



Affordable Housing Alert

Developments in affordable housing law

A publication of Nixon Peabody LLP

MAY 1, 2009

Rural Development issues preservation, new construction, and rural voucher funding and application notices

By Richard Michael Price and Tatiana Gutierrez Abendschein

On April 29, 2009, the Rural Housing Service (RHS) issued NOFAs for the Rural Development (RD) voucher program and the Section 515 Rural Rental Housing Program for New Construction, as well as a notice of solicitation of applications for the Section 515 (multifamily housing) and 514/516 (off-farm labor housing) Multi-family Housing Revitalization Demonstration Program (MPR). This article will briefly summarize these three notices, which are important to any affordable rural housing operator.

PRESERVATION OF RURAL HOUSING

The RD MPR is seeking pre-applications by 5 p.m. EST on June 29, 2009. The authorized restructuring tools are debt deferrals, revitalization grants, zero percent loans, and soft-second loans. All non-deferred RD debt, regardless of lien position, must be secured within market value, but deferred debt may exceed the market value of the security, and payment of such debt will not be required from normal project operation income, but from excess cash. RD will identify MPR transactions in three categories: (1) simple transactions that involve no change in ownership; (2) complex transactions, which consist of a property transfer to new ownership or transactions requiring a subordination agreement as a result of third-party funds; and (3) portfolio transactions.

The MPR process commences with a pre-application, followed by an initial eligibility screening by RD. RD will then rank all eligible, complete, and timely filed pre-applications. Top ranked pre-applicants are then invited to submit a formal application. At that point, the formal applicants must provide a capital needs assessment (CNA) in order that RD can determine the proper combination of restructuring tools to be made available, as well as to allow RD to perform additional eligibility review and to underwrite the proposal to determine financial feasibility. Applicants can participate in a “community market rent” demonstration, allowing an owner to set a rent above the approved basic rent for any unit not currently occupied by a tenant receiving RD rental assistance. Eligible tenants for these units must have adjusted annual incomes sufficient to allow them to pay the community market rent using less than 30 percent of their adjusted income. With RD’s consent, up to 50 percent of the difference between the basic rent and the new community market rent could be retained by the owner as increased return. Owners who contribute cash to fund any hard costs of construction to meet immediate needs identified by the CNA may receive a return on investment on those funds. RD may also allow the return to owner to be included in a “cash flow split” agreement.

SECTION 515 NEW CONSTRUCTION

RD issued a NOFA for the Section 515 Rural Rental Housing Program for New Construction on April 29, 2009. The deadline for receipt of response applications is 5 p.m. local time on June 29, 2009. Section 515 provides RD with the authority to make loans to any individual or entity, including Indian tribes, to provide rental or cooperative housing and related facilities in rural areas for very-low-, low-, or moderate-income persons or families, including elderly persons and persons with disabilities. RD's rental assistance will not be available for new construction in FY 2009.

RD VOUCHER PROGRAM

RD issued a notice regarding a demonstration voucher program and funding availability for the program. The FY 2009 Omnibus Appropriations Act appropriated \$4,965,000 to RD for rural housing vouchers for low-income households residing in 515 loan properties that have been prepaid after September 30, 2005, at amounts equaling the difference between comparable market rents and the tenant paid rent for such units, subject to the availability of annual appropriations. The Omnibus bill also stated that the USDA secretary should administer the RD vouchers in accordance with regulation and administrative guidance applicable to the HUD Section 8 Housing Choice Voucher program. Tenants in foreclosed 515 properties are also eligible for the vouchers.

The general limitations provided in the notice include the rental unit's passing an RD health and safety inspection, prohibition of use for a unit already assisted by Section 8 or RD rental assistance, and prohibition of use for the purchase of a home. The tenant must be a citizen or noncitizen national or qualified alien to be eligible for the voucher, and be residing at the relevant 515 property on the date of prepayment or foreclosure. RD will obtain a rent comparability study for the property 90 days before the date of the intended prepayment of foreclosure to calculate the voucher amount each tenant would be entitled to receive. The family that receives an RD voucher has an initial search period of 60 calendar days from receipt of voucher to find a housing unit. Subject to RD approval, the search period can be increased by the tenant to a maximum of 120 days. The voucher can be used either at the current property or at another property, so long as the unit and rent qualify for the program.

HUD REGULATORY ROUNDUP

In the past year, HUD has issued several Federal Register notices or other administrative documents. You may find some important guidance in one or another, even though no one of these notices creates major policy change in itself.

On April 29, 2009, HUD issued a request for recommendations regarding administrative and procedural changes to expedite the approval of applications for FHA-insured multifamily mortgages involving low-income housing tax credits or tax-exempt bonds. HUD's request is in accordance with Title VIII of the Housing and Economic Recovery Act of 2008 (HERA), which increases HUD's ability to facilitate and coordinate the use of LIHTC or tax-exempt bonds with multifamily projects that receive HUD assistance.

On January 27, 2009, HUD issued a final rule refining income and rent determinations requirements in public and assisted housing proposals. The purpose of the final rule is to implement the Upfront Income Verification Process and to require the use of HUD's Enterprise Income Verification System

as a part of HUD's Rental Housing Integrity Improvement Project, meant to reduce the number and dollar amount of errors in HUD's rental assistance programs.

On December 17, 2008, HUD published a final rule amending HUD's regulations under the Program Fraud Civil Remedies Act of 1986, formally recognizing that the "ability to pay" can be a factor in determining amounts of penalties. Similar changes are pending in a proposed civil money penalty regulation, issued last October 17.

On November 26, 2008, HUD published a final rule modifying HUD's policies and practices regarding responses to subpoenas and other demands for testimony of HUD employees, and for production of documents by HUD. This has often been an issue for parties seeking to obtain formal documentation from HUD. It delegates authority to make such determinations to additional officers within the Office of General Counsel, revises the criteria in use to evaluate such demands, and eliminates provisions covering HUD's response to demands.

If you have any questions about this alert, please contact Richard Michael Price at 202-585-8716 or rprice@nixonpeabody.com, Monica H. Sussman at 202-585-8833 or msussman@nixonpeabody.com, Stephen J. Wallace at 202-585-8714 or swallace@nixonpeabody.com, Tatiana Gutierrez Abendschein at 202-585-8860 or tgutierrez@nixonpeabody.com, or your regular Nixon Peabody LLP attorney.