

MEMORANDUM OF UNDERSTANDING

Between

the Department of Housing and Urban Development

and

the Alabama Housing Finance Authority

INTRODUCTION

WHEREAS, the U.S. Department of Housing and Urban Development hereinafter referred to as HUD, acting by and through the Federal Housing Administration, hereinafter referred to as FHA, and the Alabama Housing Finance Authority, hereinafter referred to as AHFA, wish to enter into this Memorandum of Understanding (MOU) regarding the Subsidy Layering Review of the sources and uses of funds in projects receiving low-income housing tax credits and HUD Housing Assistance. (HUD Housing Assistance refers to those programs administered by FHA or the Office of Housing.)

WHEREAS, Section 102(d) of the Housing and Community Development Reform Act of 1989 requires the Secretary of HUD to limit assistance granted to a project to:

“...not be more than is necessary to provide affordable housing after taking account...[Other Government Assistance]”. (A copy of Section 102 of the Housing and Community Development Reform Act of 1989 is attached as Exhibit A.)

WHEREAS, Section 911 of the Housing and Community Development Act of 1992 provides that:

The requirements of Section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 may be satisfied in connection with a project receiving assistance under a program that is within the jurisdiction of the Department of Housing and Urban Development and under Section 42 of the Internal Revenue Code of 1986 by a certification by a housing credit agency to the Secretary, submitted in accordance with guidelines established by the Secretary, that the combination of assistance within the jurisdiction of the Secretary and other government assistance provided in connection with a property for which assistance is to be provided within the jurisdiction of the Department of Housing and Urban Development and under Section 42 of the Internal Revenue Code of 1986 shall not be greater than is necessary to provide affordable housing. (A copy of Section 911 of the Housing and Community Development Act of 1992 is attached as Exhibit B.)

WHEREAS, Section 42 of the Internal Revenue Code authorizes allocations of Low-Income Housing Tax Credits (LIHTC) to be administered by State or local housing credit agencies to encourage the development of housing for low income tenants.

WHEREAS, Section 42 of the Internal Revenue Code requires AHFA to ensure that *“The housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period.”*

WHEREAS, AHFA allocates low-income housing credits pursuant to a qualified allocation plan which may be revised from time to time in accordance with the priorities of the State.

THEREFORE, HUD and AHFA, in acknowledgment of their complementary goals, agree to cooperate in their efforts to ensure that only the assistance necessary to provide affordable housing is provided to a project receiving Low-Income Housing Tax Credits and HUD Housing assistance.

BOTH PARTIES THEREFORE AGREE AS FOLLOWS:

- (a) Subsidy layering analysis must be performed whenever applicant disclosure is required by Sections 102(b) and (c) of the Reform Act and upon issuance of form IRS-8609 indicating the amount of tax credits awarded.
- (b) HUD and AHFA will share information on project costs for all projects financed with a combination of low-income housing tax credits and HUD Housing assistance.
- (c) HUD and AHFA will use the following fee norms which HUD and AHFA have established for layering analysis purposes.
 - (1) Builder's Profit: Six percent (6%) of Construction Contract Amount.
 - (2) General Overhead: Two percent (2%) of the Construction Contract Amount.
 - (3) General Requirement: Six percent (6%) of the construction contract.
 - (4) Developer's fee: Fifteen percent (15%) of the total development cost.

- (c) The above fee norms will be used in AHFA's analysis of the amount of assistance that is necessary for a project. As allowed by Section 911, fees may exceed the norms when justified by special circumstances. The percentage allowances above for Builder's Profit, General Overhead and General Requirement are general guidelines and may be exceeded; however, their sum should not exceed 15% of the construction contract unless otherwise provided for in the State's Qualified Allocation Plan.
- (d) HUD and AHFA agree to the definitions and formulas for the determination of profits, costs and amounts of assistance in the current qualified allocation plan for the State which plan is attached to this MOU as Exhibit C.
- (e) In cases where the results of AHFA's analysis indicate that there will be excess assistance, AHFA will reduce the amount of low income housing credits to eliminate the excess as required by Section 42 of the IRS Code.
- (f) AFHA and HUD understand that neither AHFA nor HUD certifies the accuracy of the tax credit applicant's eligibility or compliance with Section 42 of the Internal Revenue Code. AHFA understands that the owner provides such certification to HUD and to FHA.
- (g) AHFA and HUD understand that, unless required by law, the general information shared under this MOU is for internal analysis and will not be disclosed to other than the appropriate HUD and AHFA employees. Further, AHFA and HUD understand that specific information on a proposal may be

shared with the applicant and other providers of funds on the respective proposal as appropriate.

- (h) Any modification to the conditions of this agreement must be reviewed and accepted by both HUD and AHFA. Any revision to this agreement will be added as an amendment.
- (i) As provided for by Section 911(c) of the Housing and Community Development Act of 1992, if HUD determines that a housing credit agency has failed to comply with guidelines for subsidy layering review, the authority to perform the subsidy layering analysis may be withdrawn.

HUD AGREES:

To provide AHFA information on tax credit projects being considered for HUD assistance as follows:

- (1) a copy of any notification of insurance commitment or subsidy contract issued to applicants;
- (2) a copy of any cost certification and/or cost analysis provided to, or prepared by HUD; and
- (3) the results of any analysis on necessary assistance prepared by HUD to the applicant and AFHA.

AHFA AGREES:

- (a) To inform any applicant seeking a combination of both Tax Credits and HUD Housing assistance that the MOU will be applied to the underwriting of the Tax

Credit application. A copy of the MOU may be provided to applicants for their information.

(b) To maintain the following information:

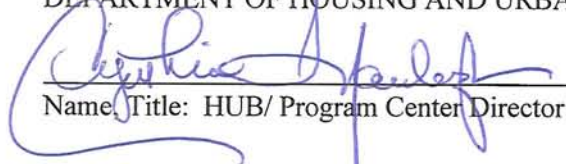
- (1) The list of tax credit requests received from applicants that indicate they are seeking a combination of Tax Credits and HUD Housing Assistance;
- (2) For each request a copy of the Tax Credit Application with the development cost breakdown used to estimate the amount of tax credits for which the developer would be eligible; and
- (3) Documentation supporting the subsidy layering review findings.

(c) To provide to HUD the following information:

- (1) The Section 911 certification of subsidy layering review findings and a copy of the developer's disclosure(s) of sources and uses of funds; and
 - (2) The IRS Form 8609 and the Section 911 certification, (for projects receiving both tax credits and HUD Housing assistance) when the development is complete and the sources and uses of funds is final.
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ACCEPTANCE AND SIGNATURE OF EACH APPROVING PARTY

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT


Name, Title: HUB/ Program Center Director

Date: 8/30/00

ALABAMA HOUSING FINANCE AUTHORITY



Robert Strickland, Executive Director

Date: 8/15/00

SEC. 102. HUD ACCOUNTABILITY.

(a) Notice Regarding Assistance.--

(1) Publication of notice of availability.--The Secretary shall publish in the Federal Register notice of the availability of any assistance under any program or discretionary fund administered by the Secretary.

(2) Publication of application procedures.--The Secretary shall publish in the Federal Register a description of the form and procedures by which application for the assistance may be made, and any deadlines relating to the award or allocation of the assistance. Such description shall be designed to help eligible applicants to apply for such assistance.

(3) Publication of selection criteria.--Not less than 30 days before any deadline by which applications or requests for assistance under any program or discretionary fund administered by the Secretary must be submitted, the Secretary shall publish in the Federal Register the criteria by which selection for the assistance will be made. Subject to section 213 of the Housing and Community Development Act of 1974, such criteria shall include any objective measures of housing need, project merit, or efficient use of resources that the Secretary determines are appropriate and consistent with the statute under which the assistance is made available.

(4) Documentation of decisions.--

(A) The Secretary shall award or allocate assistance only in response to a written application in a form approved in advance by the Secretary, except where other award or allocation procedures are specified in statute.

(B) The Secretary shall ensure that documentation and other information regarding each application for assistance is sufficient to indicate the basis on which any award or allocation was made or denied. The preceding sentence shall apply to--

(i) any application for an award or allocation of assistance made by the Secretary to a State, unit of general local government, or other recipient of assistance, and

(ii) any application for a subsequent award or allocation of such assistance by such State, unit of general local government or other recipient.

(C)(i) The Secretary shall notify the public of all funding decisions made by the Department. The Secretary shall require any State or unit of general local government to notify the public of the award or allocation of such funding to subsequent recipients.

Section 102 from the Housing and Community Development Reform Act of 1989
The notification shall include the following elements for each funding decision:

- (I) the name and address of each funding recipient;
- (II) the name or other means of identifying the project, activity, or undertaking for each funding recipient;
- (III) the dollar amount of the funding for each project, activity, or undertaking;
- (IV) the citation to the statutory, regulatory, or other criteria under which the funding decision was made; and
- (V) such additional information as the Secretary deems appropriate for a clear and full understanding of the funding decision.

(ii) The notification referred to in clause (i) of this subsection shall be published as a Notice in the Federal Register at least quarterly.

(iii) For purposes of this subparagraph, the term "funding decision" means the decision of the Secretary to make available grants, loans, or any other form of financial assistance to an individual or to an entity, including (but not limited to) a State or local government or agency thereof (including a public housing agency), an Indian tribe, or a nonprofit organization, under any program administered by the Department that provides, by statute, regulation, or otherwise, for the competitive distribution of financial assistance.

(D) The Secretary shall publish a notice in the Federal Register at least annually informing the public of the allocation of assistance under section 213(d)(1)(A) of the Housing and Community Development Act of 1974.

(E) The Secretary shall ensure that each application and all related documentation and other information referred to in subparagraph (B), including each letter of support, is readily available for public inspection for a period of not less than 5 years, beginning not less than 30 days following the date on which the award or allocation is made.

(5) Emergency exception.—The Secretary may waive the requirements of paragraphs (1), (2), and (3) if the Secretary determines that the waiver is required for appropriate response to an emergency. Not less than 30 days after providing a waiver under the preceding sentence, the Secretary shall publish in the Federal Register the Secretary's reasons for so doing.

(b) Disclosures by Applicants.—The Secretary shall require the disclosure of information with respect to any application for

Section 102 from the Housing and Community Development Reform Act of 1989 assistance within the jurisdiction of the Department for a project application submitted to the Secretary or to any State or unit of general local government by any applicant who has received or, in the determination of the Secretary, can reasonably be expected to receive assistance within the jurisdiction of the Department in excess of \$200,000 in the aggregate during any fiscal year or such lower amount as the Secretary may establish by regulation. Such information shall include the following:

(1) Other government assistance.—Information regarding any related assistance from the Federal Government, a State, or a unit of general local government, or any agency or instrumentality thereof, that is expected to be made available with respect to the project or activities for which the applicant is seeking assistance. Such related assistance shall include but not be limited to any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance.

(2) Interested parties.—The name and pecuniary interest of any person who has a pecuniary interest in the project or activities for which the applicant is seeking assistance. Persons with a pecuniary interest in the project or activity shall include but not be limited to any developers, contractors, and consultants involved in the application for assistance or the planning, development, or implementation of the project or activity. For purposes of this paragraph, residency of an individual in housing for which assistance is being sought shall not, by itself, be considered a pecuniary interest.

(3) Expected sources and uses.—A report satisfactory to the Secretary of the expected sources and uses of funds that are to be made available for the project or activity.

(c) Updating of Disclosure.—During the period when an application is pending or assistance is being provided, the applicant shall update the disclosure required under the previous subsection within 30 days of any substantial change.

(d) **Limitation of Assistance.**—The Secretary shall certify that assistance within the jurisdiction of the Department to any housing project shall not be more than is necessary to provide affordable housing after taking account of assistance described in subsection (b)(1). The Secretary shall adjust the amount of assistance awarded or allocated to an applicant to compensate in whole or in part, as the Secretary determines to be appropriate, for any changes reported under subsection (c).1/

Section 102 from the Housing and Community Development Reform Act of 1989
1/See section 911 of the Housing and Community
Development Act of 1992, Pub. L. 102-550, set forth,
post, this part.

(e) Administrative Remedies.—If the Secretary receives or obtains information providing a reasonable basis to believe that a violation of subsection (b) or (c) has occurred, the Secretary shall—

(1) in the case of a selection that has not been made, determine whether to terminate the selection process or take other appropriate actions; and

(2) in the case of a selection that has been made, determine whether to—

(A) void or rescind the selection, subject to review and determination on the record after opportunity for a hearing;

(B) impose sanctions upon the violator, including debarment, subject to review and determination on the record after opportunity for a hearing;

(C) recapture any funds that have been disbursed;

(D) permit the violating applicant selected to continue to participate in the program; or

(E) take any other actions that the Secretary considers appropriate.

The Secretary shall publish in the Federal Register a descriptive statement of each determination made and action taken under this subsection.

(f) Civil Money Penalties.—

(1) In general.—Whenever any person knowingly and materially violates any provision of subsection (b) or (c), the Secretary may impose a civil money penalty on that person in accordance with the provisions of this section. This penalty shall be in addition to any other available civil remedy or any available criminal penalty, and may be imposed whether or not the Secretary imposes other administrative sanctions.

(2) Amount of penalty.—The amount of the penalty, as determined by the Secretary, may not exceed \$10,000 for each violation.

(g) Agency Procedures.—(1) The Secretary shall establish standards and procedures governing the imposition of civil money penalties under subsection (f). These standards and procedures—

(A) shall provide for the Secretary to make the determination to impose the penalty or to use an administrative entity to make the determination;

(B) shall provide for the imposition of a penalty only after

Section 102 from the Housing and Community Development Reform Act of 1989 the person has been given an opportunity for a hearing on the record; and

(C) may provide for review by the Secretary of any determination or order, or interlocutory ruling, arising from a hearing. If no hearing is requested within 15 days of receipt of the notice of opportunity for hearing, the imposition of the penalty shall constitute a final and unappealable determination. If the Secretary reviews the determination or order, the Secretary may affirm, modify, or reverse that determination or order. If the Secretary does not review the determination or order, the determination or order shall be final.

(2) Factors in Determining Amount of Penalty.—In determining the amount of a penalty under subsection (f), consideration shall be given to such factors as the gravity of the offense, ability to pay the penalty, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate.

(3) Reviewability of Imposition of a Penalty.—The Secretary's determination or order imposing a penalty under subsection (f) shall not be subject to review, except as provided in subsection (h).

(h) Judicial Review of Agency Determination.—

(1) In general.—After exhausting all administrative remedies established by the Secretary under subsection (g)(1), a person against whom the Secretary has imposed a civil money penalty under subsection (f) may obtain a review of the penalty and such ancillary issues as may be addressed in the notice of

determination to impose a penalty under subsection (g)(1)(A) in the appropriate court of appeals of the United States, by filing in such court, within 20 days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part.

(2) Objections not raised in hearing.—The court shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (g)(1) unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the court shall

Section 102 from the Housing and Community Development Reform Act of 1989 remand the matter to the Secretary for consideration of such additional evidence.

(3) Scope of review.—The decisions, findings, and determinations of the Secretary shall be reviewed pursuant to section 706 of title 5, United States Code.

(4) Order to pay penalty.—Notwithstanding any other provision of law, in any such review, the court shall have the power to order payment of the penalty imposed by the Secretary.

(i) Action To Collect the Penalty.—If any person fails to comply with the determination or order of the Secretary imposing a civil money penalty under subsection (f), after the determination or order is no longer subject to review as provided by subsections (g)(1) and (h), the Secretary may request the Attorney General of the United States to bring an action in an appropriate United States district court to obtain a monetary judgment against the person and such other relief as may be available. The monetary judgment may, in the court's discretion, include the attorneys' fees and other expenses incurred by the United States in connection with the action. In an action under this subsection, the validity and appropriateness of the Secretary's determination or order imposing the penalty shall not be subject to review.

(j) Settlement by the Secretary.—The Secretary may compromise, modify, or remit any civil money penalty which may be, or has been, imposed under this section.

(k) Regulations.—The Secretary shall issue such regulations as the Secretary deems appropriate to implement this section.

(l) Deposit of Penalties.—The Secretary shall deposit all civil money penalties collected under this section into miscellaneous receipts of the Treasury.

(m) Definitions.—For the purpose of this section—

(1) The term "Department" means the Department of Housing and Urban Development.

(2) The term "Secretary" means the Secretary of Housing and Urban Development.

(3) The term "person" means an individual (including a consultant, lobbyist, or lawyer), corporation, company,

association, authority, firm, partnership, society, State, local government, or any other organization or group of people.

(4) The term "assistance within the jurisdiction of the Department" includes any contract, grant, loan, cooperative agreement, or other form of assistance, including the insurance

Section 102 from the Housing and Community Development Reform Act of 1989 or guarantee of a loan, mortgage, or pool of mortgages.

(5) The term "knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section.

(n) Effective Date.—This section shall take effect on the date specified in regulations implementing this section that are issued by the Secretary after notice and public comment. [42 U.S.C. 3545]

[p. 1417, Basic Laws]

SUBSIDY LAYERING REVIEW EXCERPT FROM HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1992

[Public Law 102-550; 106 Stat. 3875; 42 U.S.C. 3545 note]

SEC. 911. SUBSIDY LAYERING REVIEW.

(a) Certification of Subsidy Layering Compliance.—The requirements of section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 may be satisfied in connection with a project receiving assistance under a program that is within the jurisdiction of the Department of Housing and Urban Development and under section 42 of the Internal Revenue Code of 1986 by a certification by a housing credit agency to the Secretary, submitted in accordance with guidelines established by the Secretary, that the combination of assistance within the jurisdiction of the Secretary and other government assistance provided in connection with a property for which assistance is to be provided within the jurisdiction of the Department of Housing and Urban Development and under section 42 of the Internal Revenue Code of 1986 shall not be any greater than is necessary to provide affordable housing.

(b) In Particular.—The guidelines established pursuant to subsection (a) shall—

(1) require that the amount of equity capital contributed by investors to a project partnership is not less than the amount generally contributed by investors in current market conditions, as determined by the housing credit agency; and

(2) require that project costs, including developer fees, are within a reasonable range, taking into account project size, project characteristics, project location and project risk factors, as determined by the housing credit agency.

(c) Revocation by Secretary.—If the Secretary determines

Section 102 from the Housing and Community Development Reform Act of 1989 that a housing credit agency has failed to comply with the guidelines established under subsection (a), the Secretary--

(1) may inform the housing credit agency that the agency may no longer submit certification of subsidy layering compliance under this section; and

(2) shall carry out section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 relating to affected projects allocated a low-income housing tax credit pursuant to section 42 of the Internal Revenue Code of 1986.

(d) Applicability.--Section 102(d) of the Department of Housing and Urban Development Reform Act of 1989¹/ (42 U.S.C. 3545(d)) shall apply only to projects for which an application for assistance or insurance was filed after the date of enactment of the Housing and Urban Development Reform Act. [42 U.S.C. 3545 note]

1/Probably intended to refer to the Department of Housing and Urban Development Reform Act of 1989, approved December 15, 1989, set forth ante, this part.

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