



Affordable Housing Alert

Developments in affordable housing law

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HUD issues new subsidy layering guidelines for project-based vouchers

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On July 9, 2010, HUD issued a *Federal Register* notice (“Notice”) with guidelines and procedures that Public Housing Agencies must follow in assuring that a Subsidy Layering Review is performed in connection with the provision of Section 8 Project-Based Vouchers (“PBVs”) in newly constructed and substantially rehabilitated projects.

In 2008, Congress passed legislation intended to streamline the procedures for Subsidy Layering Reviews in order to expedite the use of PBVs by PHAs. The intent of the legislation was to eliminate duplication of Subsidy Layering Reviews conducted by a Housing Credit Agency (defined below) and HUD in connection with PBVs. One of the changes in the 2008 legislation was to eliminate the need for a Subsidy Layering Review when PBVs are used for an existing housing project. HUD confirms in the Notice that this provision of the legislation was self-implementing and became effective immediately upon the enactment of the legislation.

With respect to new construction and substantially rehabilitated projects that are receiving PBVs, the Notice provides the Subsidy Layering Review processing requirements and guidance for PHAs and for “qualified Housing Credit Agencies (“HCAs”),” which term includes State Housing Finance Agencies and other state agencies authorized to do Subsidy Layering Reviews in connection with the provision of low-income housing tax credits (“LIHTCs”) and participating jurisdictions in the HOME program. Under the Notice, for new construction and substantial rehabilitation projects utilizing PBVs, the Subsidy Layering Review may be satisfied if the HCA has conducted such a review with respect to the LIHTCs, HOME funds, and other government financing in the project and takes into consideration the provision of the Section 8 PBVs in its Subsidy Layering Review analysis.

If the HCA intends to undertake the processing of the Subsidy Layering Review for PBVs in connection with other financing, the HCA must notify HUD of its intent to participate before it undertakes any Subsidy Layering Reviews under the Notice and must certify to HUD that it will conduct the Subsidy Layering Review for the PBVs in accordance with the provisions of the Notice.

The Notice defines two categories of HCA Subsidy Layering Review: (i) a proposed project where the HCA will conduct a Subsidy Layering Review that takes into consideration the PBVs, and (ii) a proposed PBV project where the Subsidy Layering Review has been performed by the HCA and did not take into consideration the PBVs. The Notice provides separate guidance and procedures with respect to the Subsidy Layering Review for each category of project. However, in both categories of projects, the Notice states that the HCAs must consider the effect the operational support provided to the project by the PBVs will have on the HCA's analysis in regards to the level of subsidy "required to make the project feasible without over compensation."

The analysis of the operational support must consider the debt coverage ratio (a minimum of 1.10 coverage and a maximum of 1.45 coverage) and the amount of cash-flow generated by the project over a 15-year operating pro forma period, in order to determine if excess funding exists in the project. In addition to certain safe harbor standards, with respect to the analysis of the development costs, the Notice provides that if the cash flow analysis, minus required reserve amounts, exceeds 10% of total expenses, then the PBV assistance may be greater than is necessary to provide the affordable housing and the HCA must re-visit the operating pro forma to reduce the cash-flow so that it does not exceed 10% of total operating expenses. If the owner declines, then the HCA must recommend to HUD that there be a reduction in the PBV rents or in the number of PBVs being provided to the project.

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