§ 4610. Entrance fee escrow account. As a condition for approval to advertise and collect refundable entry fees/deposits:

1. The operator shall establish an interest-bearing account with a New York bank, New York savings and loan association, or New York trust company for any entrance fees received by the operator, which escrow funds shall be subject to release as provided by subdivision seven of this section.

2. An escrow agreement shall be entered into between the bank, savings and loan association, or trust company and the operator of the community. The agreement shall state that its purpose is to protect the resident or the prospective resident and that, upon presentation of evidence of compliance with applicable portions of this article, or upon order of a court of competent jurisdiction, the escrow agent shall release and pay over the funds, or portions thereof, together with any interest accrued thereon or earned from investment of the funds, to the operator or resident as directed.

3. Checks, drafts, and money orders for deposit from prospective residents shall be made payable to the escrow agent only.

4. All funds deposited in the escrow account shall remain the property of the resident until released to the operator in accordance with this section, and the funds shall not be subject to any liens or charges by the escrow agent or judgments, garnishments, or creditor's claims against the operator or community.

5. At the request of the operator, the commissioner, or the superintendent, the escrow agent shall issue a statement indicating the status of the escrow account.

6. Escrowed funds shall not be released to the operator unless:

a. construction or purchase of the community has been substantially completed, an occupancy permit covering the living unit has been issued by the local government having authority to issue such permits, and the

living unit becomes available for occupancy; or

b. the operator has submitted an application to the commissioner, on forms approved by the department, for authorization to use escrowed entrance fees to assist the operator in financing the construction or purchase of a proposed community and the commissioner, with the advice of the superintendent, and in accordance with such regulations as may be promulgated by the council, has approved such application. The commissioner shall not approve such application over the objection of the superintendent, and shall not approve it unless satisfied that the following conditions have been met:

(i) the operator has executed contracts accompanied by an entrance fee or entrance fee deposit for at least sixty percent of all proposed living units;

(ii) the aggregate entrance fees or deposits received by the operator pursuant to executed contracts equal at least twenty-five percent of the total of the entrance fees due at occupancy for at least sixty percent of all proposed living units, or at least ten percent of the total entrance fee due at occupancy for at least seventy percent of all proposed living units, whichever is less;

(iii) the operator has entered into a contract for the construction or purchase of the community which contract has a fixed maximum price and, if a construction contract, the contractor has secured a performance or completion bond for the benefit of the operator;

(iv) the operator has received a firm commitment for a permanent mortgage loan or other long term financing and conditions to the commitment prior to disbursement of funds thereunder, other than completion of construction or purchase, are substantially satisfied;

(v) the total amount of escrowed entrance fees or deposits that may be approved for release under this paragraph shall not exceed fifteen percent of the total costs of acquiring, constructing and equipping the proposed community;

(vi) use of the entrance fees or deposits shall not impair the operator's ability to comply with the requirements of section forty-six hundred eleven of this article;

(vii) the operator's executed contracts or amended contracts referred to in subparagraph (i) of this paragraph, and all contracts generating

the entrance fees for which release is sought, contain a provision conspicuously disclosing the intended use of entrance fees, and that all refunds shall be in accordance with the otherwise applicable provisions of this article, the regulations adopted pursuant thereto and the contract;

(viii) the use of the entrance fees or deposits under this paragraph will promote the efficient and cost-effective acquisition or development of the proposed community; and

(ix) the release, availability and use of the entrance fees comply with any other conditions the council shall establish.

7. If the funds in an escrow account under this section and any interest thereon are not released to the operator within such time as provided by rules and regulations adopted by the council, then such funds shall be returned by the escrow agent to the persons who had made payment to the operator.

8. An entrance fee held in escrow may be returned by the escrow agent to the person who paid the fee upon receipt by the escrow agent of notice from the operator that such person is entitled to a refund of the entrance fee.

9. Nothing in this section shall be interpreted as requiring the escrow of any nonrefundable application fee, designated as such in the contract, received by the operator from a prospective resident.

10. Construction of housing or other facilities shall not begin until:

a. the operator has executed contracts accompanied by a deposit of at least ten percent of the entry fee payment for fifty percent of all units; and

b. all permits and approvals necessary for operation of the community have been granted except those that depend upon construction;

Provided, nothing in this subdivision shall prohibit an operator, upon the approval of the council, or an applicant or prospective applicant

upon the approval of the commissioner pursuant to section forty-six hundred twenty-one of this article, from constructing model units and a sales office.

11. Any entry fee deposit required by an operator shall be fully refundable if the contract is cancelled within seventy-two hours of its execution. In the event of cancellation, the entry fee deposit shall be refunded within three business days of receipt of cancellation.