

restrictions, given the available financing structure, firm financing commitments, and market for the project;

(3) Whether the mixed-finance owner has the resources and capacity to develop and operate the project for the required time period;

(4) Whether the HUD-assisted units are comparable in size, location, appearance, and design to any units without HUD assistance;

(5) Whether the mixed-finance owner will develop and operate the Section 202 or 811 assisted units in accordance with all HUD program requirements, including program regulations governing those units;

(6) Whether the documents include the required covenants and use restrictions, which must be recorded prior to release of HUD funds;

(7) Whether the mixed-finance owner has obtained all necessary State, local, and Federal approvals, zoning changes, or variances;

(8) Whether the design of the development meets applicable accessibility requirements;

(9) Whether the supportive services to be provided for the Section 202 or 811 units are at least equal to the services the sponsor proposed to provide in its 202 or 811 application for funding;

(10) Whether the assistance to be provided under this part, taking into account all assistance to be received by the project, is no more than necessary to provide affordable housing, as required by section 102(d) of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. 3545(d);

(11) Whether any other processing criteria that HUD may prescribe from time to time are satisfied;

(12) Whether the mixed-finance owner has certified to compliance:

(i) With all applicable Federal, State, or local civil rights laws and regulations;

(ii) With all environmental regulations;

(iii) With applicable wage rates determined in accordance with the Davis-Bacon Act and with related labor standards.

§ 891.825 Evidentiary materials.

Any updates or amendments to materials submitted at the firm commitment/mixed-finance proposal stage must be submitted as part of the evidentiary materials, even if not specifically requested.

(a) *General.* Except as otherwise expressly provided, a mixed-finance owner is required to submit for HUD review and approval prior to HUD's approval of the release or drawdown of capital advance funds all evidentiary materials required by HUD. Upon HUD approval of evidentiary materials, the evidentiary materials will be executed and recorded in the order required by HUD, along with other required documents. All the executed documents for the mixed-finance project will be made available for HUD's final review before drawdown of funds. The evidentiary materials must include:

(1) *Organizational documents.* Updated organizational documents of the mixed-finance owner, nonprofit organization, and all participating parties in the partnership showing that:

(i) One of the purposes of the mixed-finance owner is the promotion of the welfare of elderly persons or persons with disabilities;

(ii) There is no prohibited conflict of interest or prohibited identity of interest involving the sponsor, the nonprofit organization, or the mixed-finance owner, and the mixed-finance owner is not controlled by or under the direction of persons or firms seeking to derive profit or gain from the mixed-finance owner. Individual conflict of interest and identity of interest and disclosure certifications must be submitted by all directors, officers, shareholders, trustees, and agents of the mixed-finance owner and the nonprofit organization and all development team members; and

(iii) A partnership agreement has been entered into between the mixed-finance owner, its general partner, and any other participating entities that establishes the relationship of the partners with respect to implementation of the proposal.

(2) *Amendment to capital advance.* A mixed-finance amendment to the capital advance agreement.

(3) *Deed; declaration of covenants or deed restriction.* A deed or ground lease to the mixed-finance owner with a declaration of covenants or deed restriction, and a pro forma title policy. The first recorded document must be a covenant running with the land, deed restriction, Use Agreement, or other document of public record in the form prescribed by HUD that will assure to HUD's satisfaction that the HUD-assisted units will be available for use by eligible very low-income elderly or disabled families in accordance with all applicable requirements for no less than 40 years, and that any party that subsequently acquires the mixed-finance development will be fully bound under these covenants and deed restrictions;

(4) *Zoning.* Evidence that the zoning of the site permits construction of the mixed-finance development;

(5) *Site control.* Evidence that the sponsor, nonprofit organization, or mixed-finance owner has control of the site for such period of time as may be required by HUD, and a title policy or report evidencing that the site is free of any encumbrances, restrictions, or reverts that could adversely affect use of the site for the proposed project;

(6) *Development agreement.* Any development agreement or agreements, or other document showing the proposed development schedule; the respective responsibilities of each party for each development phase; the expected costs and financing for those costs; the allocation of risk of loss as between or among the parties; and guarantees of completion, insurance, and bonding requirements as applicable to regular 202 and 811 projects;

(7) *Regulatory agreement.* A regulatory or operating agreement that provides binding assurance that operation of the 202 or 811 units will be in accordance with the applicable Section 202 or 811 requirements;

(8) *Management agreement.* Any agreement relating to management of the Section 202 or 811 development by an entity other than the mixed-finance owner or the nonprofit organization, requiring that the management of the project will be in accordance with Section 202 or 811 requirements;

(9) *Financing documents.* Any updates to the financing and firm commitment documents required under the mixed-finance Proposal;

(10) *Federal subsidies.* A description of the amount and source of any housing assistance that the project will receive from a state, unit of local government, or the Federal government, as required by section 102(d) of the HUD Reform Act of 1989, 42 U.S.C. 3545(d);

(11) *Certification of compliance with approved proposal.* The mixed-finance owner's certification that it will develop and operate the number of 202 or 811 units approved by HUD, in the configuration and with the bedroom sizes approved by HUD, within the approved cost limits; and comply with all applicable statutory, regulatory, and Executive Order requirements for the 40-year period required by law and in accordance with the HUD-approved proposal;

(12) *Legal opinion.* A legal opinion supporting the legal capacity of the mixed-finance owner and its affiliates to enter into all necessary agreements to develop and operate the mixed-finance project, as well as the validity and priority of the covenants and restrictions of the mixed-finance documents. The legal opinion must attest that the counsel has examined the availability of the participating parties' financing, the amounts and sources of financing committed to the mixed-finance project by the participating parties, and that such financing has been irrevocably committed for use in carrying out the project;

(13) *No assignment.* A statement by the mixed-finance owner and the nonprofit organization, which must be included in all agreements and contracts with participating parties, that a transfer of 202 or 811 capital advance funds or rental assistance to the mixed-finance owner shall not be deemed an assignment of the funds, and the transferee shall not succeed to any rights or benefits of the nonprofit organization under the capital advance agreement;

(14) *No third-party beneficiary relationship.* A statement to be included in the capital advance agreement and the mixed-finance amendment to the capital advance agreement that nothing in the capital advance agreement or

mixed-finance amendment to the capital advance agreement shall be deemed to create a relationship of third party beneficiary, principal-agent, or any relationship involving HUD.

(15) *Additional certifications.* The owner's certification to:

(i) Compliance with all applicable Federal, State, or local civil rights requirements;

(ii) Compliance with all deed conditions and covenants running with the land, including the requirement not to dispose of the development without the prior written approval of HUD for the entire period that the use restrictions for the assisted housing remain in effect;

(b) *Other.* The mixed-finance owner must submit such other evidentiary materials as HUD may require.

EFFECTIVE DATE NOTE: At 68 FR 67321, Dec. 1, 2003, § 891.825 was added. This section contains information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 891.828 Loan of capital advance funds to mixed-finance owner.

Upon issuance of the firm commitment for capital advance financing, the nonprofit organization to which has been transferred the fund reservation by the sponsor, shall execute a capital advance agreement and an agreement to enter into a Project Rental Assistance Contract with HUD. Upon approval of the mixed-finance proposal and the evidentiary materials, the mixed-finance owner shall provide a Note evidencing a non-amortizing loan of the capital advance funds for a period of not less than 40 years at the program interest rate in effect on the date of the Note. The mixed-finance owner shall execute and record a use agreement, which shall include a complete legal description of the project site and which shall be accompanied by a title insurance policy or commitment insuring the validity and priority of the use agreement. Capital advance funds can be drawn down under a disbursement and escrow agreement in accordance with § 891.830.

§ 891.830 Drawdown.

(a) Upon its approval of the executed evidentiary materials and other documents submitted and upon determining that such documents are satisfactory, HUD may approve the drawdown of capital advance funds in accordance with the HUD-approved drawdown schedule.

(b) The capital advance funds may only be drawn down in an approved ratio to other funds, in accordance with a drawdown schedule approved by HUD. The nonprofit organization and the mixed-finance owner shall certify, in a form prescribed by HUD, prior to the initial drawdown of capital advance funds, that they will not draw down more capital advance funds than necessary to meet the pro rata share of the development costs for the 202 or 811 units. The nonprofit organization and the mixed-finance owner shall draw down capital advance funds only when payment is due and after inspection and acceptance of work covered by the draw.

(c) Each drawdown of funds constitutes a certification by the mixed-finance owner and the nonprofit organization that:

(1) All the representations and warranties submitted in accordance with this subpart continue to be valid, true, and in full force and effect;

(2) All parties are in compliance with their obligations pursuant to this subpart which, by their terms, are applicable at the time of the drawdown of funds;

(3) All conditions precedent to the drawdown of the funds by the nonprofit organization and the mixed-finance owner have been satisfied;

(4) The capital advance funds drawn down will be used only for eligible costs actually incurred in accordance with the provisions of this subpart and the approved proposal; and

(5) The amount of the drawdown is consistent with the ratio of 202 or 811 units to other units.

§ 891.833 Monitoring and review.

HUD shall monitor and review the development during the construction and operational phases in accordance