agreement as NCDC may require.

Since NCDC must review the economic and financial feasibility of the project periodically, the developer must submit for all completed development years a comparison of the actual costs and revenues vs. initial projections contained in the previous year's submission.

The developer should analyze and explain the cause of any discrepancies. In light of this analysis, the developer should supply forecasts of source and application of funds for the remaining development years. The projections should include any revisions in the detailed schedules of land absorption, unit prices, costs, and revenues.

Financial statements must be submitted in a format satisfactory to the NCDC. A standard format for financial reporting is under development by the NCDC for the purposes of monitoring and application review. This will be closely related to the monthly uniform statistical reporting system and will permit sensitivity analysis showing the relative impact of changes in the pace of development, costs or revenues, on the financial plan.

The annual report and opinion of independent certified public accountants must be based upon an examination made in accordance with generally accepted accounting principles, must conform to any instructions issued by the NCDC and must include a statement that the accountants have no knowledge of any default.

For the purposes of the statements required to be furnished to the NCDC, any division of the developer (or of a subsidiary) which is engaged in non-Title VII activities is deemed to be a subsidiary. A separate schedule is required to accompany each balance sheet to reconcile real property values reflected therein with values reflected in the schedule of security.

c. Uniform Statistical Systems Reporting. Monthly reports of coded items of statistical information are required to permit quantitative measurement
of progress in project development. The NCDC model (under development) into which this information is fed will permit comparison with projected progress and sensitivity analysis by modification of selected variables. It will also permit comparison of assisted projects since the coded information will be uniformly defined.

d. Narrative Performance Reports. On a semi-annual basis, the developer must furnish to the NCDC 10 copies of a consolidated report of progress during the preceding six months in performance of the developer's obligations under the performance covenants of the project agreement. The format of the report is indicated in Appendix 11.

Each such report should contain a review of major issues and problems being encountered by the developer together with proposed action for their resolution, an up-to-date report on all Federal grants which have been requested or received, and a comprehensive progress report on each section under the development plan. A separate section listing significant action to be taken during the interval between reports and a review of the status of those items scheduled for action in the preceding report should also be included. A final section of each report should specify an agenda (including representatives of the developer and consultants) for a meeting within 10 days thereafter with the NCDC and any other appropriate Federal, state or local officials to be held either at HUD or the project site to review outstanding issues and coordinate governmental efforts in support of the project.

On an exceptional reporting basis, the NCDC may request narrative reports of progress in cases where the developer is facing particularly difficult problems, such as adverse economic problems or difficulties with local government.

e. Annual Review of Development Plan. At the end of each year the developer submits to the NCDC an evaluation of the accomplishments of the previous one-year plan, a statement of changed or changing conditions affecting development,
and proposed one-year, three-year, and (if major changes have been made) long-term plans in each development category contained in the development plan. The amendment process resulting from this review is described in Section 2-14.

f. Reports of Adverse Change. The developer must ascertain and give immediate notice to the NCDC of any facts or conditions which may adversely and substantially affect or impede the implementation of the project. Specified matters include (1) notice of litigation affecting the status or powers of, or ownership interests in, the developer or any restricted subsidiary; outstanding debentures; or project property, project requirements or the use of project funds involving $50,000 or more; (2) changes in laws, ordinances or official plans, related to the project; (3) damage to project property in excess of $50,000; (4) work stoppages for longer than five business days on any part of the project; and (5) defaults on contracts or subcontracts covering project development work.

g. Internal Reporting. The developer is encouraged to develop an internal reporting system compatible with the NCDC guidelines and meeting his own management needs, as described in Section 3-9. Since information required by the NCDC will be essential for internal management reporting, the developer should avoid duplicative procedures for collection, analysis and review of such information.

h. Evaluation. The developer is encouraged to undertake evaluation as an integral part of monitoring activities. Monitoring alone involves statistical reporting or narrative description of progress, as required by the development plan, but evaluation adds a subjective assessment or quantitative measurement of the qualitative aspects of development. For example, a routine monitoring or statistical report concerning low and moderate income housing would show the number of lots sold to builders of low and moderate income housing units, the number of
units actually under construction, the number of units occupied, and a profile by race and income of the occupants of such units. An evaluation might include a survey and analysis of the degree to which these low income residents are satisfied with the new community, the degree to which intergroup tensions are growing or being resolved, the efficiency of location policies, the quality of services, and so on.

The NCDC will contract with outside experts, undertake its own field surveys, and make use of other federal agencies for qualitative evaluation of approved new communities, independent of the specific targets in development plans. These efforts will be designed to improve the state of the art of community building and assist the developer of the new community for which studies are being conducted. Particularly important in the area of evaluation is an assessment of the degree to which human needs have been met and are continuing to be met by the new community plan. See Section 3-5.

2-13-3. FEES.

a. Annual Fee. An annual fee equal to 0.5 percent of the average principal amount of guaranteed obligations, and unused guarantee commitment, outstanding during the preceding year must be paid on the first anniversary date of the guarantee, until the seventh such date; and, thereafter, an annual fee of 1 percent of the average principal amount of guaranteed obligations, and unused guarantee commitment, outstanding during the preceding year must be paid on each subsequent anniversary date of the initial guarantee. Annual fees may, however, be waived at the discretion of the NCDC in the case of obligations issued by a public developer if the guarantee fee has also been waived. See paragraph 2-11-5.

b. Transfer Charge. Upon application for approval of a case involving the substitution of developers, a transfer charge of 0.05 percent of the unused portion of the commitment for interest loan or guarantee assistance must be paid.
SECTION 2-14. AMENDMENTS AND WAIVERS

2-14-1. PURPOSE. Throughout the development period, it is anticipated that numerous modifications will be necessary or desirable in the contractual understandings affecting the developer and the NCDC. Such modifications are contemplated in the project agreement and trust indenture by specific provisions designed to facilitate appropriate amendments and waivers. Amendment of the development plan attached to the project agreement is not only contemplated but must be the subject of an annual review by the developer to assure that the planning process remains dynamic and responsive to changing project needs and advances in the art of community planning and building. In limited instances, the NCDC is given authority to require amendments which are necessary to achieve statutory objectives in the light of changed circumstances.

2-14-2. SCOPE. Situations will frequently arise under the many detailed covenants of the project agreement and development plan when, for good cause, the developer should be excused temporarily from strict technical compliance with specific requirements. This is accomplished at the developer's written request by waiver in the form of a letter from the NCDC setting forth the required performance to be excused and the limitations or conditions upon which the waiver is granted. If the parties find it appropriate to alter or add any requirement or understanding which has the effect of increasing or changing (rather than releasing) the obligations of either party, then the modification should be accomplished by way of an amendment to the appropriate contract, executed by the original parties thereto with the written consent of any third-party beneficiaries. The development plan contains special provisions authorizing non-substantial amendments by the developer without execution or consent of the NCDC; certain non-substantial amendments are, however, defined and the developer bears the risk that other amendments may be found by the NCDC to be substantial. Special provisions are also contained in the indenture authorizing supplemental indentures to be executed by the developer and trustee with the consent of the NCDC but without consent of the holders of guaranteed obligations in defined instances not materially affecting the rights of the holders.

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2-14-3. PROCESS AND TIMING.


1) Substantial Amendment. Any amendment to the development plan which materially affects achievement of the purposes of the Act will be considered a substantial amendment requiring the prior approval of the NCDC. So long as an amendment, either solely or cumulatively as one in a series of amendments, does not infringe any of the percentage limitations set forth below, it will not be regarded as a substantial amendment:

(a) Changes the overall density provisions of the development plan by a factor of less than 10 percent thereof; or

(b) In the case of a defined stage of the development plan, changes the density provisions by a factor of less than 20 percent thereof; or

(c) Changes the overall provisions in the development plan for dwelling units to be available to any income quartile in the metropolitan area profile (as amended from time to time), or the agreed provisions for low and moderate income housing, by a factor of less than 5 percent thereof; or

(d) In the case of any defined stage of the development plan, changes the provisions of the development plan for dwelling units to be made available to each income quartile in the metropolitan area profile (as amended from time to time) by a factor of less than 10 percent; and

(e) Reduces, increases or relocates the area of any of the land use categories contained in the development plan by a factor of less than 10 percent thereof.
(2) **Criteria for Approval.** In approving or disapproving amendments, the NCDC applies the same criteria and policies outlined in Chapter 3 of this Handbook that it applies in approving the initial application. In considering proposed changes in the development pace for commercial or residential land, the NCDC will take into account market conditions and performance during the previous year.

In the case of major changes, the developer should provide documentation to show that the proposed changes will not have an adverse effect on physical planning relationships, the environment, achievement of social objectives, or the economic and financial plan, and that the changes will be acceptable to local government. The level of documentation for a major change should conform to that required for the application.

(3) **Amendments Required by the NCDC.** In the project agreement, the NCDC reserves the right after 5 years to require changes in the income mix of housing based on changes in the metropolitan area profile, in assumptions as to market demand or in assumptions as to employment within the project, but as a rule the total units of low and moderate income housing may not be increased by more than 15%. In case of default, the NCDC may direct the developer to amend the development plan in any manner deemed appropriate by the NCDC to contribute materially towards cure of the default. See Section 2-15.

(4) **Effective Date.** Any amendment to the development plan becomes effective 30 days after it has been supplied to NCDC by the developer, except that substantial amendments and required amendments become effective only upon approval of the NCDC. The developer must immediately supply to the NCDC copies of any amendments to the development plan, whether or not approval is required, and must notify the NCDC of any action which would have the effect of a substantial
amendment to the development plan.

Amendments may occur at any time, but the developer is required to propose amendments in conjunction with his annual review and evaluation of the plan and progress thereunder. See Section 2-13. At a minimum, the 1-year and 3-year commitments included in the plan must be amended.

b. Trust Indenture.

(1) Amendment without Consent of Holders. The indenture provides that at any time supplemental indentures may be executed without consent of the holders of the obligations issued thereunder for the following purposes:

(a) to correct the description of property subject to the lien or to add property (release of property may be effected without a supplemental indenture);

(b) to correct ambiguities in the text if the interests of the holders are not adversely affected; and

(c) to change provisions of the indenture relating to escrow and security arrangements and to the deposit of funds in advance of payment with the trustee.

(2) Consent of the Holders. If a supplemental indenture requires consent of the holders, the written approval of the holders of at least two-thirds of the principal amount of outstanding obligations will ordinarily be sufficient; but the approval of any affected holder is required for the following purposes:

(a) to change the maturity, premium, or interest, to reduce the principal, to change the place or currency of payment or to impair the right of suit for payment;

(b) to reduce the percentage of principal
amount required to approve supplemental indentures or waivers;

(c) to restrict the requirements for approval by each affected holder.

(3) Consent of the NCDC. All supplemental indentures require consent of the NCDC except for the purpose of empowering a second trustee to act for the holders in case of any conflict of interest. See paragraph 2-10-1. c.(3).

c. Other Amendments. Provisions of the project agreement (other than the development plan) and of each related agreement with owners or managers of the developer may be freely amended at any time by the respective parties thereto, except that covenants of the NCDC as to execution of replacement guarantees and payments and deposits in respect of payment under guarantees may be waived or amended only with the consent of the holders.
SECTION 2-15. DEFAULTS AND REMEDIES

2-15-1. PURPOSE. Like all credit agreements, the Title VII project agreement spells out in detail the consequences of failure to perform in accordance with the covenants contained in the agreement. Unlike other credit agreements, however, the government is given a wide range of graduated remedies from which to choose the most appropriate means of enforcing the developer's performance of its obligations. This feature of the agreement is designed to permit selection of the remedy best suited to serve the public interest under the particular circumstances prevailing at the time of any default. The availability of graduated remedies enables the government to avoid the usual creditor's dilemma when faced with a debtor's default: choosing between foreclosure and acquiescence when neither is appropriate.

Because of the technical nature of many of the developer's covenants, particularly those designed to provide early warning of potential financial difficulties, there will be many occasions when waiver of technical defaults may be appropriate. See Section 2-14. In some of these cases recommendations from the NCDC as to remedial action may be made which do not, however, constitute the exercise of legal remedies. In the case of financial default, these recommendations may include an increase in capitalization to which the NCDC may be willing to contribute in the form of additional guarantee or interest loan assistance.

At the other end of the spectrum, it is unlikely that the NCDC would elect to foreclose upon its lien in order to sell the project real property tract by tract. The NCDC may elect to assume loss or increased risk of loss in order to achieve the public purposes which prompted approval of the project. While this may require transfer of the project to new ownership, the remedies of acceleration and foreclosure need not necessarily be exercised for this purpose and will be avoided whenever possible. Acceleration and foreclosure are in any event available to the government only in the event of default of a financial nature.
2-15-2. **SCOPE, PROCESS AND TIMING.** The remedies discussed in this Section are available only to the NCDC. Remedies available to holders of guaranteed obligations are discussed in subparagraph a(2) of paragraph 2-10-1. Individual members of the public or communities financed under Title VII are not beneficiaries of covenants under the project agreement or trust indenture.

a. **Breach of Performance or Reporting Covenant.**

(1) **Nature of Default.** The developer's performance covenants include adherence to the development plan, the affirmative action program for equal opportunity, labor standards and the other covenants summarized in subparagraph a(6)(a) of paragraph 2-9-2. The developer's reporting covenants include the obligation to submit performance and other reports described in Section 2-13, except that for purposes of remedies in the event of default, failure to comply with financial reporting requirements is considered a financial default.

(2) **Immediate Remedies.** Breach of a performance or reporting covenant results in the immediate suspension of:

(a) escrow disbursements;

(b) property releases from the lien of the NCDC; and

(c) any obligation of the NCDC to guarantee additional obligations of the developer.

(3) **Remedies after Grace Period.** If the performance or reporting default continues beyond a 60-day period of grace measured from the date of notice of default from the NCDC, the NCDC may invoke singly or cumulatively a further range of remedies including:

(a) amendment of the development plan at the direction of the NCDC in a manner

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contributing materially to cure of the default;

(b) suit for injunctive relief or damages; and

(c) the exercise of voting control of the developer to influence management or, if necessary, to replace management.

b. Financial Default.

(1) Nature of Default. Financial defaults include:

(a) failure by the developer to make payments when due to the holders or the NCDC or to make required deposits in respect of such payments;

(b) breach of any financial covenant described in Section 3-7 or of the escrow or security arrangements described in Section 2-12;

(c) breach of any warranty described in subparagraph a(3) of paragraph 2-9-2;

(d) issuance of or petition for a bankruptcy decree; and

(e) acceleration of any other debt obligation of the developer.

(2) Immediate Remedies. The immediate remedies listed above for a performance or reporting default also apply to any financial default. In addition, all other remedies for financial default may be invoked immediately without a period of grace in the event the developer fails to make timely deposits for payments of interest, principal or premium to holders of guaranteed obligations or fails to make timely payments of interest or principal to the NCDC in the case of an interest loan. All remedies also become immediately available if the developer files for or
consents to a bankruptcy decree or if repayment of other indebtedness of the developer isaccelerated.

(3) Remedies after Grace Period. If the financial default continues after a period of grace (varying in time with the nature of the default), all of the remedies listed above for a performance or reporting default become available to the NCDC. In addition, the NCDC may accelerate payment of the principal of outstanding guaranteed obligations and any interest loan and may foreclose upon its security interest in the developer’s property.

(4) Grace Periods. The applicable periods of grace for financial defaults are as follows:

(a) for failure to make timely payment of any annual fee to the NCDC: 10 days;

(b) for breach of any financial covenant, warranty or escrow or security provision: 30 days after notice of default from the NCDC; and

(c) for entry of an involuntary decree of bankruptcy: 60 days.

(5) Rescission of Acceleration. Within 60 days after the NCDC has exercised its remedy to declare all outstanding guaranteed obligations and any interest loan to be immediately due and payable, the NCDC retains the option to rescind its declaration of acceleration by notice to the developer and the trustee.