to correct these violations. Accordingly, the Secretary hereby declares you in default of these contracts and is thus entitled to pursue the remedies therein provided.

Before initiating litigation, however, we will provide you with an opportunity to discuss your proposals to remedy this situation. We will delay our request to the Department of Justice to pursue litigation, including the alternatives of specific performance or foreclosure, for 30 days. To set up a meeting with my staff in , please contact, or have your attorney contact, , Office of Counsel, at . If you prefer to submit a written response, please send it to at Room .

If you fail to respond to the Secretary's satisfaction within 30 days, be advised that the Secretary will institute suit. In such event, attorneys' fees are not an eligible project expense.

Sincerely,



OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING -  
FEDERAL HOUSING COMMISSIONER

Re: - Project No.

Dear Mr.

The Department of Housing and Urban Development (the "Department" or "HUD") has compiled documentation showing that \_\_\_\_\_, (the "Owner") has failed to maintain \_\_\_\_\_ (the "Project") in good repair and condition, and thus has violated paragraph 10 of the HUD-insured Mortgage (the "Mortgage") held by \_\_\_\_\_. Paragraph 10 provides in part as follows:

AND MORTGAGOR COVENANTS, PROMISES, AND AGREES HEREBY:

• • • • •

10. To commit or suffer no waste of said property, [and] to maintain and keep the buildings, fences, and other improvements to be erected on said premises in good repair and condition....

• • • • •

Therefore, pursuant to 24 CFR §207.257, the Department hereby exercises its right to require \_\_\_\_\_ to accelerate payment of the outstanding principal balance due on the Mortgage on the basis of this violation. You are hereby directed to immediately send a notice of acceleration to the Owner, with a copy to the undersigned.

\_\_\_\_\_ declaration of default and acceleration of the debt pursuant to this letter shall constitute an event of default as provided in section 207.255(a)(2) of the regulations. Upon expiration of the thirty day grace period specified in §207.255(c) of the regulations, \_\_\_\_\_ shall be entitled pursuant to §207.258(a) to give the Department notice of its intention to file an insurance claim and of its election to assign the Mortgage. Because of the Department's interest in restoring the Project to satisfactory condition as soon as

possible, we request that you expedite the filing of the insurance claim. In this connection please contact to arrange for the assignment.

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## SUPPLEMENT D

(Mortgagor Name  
and Address)

Re: Project Name: \_\_\_\_\_  
Location: \_\_\_\_\_  
Project No.: \_\_\_\_\_

Dear \_\_\_\_\_:

This letter, when properly executed by an authorized officer of \_\_\_\_\_ (herein called the "Mortgagor"), shall constitute an agreement between the Mortgagor and the Secretary of Housing and Urban Development (herein called the "Secretary"), acting by and through \_\_\_\_\_ (title) \_\_\_\_\_ (name) with regard to FHA Project No. \_\_\_\_\_ (herein called the "Project").

WHEREAS, the Mortgagor has failed to make payments owed to the Secretary under a Mortgage Note secured by the Project, and has been duly declared to be in default by the Secretary;

WHEREAS, the Regulatory Agreement entered into between the Mortgagor and the Secretary provides that the Secretary may take possession of the Project after such default by the Mortgagor;

WHEREAS, the Mortgagor and Secretary wish to provide for the orderly and peaceable transfer of the possession and management of the Project from the Mortgagor to the Secretary.

NOW, THEREFORE, the Mortgagor and the Secretary agree as follows:

1. The Mortgagor will deliver to the Secretary or his agents possession of all the property, real, personal or mixed, associated with, derived from or used in the operation of the Project.
2. The mortgagor and his agent will refrain from interfering in any way with the possession, preservation, operation and management of the Project by the Secretary or his agents.

3. The Mortgagor hereby assigns to the Secretary the right to collect and receive all rents, charges and profits from the Project. The Secretary agrees to use this Project income to pay necessary expenses for operating and preserving the Project and to also pay the Mortgagor's obligations under the Note and Mortgage when Project income exceeds operating expenses. When operating expenses exceed project income, any advances made by the Secretary will be added to the outstanding indebtedness due and payable under the Mortgage.
4. The Mortgagor shall deliver to the Secretary forthwith, but in no event later than \_\_\_\_\_, the following:
  - (a) All funds held as tenant security deposits, along with an accounting for each tenant of the amount collected and date of collection.
  - (b) All funds in Project operating accounts, reserve fund accounts and any other accounts derived from or associated with the operation of the Project.
  - (c) All existing leases entered into between the Mortgagor and the current tenants of the Project, and a schedule of current rental rates.
  - (d) All supplies, furniture, equipment and other personal property associated with the Project.
  - (e) All existing service contracts for the Project including, but not limited to, contracts for landscaping, pest control, metered laundry equipment, air-conditioning and heating.
5. The Mortgagor will preserve all financial records, books of account and related materials and make them available to the Secretary for inspection at any time. The Mortgagor will also provide the Secretary with a final financial accounting for the project covering the period from the Mortgagor's last audited financial statement to the date of possession by the Secretary. This accounting must be prepared by an independent public accountant and certified by the accountant and the Mortgagor in accordance with the requirements of HUD Handbook 4372.1. The Mortgagor shall provide this accounting by \_\_\_\_\_

- 6. The Mortgagor acknowledges that the Secretary may act as the agent of the Mortgagor and any other party who has ownership interest in the project when necessary to carry out all management functions at the project, such as tenant evictions and rent increases, which are reserved to property owners by state law.
- 7. The Mortgagor acknowledges that the Secretary, in taking possession of this project, assumes none of the liabilities, costs or expenses incurred by the Mortgagor prior to the taking of possession by the Secretary.
- 8. The Mortgagor acknowledges that the actions detailed herein are to be taken without prejudice to or waiver of any right of the Secretary in any matter that has or may arise in connection with the Project.

Secretary of Housing and  
Urban Development

Mortgagor:

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_



OFFICE OF GENERAL COUNSEL

J. Christopher Kohn, Esq.  
Director, Commercial Litigation Branch  
Civil Division  
U.S. Department of Justice  
Post Office Box 875  
Ben Franklin Station  
Washington, D.C. 20044

Re:

Dear Mr. Kohn:

Enclosed are proposed complaints against the owners of two multifamily housing projects in \_\_\_\_\_, and the contract purchasers of each of the three projects. The complaints are based on the defendants' failure to properly maintain the projects and they seek orders placing HUD in possession of each of the three projects. After assuming possession of the projects, which are badly deteriorated, HUD intends to perform extensive repairs.

At the present time, the mortgages on the two of the three projects are held by HUD while the third is held by a private lender. The holder of the third mortgage is in the process of assigning the mortgage to HUD. HUD does not have the statutory authority to advance money from its insurance funds to perform necessary repairs before HUD acquires the mortgage. Therefore the complaint concerning the privately held mortgage should not be filed until the assignment of the mortgage for that project placed on record. We will notify you immediately after the assignment has been recorded.

We believe that our interests in these cases will best be protected by filing of motions for summary judgment as soon as possible after the cases have been filed. Enclosed is a proposed memorandum and declaration to support such a motion in one case. The declaration has been reviewed and approved by the potential declarant. These documents can be used as a model for memorandums filed in the other cases or they can be modified to cover all of the cases if they are consolidated by the court.

The low and moderate income housing projects were built with the proceeds of loans which were insured against default by the Secretary of HUD under Section 221(d)(3) of the National Housing Act, 12 U.S.C. §1715l(d)(3), [ ] or Section 236 of the National Housing Act, 12 U.S.C. §1715z-1, [ ]. The loans were made in the late and early , and there are a total of units in the three projects. Each project is owned by a separate nonprofit corporation which is affiliated with

In consideration for the mortgage insurance provided by the Secretary, the owners entered into Regulatory Agreement contracts with the Secretary which impose certain restrictions on the way the owner operates the project. The Regulatory Agreements provide, among other things, that the owners must maintain the projects "in good repair and condition" and that the owners may not sell or convey the projects without HUD's approval.

The Regulatory Agreements specify several remedies which are available to HUD if the owner should fail to observe its obligations thereunder. Among these is the right to:

Take possession of the project...and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement.

Paragraph 12(c).

The and projects were opened in stages between in physical and financial trouble even though HUD provided cash rental subsidies for 100 of the units under Section 8 of the Housing Act of 1937, 42 U.S.C. §1437f. Today, HUD subsidizes all of the units in the projects. The situation stabilized in the middle and late 1970's, but by 1980, the projects were once again in serious trouble. In the next several years, HUD consented to a mortgage modification agreement and provided nearly to repair the roofs and make other needed repairs. Despite these and other efforts, however, the physical condition of the projects continued to deteriorate. Throughout this period, the nonprofit owners and their sponsor, , believed that they could reverse the projects' fortunes even though they had no money of their own and even though HUD continually rated the management as less-than-satisfactory.

In 1987, , Inc. finally recognized that the projects could not be saved unless a new owner was found with the resources to begin a comprehensive repair program. After reviewing proposals and inspecting other projects that had been

purchased and improved, \_\_\_\_\_, Inc. selected \_\_\_\_\_ to purchase and syndicate the projects. In December 1987, the owners executed Agreements of Sale under which they agreed to sell the projects to partnerships controlled by \_\_\_\_\_. Copies of these Agreements are attached to the proposed complaints as Exhibit B.

Under these Agreements, the purchasing partnerships acquired equitable title to the projects, along with all of the benefits and obligations of ownership, Paragraph 3.F. The sale of the projects was specifically contingent on HUD's approval of the transactions, Paragraph 3.A., and the purchasers agreed to reconvey their interest in the projects to the owners if HUD disapproved, Paragraph 3.F.(2)(f). In addition, the purchasers specifically agreed to be bound by the terms of the Regulatory Agreements, Paragraph 3.F.(2)(g).

In September 1988, the purchasers took control of the projects and appointed \_\_\_\_\_ as their manager. \_\_\_\_\_ is affiliated with \_\_\_\_\_ through an extensive network of interrelated companies.

In April 1988, the purchasers submitted formal applications for HUD's approval of the sales. After reviewing the applications, HUD determined that the purchasers did not have sufficient resources to adequately repair the project and that HUD did not have funding available for this purpose. For this reason, HUD could not immediately approve the sales, but negotiations between HUD and the purchasers continued until January 1990 when, for reasons not related to these projects, HUD excluded \_\_\_\_\_ and other affiliated organizations from further participation in HUD programs. Shortly thereafter, HUD formally disapproved the transfers and ordered the purchasers to reconvey, and the owners to reacquire, the interests which were transferred to the purchasers under the Agreements of Sale. To date, neither the owners nor the purchasers have taken any steps to effectuate a reconveyance. \_\_\_\_\_ managed the projects until October 1990, when the purchasers notified HUD that they had appointed \_\_\_\_\_ as the management agent for the complex.

Although each of the project loans is now current, the physical conditions at the complex have not improved since the contract purchasers assumed management. As more fully described in the enclosed pleadings, the complex has major plumbing and heating problems. Also, one of the three phases needs a new roof and many of the porch and stairway railings are dangerously loose. Vandalism is rampant and security is nonexistent. Violence is so prevalent that recent reports in the \_\_\_\_\_ media have compared it to Dodge City. Secretary Kemp has visited the complex twice in the past several months and has stressed to all concerned the need to take action to correct the problems there.

### Legal Analysis

Our request to be placed in possession of the projects is based on paragraph 12(c) of the Regulatory Agreements which, as described above, permits HUD to

Take possession of the project...and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement.

We are not aware of any case law interpreting this precise provision. However, there are several reported cases in which HUD has been given control of a project, or a receiver has been appointed to operate a project, pending foreclosure under a similar provision in the project's mortgage.<sup>1</sup>

In some of these cases, the court has established a receivership solely on the basis of the contractual provision authorizing it. United States v. Queen's Court Apartments, Ltd 296 F.2d 534 (9th Cir. 1961); Garden Homes, Inc., v. United States, 207 F.2d 459 (1st Cir. 1953); United States v. Mountain Village Company, 424 F.Supp. 822 (D. Mass. 1976). Other courts have looked beyond the contractual right to possession or receivership to see if other equitable factors exist which will persuade it to grant the request. One of the factors which has typically satisfied the court's search is the physical deterioration of the property and the danger of waste. United States v. Cedar-Riverside Land Company, 592 F.2d 470 (8th Cir. 1979); United States v. Queen's Court Apartments, Inc., 288 F.2d (9th Cir. 1961); View Crest Garden Apartments, Inc. v. United States, 281 F.2d 844 (9th Cir. 1960).

As explained earlier, there is more than ample evidence to show that the defendants have failed to adequately maintain the projects.

Courts have also noted that the policies behind the National Housing Act are relevant considerations when deciding whether to

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<sup>1</sup>Most of these cases concern the establishment of a receivership rather than the appointment of HUD as mortgagee-in-possession (MIP) as requested here. But courts have considered request for MIP status to be an alternative to a request for the creation of a receivership, and will almost certainly apply the same standards when deciding whether to grant either request. See, United States v. St. Paul Missionary Public Housing, Inc., 575 F.Supp. 867 (N.D. Ohio 1983). See also, United States v. American National Bank and Trust Company of Chicago, 573 F.Supp. 1317 (N.D. Ill. 1983).

implement remedies at a HUD-involved project when the Regulatory Agreement has been violated. The Regulatory Agreement was designed to advance the policies of the National Housing Act, as the obligations imposed by the Regulatory Agreement on the owner "were exacted in order to comply with the requirements of the National Housing Act and the Regulations. . . ." United States v. Haddon Haciendas, 541 F.2d 777, 784 (9th Cir. 1976). Accordingly, the relief HUD is seeking should be granted, if for no other reason, because to do so would be to advance the goals of the National Housing Act by improving the living conditions at the complex.

Although the project loans are still current, HUD has requested the insured lenders to declare the loans to be in default because of the owner's failure to maintain the projects (this is a violation of the project's mortgages as well as a violation of the Regulatory Agreements) and to assign the loans to HUD. Two of the lenders have completed the assignments and the third is in the process of doing so. When HUD holds the mortgage on a project, it has the right to advance money from its General Insurance Fund to implement an extensive repair program. 54 Comp.Gen. 1061 (1975). HUD has begun the administrative process for foreclosing the two HUD-held mortgages, but it will be several months before the foreclosures can be concluded, and the problems at the complex are so severe that HUD does not wish to wait for foreclosure before addressing them. The most expeditious way to address these problems is through the litigation requested herein.

We believe that service on the owners [ \_\_\_\_\_ Inc.] can be made through \_\_\_\_\_, the President of each organization, at \_\_\_\_\_ . According to the sale contracts, the purchasers can be served at \_\_\_\_\_

\_\_\_\_\_ is the attorney on my staff who is assigned to this case. If you need further information about any of the matters discussed in this letter, you may contact \_\_\_\_\_

Enclosures

## UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

Civil Action No.

Defendants.

COMPLAINT

Comes now the United States of America on behalf of the Secretary of Housing and Urban Development (HUD) and respectfully brings this action for an order authorizing HUD to take possession of the housing project in

JURISDICTION

1. This Court has jurisdiction over this civil action under 28 U.S.C. § 1345.

VENUE

2. Venue is proper in the under 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff is the United States of America suing on behalf of the Secretary of Housing and Urban Development ("the Secretary" or "HUD").

4. . ("the owner") is a corporation organized and existing under the laws of the State of \_\_\_\_\_ and is the owner of \_\_\_\_\_ and moderate income housing project located in ("the project").

5. \_\_\_\_\_ Limited Partnership, a limited partnership,

#### STATUTORY AND REGULATORY SCHEME

6. Under Section 221 of the National Housing Act, 12 U.S.C. § 17151, the Secretary is authorized to assist private industry in providing housing for low- and moderate-income families by insuring mortgages which satisfy the eligibility requirements of 12 U.S.C. § 17151(d).

7. Each eligible mortgagor must agree to comply with the requirements of the Secretary with respect to rents, charges, and methods of operation as a condition precedent for receiving mortgage insurance in connection with the financing and construction of multifamily housing projects. 12 U.S.C. § 17151(d)(3). To implement such requirements, the Secretary is authorized to enter into Regulatory Agreements with mortgagors who participate in the Secretary's mortgage insurance program. 12 U.S.C. § 17151(d)(3).

8. The Secretary of HUD is authorized to promulgate rules and regulations to carry out the various mortgage insurance and

subsidy programs under Title II of the National Housing Act. 12 U.S.C. § 1715(b).

9. Pursuant to 12 U.S.C. § 1715(b), the Secretary has promulgated regulations governing the Section 221 insurance programs which appear at 24 C.F.R. § 221.502 et seq. These regulations provide that the Federal Housing Commissioner may regulate and restrict the mortgagor by means of a Regulatory Agreement as long as the Commissioner is the insurer, holder or reinsurer of the mortgage. 24 C.F.R. § 221.529.

FACTUAL STATEMENT

10.                                was built with the proceeds of a loan which was insured against default by the Secretary of HUD pursuant to Section 221(d)(3) of the National Housing Act, 12 U.S.C. § 1715(d)(3). The project was completed in

In consideration for the Secretary's agreement to insure repayment of the project loan,                                Inc.

(then known as                                ) executed a Regulatory Agreement with the Secretary. A copy of the Regulatory Agreement is attached hereto as Exhibit A.

11. Paragraph 8 of the Regulatory Agreement requires the owner to "maintain the [project], accommodations and the grounds and equipment appurtenant thereto, in good repair and condition."

12. The Regulatory Agreement provides that  
, may not convey, transfer or encumber the  
project without the prior written approval of the Secretary.  
Paragraph 7(a).

13. The Regulatory Agreement states at paragraph 12(c) that  
upon a breach by the owner of any provision, HUD may  
take possession of the project...and operate the project  
under the terms of this Agreement until such time as the  
Secretary in his discretion determines that the owners are  
again in a position to operate the project in accordance  
with the terms of this Agreement.

14.

15. Pursuant to rights which were conferred by the  
took  
possession of the project in September 1988, and appointed an  
identity-of-interest company as its managing agent. The  
purchaser has had full responsibility for managing the project  
since then.

BREACH OF CONTRACT - FAILURE TO MAINTAIN  
THE PROJECT IN GOOD REPAIR

16. Plaintiff realleges paragraphs 1-16 above which are incorporated fully herein.

17. Contrary to their obligations under paragraph 8 of the Regulatory Agreement,

have failed to maintain the project in good repair and condition. This failure threatens the health and safety of the tenants.

18. As described above in paragraph 14, the Regulatory Agreement permits HUD to take possession of the project when the obligations thereunder have been violated and to manage the project until HUD determines that the owner can operate it in accordance with the terms of the Regulatory Agreement.

WHEREFORE PLAINTIFF PRAYS:

A. For an order placing HUD in possession of until such time as HUD, in its discretion, determines that

Limited  
Partnership are capable of operating the project in accordance

with the requirements of the Regulatory Agreement;

B. For all other relief this Court deems just and proper.

Dated: \_\_\_\_\_, 1990

United States Attorney

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UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

Civil Action No.

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

This memorandum is filed in support of a motion by the United States of America for the appointment of the Department of Housing and Urban Development (HUD) to take possession of and operate the \_\_\_\_\_ housing project. \_\_\_\_\_ was built with the proceeds of a loan which was insured against default by HUD under Section 221(d)(3) of the National Housing Act. Its owner, \_\_\_\_\_ agreed to operate the project in compliance with certain reasonable conditions which are set forth in a Regulatory Agreement contract with HUD. The owner and other parties who are now bound by the Regulatory Agreement have failed to maintain the project in good repair and condition as required, and the health and safety of the tenants is threatened. As a result, it is vital to the interest of the tenants, the government, and the taxpayers that the project be taken away from the owner and that the relief requested in the government's motion be granted.

## I. STATEMENT OF FACTS

### A. HUD's Obligations under the National Housing Act

Congress established HUD and the programs administered by the agency to address identified national housing objectives. Perhaps the most fundamental of these goals is the provision of "a decent home and suitable living environment for every American family." 42 U.S.C. §1441. Congress has authorized HUD to administer the programs contained in the National Housing Act ("the Act"), 12 U.S.C. §1702, and requires that, in doing so, HUD act in a manner consistent with and in furtherance of congressionally-stated national housing objectives. 42 U.S.C. §1441.

Section 221 of the Act, 12 U.S.C. §17151, created several mortgage insurance programs "to assist private industry in providing housing for low and moderate income families and for displaced families." Under the programs pertaining to multifamily housing, the Secretary of HUD may insure loans made by private lenders to private developers or other owners for the purpose of building housing projects for low and moderate income tenants. If the borrower defaults on repayment of the loan, the insured lender may assign the mortgage to HUD in exchange for insurance payments, as provided in 24 C.F.R. §5207.255 et seq. Upon assignment of the mortgage, HUD assumes all rights of the insured lender.

### B. The Project

is a multifamily housing project located in [redacted] The project is owned by defendant [redacted] ("the owner") and was built with the proceeds of a loan insured by HUD under Section 221(d)(3) of the Act. The project was completed in November 1970.

At the present time, the project is approximately [redacted] occupied. Approximately [redacted] people live there, of whom [redacted] are children. Typically, the tenants are single-parent families with low and moderate incomes. HUD provides cash rental subsidy payments for every unit in the project under Section 8 of the Housing Act of 1937, 42 U.S.C. §1437f. HUD began providing subsidies in [redacted] when it authorized payments for 100 of the units. HUD increased the coverage of these subsidies until, in 1988, all [redacted] units were eligible for subsidy payments. These payments amount to roughly [redacted] each month.

### C. The Regulatory Agreement

To ensure that projects like [redacted] serve the purpose intended by Congress, the Secretary of HUD

may, in his discretion, require the mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return and methods of operation, and for such purpose the Secretary may make such contracts with...any such mortgagor as the Secretary may deem necessary to render effective such restrictions and regulations.

12 U.S.C. §17151d(3). See also, 24 C.F.R. §221.529.

At HUD elected to regulate the owner by requiring it to execute the standard Regulatory Agreement contract for Section 221(d)(3) projects. A copy of the Regulatory Agreement is attached to as Exhibit A hereto. The Regulatory Agreement contains numerous provisions which help HUD assure that the project and the money received by it are used to further the congressionally-mandated purpose. One of the owner's most important obligations is to maintain the project in good repair and condition. Paragraph 8. A project which is poorly maintained cannot provide a decent home or suitable living environment for the tenants.

If the owner fails to comply with its obligations under the Regulatory Agreement, HUD is specifically authorized to

take possession of the project...and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement.

Paragraph 12(c).

#### D. Recent History

After years of steadily declining conditions at the project, HUD urged the owner to sell it to any organization which could restore the project to sound physical condition. The owner initially resisted, but, in late 1987 after reviewing other projects which had been purchased and restored, .

Limited Partnership ("the purchaser"). During the negotiations between the owner and the purchaser, HUD worked with both parties to identify the project's physical problems and to devise a plan for solving them.

The parties executed an \_\_\_\_\_ under which the purchaser acquired equitable title to the project along with the \_\_\_\_\_ Paragraph 3.F. A copy of the Agreement of Sale is attached as Exhibit B hereto. The Agreement of Sale expressly stated that conveyance of full title would not take place until HUD reviewed and approved the transaction in accordance with its customary procedures for such matters. Paragraph 3.A.

title) so that the purchaser could seek low income housing tax credits from the \_\_\_\_\_

One of the most important provisions of the \_\_\_\_\_ under which the purchaser agreed to be bound by the terms of the project's Regulatory Agreement.

In September \_\_\_\_\_ the purchaser appointed an affiliated organization, \_\_\_\_\_, to manage the project. For the past two years, the purchaser has had full responsibility for the management and operations of the project.

\_\_\_\_\_ is no longer the management

agent for the project. Even though it retains legal title,  
. is no longer involved in the  
project's day-to-day functioning.

adequately repair the project and that HUD did not have enough  
funding available for this purpose. Accordingly,

At that time, for reasons  
not related to this project, HUD excluded the purchaser's  
and other affiliated organizations from  
further participation in HUD programs.

HUD also ordered the purchaser to reconvey, and the owner to  
reacquire, the interests which were transferred to the purchaser  
under the Agreement of Sale. As yet, neither the owner nor the  
purchaser have taken any steps to reconvey, and the purchaser  
continues in possession of the project.

#### E. Physical Deterioration

The project is in serious disrepair. HUD conducted a formal  
inspection of the project in and found numerous  
health-threatening conditions, many of which had gone uncorrected  
for years. HUD representatives have returned to the project 4 or  
5 times since April 1990, and most of these unsafe conditions  
still exist. The facts surrounding the project's physical

condition are summarized below and described in more detail in the attached Declaration of \_\_\_\_\_, which is attached as Exhibit C hereto.

One of the project's most pressing needs is for a new heating system. Last \_\_\_\_\_, the heat in numerous units went off at Christmas time and was only restored after emergency repairs were made. These repairs were at best a stopgap measure, and with the approach of winter, an entirely new system is urgently needed.

The project's plumbing has been a continuing problem. In almost all units, the bathroom fixtures leak into the kitchens below causing extensive damage to the walls, ceilings, floors and appliances. In many units, hot water is unavailable for days at a time. Raw sewage sometimes backs up into bathrooms.

Window glazing is deteriorated or missing throughout the project, permitting the windows to be easily blown or pushed out. The glazing around doors in the project is in the same condition.

Vandalism is rampant, particularly in the common areas and vacant units. Appliances have been ripped from walls and floors of vacant units and carted away. Large holes have been kicked in the doors and walls, creating an attractive but dangerous place for the project's many children to play. Vandalism has been made worse by the absence of any on-site security. The project's outdoor lighting no longer works. The project is so dangerous that newspaper accounts have compared it to Dodge City.

In short, \_\_\_\_\_ is a terrible place to live.

II. ARGUMENT

The obligation of the defendants under the Regulatory Agreement to maintain the project in good condition and repair is crystal clear. Similarly, it is clear that the defendants have fallen far short of this standard and that the tenants are the ones who are suffering. For this reason, the government seeks enforcement of HUD's contractual right to take over and manage the project.

A. Summary Judgment May Be Granted Because There Are No Genuine Issues of Material Fact

The only facts which are material to this motion concern the physical condition of the project and those facts are not in dispute. In fact, they are painfully apparent. The Declaration of \_\_\_\_\_ provides an accurate, detailed and unassailable narrative describing the present conditions at the project.

Summary judgment may be granted when, as in this case, there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); 60 Ivy Corporation v. Alexander, 822 F.2d 1432 (6th Cir. 1987). Where there is no such issue, summary judgment is an appropriate way to avoid a needless trial. County of Oakland v. City of Berkeley, 742 F.2d 289 (6th Cir. 1984).

B. The Facts and Law Justify Placing HUD in Possession of the Project

As stated above, paragraph \_\_ (c) of the Regulatory Agreement permits HUD, upon default, to

Take possession of the project...and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement.

While there are no reported cases which interpret this precise provision, several courts have invoked a comparable provision to give HUD control of a project, or to appoint a receiver to operate a project, pending foreclosure.<sup>1</sup>

In some of these cases, the court has taken control of the project away from its owner solely on the basis of the contractual provision authorizing it to do so upon default of the owner's obligations. United States v. Queen's Court Apartments, Ltd., 296 F.2d 534 (9th Cir. 1961); Garden Homes, Inc., v. United States, 207 F.2d 459 (1st Cir. 1953); United States v. Mountain Village Company, 424 F.Supp. 822 (D. Mass. 1976).

It has long been the government's position that these cases state the correct view of the law. See e.g., View Crest Garden Apartments, Inc. v. United States, 281 F.2d 844 (9th Cir. 1960)

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<sup>1</sup>A number of these cases concern the establishment of a receivership rather than the appointment of HUD to take possession of the project as requested here. But courts have consistently viewed a request to place HUD in possession as an alternative to a request for receivership, and will almost certainly apply the same standards when deciding whether to grant either request. See, United States v. St. Paul Missionary Public Housing, Inc., 575 F.Supp. 867 (N.D. Ohio 1983). See also, United States v. American National Bank and Trust Company of Chicago, 573 F.Supp. 1317 (N.D. Ill. 1983).

at 846. Here, the defendants' default and HUD's contractual right to possession of the project are obvious. For this reason alone, the court should grant the present motion.

Notwithstanding the government's position on this issue, some courts have, without rejecting that position, looked beyond HUD's contractual rights to see if other, equitable factors exist which will persuade it to grant the request. One of the factors which courts have found relevant is the physical deterioration of the property and the danger of waste. United States v. Queen's Court Apartments, Inc., 288 F.2d 253, 255 (9th Cir. 1951); View Crest Garden Apartments, Inc. v. United States, 281 F.2d at 849. See also, United States v. Cedar-Riverside Land Company, 592 F.2d 470 (8th Cir. 1979);

In addition, courts have also found that the policy behind the National Housing Act is a relevant consideration for the implementation of remedies at a HUD-involved project. The federal interest in such projects is more than the protection of the public fisc. United States v. Faddon Haciendas, 541 F.2d 777, 784 (9th Cir. 1976). The Regulatory Agreement was designed to advance the policies of the National Housing Act, and the obligations imposed by the Regulatory Agreement upon "the owner were exacted in order to comply with the requirements of the National Housing Act and the Regulations. . ." Id., at 784. The Regulatory Agreement and the obligations it imposes on project owners are the primary means through which HUD enforces the Act.

If the court were to look for factors beyond the contractual

provision permitting HUD to take possession, it would find them in abundance. There is more than sufficient evidence of physical deterioration at the project and waste. Indeed, the conditions at the project are inconsistent with National Housing Act objectives because they seriously jeopardize the health and safety of the tenants.

Admittedly, the project was in poor physical condition in September 1988 when the purchaser took control, but this is immaterial to the present motion. The motion is based on the undeniable fact that the project is still in poor physical condition today, over two years later.

There is no doubt that both HUD and the purchaser have attempted to address the project's problems. The purchaser has spent substantial amounts of money in making repairs, but these expenditures have proven to be far too little too late. For its part, HUD worked with the owner and the purchaser before December 1987 to identify the project's physical problems and to find solutions to those problems. After December , HUD continued to provide Section 8 subsidy payments to the project and authorized both an increase in those payments and a rent increase that augmented project income by more than 27%. HUD has also obtained commitment from the insured private lenders to fund emergency repairs. In addition to all of these activities, HUD has also met with representatives of the tenants on a regular basis. See paragraph 22, , Exhibit C.

When all is said and done, however, it is the responsibility

of the defendants, not HUD, to ensure that the project is properly maintained. It is the defendants, not HUD, who have assumed the burdens of ownership as well as the benefits. It is the defendants, not HUD, who have voluntarily agreed to keep the project in proper repair and to permit HUD to take over if they fail to comply with this crucial obligation.

The purchaser and its agent have controlled the project for more than two years and have utterly failed to correct the very serious problems that exist. The court can only conclude from this that the defendants do not have the ability or the resources to make the needed repairs and that the tenants will continue to suffer so long as the defendants remain in control. For this reason, the only hope for the project and for the tenants is to enforce the explicit terms of the Regulatory Agreement and permit HUD to assume possession and to carry out an effective repair program.

#### CONCLUSION

For the reasons described above, the government's motion for summary judgment should be granted.

Dated: \_\_\_\_\_, 1990

United States Attorney

\_\_\_\_\_