



Overview of Memorandums of Understandings (MOUs), Agreements, and Contracts in the Development Process

A supportive housing developer may use this tool to understand the different agreements, Memorandums of Understandings (MOU), and Contracts necessary during the development process.

Overview

There are many types of agreements that need to be executed during the supportive housing development process. This document will describe different circumstances that require an agreement and the different elements of a development partnership agreement.

Description of Agreements:

- Memorandums of Understanding (MOU) – Is a formal agreement that establishes a relationship between parties. As a development project proceeds, more agreements may be necessary, but a MOU may help with preliminary negotiations.
- Development Agreement – Clearly defines the relationship roles and financial roles, responsibilities, and financial takings. Low Income Housing Tax Credit (LIHTC) projects often require a certain type of agreement called a joint venture. Other agreements that fit in this category include partnership agreements and limited partnership.
- Contract – Is put in place when services are being exchanged for payment between two parties.



Events/Circumstances that Require Agreements

This chart depicts events or decisions that may require an agreement between the sponsor and another party, the reason for the agreement, and key terms in the agreement.

Events that Require an Agreement	Name of Agreement (s)	Reasons for the Agreement	Key terms in the agreement
Partnering with Another Developer	MOU, Development Agreement, Partnership Agreements	Leverage community connections (with funders, community-based organizations), experience (expertise), and access to capital.	Overview of project, project ownership, compensation, roles of parties, responsibilities, project timeline, communication, termination, choice of law, process for amendment
Service Provider Partnership	MOU/Contract	Identifying the service provider early in the development process has numerous advantages. Executing an MOU will help define the relationship, roles and responsibilities of the service provider throughout the development process and into operations.	Overview of project, project ownership, compensation, roles of parties, responsibilities, project timeline, communication, termination, choice of law, process for amendment
Property Manager Partnership	MOU/Contract	Identifying the property manager early in the development process has numerous advantages. Executing an MOU will help define the relationship, roles, and responsibilities of the property manager throughout the development process and into operations.	Overview of project and proposed tenancy, expectations, compensation, roles of parties, roles and responsibilities, project timeline, communications, termination, choice of law

Determining Ownership	Development/Partnership Agreement	It is important to determine what entity is going to take title to the property. Is the sponsor going to take title in its name or will a new corporation or partnership be created?	<ul style="list-style-type: none"> • Corporations, Partnerships, LLCs, For-profit or non-profit • Single asset entity – confines the risk of a project from other assets of the sponsor/developer • Condominium ownership – each entity owns a defined portion of the project. • Defines % share of ownership and responsibilities between partners. May also define developer fee split and/or distribution of flow of funds.
Hiring Development Consultant	Contract	The Sponsor may choose to hire a development consultant to manage the overall development process, assist with funding applications, and manage the development team. It is up to the Sponsor to determine what expertise they have and what they will need to contract assistance from.	Statement of Work, Consultant Responsibilities as Independent Contractor, Exclusions and Reimbursements, Liaison, Term of Contract, Cancellation, Payment of Fees, Nondiscrimination, Assignment, Arbitration, Identity of Interest
Hiring Development Team/Specialty Consultants	Contract	Members of the development team include but are not limited to, engineers, architects, environmental consultants, attorneys (real estate, financial), expeditors, accountants, historic consultants, construction management firms, Auditors, and compliance firms. Either the Sponsor or Development Consultant will have to procure these services and enter contracts with each specialty.	Statement of Work, Consultant Responsibilities as Independent Contractor, Exclusions and Reimbursements, Liaison, Term of Contract, Cancellation, Payment of Fees, Nondiscrimination, Assignment, Arbitration, Identity of Interest

<p>Securing investors/syndication, LIHTC Partnership (General Partner and Limited Partner)</p>	<p>Development /Partnership/Investment Agreement</p>	<p>Often investors are brought to a development to provide resources to 1) support a goal and 2) financial return. A basic overview of what investors are looking for are alignment with regional or purpose priorities, fees, appreciation of the asset, residual cash flow and tax benefits. Certain funding may require the Sponsor to create a new legal entity. Low Income Housing Tax Credits will require a new entity to be formed to sell/benefit from the credits. A common structure includes a General Partner and Limited Partner.</p>	<p>Common terms include roles and responsibilities, compliance requirements, % split, timing, and type of financial benefits, and opportunities to ‘cure’ or correct non-compliance.</p>
<p>Borrowing for Predevelopment, Acquisitions, and Construction</p>	<p>Promissory Note, Funding Agreement, Loan Agreement, Regulatory Agreement, Mortgage, Deed of Trust, Deed of Restriction, Subordination Agreement, Mortgage/Security Agreement</p>	<p>The sponsor or ownership entity will need to secure financing to fund the project. The Loan Agreement/Note, Deed Restriction, etc. outline the terms, conditions, and expectations in exchange for the financing. Lenders may provide their funding at different stages of the project (pre-development, construction, acquisition) and across multiple stages. A sponsor/owner must understand when the funding will be available and whether there are sufficient funds at each stage. Lenders look at multiple factors when underwriting a project, including expertise, financial feasibility, collateral (what assets can be leveraged to recoup financing not repaid), cash flow, capacity, and credit.</p>	<ul style="list-style-type: none"> • Promissory Note/Funding/Loan Agreement: Position of lenders is stated, type of payment (lump sum vs. reimbursement, balance repayment) • Regulatory or Use Agreement: States the requirements of funding source (mixed income tenancy, tenant income and maximum rents, and affordability period)

<p>Receiving Grants</p>	<p>Funding or Grant Agreement</p>	<p>Grant funders are brought to a development for the purpose of providing resources to support an agreed upon goal and outcome. A basic overview of what grant funders will assess include alignment with regional or purpose priorities, financial and programmatic feasibility, expertise, timeframe, and compliance with requirements.</p>	<ul style="list-style-type: none"> • Eligible Costs i.e. services, development, tenant costs • Structure of payments: lump sum, advance, reimbursement
<p>Securing Property</p>	<p>Purchase Contracts, Options</p>	<p>A developer or sponsor will seek to gain 'site control' for the project site. This site control will permit access for a set period of time, price, and other purchase conditions. During the initial period of site control, the developer will complete site assessments such as an environmental study and survey which will help to inform the feasibility and costs to develop the project.</p>	<p>Purchase Agreement: Parties, description of Property, Purchase Price, Deposit and Escrow, Title, Deed, Adjustments, Closing and Recording Costs, Settlement, Tenancies, Risk of Loss, Conditions and Operating of the property, Inspection, Representations and Warranties of Seller and Purchaser, Choice of Law, Brokerage, Time of Essence, Acceptance, Assignment, General Provisions, Notices.</p> <p>Option: Is similar to purchase agreements but the purchaser is only required to decide if they are going to purchase the property. There is a cost that the developer will pay to enter a Purchase Option. Terms include Granting of Option, Option Period, Exercise of Option, Purchase Price, Failure to Exercise the Option.</p>

Agreement Content

The remainder of this document will discuss the specifics of an agreement when partnering with another developer

1. Why partner with another developer as an emerging developer?

There are many reasons an emerging developer would find it beneficial to partner with another developer to complete a supportive housing development. Each partner brings specific strengths and opportunities for growth to a development project, and it is important to understand those skills when evaluating a partnership. It is even more important to understand your individual strengths when negotiating a partnership.

During the partnering stage it is important to understand each organization's goals. This includes both mission goals and financial goals. Aligning these goals for the project's purpose is important, even if each organization brings a distinct perspective, approach, or expertise.

If an emerging developer is considering partnering with a more experienced developer, it can be helpful to evaluate these questions.

- Does your organization have the expertise to develop Supportive Housing (SH)? Expertise is the knowledge and skills necessary for development.
- Does your organization have the capacity to develop SH? Capacity is the time and staff necessary for development.
- Does your organization have the experience to develop SH? Experience is a proven track record of housing development success.
- Does your organization have access to financial resources to develop SH? Access to predevelopment funds? Access to control/acquire a site?
- Does your organization have the balance sheet to develop SH? This includes the organization's net worth, liquidity to sustain the organization and project during all phases of the project (planning, construction, and operations).

2. Negotiating the Deal

Understanding the value, you bring to a development is important when negotiating the details. Your value may be represented in the following categories.

- Access to special funding rounds or pools of resources
- Community relationships, reputation, understanding, and experience
- Access to service funding
- Value of your balance sheet
- Capacity of your organization
- Access to land
- Community networks

Understand and Design the Partnership to Address Advantages and Challenges

a. There are many advantages to a partnership when it is negotiated fairly.

- The less experienced partner can gain real project development experience and learn from more experienced developers which can help in future developments.
- Each partners' expertise can help with scoring and underwriting in current and future developments.
- Increased financial resources and strength.
- Access to guarantees that can be used to leverage financial resources.
- Access to real estate development networks.

b. Challenges of a partnership

- Clearly define responsibilities to address the loss of 100% control over the transaction.
- Increased complexity that comes from shared ownership.
- Increased time and effort to manage and establish the relationship.
- Missions might not align as well as originally thought and can have negative effects on your reputation.

3. Role of Regulatory and Funding Agencies

There is an increasingly important role for regulatory and funding agencies to guide and inform the terms of partnership agreements when funding emerging development organizations. A key role of regulatory and funding agencies is to establish standards for fair partnerships regarding the economic terms of agreements.



Suggested Elements of a Supportive Housing Development Agreement

Section Purpose	Guiding Questions	Developer Notes
<p>Section 1: Parties and arrangement</p> <p>In this section describe who the agreement is between and their addresses, the intention of the development and state that the parties desire to enter into an agreement.</p>	<ul style="list-style-type: none"> • Who is the agreement between? State what the role of the parties. • What is the address of the property to being developed? • What is the status of property ownership? Are there any existing contracts to purchase properties? • Describe the Development: What is the unit mix and affordability? • Population Served / Housed: Who is the intended population for these units? Who is eligible if there aren't enough of the targeted population? Who is a service priority? What does the tenant selection process look like? 	
<p>Section 2: Creation, Purpose, and Term of agreement</p> <p>In this section describe how, why, and when the project will be developed.</p>	<ul style="list-style-type: none"> • Is the project being developed jointly? • Who is providing what services and what funding is available? • What are the terms of the agreement? What are the terms and conditions for an extension? How is the agreement terminated? • Is the agreement subject to funding approvals or other conditions? 	

Section 3: Ownership and Legal Structure

In this section describe how the deal will be legally structured and who will be bringing what to the deal.

- Is a new entity being created? This may require additional agreements.
- What will the membership of the new entity be?
- What percent interest will each entity have? Who will control the interest?
- Will decisions be made in consultation with each party? Who has the final say?
- If a LIHTC project, when will equity investor join? How much (%) operational and financial interest will they receive?
- Who is responsible for identifying and securing predevelopment and acquisition costs?

Section 4: Roles and Responsibilities

This section describes the role and responsibilities that each party will lead throughout the development process. These roles can include financing, construction, general project management, and community engagement.

- Will written consent be needed for any changes? (to adopt, amend, or deviate from development budget, design plans, tax credit syndicator, marketing, general contractor, lenders, development teams)
- Who will coordinate and direct all predevelopment work?
- Will the project management be shared?
- Who will prepare budgets and proformas?
- Who will apply for financing?
- Who will manage submissions to government partners and investors?
- Who will provide construction oversight?
- Who will schedule project meetings and calls?
- Who will manage project change orders?
- Will a transfer of interest occur once permanent financing is secured?

Section 5: Fees

In this section the economic aspects of the deal are determined. This section may require the most negotiations.

- Who will receive project income prior to permanent financing? Will this information be included in the operating agreement with the investor?
- Are there fees due for predevelopment consulting?
- What is the developer fee split?
- Is there a deferred developer fee?
- Who will receive any supportive services fees?

Section 6: Guarantees

In this section describe what guarantees each party is bringing to the project. When negotiating this Section, fee splits determined in Section 5 should be considered.

- Who will be providing guarantees to the funders? What will the guarantees be for? (shortfall guaranty, repurchase guaranty, downward credit adjuster guaranty, operating deficit guaranties)

Section 7: Non-Residential Space

In this section describe any commercial or industrial space that will be developed as part of the project and how the economics will work during development and in operations.

- Who will be renting the space? Is the renter also a member of the partnership?
- What is the rental fee?
- Who will be paying for utilities?
- Will the space be turnkey? Or will tenant improvements be necessary? Who will pay for tenant improvements?

<p>Section 8: Non-compliance, Cure and Indemnification</p> <p>This section will describe each partners' obligation to address claims, non-compliance, debts, or liabilities.</p>	<ul style="list-style-type: none"> • Is it mutual indemnification? 	
<p>Section 9: Termination</p> <p>It is important for all parties to understand how to terminate the agreement if the other party is not performing or the deal no longer makes financial or mission sense.</p>	<ul style="list-style-type: none"> • How will the agreement be terminated? • Is written consent required? • What legal or financial obligations remain or transfer when an agreement is terminated? 	
<p>Section 10: Right of First Refusal</p> <p>In this section, it is important to determine what happens to the land and development should one party want to dissolve the agreement, or if the term of the agreement comes to an end.</p>	<ul style="list-style-type: none"> • Who has the right to first refusal? • Is there a purchase option? • What are the conditions set by the funders and funder agreements? 	

Section 11: Confidentiality

This section outlines how information can be disseminated during and after the agreement.

- Are the parties allowed to disclose any information in this agreement during or post the agreement's expiration to other parties?

Section 12: Miscellaneous

Every development project is different, and the agreement might require additional sections to ensure that all parties are adequately protected, and expectations are known.

- Are there any other terms specific to this deal that need to be included?

Please reach out to consulting@csh.org with any questions.

