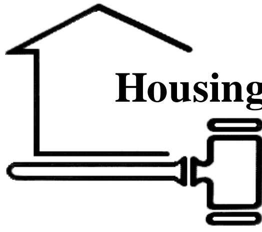

Housing and Development Law Inst

THE COUNSELLOR

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Calendar of Events:

HDLI's 24th Annual Fall CLE Conference October 29, 2007 San Diego, CA

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HUD's FINAL NOTICE ON PHA AFFILIATES

By Lisa L. Walker

For the past three years the HUD Office of Inspector General (OIG) has been scrutinizing relationships between certain PHAs and their affiliates. In 2004, the IG pointed out a number of violations of the Annual Contributions Contract (ACC) and regulations in the sample of agreements and transactions it surveyed between a few PHAs and their affiliated housing development entities, non-profit organizations, and instrumentalities. *OIG Report No. 2004-AT-0001*. On June 20, 2007 HUD issued a final Notice intended to reaffirm the requirements of Public and Indian Housing programs, the ACC, and regulations (collectively, public housing requirements) that apply to public housing activities, including mixed-finance development activities. *PIH 2007-*. Attached as Appendix 1 to the Notice is a checklist that serves as guidance for assessing compliance with the requirements discussed in the Notice.

Purpose of the Notice

The Notice restates HUD's policy of encouraging the use of affiliates and instrumentalities. It also provides guidance on the fiduciary and organizational linkages between affiliates, instrumentalities and PHAs. It describes the extent to which public housing funds can be used to form affiliates and instrumentalities. It also underscores that HUD has regulatory authority over PHAs and their afiliates and instrumentalities, and that when an affiliate or instrumentality participates in a public housing development program it becomes subject to existing requirements.

HUD intends to use the Notice to focus on existing development-related requirements applicable to administrative fees and development cost allocation; prohibition of conflicts of interest; the procurement of related entities; and disposition and encumbrance of public housing property. The Notice also provides guidance to the HUD Headquarters and field office staff on identifying transactions that have not been approved by the Department and addressing the issues that arise in the transactions.

Definitions

Affiliate

The Notice defines "affiliate/ affiliated entity" as an entity, other than an instrumentality, formed by the PHA under state law in which a PHA has a financial or ownership interest or participates in their governance. The PHA as an institution has some measure of control over the assets, operations, or management of the affiliate, but such control does not rise to the level of control to qualify the entity as an instrumentality. In addition, for the purpose of the Notice, the definition of "affiliates" includes only those entities that use public housing funds to carry out public housing development functions of the PHA. Except as specified in the Notice, HUD will treat an affiliate like an unrelated third party contractor.

Instrumentality

The Notice defines "instrumentality" as an entity related to the PHA whose assets, operations,

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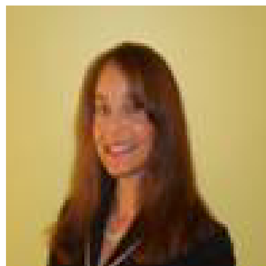
President's Message

Dear Members: We want you!

We are enlisting your help to spread the good news about HDLI's unsurpassed networking, educational, and advocacy services. No where else can housing professionals receive high level education, training and exposure to the myriad of legal issues that our industry faces on a daily basis. Surely you know a few housing agencies, housing lawyers, Section 8 landlords, management companies, financial institutions, or other stakeholders in the industry who can both add another dimension to the discussions at our conferences and also benefit by our unique services. Please help us to promote the value of membership in HDLI to all of your colleagues, affiliates, contractors, financiers, and lawyers who do business for your agency. If you know of any prospects in these areas, please take a minute to send our staff an e-mail or note with their contact information. Your active assistance will make all the difference in ensuring that we can continue to provide a high level of service for our members.

I am really looking forward to seeing you at our upcoming legal CLE conferences: our Fall Conference taking place October 29, 2007 at the NAHRO annual conference in San Diego, CA, and our annual General Counsel Forum and Spring Conference next year. Please budget to attend these events. We strive hard to give you more content and substance than other conference providers. The information learned and networking that takes place at these events is invaluable. We know that everyone's resources are tight, and appreciate your making our conferences a priority. In order to better meet your expectations please share your legal challenges with our Executive Director & General Counsel so that the HDLI Board can provide the information you need. In light of the change in methodology in our public housing accounting, HDLI will hopefully entice counsel and leadership about various innovative ways to provide contemporary housing along with strategies to create or sustain viable communities with commercial opportunities in this changing environment.

HDLI continues to review issues of national impact to the housing industry by writing amicus briefs. We believe it is important to be engaged and provide excellent legal briefing to the judiciary to support the appropriate policy and laws. Lastly, because the professionals in housing are uniquely situated to participate and educate in this specialized area, I encourage all the membership to take note of major occurrences in the civil rights arena and share your thoughts with us and our sister professional organizations. Our mission supports various aspects of an individual's success who benefit from the housing we provide across the country.



Lisa L. Walker, Esq.

A Letter from the Executive Director and General Counsel

Dear Members,

The lead article in this issue discusses HUD's recent final notice on affiliates, which recounts the requirements of Public and Indian Housing programs, the ACC, and regulations that apply to transactions involving affiliates and instrumentalities, including mixed-finance development activities. I also recommend your reading, on page 4 of this issue, about a New York tenant who was successful in getting a landlord to forego eviction proceedings by raising a defense under the 2005 reauthorization of the Violence Against Women Act ("VAWA"). While there may be other cases around the country, this is the first of which I have heard.

NEW TRAINING is coming! Later this year, HDLI will be adding an additional training to its panoply of services: training for your staff and hearing officers on the *informal grievance process*. This interactive training will fully prepare your staff in selecting appropriate hearing officers, provide in-depth training for the hearing officers with regard to legal due process, tenant defenses, documentation, etc., and train your staff on how to successfully defend favorable decisions of the hearing officer. *Stay tuned for more information . . . .*

Have a Wonderful Summer and Continue to Stay in Touch Through HDLI's List Serve!

HDLI Welcomes to Membership:

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Stratford, Connecticut

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Savannah, Georgia

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TENANT CANNOT BE EVICTED FOLLOWING CRIMINAL ACTS OF EX-BOYFRIEND: One of the First Lawsuits Raising a Defense Under the Violence Against Women Act

By Lisa L. Walker

As you know, the 2005 reauthorization of the Violence Against Women Act (VAWA 2005) provides that domestic violence victims and their other household members cannot be evicted based on the criminal acts of their abusers related to domestic violence. The following housing court case arising in Brooklyn, New York is one of the first in the country to assert the new VAWA protections on behalf of a domestic violence victim. The case was resolved on May 30, 2007 by settlement agreement in favor of the tenant's continued occupancy.

In *Brooklyn Landlord v. RF* (2007), a female tenant had lived in the same apartment in a Section 8 housing complex in Brooklyn since 1996 with her three young children. The tenant had an abusive relationship with another tenant for four years, had one child by him, and was subject to physical and verbal abuse. Even after the relationship ended in 2000 and he was evicted in 2003, the ex-boyfriend continued to harass, stalk and physically assault the tenant. In late April 2006, the ex-boyfriend came to the tenant's apartment in the middle of the night, banging on the door and screaming at her. The tenant called the building security guard, who was unable to reason with the abuser. The abuser left before the police arrived, but returned one week later. This time, the abuser confronted the same security guard, and shot at him. When the police arrived, the abuser told the police that he lived with the tenant and was married to her. The tenant denied these claims. She claimed that the ex-boyfriend's family and friends continued to provide him access to the building and that she could not control his actions. The landlord sought to evict the tenant for the violent acts committed by her ex-boyfriend and for her failure to list the ex-boyfriend as a member of the household on her annual recertification. Ultimately, the abusive ex-boyfriend went to prison.

After initial settlement talks failed, legal services filed a motion for summary judgment which asserted the defenses to eviction enacted as part of VAWA 2005 and counterclaims alleging that the landlord was evicting the tenant because she was a victim of domestic violence and stalking, and was therefore engaging in unlawful sex discrimination. The case was finally resolved by settlement agreement on May 30, 2007. The terms of the settlement were as follows: the landlord agreed to dismiss the eviction action and promptly respond to the tenant's "requests for assistance" regarding the ex-boyfriend, including providing functioning locks in the building. In exchange, the tenant agreed not to knowingly allow the ex-boyfriend access into the business or her premises, subject to the provisions of any further visitation or custody order.

This case is disturbing on a number of fronts. While it was not resolved by judicial mandate, it nonetheless fails to take into account the expressed exceptions under the VAWA statute. First, VAWA does not protect against violations of the lease that do not result from the alleged violence. It appears that the tenant's ex-boyfriend lived with her for some period of time when she failed to list him as a member of her household on her annual recertification. This is a clear violation of the lease that arguably is unrelated to the violence. Of course, the tenant may claim that she allowed the ex-boyfriend to live in the unit out of fear for the consequences of not allowing him to do so. However, it is at least arguable that the two acts are unrelated. Second, VAWA excludes from its protections conduct that results in "actual and imminent threats" to other tenants, employees, or others providing services to the property. Clearly, the ex-boyfriend's violent actions toward the security guard and potentially other third parties would fall squarely within the "actual and imminent threat" exception to VAWA. It is easy to "*Monday Morning Quarterback*" this call; however, I seriously question whether the landlord should have settled this case.

CASE CORNER

The following recently-reported cases are full of interesting issues:

ATTORNEYS' FEES

Adapt of Philadelphia v. Philadelphia Hous. Auth., No. 98-4609, 2007 U.S. Dist. LEXIS 35870 (E.D.Pa. 5/15/07)

COURT: U.S. District Court for the Eastern District of Pennsylvania.

FACTS: Plaintiff, ADAPT of Philadelphia ("ADAPT") filed suit against a PHA and its executive director alleging that the PHA's failure to provide a sufficient number of scattered-site housing units accessible to low income individuals with mobility impairments violated Section 504. The parties entered into a settlement agreement, which ADAPT was entitled to monitor. The court dismissed the action with prejudice but retained jurisdiction to enforce the terms of the Settlement Agreement and to adjudicate Plaintiffs' motion for attorney's fees and costs. Later, ADAPT filed a motion for attorneys' fees in connection with its enforcement and monitoring of the settlement agreement, which the parties ultimately resolved by consent. ADAPT continued to monitor progress under the settlement agreement, and determined that the PHA had not complied with certain deadlines. ADAPT filed a motion to enforce the Settlement Agreement, and the PHA countered with its own motion to enforce or in the alternative vacate the Agreement. The court held a seven day evidentiary hearing regarding the motions. From the time ADAPT filed its motion to enforce until the evidentiary hearing, the parties conducted discovery and engaged in extensive motion practice. The court ultimately denied both motions to enforce the Settlement Agreement and PHA's alternative motion to vacate. Nothing else transpired from the parties until nine months later when counsel for ADAPT wrote a letter to the court stating its intent to seek attorneys' fees for monitoring the Agreement However, it took more than six months for ADAPT to file its motion for attorneys' fees.

ISSUE 1: Whether ADAPT was a "prevailing party" for purposes of a fee award, given that that parties entered into a settlement agreement.

HOLDING/RATIONALE 1: Yes. The court rejected the PHA's argument that the order approving the parties settlement agreement was not an order, and therefore that ADAPT was not a "prevailing party." It found that the order, however characterized, approving the stipulated settlement contained mandatory language, was entitled "Order," was signed by this court, provided for the court to retain jurisdiction to enforce the terms of the Settlement Agreement, and even explicitly conferred prevailing party status on ADAPT.

ISSUE 2: Whether ADAPT's motions for enforcement and monitoring attorneys' fees were untimely.

HOLDING/RATIONALE 2: Yes. Rule 54 of the Federal Rules of Civil Procedure provides, that, unless otherwise provided by statute or order of the court, the motion for attorneys' fees must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. The court found that Rule 54 permits courts to extend the fourteen day time limit; however, Rule 54 must be read in conjunction with Rule 6. Rule 6 mandates different standards depending upon when the moving party requests an extension of time. The court found that if the moving party does not seek an extension until after the time limit has expired, the court may exercise its discretion only if a motion is made and the moving party proves its failure to comply with the applicable deadline was the result of excusable neglect. The court agreed that the PHA that the clock began to run under Rule 54(d)(2)(B) when the court denied ADAPT's motion to enforce the Settlement Agreement. Thus, according to PHA, ADAPT's motion in this regard had to be filed by September 12, 2005. Since the order did not provide for an extension of time, and the parties never stipulated to and ADAPT never sought an extension within the fourteen day time limit or at any point thereafter, the court found that ADAPT filed its motion for enforcement fees over a year later too late.

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CASE CORNER CONTINUED

With regard to monitoring fees, ADAPT claimed that it is entitled to monitoring fees for time spent on the three motions to compel discovery and its other efforts to determine whether the PHA was complying with the Settlement Agreement. The PHA argued that ADAPT was required to file its motion for monitoring fees fourteen days after it informed the court by letter that PHA complied with the Phase II deadline. ADAPT countered that its motion was timely because monitoring activities do not necessarily lead to a "judgment" that triggers the start of the fourteen day time limit. ADAPT argued that the fourteen day filing period is not mandatory so long as the opposing party has notice of the party's intention to seek attorneys' fees.

The court agreed that the fourteen day clock did not begin to run when this court approved the Settlement Agreement; rather ADAPT was entitled to monitoring fees. The court found that it would be an unwise use of the attorneys' resources and a drain on judicial economy to require parties to file motions for attorneys' fees after every step in the monitoring process. However, the court found that when ADAPT wrote to the court that its monitoring activity was at an end since PHA was in compliance with the Settlement Agreement's Phase II deadline, the Rule 54(d)(2)(b) time limit was triggered at least by that date. The court disagreed with ADAPT's argument that its motion for attorneys' fees complied with the "spirit" of Rule 54 and that the fourteen day time limit should not be mandatory because PHA had notice through ADAPT's letter to the court that it intended to seek attorneys' fees. While acknowledging that notice to the opposing party is one concern that Rule 54 was designed to address, the court held that notice is not the only concern. Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. The court ultimately held that even if PHA had ample notice of ADAPT's intention to file a motion for attorneys' fees, ADAPT's six month delay in actually filing its motion undermines the interest in resolving these disputes while the services are "freshly in mind."

DISCRIMINATION

Lachira v. Sutton, No. 3:05cv1585 (PCD), 2007 U.S. Dist. LEXIS 33250 (D. Conn. 5/7/07)

COURT: U.S. District Court for the District of Connecticut.

FACTS: A disabled, Hispanic Section 8 tenant and her minor son lived in a building where there were no other tenants with children. She claimed that over the course of her tenancy her landlord subjected her and her child to a number of racial epithets. She contended that landlord told her that "it has been a mistake to rent to you with a child," and that he did not want her child in the building. She claimed that the landlord screamed, cursed, and insulted her, including saying "move you stupid Spanish people,'" and screamed and cursed at her child, telling him that he and Plaintiff were "stupid Spanish people" and that there were no children allowed in the building. The landlord denied making these statements. The plaintiff claimed that the landlord entered her apartment without notice, looking through her child's room and his desk. Indeed, a police report indicated that the police were dispatched to the tenant's residence for a "landlord tenant disagreement about having son in apartment." As the tenant's disability worsened, the tenant claimed that she needed railings installed on the stairway in the building, but that the landlord refused to do the installation. However, the Plaintiff admitted in her deposition that the landlord fulfilled her reasonable accommodation request for the installation of a second railing. The tenant sued her landlord, alleging that the defendants discriminated against her based on her race, ethnic origin, disability and familial status. Plaintiff also asserted a state law claim of intentional infliction of emotional distress. The landlord moved for summary judgment.

ISSUE: Whether there was sufficient evidence of intentional discrimination.

HOLDING/RATIONALE: The court found insufficient evidence to show intentional discrimination. The quarrels and fights described by the parties, while certainly undesirable, do not evince a discriminatory intent on the part of Defendants. The court found that, aside from allegedly calling Plaintiff a "stupid Spanish person," there was no evidence that any of the landlord's conduct, even if wrongful, was motivated by any discriminatory animus. The court found that while there was little doubt that the parties did not get along, and that on at least one occasion the landlord's husband resorted to racial epithets and lewd gestures, that was not enough to establish an FHA claim under § 3617. The court stated that "Congress did not intend the FHA to provide a remedy for every squabble, even continuing squabbles, between neighbors of different races."

DUE PROCESS

Marrero-Gutierrez v. Molina, No. 06-2527, 2007 U.S. App. LEXIS 14475 (1st Cir. 2007)

COURT: U.S. Court of Appeals for the First Circuit.

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CASE CORNER CONTINUED

FACTS: Plaintiffs were former PHA employees and active members of a certain political party. One plaintiff, a career position as Director of the Section 8 Program, claimed that as a result of office reorganization following a recent election, she was constructively demoted through a reduction of her responsibilities and subjecting her to an abusive work environment. She claimed that she was badly treated at work and that her political party was mocked. The employee attended an informal hearing and was given an opportunity to respond to each of the allegations. The other plaintiff, who had worked in the housing department for ten years, claimed that he was demoted because of his political affiliation. After claims for monetary relief were dismissed on Eleventh Amendment grounds, the court considered the defendants' judgment on the pleadings.

ISSUE 1: Whether, in considering the application of the statute of limitations for a Section 1983 wrongful demotion claim, the date of the injury should be tolled until a plaintiff learns of the discriminatory animus that made the demotion wrongful.

HOLDING/RATIONALE 1: No. The court noted that Section 1983 claims accrue when the plaintiff knows, or has reason to know, of the injury on which the action is based. A claimant is deemed to "know" or "learn" of a discriminatory act at the time of the act itself (i.e., the demotion) and not at the point that the harmful consequences are felt. The court rejected the plaintiff's argument that this date should be suspended until the plaintiff learned the discriminatory motives behind the discrete act.

ISSUE 2: Whether the informal pre-termination hearing was constitutionally adequate due process, or whether a post-termination hearing also was required.

HOLDING/RATIONALE 2: Due process requires only that a pre-termination hearing fulfill the purpose of "an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action This initial check requires the employee to receive notice of the charges, an explanation of the evidence that supports those charges, and the ability to refute that evidence. The court found that any standard that would require more process than this would unduly impede the government in removing poorly performing employees. Accordingly, the court held that no post-termination hearing was necessary.

ISSUE 3: Whether the employer is liable for political discrimination in violation of the First Amendment.

HOLDING/RATIONALE 3: No. To establish a prima facie case, a plaintiff must show that party affiliation was a substantial or motivating factor behind a challenged employment action. Although the employee claimed that she was badly treated at work and that her political party was mocked, she failed to set forth a causal connection between her demotion and the political animus that she alleges prompted it. Merely juxtaposing that she is an active member of the political party and that the defendants are affiliated with a rival party is insufficient in itself to create a causal link.

FALSE CLAIMS

***Coleman v. Hernandez*, No. 3:05CV1207 (SRU), 2007 U.S. Dist. LEXIS 39778 (D. Conn. 5/24/07)**

COURT: U.S. District Court for the District of Connecticut.

FACTS: A section 8 tenant rented a unit for $1,550 per month. Her share of the rent was $20, resulting in a subsidy of $1,530. On six separate occasions the landlord charged his tenant, and the tenant paid, an "additional rent payment" for water usage of $60.00 per month for a total of $360. The landlord had threatened to evict the tenant if she did not pay the additional sum. After the tenant vacated the rental property, she demanded the return of the "additional rent payments," which the landlord refused to do. The tenant filed a *qui tam* action. The government declined to intervene. The primary issue at trial was the amount of the government's loss. The government first argued that its baseline measure of damages was $1,530 for each of the six false claims ($9,180 total) before trebling. The government argued that, had it known that the landlord was violating Section 8 rules, it would not have paid any subsidy. The government then argued that the $9,180 should be trebled to $27,540, and then *after trebling,* the landlord would be entitled to an offset of $9,180, constituting the amount of the actual value received by the government (i.e., for use of the unit). Under this calculation, the trebled damages amount, adjusted for the offset, would be $18,360. In addition, the government argued that it was entitled to a civil penalty of $5,500-$11,000 for each of the six false claims (between $33,000 and $66,000). Thus, the government sought a default judgment, before costs, interest, and attorneys' fees, in the amount of $51,360 to $84,360 as a result of the $360 overcharge.

ISSUE: What was the proper measure of damages for the government and for the tenant?

HOLDING/RATIONALE: The court concluded that since the landlord submitted six false claims, he was liable for a civil penalty and treble damages on each of the six false

continued on next page

CASE CORNER CONTINUED

claims. The court found that the landlord had charged the tenant an additional rent payment of $60 on six occasions ($360 total). Thus, by reason of the false statements (the improper demand of additional rent payments), the government, in effect, paid out an extra $60 on each of six occasions, because the landlord was improperly obtaining that $60 from the tenant. Had the rental subsidy claims been truthful, the government would have paid $60 less than it did on each of six occasions. Thus, the measure of the government's damages is $360. Thus, the court found that the government sustained damages of $360, which, when trebled, totaled $1,080. The court also granted the government a civil penalty of $5,500 for each of the six violations, or $33,000. Thus, the court found that the government's total award of damages and penalties on the False Claims Act claim should be $34,080 plus post-judgment interest.

The court also granted the tenant a *qui tam* award under the False Claims Act since the government did not intervene in the suit. Finding that it could award a *qui tam* plaintiff between 25 and 30 percent of the damages awarded to the United States, the court determined that 30 percent of the proceeds awarded to the United States (30 percent of $ 34,080) or $ 10,224, was appropriate. The court also awarded the tenant actual damages of $ 360 based upon the landlord's improper demand for the "additional rent payments," and attorneys' fees of $13,775. So, in order to secure a mere $360 for water charges, the landlord had to pay out $44,664 plus $13,775 in attorneys' fees, for a whopping total of $48,439!

SECTION 8

Gammons v. Massachusetts Dept. of Hous. And Comm. Dev't., No. 07-10110-PBS, 2007 U.S. Dist. LEXIS 33637 (D. Mass. 5/9/07)

COURT: U.S. District Court for the District of Massachusetts.

FACTS: A PHA terminated the Section 8 benefits of a tenant who intentionally failed to list her husband as a member of her household. The tenant claimed that the husband did not reside with her, and provided letters showing alternative addresses for the husband. An investigator told the hearing officer that the landlord stated he resided there. Several documents - a bill, RMV records, and a bank account - corroborated the conclusion that the husband considered the tenant's residence as his own. Appealing the termination decision, the tenant alleged, *inter alia*, that the procedures employed by the PHA during their termination hearings violated her family's due process rights. Specifically, the tenant argued that it was improper for one of the PHA's two witnesses, an investigator, to testify that the tenant's landlord had stated that the husband was living with the tenant.

ISSUE 1: Whether the trial court erred in admitting evidence provided by a non-testifying landlord in violation of the tenant's due process rights.

HOLDING/RATIONALE 1: No. The court noted that hearsay evidence is admissible in administrative proceedings, where relevant. The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he was denied his right to cross-examine every person questioned by the government. Therefore, the use of hearsay at the Section 8 hearing was permissible and did not violate due process.

ISSUE 2: Whether there was sufficient evidence in the record for the hearing officer to conclude by a preponderance of the evidence that the husband resided at the tenant's residence.

HOLDING/RATIONALE 2: Yes. In according deference to the factual findings of the PHA, the court concluded that there was sufficient evidence to conclude that the husband resided at the tenant's residence. The investigator told the hearing officer that the landlord stated he resided there. Several documents - a bill, RMV records, and a bank account - corroborated the conclusion that the husband considered the tenant's residence as his own. The hearing officer considered the letters that the tenant provided showing alternative addresses for the husband, but found it to be overwhelmingly obvious that the husband used the tenant's home as his primary residence.

U. S. v. Petruk, No. 06-2666, 2007 U.S. App. LEXIS 9369 (8th Cir. 4/25/07)

COURT: U.S. Court of Appeals for the Eighth Circuit.

FACTS: Defendants husband and wife admitted that for 14 years they illegally obtained Section 8 benefits for homes that the husband actually owned and in which the wife lived. To qualify for the subsidies, the wife certified annually that her household comprised only herself and her two children when they were living with her. The housing authority took them to court and the court ordered restitution. Defendants argued that the restitution order, which reflected the total amount of subsidies that they had received, was incorrect because the owner qualified for

continued on next page

CASE CORNER CONTINUED

the subsidies, the tenant lived with the owner for only a portion of the 14 years, and the owner was entitled to receive subsidies for the periods of time that the tenant lived elsewhere. HUD argued that its loss was the total amount of subsidy that it paid to the owner.

ISSUE: What is the proper amount of loss for restitution purposes?

HOLDING/RATIONALE: For restitution purposes, the government's amount of loss is the total amount of subsidies paid, minus any subsidy amounts that defendants properly would have been entitled to receive during the conspiracy period. HUD will not pay Section 8 subsidies for owner-occupied housing. The court found that, except when dealing with HUD, the husband had claimed both homes as his homestead each year; represented that he resided in the homes in loan applications, purchase agreements, and insurance policies; and at times lived in the homes with the wife and children. The owner's residence at the properties with his wife and children while he received the Section 8 subsidies on her behalf was specifically precluded by Section 8 regulations.

HDLI IS GOING PAPERLESS!

HDLI will soon begin sending all of our publications to members electronically, so please make sure that we have your current e-mail address! Paper copies of the publications will not be available as an option.

If you already receive *The HDLI Messenger* by e-mail, then we have your address and you do not need to do anything. You will receive future issues of *The Authority* and *The Counsellor* via e-mail as well.

If you do not receive *The HDLI Messenger* or if your e-mail has changed, please send a message to hdli@hdli.org with your name, the name of your agency or law firm, and the e-mail address where you want to receive HDLI publications. Or you can fax the enclosed form to (202) 289-3401.

RECENT HUD NOTICES

Following are some of the important recent HUD Rules, Proposed Rules, and/or Notices that appear in the Federal Register, along with a brief description.

RECENT HUD PIH NOTICES
(Office of Public and Indian Housing)

Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2007-23 (HA)	8/1/07	$100 Million Set-Aside Provision to Adjust Public Housing Agencies Baseline Funding, Housing Choice Voucher Program CY 2007	Publishes HUD's decision to re-open the application period for requests for funds from the $100 million set-aside provided under the Revised CR 2007 and to extend the period of eligibility for portability and unforeseen circumstances into CY 2007.	8/31/08
PIH 2007-22 (HA)	7/31/07	Fungibility Plans by PHAs in Hurricane Katrina and Rita Disaster Areas	Informs PHAs in Louisiana and Mississippi who are eligible to combine Housing Choice Voucher and public housing operating and capital funds that this fungibility has been extended to include both calendar years 2006 and 2007	7/31/08
PIH 2007-21 (HA)	7/23/07	Guidance on Methods and Schedules for Calculating FFY 2008 Operating Subsidy Eligibility	Guidance on Methods and Schedules for Calculating FFY 2008 Operating Subsidy Eligibility	7/31/08
PIH 2007-20 (HA)	6/6/07	Impact of Non-Parental Child-Only Welfare Grants on Families Participating in the Family Self-Sufficiency Program	Determines that child-only or non-needy TANF grants made to or on behalf of a dependent child solely on the basis of the child's need and not on the need of the child's current non-parental caretaker do not qualify as welfare assistance under the FSS regulations because such grants are not designed to meet the family's ongoing basic needs.	6/30/08
PIH-2007-19 (HA)	6/29/07	Public Housing Development Cost limits	Discusses the development of public housing and other eligible replacement housing under a HOPE VI Grant and or under an ACC	6/30/08

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Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2007-18 (HA)	6/26/07	Extension of Housing Choice Voucher Program Enhanced Vouchers	Extends PIH 2006-26, same subject, which expired on 6/30/07, for another year. PIH-2006-26 and PIH 2005-24 revised the procedure for the calculation of voucher HAPs under PIH Notices 97-29, 98-19, 99-16, and 00-09 for families that received enhanced vouchers because of prepayment of a mortgage or voluntary termination of FHA mortgage insurance of a preservation eligible property in FY 1997,1998, and 1999.	6/30/08
PIH-2007-17	6/21/07	Extension of the Disaster Voucher Program and Revised Term for the Waiver of Tenant Contribution	Informs that the DVP has been extended beyond its previous sunset date of 9/30/07. In addition, the time period for the waiver of the normally applicable voucher program tenant rent contribution requirements for DVP families has been changed to 12/31/07.	6/30/08
PIH 2007-16	6/18/07	New Asset Management Stop Loss Deadlines	Sets forth a table showing the revised deadlines by which PHAs must demon-strate they have successfully converted to asset management in order to have their losses stopped; the date the submissions are due; the corresponding percent at which the losses will be stopped; and the calendar year in which that stop in the losses will take effect.	7/31/08
PIH-2007-15 (HA)	6/20/07	Applicability of Public Housing Development Requirements to Transactions between Public Housing Agencies and their Related Affiliates and Instrumentalities	Addresses development transactions with PHA partners. Focuses on existing development related requirements applicable to administrative fees and development cost allocation; prohibition of conflicts of interest; the procurement of related entities; and disposition and encumbrance of public housing property. Notice does not apply to development or management of non-public housing programs that are not funded with public housing funds, even if carried out by entities related to the PHA.	6/30/08
PIH-2007-14 (HA)	6/18/07	Implementation of Federal Fiscal Year 2007 Funding Provisions for the Housing Choice Voucher Program	Implements the HCV program funding provisions resulting from enactment of the Revised Continuing Appropriations Resolution, 2007 (Revised CR 2007) and the U.S. Troop Readiness, Veterans Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (the Supplemental 2007). Established a new allocation methodology for calculating and distributing HAP renewal funds and continues to prohibit the use of renewal funds for over-leasing (“re-benchmarking”).	6/30/08

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Notice	Date Issued	Subject	Substance	Expiration Date
PIH-2007-13 (HA)	6/15/07	Certification of accuracy of data in the Public Housing Information Center System used to calculate the Capital Fund formula allocation in Fiscal Year 2007	Requires executive directors (or an authorized subordinate staff person) to certify to the accuracy of the data PHAs have submitted to HUD in the Public Housing Information Center (PIC) system.	6/30/08
PIH-2007-12 (HA)	5/24/07	Guidance on Integrated Pest Management	Informs PHAs of reference materials on Integrated Pest Management (IPM) located in Maintenance Guidebook Seven: Termite, Insect and Rodent Control and reference material located at paragraph 7 of the notice. The decision to reflect IPM processes in their ongoing pest control efforts rests solely on local management. The use of this material is voluntary but recommended by HUD.	5/31/07
PIH-2007-10 (HA)	4/30/07	Voucher Funding In Connection with the Demolition or Disposition of Occupied Public Housing Units	Describes the funding process for providing HCVs in connection with the demolition or disposition of occupied public housing units. Applies to PHAs seeking vouchers for relocation or replacement housing related to demolition or disposition (including HOPE VI), and plans for removal (required and voluntary conversion under section 33 of the Housing Act and mandatory conversion under section 202.	4/30/08
PIH-2007-9 (HA)	4/10/07	Updated Changes in Financial Management and Reporting Requirements for PHAs Under the New Operating Fund Rule (24 CFR part 990)	Transmits changes in financial management and reporting for PHAs pursuant to the revisions to the Final Rule on the Public Housing Operating Fund Program published in the Federal Register on September 19, 2005 (79 FR 54983). Attached to notice are the supplement to the Financial Management Handbook, Handbook 7475.1 REV., CHG-1, Changes in Financial Management and Reporting for Public Housing Agencies Under the New Operating Fund Rule (24 CFR 990) Revised, April 2007.	4/30/08
PIH-2007-8 (HA)	3/22/07	Extension Notice PIH 2006-15 (HA), Single Audit Act (A-133) Independent Auditor Report Submission for PHAs	Extends the requirement that a PHA shall provide one copy of the completed audit report package and the Management Letter, performed under the Single Audit Act Amendment of 1996 (P.L. 104-156) and issued by the independent auditor, to the local HUD office having jurisdiction over the PHA.	3/31/08

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Notice	Date Issued	Subject	Substance	Expiration Date
PIH-2007-7 (HA)	3/13/07	Guidance on Appeals under Subpart G of the Revisions to the Public Housing Operating Fund Program	Provides guidance to PHAs and field offices on the grounds for appeals and the procedures for submitting appeals under the final rule published in the Federal Register on September 19, 2005 (79 FR 54983).	3/31/08
PIH-2007-6 (HA)	3/7/07	Process for Public Housing Agency Voluntary Transfers of Housing Choice Vouchers, Project-Based Vouchers and Project-Based Certificates	Clarifies the circumstances under which HUD will consider a voluntary transfer of budget authority and corresponding baseline units for the HCV program (including PBVs and PBCs) from the divesting PHAs CACC to the receiving PHAs CACC. It also explains the process and procedures associated with such a transfer. Five-year mainstream vouchers and Section 8 Moderate Rehabilitation units will be addressed under a separate notice.	3/31/08
PIH-2007-5 (HA)	2/16/07	Revised Voucher Housing Assistance Payments Contract (Form HUD 52641) and Tenancy Addendum (form HUD 52641A); Housing Choice Voucher Program Administration and the Violence Against Women and Justice Department Reauthorization Act of 2005 (VAWA 2005)	Transmits a revised Housing Assistance Payments Contract (HAP Contract, form HUD 52641) and a revised Tenancy Addendum (form HUD 52641A). These forms have been revised to reflect the statutory requirements of the Violence Against Women and Justice Department Reauthorization Act of 2005 (VAWA 2005) that are related to housing choice voucher program HAP contracts and leases. Forms are available through HUDCLIPS at (www.hudclips.org).	2/28/08
PIH-2007-4 (HA)	2/4/07	Extension Disaster Voucher Program (DVP) Operating Requirements Rental Assistance for HUD-Assisted Families and Special Needs Families Displaced by Hurricanes Katrina and Rita	Extends various Katrina-related notices	2/28/08
PIH-2007-3	1/23/07	Reoccupancy Policies for Pre-Disaster HUD Assisted and Special Needs Families Displaced by Hurricanes Katrina and Rita	States HUD’s reoccupancy policies for pre-disaster public housing, tenant-based voucher, project-based voucher, Section 8 moderate rehabilitation, Section 8 project-based certificate, and Special Needs Families displaced by Hurricanes Katrina and Rita.	1/31/08

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Notice	Date Issued	Subject	Substance	Expiration Date
PIH 2007-1 (TDHEs)	1/3/07	Reinstatement Notice PIH 2006-1 Requirement for Designation of Public Housing Projects	Reinstates Notice PIH 2006-1 (HA), which expired January 31, 2007, for another year until January 31, 2008	1/31/08

OTHER RECENT HUD NOTICES

Notice	Date Issued	Subject	Substance	Expiration Date
72 FR 41821	7/25/07	Supplement to FY 2007 SuperNOFA for HOPE VI (additional $94.52 million)	NOFA response date is 11/7/07	n/a
72 FR 39545	7/18/07	Proposed Rule re: Use of Public Housing Capital and Operating Funds for Financing Activities	Proposed rule to establish protocol to permit pledge of public housing capital and operating funds for debt service.	Comment Due Date: 9/17/07
72 FR 39539	7/18/07	Proposed Rule re: Design and Construction Requirements; Compliance With ANSI A117.1 Standards	Proposed rule to clarify that compliance with the 1986, 1992, and 1998 ANSI requirements remains sufficient to meet the design and construction requirements of the Fair Housing Act and its amendments.	Comment Due Date: 9/17/07
72 FR 39539	7/18/07	Report of HUD Review of the Fair Housing Accessibility Requirements in the 2006 International Building Code	This notice publishes HUD's review of certain accessibility provisions of the 2006 IBC.	n/a
72 FR 38397 (7/12/07)	6/27/07	Notice of Proposed Fiscal Year (FY) 2008 Fair Market Rents (FMRs)	Lists proposed FY08 FMRs based on 2000 census data, updated with more current survey data. For the first time, HUD is using data from the Census Bureau's American Community Survey (ACS).	Comment Due Date: 8/13/07
CPD 07-04	6/12/07	Notice of Procedures for Designation of Consortia as a Participating Jurisdiction for the HOME program	Provides procedures for Designation of Consortia as a Participating Jurisdiction for the HOME program	6/12/08

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RECENT HUD HOUSING NOTICES
(Assistant Secretary for Housing - Federal Housing Commissioner)

Notice	Date Issued	Subject	Substance	Expiration Date
CPD-07-03	4/17/07	Instructions for Urban County Qualification for Participation in the Community Development Block Grant (CDBG) Program for Fiscal Years (FYs) 2008-2010	Establishes requirements, procedures and deadlines to be followed in the urban county qualification process for FYs 2008-2010.	4/17/08
CPD-07-02	3/21/07	Transition Policy for Low/Mod Income Summary Data Updates for Fiscal Year 2007 for the State Community Development Block Grant program	Describes policy guidance for using the updated Low/Mod Income Summary Data (LMISD) resulting from the new income limit areas HUD is now using when preparing median family income estimates and income limits. Of the approximately 40,000 units of general local government, only 16 areas that previously met the 51% low and moderate income (LMI) eligibility threshold, now fail to meet the threshold. There are nearly 400 new areas that previously were not eligible, and now meet the 51% eligibility threshold. Information on the impact on all areas is contained in websites listed later in the Notice.	3/21/08
CPD-07-01	3/21/07	Transition Policy for Low/Mod Income Summary Data (LMISD) Updates for Fiscal Year (FY) 2007 Community Development Block Grant (CDBG) Program -- Entitlement Grantees	Describes policy guidance for using the updated Low/Mod Income Summary Data (LMISD) resulting from the new income limit areas HUD is now using when preparing median family income estimates and income limits. Income limits have changed because income-limit area definitions have changed. Notice provides relevant information to grantees, as well as an attachment indicating which grantees have been affected by the updated LMISD.	3/21/08
H 07-03	3/23/07	Fiscal Year 2007 Interest Rate for Section 202 and Section 811 Capital Advance Projects	Sets forth the Fiscal Year 2007 nominal interest rate for the Section 202 and Section 811 Capital Advance Programs. Based on the formula specified in the Housing and Community Development Act of 1987, the interest rate is 5.25 percent.	3/21/08

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Notice	Date Issued	Subject	Substance	Expiration Date
H 07-02	3/13/07	Guidelines for Continuation of Interest Reduction Payments after Refinancing: Decoupling, Under Section 236(e)(2) and Refinancing of Insured Section 236 Projects into Non-Insured Section 236(b) Projects	Notice H 00-8, which was issued on May 16, 2000 and expired on May 16, 2001, is being reinstated and extended to March 31, 2008. Notice previously was reinstated by Notice H 05-19, which was issued on November 9, 2005 and expired on November 30, 2006.	3/31/08
H 07-01	2/2/08	Disaster Recovery Guidance by Multifamily Housing After a Presidentially-Declared Disaster	Notice H 2004-22, which was issued on November 10, 2004 and expired on November 30, 2005, is being reinstated and extended to February 28, 2008. Notice previously was reinstated by Notice 05-20, which was issued on December 1, 2005 and expired on December 31,2006.	2/28/08

OTHER IMPORTANT NOTICES

Agency	Directive No.	Date Issued	Subject	Substance
IRS	E7-11731	6/18/07	Section 42 Utility Allowance Regulations Update	Contains proposed regulations that amend the utility allowances regulations concerning the low-income housing tax credit. The proposed regulations update the utility allowances regulations to provide new options for estimating tenant utility costs. The proposed regulations affect owners of low-income housing projects who claim the credit, the tenants in those low-income housing projects, and the state and local housing credit agencies who administer the credit.

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Agency	Directive No.	Date Issued	Subject	Substance
HUD	FR-5076-D-15	6/8/07	Redelegation of Authority to the Director of the HUD Office of Healthy Homes and Lead Hazard Control Regarding Lead-Based Paint Enforcement	Redelegates to the Director of the Office of Healthy Homes and Lead Hazard Control authority presently residing with the Assistant Secretary for Housing--Federal Housing Commissioner or the Assistant Secretary's designee under 24 CFR 30.45 and 30.68 with respect to enforcement of lead-based paint requirements. These lead-based paint regulations, which are set out in 24 CFR part 35, subparts B, G, H, and R, require the notification, evaluation, and reduction of lead-based paint hazards in (1) multifamily residential properties for which HUD is the owner of the mortgage or for which a lender receives mortgage insurance, including non-residential properties being converted to multifamily residential properties and (2) multifamily residential properties for which the owner receives project-based housing assistance.
HUD	FR-4998-P-01	5/18/07	Refinement of Income and Rent Determination Requirements in Public and Assisted Housing Programs	This Proposed Rule revises HUD's public and assisted housing program regulations to implement the process of upfront income verification (UIV) of applicants and participants in assistance programs by public housing agencies (PHAs), including through use of the Enterprise Income Verification (EIV) system. Comment Due Date: 8/20/07
HUD	E7-11169	6/4/07	Section 538 Multi-Family Housing Guaranteed Rural Rental Housing Program (GRRHP) Demonstration Program for Fiscal Year 2007	NOFA that announces the implementation of a demonstration program under the section 538 Guaranteed Rural Rental Housing Program (GRRHP) pursuant to 7 CFR 3565.4 for Fiscal Year (FY) 2007 and 7 CFR 3565.17 Demonstration programs. The Demonstration Program's purpose is to test the viability and efficacy of the concept of a continuous loan note guarantee through the construction and permanent loan financing phases of a project. Deadline is: 8/13/07.
USDA, RHS	E7-11081	6/4/07	Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative (RCDI)	NOFA announcing the availability of $6,286,500 of competitive grant funds for the RCDI program through the Rural Housing Service. Deadline is: 4 p.m. eastern time on 9/6/07.

HUD's FINAL NOTICE ON PHA AFFILIATES Continued

and management are legally and effectively controlled by the PHA, through which PHA functions or policies are implemented and that utilize public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. For the Department's purposes, an instrumentality *assumes the role of the PHA and is the PHA under the public housing requirements* for purposes of implementing public housing development activities and programs. instrumentalities must be authorized to act for and to assume such responsibilities. In addition, an instrumentality must abide by the public housing requirements that would be applicable to the PHA.

The Notice states that instrumentalities will be considered, for purposes of the public housing program, to be the PHA. As such, the instrumentality must have the authority to carry out proposed activities of the PHA. Generally, the requirements are assumed to be met where the instrumentality is created as a division within the existing structure of the PHA. The Notice sets forth five factors that should be considered in the formation and operation of an instrumentality of the PHA which is a separate legal entity from the PHA:

1. The instrumentality is directed or managed by the same persons who constitute the board of directors or governing body of the PHA or who are employees of the PHA.

2. Board positions on the instrumentality may be associated with an employment position at the PHA or appointed by such persons. In the event of a PHA staff change, the PHA would appoint another employee to the board of the instrumentality.

3. The organizational documents of the instrumentality contain provisions that in the event of a change in the controlling interest of the instrumentality, all public housing assets of the instrumentality are returned to the PHA or are otherwise protected.

4. The organization is a component unit of a primary government using the suggested criteria and tests included in the Government Accounting Standards Board Statement 14.

5. An instrumentality must abide by the public housing requirements that would be applicable to the PHA.

The Notice notes that under the existing public housing structure there is usually one PHA in a jurisdiction. Therefore, any entity that does business with the PHA is presumed to be a contractor. The Notice makes clear that an entity will be treated as a contractor unless it is made clear by the PHA that it should be treated differently, e.g., as an instrumentality. If you are planning to use an "instrumentality," it would be wise to obtain a private legal opinion, an opinion from the local government, or guidance from the Department that the entity satisfies the requirements of an "instrumentality" under HUD regulations and has the requisite powers and delegated authority to carry out the responsibilities of the PHA for development purposes under the applicable public housing requirements. If you do not obtain such an opinion, then you would look to the indicia of control over the entity as the basis for whether the entity can be treated as an instrumentality. If you don't meet the requisite requirements, the entity will be treated as a contractor.

Application

The Notice applies to public housing development activities pursuant to 24 CFR Part 941. It *does not apply* to development or management of non-public housing programs that *are not funded with public housing funds*, even if carried out by entities related to the PHA. The Notice also *does not apply* to PHA instrumentalities, affiliates, consortia or joint ventures *providing administrative management, supportive or social services pursuant to Section 13 of the Act and its implementing regulations at 24 CFR Part 943*. Notwithstanding any provision of this Notice, Moving to Work (MTW) participants may continue to operate in accordance with their MTW Agreements with the Department.

Funding the Formation of Affiliates and Instrumentalities

The Notice specifically allows the use of federal funds to form affiliates and instrumentalities, with certain restrictions. Generally, public housing funds may be used for administrative expenses incurred in the formation of an affiliate or instrumentality created to develop and operate a PHA's public housing development programs. However, with regard to mixed income and/or mixed-use development, the Notice makes clear that the development must contain public housing units, although it also may contain Low Income Housing Tax Credit (LIHTC) units, other affordable units, market rate housing, and commercial development.

With regard to tax credit development, the Notice makes clear that PHAs may use public housing funds for the costs of preparing and submitting a tax credit application, where it is developing public housing units in a mixed-income project, a mixed-use project, or a project that consists solely of public housing units, some of which are also LIHTC units.

The Notice also makes clear that public housing funds *may not* be used to pay the cost of forming an affiliate/instrumentality created for the sole purpose of developing LIHTC or market rate developments *that do*

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HUD's FINAL NOTICE ON PHA AFFILIATES Continued

not include any public housing units. In those cases, you must use non-public housing funds, which includes de-federalized fees paid to the Central Office Cost Center.

The Notice also addresses the situation where an affiliate or instrumentality is formed to participate in multiple projects where some of the projects may not include public housing units. The Notice states that as long as the first project contains some public housing units, then public housing funds can be used to establish an affiliate or instrumentality.

Fiscal Management and Cost Allocations

The Notice provides guidance on fiscal management and cost allocation when public housing funds are involved in a development activity. As a general rule, public housing funds may only be used for the development, administration, or management of a project that contains public housing units subject to the authority by which the funds were appropriated. The costs to carry out the administrative, management, or development functions for a project containing no public housing units must be paid for with funds other than public housing funds. Under the Notice, PHAs can either use the cost allocation system outlined in the Notice or a fee based approach in lieu of cost allocation.

Cost Allocation

The Notice outlines basic cost allocation requirements:

Shared resources - where staff, facilities, equipment, or other resources are shared between a PHA and an affiliate/instrumentality, or between the public housing program and non-public housing programs, the costs must be equitably allocated to each entity or program. This is the cost allocation principle that is the norm for both public and private business practices, and it applies to the development of public housing.

Loaned employee - the same cost allocation requirements apply where a PHA's employee performs work for an affiliate as a consultant or other type of contractor.

Mixed finance - in the case of mixed-finance development the number of public housing units must be approximately proportionate to the PHA's contribution compared to the number of non-public housing units and the contribution from other sources.

Fee based structure

PHAs may use a fee based structure in lieu of cost allocation systems. Where the PHA earns certain fees, as detailed in the Financial Mangement Handbook, it may use the fees as the PHA wishes, including to pay affiliate or instrumentality costs. This structure is permitted under Section A(2)(b) of Attachment A of Circular A-87 as an alternative to reduce the administrative burden regarding the establishment of overhead rates.

Reasonable administrative fees (3% - 6% TBC)

A PHA may use an administrative fee for any purpose appropriate for local revenue, including PHA, instrumentality, or affiliate costs, such as to pay the Central Office Cost Center or to hire external consultants including a program manager, development advisors, or relocation specialists. The administrative fees or costs incurred must be within the administrative fee limits.

The Notice states that, when using public housing funds in mixed finance developments, a fee of 3% of the total project budget may be paid with public housing funds (the "administrative fee"). The admin fee covers the PHA's administrative cost for the mixed-finance development activities. If you are able to demonstrate to the Department, in writing, that a higher fee is appropriate for the scope of work, specific circumstances of the project, and local or national market for the services provided, then you may charge up to a 6% administrative fee.

The total project budget includes all hard and soft development costs paid with both public and private financing. Unfortunately, the total project budget cannot include Community and Supportive Services (CSS) costs for the purpose of calculating the administrative fee. If the administrative fee is at or below the 3% safe harbor standard, no further review is required.

For PHAs undertaking development, any administrative fee that the PHA charges for mixed-finance development programs is considered non-program income for purposes of A-87 and 24 CFR Part 85, provided that the fees charged are reasonable under the criteria established by the Department. However, other state and local restrictions may still apply. Consequently, any reasonable fees earned by the PHA will be treated as local revenue subject only to the controls and limitations imposed by the PHA's management, board or other authorized governing body.

The Notice makes clear that PHAs are not required to document or demonstrate actual costs to earn the administrative fee. Additionally, you don't have to distinguish or separately account for the expenses or costs associated with the administrative fee earned from its public housing development programs.

Accounting and reporting requirements

PHAs must ensure that their instrumentali-

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HUD's FINAL NOTICE ON PHA AFFILIATES Continued

ties comply with Generally Accepted Accounting Principles (GAAP) reporting requirements. *24 CFR 5.801*. This means that the instrumentality must provide the PHA and the Department with audited financial statements and financial performance reviews. If an affiliate is included as a component unit or, to the extent that these accounting and reporting requirements apply to unrelated third party contractors, then affiliates must also comply. *PHA GAAP Flyer, Vol. 1, Issue 3, July 1999*.

Conflicts of Interest

The Notice also addresses conflicts of interest, an area of significant concern to the HUD OIG. Since an instrumentality is construed as the PHA, and an affiliate is considered a contractor, they are bound by the same conflict of interest provisions to which PHAs are subject, as set forth in both the ACC and in 24 CFR Part 85. However, since an instrumentality is construed as the PHA in conjunction with public housing development activities, the Notice makes clear that there is no inherent conflict of interest regarding transactions between a PHA and its instrumentality within the sphere of activity.

The Notice states that the Department is most concerned with conflicts of interest resulting in an actual or perceived personal financial benefit to agents of the PHA, instrumentality and affiliate involving public housing funds. Such instances create, at a minimum, a perception of abuse of authority and self-dealing in a federal program. This is an area where the Department will closely scrutinize the transactions and will consider all available remedies for resolving these conflicts.

The Notice provides an overview of the general conflict-of-interest concepts set forth in 24 CFR Part 85.36 and in Section 19, Part A of the ACC (Form HUD-53012A (7/95)). Of course, for good cause, PHAs can request from the Department a written waiver and an exception to the conflict-of interest provisions in the regulations and in the ACC. One area to note is in employment sharing arrangements. The Notice affirms that there is no conflict of interest where an employee or agent of the PHA, affiliate, or instrumentality receives a normal and customary compensation package for employment by the PHA or the affiliate/ instrumentality, including compensation provided to the employee by the PHA or the affiliate/ instrumentality. Where the PHA permits its staff to provide services to an affiliate or instrumentality the allocation of the salary expenses between these entities do not create a conflict of interest for the individual employee. Similarly, when a bonus provided by the PHA to the development director or payrolled employee for their service to the instrumentality/affiliate would not be considered a financial interest, if consistent with the PHA's customary compensation package.

Procurement of Affiliates/ Instrumentalities/Mixed Finance Owners Entities

There are marked distinctions between procurement practices of/by affiliates and those of/by instrumentalities. Indeed, they operate in the opposite of each other. Since an instrumentality is construed as the PHA, a PHA's procurement of an instrumentality for development *is not* subject to 24 CFR Part 85. However, when the instrumentality selects its partners and subcontractors, *it must comply with Part 85* to procure these third party members of its operational or development team (i.e., architects, consultants, contractors, attorneys, etc.) because the instrumentality is subject to the same procurement requirements as the PHA. *24 CFR Part 85 and 24 CFR Part 941.*

In contrast, a PHA's procurement of an affiliate *is* subject to the applicable provisions of 24 CFR Part 85 and 24 CFR Part 941. The PHA may choose to implement any of the methods of procurement outlined in 24 CFR 85.36, including procurement by noncompetitive proposals, as long as the preconditions to the use of that method are met. For purposes of mixed-finance development the affiliate may be procured in accordance with 24 CFR 85.36 as modified by 24 CFR 941.602(d). However, when the affiliate contracts for goods or services, including services of the other members of its operational or development team (e.g., architects, consultants, contractors, and attorneys), it is *not* subject to 24 CFR Part 85.

With regard to procurement by an owner entity in mixed finance development, you must refer to 24 CFR 941.602(d)(2) which addresses the exercise of "significant functions" within the owner entity by the PHA or an instrumentality in order to determine whether the procurement of subcontractors is subject to 24 CFR Part 85. In a mixed-finance transaction, the procured developer typically forms the owner entity and assumes a role in the partnership. The Notice provides examples of PHA or affiliate/ instrumentality involvement in the owner entity and whether that involvement is subject to Part 85.

Section 30, Capital Fund Financing and Public Housing Development

Private development firms, PHAs, affiliates and instrumentalities providing development functions for public housing development and/or mixed-finance housing development projects must conform to the requirements of section 30 of the 1937Act (42 U.S.C. 1437z-2), to the extent they mortgage or grant a security interest in any public housing asset. The Notice provides an overview.

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HUD's FINAL NOTICE ON PHA AFFILIATES Continued

Private development firms and/or affiliates and instrumentalities undertaking mixed-finance development of public housing units must conform to applicable public housing requirements. Specifically, the entity must follow the requirements of 24 CFR Part 941, Subpart F – Public/Private Partnerships for Mixed-Finance Development of Public Housing Units, and the guidance and procedures established by the OPHI, including but not limited to the Mixed-Finance Guidebook (1998). The OPHI must approve the obligation of any public housing funds prior to the expenditure of these funds.

Disposition and Encumbrance of Public Housing Property

PHAs, affiliates, and instrumentalities may not dispose of or encumber public housing property without the Department's approval either under 24 CFR Part 970 or Part 941, or section 30 of the Act, as applicable. The Notice provides a nonexclusive list of examples of general types of encumbrances that are prohibited by the ACC covenant without the prior written approval of HUD. The penalty for violating these requirements may include reimbursement of all public housing funds. The exception is when disposition occurs through mixed-finance development. In that case, transfer by deed or ground lease of public housing property to an instrumentality, affiliate or mixed-finance owner entity for the purpose of developing public housing through the mixed-finance method *does not* require written approval from the Department through 24 CFR Part 970. The PHA need only provide a certification stating that the disposition is in compliance with the provisions of Section 18 of the Act, and the Department will approve the transfer, sale or ground lease of public housing property as a component of the mixed-finance approval process.

Monitoring, Audits, and the PHA Plan

The Notice reiterates the existing requirements with regard to providing to HUD audited financial statements. It also restates the PHA's obligation to report in the PHA Plan the disposition of public housing property and any public housing development activities to be entered into with affiliates/instrumentalities and other private development entities. The PHA Plan must also include Implementation Schedules for each active grant that details the eligible activities, including development activities conducted with affiliates and instrumentalities, to be funded and the budget of estimated sources and uses. The Department must separately approve all development transactions with affiliates/instrumentalities and private development entities that utilize public housing funds for the development. *See 24 CFR Part 941, Subparts A-F sections 941.302, 941.501, 941.612, & 941.614*. Note that since non-public housing development activity is not subject to review and approval by the Department, it need not be included in the PHA plan.

TODAY'S POSITIVE QUOTATION

Dr. Martin Luther King, Jr. is said to have proclaimed:

"In the End, we will remember not the words of our enemies, but the silence of our friends."

AUGUST 2007 MEDITATIONS

(A.K.A. STRESS NEUTRALIZERS)

O.K., RIGHT NOW . . . stop multi-tasking (e.g., typing, writing, eating, and talking on the phone while you're reading this), take a deep soothing breath, exhale, read the following and take heed . . .

AWARENESS OF PROCESS

"*Fate keeps happening.*"
Anita Loos.

Our lives are not set in stone. Lives, like flowers, continue to unfold. We have options and we have choices all along the way. Certainly, we have been influenced by our past and the many forces that have impinged upon us in our formative years. Yet we do have the ability to alter our present and our future. Fate is a process that continues to emerge. As we accept who we are, we have the possibility of becoming someone else. That is the paradox of life and of living. When I can let life happen, I feel better. When I can participate in the happening of life, I soar!

LIFE IS IN THE LIVING. THE PROCESS OF LIFE KEEPS HAPPENING.

WHOLENESS

"*Don't you realize that the sea is the home of water? All water is off on a journey unless it's in the seas, and it's homesick, and bound to make its way home someday.*"
Zora Neale Hurston.

We are all like water. We are off on a journey to return to ourselves. Some of our journeys have taken us far afield, and many of our days have been absorbed by the sandy river banks that contain us. Yet we continue to flow – heavy and swollen I the spring of our lives and often reduced to a trickle as we approach the fall of our years. "Return, return, return," we murmur, as we tumble over the stones in our paths, ever cognizant that although we may wander through new and strange lands, our destination is a return.

WATER HAS TO RETURN TO THE SEA, JUST AS I HAVE TO RETURN TO ME.

HONESTY

If something is true for us, we must trust that truth. We live in a society that is built on dishonesty and ambiguity. In some business and political circles, the "good communicator" is the one who can intimidate, confuse, confound, and *win.* The art of clear, honest, communication sometimes seems to have disappeared with the age of innocence. But somewhere down deep inside each of us is a longing to be honest, to say what is true for us and speak it freely, letting others have it. We live in a society that is shriveling up from the lack of honesty. We are shriveling up from the lack of honesty.

OUR HONESTY IS ESSENTIAL.

**The foregoing is adapted from Anne Wilson Schaef's *Meditations for Women Who Do Too Much,* Harper& Row, 1990.

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