

# Nixon Peabody LLP

# Affordable Housing Law Alert

Developments in Affordable Housing Law

NOVEMBER 2005

## Project-Based Voucher Section 8 Rents in LIHTC Projects

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On October 13, 2005, we issued an Alert advising that HUD had published the final section 8 Project-Based Voucher ("PBV") rule on October 13, 2005. In addition to the revisions noted in our prior Alert, we want to bring to your attention a very significant change impacting section 8 rents for low income housing tax credit properties.

Prior to the publication of the final PBV rule, HUD had provided guidance in Notice PIH 2002-22 that with respect to units inside a Qualified Census Tract ("QCT") the section 8 PBV rents could not exceed the lower of 110 percent of the Fair Market Rent (or any HUD-approved exception payment standard) or the rent charged for unassisted comparable units. It further provided that for purposes of determining comparability, the rents for non-section 8 LIHTC units shall not be used since the units are considered assisted units.

The Notice also provided for projects outside a QCT, where the LIHTC rent is equal to or less than 110 percent of the Fair Market Rent (or any HUD approved exception payment standard) then the section 8 PBV rent cannot exceed the lower of 110 percent of the Fair Market Rent (or any HUD approved exception payment standard) or the rents charged for unassisted comparable units, i.e., the same as above for projects inside the QCT. However, where a project is outside of a QCT and the LIHTC rents are higher than 110 percent of the Fair Market Rent (or any HUD-approved exception payment standard) the Notice provided that section 8 PBV level shall not exceed the lower of the LIHTC level (i.e., the rent charged for comparable units in the building that also receive LIHTCs but do not have additional rental assistance) or the rent charged for unassisted comparable units in the private market.

The final rule now changes the HUD policy and limits section 8 PBV rents for projects inside a QCT and outside a QCT to the LIHTC rents, even if then LIHTC rents are below 110 percent of the FMRs. The final rule did not change the policy for projects outside a QCT where the LIHTC rents are higher than 110 percent of the Fair Market Rent (or any HUD-approved exception payment standard) in that the section 8 PBV rent can equal the



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lesser of the LIHTC level or the rent charged for unassisted comparable units in the private market.

This major change in HUD policy with respect to section 8 rent limits was made without public notice and comment as required for such policy changes. While we are attempting to clarify this with HUD, the final Rule policy appears to apply to annual adjustments as well as to initial rent setting. A number of section 8 PBV projects have been underwritten and financed based upon the HUD policies in place prior to the final rule and this new policy could have a negative impact on rent adjustments in these projects. Thus, for a project already under a multiyear section 8 PBV HAP Contract, the final rule rent limitation would apply to an owner's request for rent adjustment or a negative adjustment could be triggered by a PHA if the FMR decreases by 5% or more.

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