



U.S. Department of Housing and Urban Development
New York State Office
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<http://www.hud.gov/local/nyn/>

Bookletter #3

FY' 2004 – 2AHMFAM

DATE: August 1, 2004

MEMORANDUM FOR: All Owners/Managing Agents, Project Attorneys, Property Disposition (formerly HUD-owned and resold with Section 8 Assistance), Public Housing Agencies, and all HUD insured and assisted properties.

FROM: Deborah VanAmerongen, Director, New York Multifamily HUB

SUBJECT: COMMERCIAL LEASES

This Bookletter is intended to streamline and facilitate the review process for commercial leases. While compliance with this Bookletter will expedite the review process, all parties are urged to submit proposed leases well in advance of execution to give our office sufficient time for a review of the draft.

All leases submitted for review and approval must be in draft form and **NOT EXECUTED**. A lease cannot be entered into without the approval of HUD. HUD's approval is required pursuant to the Regulatory Agreement.

SUBMISSION OF PACKAGE FOR REVIEW:

The project should submit a DRAFT of the proposed lease (including all riders, supplements, addendums, schedules and exhibits), and a lease summary (including additional or supporting documents as required) providing an appropriate summary of the lease terms.

LEASE SUMMARY:

In order to expedite the approval process for the review of all proposed leases of premises located in HUD insured properties, effective as of the date of this Bookletter, the project owner should submit a summary of the lease. A sample of a summary is attached hereto as Exhibit A.

Note that all required lease provisions (specified below) may be included in a lease addendum or rider, attached to and incorporated into the lease, such that the provisions of the addendum or rider control, supercede, and take precedence over conflicting lease provisions, for so long as the mortgage on the property is either insured or held by HUD or HUD has an ownership interest in or possession of the property.

GENERAL GUIDELINES:

The project may not execute or enter into any agreement or contract for the lease, conveyance, transfer, or encumbrance of the mortgaged property without the prior written approval of the mortgagee and/or HUD.

The project may not enter into any agreement for the assignment, transfer, disposal of, or encumbrance of any personal property of the project without the prior written approval of the mortgagee and/or HUD.

The project may not approve of, undertake or permit any demolition, remodeling, modifications, alterations, reconstruction, construction to or subtraction from any part of the mortgaged property or any subtraction from any real or personal property of the project without prior written approval of HUD.

The project must set commercial rents at least at levels that will cover the commercial space's share of project debt service and operating expenses. Additionally, commercial rents must be greater than or equal to the market rents for comparable space unless it results in other compensatory financial or other benefits for the project.

If a lease contemplates a conversion of residential units to commercial use, the project should notify the mortgagee and/or HUD and comply with the applicable handbook requirements.

In general, HUD will not approve the usage of Subordination, Non-Disturbance, and Attornment Agreements.

Any lease submitted to HUD for review should include the standard HUD rider provisions listed in the attached Exhibit B.

PARKING GARAGE LEASES:

The leasing of parking facilities to the general public should not result in commercial enterprises or excessive traffic to the detriment of the residential tenants.

Any lease for a garage or parking facility should include the additional HUD rider provisions contained in the attached Exhibit B-1 (in addition to those in B).

TELECOMMUNICATION SERVICES LEASES AND TELECOMMUNICATION ANTENNA LEASES:

Please read and comply with HUD Housing Notice 03-32 reissued Housing Notice 96-19 "Telecommunications Services - Contracts between Telecommunications Service Providers and Project Owners." Additionally, all leases must comply with the guidelines attached as Exhibit C to this Bookletter.

ALL LEASES SUBMITTED FOR REVIEW AND APPROVAL MUST BE SUBMITTED IN DRAFT FORM.

If you have any questions, please call Gladys Anderson at (212) 264-0777 ext 3864 or Lindsay Collins at ext 3775.

EXHIBIT A

SAMPLE LEASE SUMMARY

1. PROJECT NAME AND PROJECT NUMBER
2. NAME OF TENANT: (Whether an Identity of Interest exists)(Trade Name)
(Parent Name);
3. TYPE OF LEASE (store, daycare center, pharmacy etc.)
4. PROPOSED COMMENCEMENT DATE OF LEASE;
5. IDENTIFY EXACT LOCATION (Square footage/floor/location);
6. TERM: (Initial/Renewals(s)/Options);
7. RENT: (Rent per square ft./Minimum Annual Rent/Initial Term/Renewal
Term(s)/CPI escalation (or equivalent i.e. Porter's Wage, Operating)/Percentage
(Cap, if any)/Tax Escalation/ Insurance Escalation/Utilities/Other);
8. MARKET COMPARABLES: Evidence that rent is at fair market value. Such
evidence may be in the form of comparable recently rented commercial space
which provides a rental range to support the proposed commercial lease rent;
9. ALLOWANCES BY LANDLORD (Total value \$) (Construction/Moving/
Free Rent/Other (i.e. lease takeover);
10. LIST ANY FINANCIAL OR NON-MONETARY BENEFIT TO THE
PROJECT;
11. LIST OTHER COMMERCIAL TENANTS AT PROJECT, IF ANY: (Include
size of premises & rent per square foot);
12. DETAIL ANY PROPOSED CONSTRUCTION: (Including alterations,
modifications, additions, build-outs, renovations) State whether work is structural
or non-structural and its impact to the building) (State whether work involves
asbestos or other environmental concern);
13. WHETHER LEASE INVOLVES A CONVERSION OF RESIDENTIAL UNITS
TO COMMERCIAL USE;
14. USE: (Permitted use/Restrictions on Tenant's use/Restrictions on Landlord's use)
15. WHETHER LEASE RESULTS IN DECREASED USE OR ACCESS BY
RESIDENTIAL TENANTS;

16. REPAIRS AND MAINTENANCE: (By Tenant or Landlord);
17. RENT ABATEMENT & RENT SET-OFF (Other than pro rata rent abatement in the case of partial casualty with termination or abatement on restoration);
18. IDENTIFY ANY LEASE PROVISION (including schedules, exhibits, attachments and riders) THAT CONFLICT WITH THE TERMS OF THE MORTGAGE OR REGULATORY AGREEMENT: (An existing conflict may be resolved by modifying the lease using a HUD rider which will control so long as HUD maintains an interest in the project);
19. DISCLOSE THE EXISTENCE OF RELATED DOCUMENTS NOT INCLUDED IN SUBMISSION PACKAGE: (Memorandum of Lease; Guaranty of Lease; Tenant Estoppel Certificate; Amendments, if any; Guaranty, if any)
20. PROVIDE ANY OTHER PERTINENT INFORMATION THAT MAY BEAR UPON HUD'S REVIEW OF THE PROPOSED LEASE AND RELATED TRANSACTION.
21. A STATEMENT INDICATING WHETHER PROJECT IS IN DEFAULT;

EXHIBIT B

STANDARD HUD RIDER PROVISIONS FOR ALL LEASES

1. The lease shall not be modified or terminated except for a breach of covenant thereof without the prior written consent of the mortgagee and/or HUD.
2. There shall be no assignment or sub-leasing of any portion of the leased premises without the prior written consent of the mortgagee and/or HUD.
3. The lease may be terminated, at the option of HUD, in the event the Secretary becomes mortgagee or owner of the property.
4. The use of the leased premises as initially approved by HUD shall not be changed without written consent of HUD.
5. In the event rental rates under a lease are stated in other than a fixed dollar amount, such as a lease specifying rents based upon a percentage of the incoming accruing from the business for which the premises were leased, a provision should be included fixing a minimum dollar amount as an annual rent.
6. In the event of any conflict between the terms of the lease and the HUD-insured Mortgage, Mortgage Note, or Regulatory Agreement, the terms of the HUD-insured Mortgage, Mortgage Note, or Regulatory Agreement shall control.
7. Landlord and tenant acknowledge that the mortgagee and/or HUD has the right to apply the money derived from any insurance on the property to the reduction of the debt. The lease shall not obligate the landlord to rebuild or restore the premises in the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or casualty, without the prior written approval of the mortgagee and/or HUD. Either party may terminate the lease, in the event insurance proceeds are not made available for repairs or restoration.
8. Landlord and tenant acknowledge that the mortgagee and/or HUD has the right to apply the money derived from any award of damages in connection with condemnation or a taking of the property by eminent domain to the reduction of the debt. The lease shall not obligate the landlord to rebuild or restore the premises in the event all or any of the buildings covered by the mortgage shall be condemned or taken, without the prior written approval of the mortgagee and/or HUD. Either party may terminate the lease, in the event any award or funds are not made available to make the premises suitable for the use intended under the lease.
9. Landlord and tenant acknowledge that all rents, profits and income payable to landlord are assigned to the mortgagee and/or HUD for the purpose of discharging the landlord's debt and that the landlord has permission to collect such rents, profits and income from tenant so long as no default exists under the project's loan documents. In the event of such default, the tenant shall upon written notice from the mortgagee and/or HUD pay all rental charges directly to the mortgagee, HUD, or another entity designated in such notice.
10. Tenant covenants that it will not voluntarily create or permit to be created against the property any lien or encumbrance nor make a pledge or an assignment of any interest in the premises.
11. Any provision in the lease, which requires landlord to indemnify or hold harmless tenant, shall be null and void and have no force or effect, for so long as the mortgage on the property is either insured or held by HUD or HUD has an ownership interest in or possession of the property.
12. Tenant agrees not to seek to recover any damages, costs or expenses from the project (to the extent insurance proceeds are made available), the project's assets, or HUD, for so long as the mortgage on the property is either insured or held by HUD or HUD has an ownership interest in or possession of the property.
13. The lease shall not become effective or legally binding until approved in writing by

EXHIBIT B-1

ADDITIONAL HUD RIDER PROVISIONS FOR PARKING/GARAGE LEASES:

1. The tenant shall not charge rental rates in excess of those as processed by the mortgagee and/or HUD, without prior written permission of the mortgagee and/or HUD.
2. A priority of use of the garage facilities shall be given to all residents at monthly rates not in excess of those approved by the mortgagee and/or HUD so long as the mortgage on the property is either insured by or held by the Secretary.
3. The lease shall not be modified nor may it be terminated (except for a breach of covenant thereof or except in those leases containing a non-disturbance provision) without the prior written consent of the mortgagee and/or HUD.
4. The tenant may not assign its rights under the lease nor undertake to sublease any portion of the leased premises without the prior written consent of the mortgagee and/or HUD.
5. The lease may be terminated at the option of HUD, in the event that by operation of the mortgage insurance contract, the Secretary becomes either (a) the holder of the mortgage or (b) the owner of the property.

Exhibit C

Telecommunication Agreements

Projects Cable Contracts

Projects requesting HUD's approval of their telecommunication agreements should follow the draft agreement (available upon request) already approved by HUD. Those agreements that do not conform to the approved draft are to be reviewed by HUD Headquarters. HUD will review these agreements only if they have included the following information in their submitted agreement:

1. The agreements for telecommunications will be looked at more favorably if written in the 6 to 8 year time frame with renewals every 5 years.
2. There must be language protecting the tenants right of refusal. (The parties acknowledge that a tenant of the Premises is not required to receive the services provided by the Operator/Provider, and may use alternate (non-cable or other cable systems) service of their choice.
3. There must be language stating that the fee paid by Provider to owner is treated as project income. And the income must be used to operate the project. The fee payable by Provider to Owner (paid to a project account to be used for project purposes including a computer training facility, training classes, security equipment or other facilities of general benefit to the residents and for Owner's profit as surplus cash as provided for in the HUD regulatory agreement) for the rights granted to Provider under this agreement.
4. If HUD becomes the mortgage holder, there is no statement that HUD must consent on all amendments to agreement.
5. HUD needs to be indemnified. (Notwithstanding any other provision of this agreement, the U.S. Department of Housing and Urban Development) (HUD), whether in the capacity of mortgage insurer, lender, owner or mortgagee in possession, shall have no obligation of indemnity, of any nature whatsoever, to any company, person or party, either now or in the future. Furthermore, should HUD become an assignee or successor under this Agreement, any obligation on the part of HUD to continue this Agreement shall be at HUD's sole discretion as determined by HUD in writing and Provider shall have the right to continue to provide the services to residents until notified of any changes in the Agreement).
6. Agreement must provide that the provider warrants equipment against endangering tenants. (Provider warrants that its equipment will not endanger tenants or cause frequent interference with normal, non-cable television reception).

7. The Owner/Management Agent on-site staff shall not be employed as sales or marketing personnel to the provider.
8. There must be an approval signature of an authorized agent of HUD on the signature page.
9. There needs to be language in the agreement on building access and improvements. (Prior to making any alterations or improvements to the Building, Provider must give Owner and HUD a reasonably detailed description thereof and, if plans and specifications therefore are required to be filed with any governmental agency pursuant to government requirements, Provider shall deliver such plans and specifications to Owner and HUD, and shall not proceed with such alterations or improvements without the prior written approval of Owner).
10. A Telecommunications Services Agreement that contains standard contract language is available at <http://hudweb.hud.gov/po/h/hm/fog/docs/telecommunications.pdf>. Any deviation from this language must be disclosed and approved by HUD.