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MEMORANDUM

September 4, 2020

To: TRIBAL HOUSING CLIENTS

From: Ed Clay Goodman
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: ***CDC Order Establishing Nationwide Eviction Moratorium; NAIHC Legislative Committee Meeting***

On September 4, 2020, the Centers for Disease Control and Prevention published an Eviction Moratorium Order, after circulating a draft earlier this week.¹ On September 3, 2020, the National American Indian Housing Council (“NAIHC”) convened a Legislative Committee Call via Zoom, during which the Moratorium and other legislative issues were discussed. The meeting was presided over by NAIHC Executive Director Tony Walters. The next Legislative Committee Call is scheduled for October 1st, 2020. The updates below are a synthesis of information provided during the call and other updates we have received.

I. CDC Nationwide Eviction Moratorium, Applicability to Tribal Housing

On Friday, September 4, 2020, citing its authority under Section 361 of the Public Health Service Act and 42 CFR 70.2, the Centers for Disease Control and Prevention (“CDC”) published the Eviction Moratorium Order (“Moratorium”) in the form of an agency emergency order that applies nationwide. The Moratorium prohibits all private and public landlords and property owners from evicting² individuals from residential properties between now and December 31, 2020 for failure to make rental or housing payments, so long as the tenant submits a declaration to the landlord (in the form attached to the Moratorium Order). The Moratorium provides that individuals may still be evicted for reasons other than not paying rent or making a housing payment. Further, the Moratorium does not remove the obligation to pay rent or make housing payments—all rent or housing payments, fees, penalties, and interests may continue to accrue between now and December 31.

The reasoning behind the Moratorium is spelled out in detail in the opening sections. It references the COVID-19 pandemic, that the disease “spreads very easily and sustainably between people who are in close contact with one another,” has resulted in significant mortality, that it is widespread in the United States (citing 5.5 million cases and 174,000 deaths and rising), and that it “presents an historic threat to public health.” The CDC notes that, “[i]n a pandemic,

¹ Eviction Moratorium Order, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Centers for Disease Control and Prevention, 85 Fed.Reg. 55292 (Sept. 4, 2020). Copy attached to this memo.

² This does not include foreclosure on a home mortgage.

eviction moratoria – like quarantine, isolation, and social distancing – can be an effective public health measure utilized to prevent the spread of communicable disease.” It goes on to note that evictions often result in homelessness and overcrowding in other homes and in homeless shelters, and that these conditions are known to facilitate the spread of the disease. The CDC also notes that the CARES Act contained a limited eviction moratorium, but it only covered tenants in certain rental properties with federal assistance or federally-related financing, and that it expired on July 24, 2020. It goes on to note that without the Moratorium, “as many as 30-40 million people in America could be at risk of eviction,” which would be a scale that is “unprecedented in modern times.” Finally, the CDC notes that “a large portion of those who are evicted may move into close quarters in shared housing or ... become homeless, thus contributing to the spread of COVID-19,” and that “[t]he statistics on interstate moves show that mass evictions would likely increase the interstate spread of COVID-19.”

The effective text of the order states as follows:

Therefore, under 42 CFR 70.2, subject to the limitations under the “Applicability” section, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person from any residential property in any State or U.S. territory in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements listed in this Order.

The order is to be enforced by Federal authorities and cooperating state and local authorities, and contains criminal penalties for violations (up to \$100,000 if the violation does not result in a death, or up to one year in jail and a fine of up to \$250,000 if the violation results in a death).

A “covered person” for the purpose of the Moratorium is a tenant, lessee, or other resident of a residential property who provides the landlord or other owner of the property a declaration, under the penalty of perjury, that:

- The individual has used best efforts to obtain all available government assistances for rent or housing;
- The individual will earn no more than \$99,000 (\$198,000 if filing a joint return) in 2020;
- The individual is unable to pay the full rent or make the housing payment due to a substantial loss of income, loss of hours, lay-off, or “extraordinary” out of pocket medical expenses;
- The individual is making best efforts to make timely partial payments; and
- Eviction would likely render the individual homeless or force him or her to move into an overcrowded living situation.

The exact language for the Declaration is set out in an Attachment to the Moratorium.

The terms of the Moratorium are somewhat confusing as to whether it applies to Indian tribes. In the effective text cited above, it prohibits person “in any State or U.S. territory” from carrying out evictions, and the definitions of those terms do not include tribes. However, there are several references to tribes in the Moratorium, such as excluding from coverage “any State, local, territorial, **or tribal area** with a moratorium on evictions that provides the same or greater level of public-health protection than the requirements listed in this Order.” (Emphasis added.) We note that many tribes have already instituted such moratoria. Thus, it appears that the CDC intends that the moratorium apply to tribes. In light of the significant criminal penalties and the CDC’s intent, we are advising clients to assume that the Moratorium does apply to Indian tribes.

The Moratorium contains no provisions encouraging or requiring renters to enter into repayment plans. Renters who defer payments will then be faced with paying the charges that accrue between now and the end of the year, with no plan in place to protect them from having to pay the accrued charges and interest all at once.

Further, the Moratorium allows evictions for other lease violations, such as criminal activity, nuisance, and drug-related criminal activity, as well as for violations of public health codes or ordinances (the latter was likely included to address tenants who are not complying with COVID-19 protection measures such as mask-wearing and social-distancing).

We anticipate that there may be litigation filed challenging the application of the Moratorium to private landlords.

During the NAIHC Legislative Committee call on September 3, one caller raised the concern that the Moratorium will place a strain on tribes who have developed housing projects using low-income tax credits. He commented that the Moratorium is inadequate to actually help low-income tenants, as the tenants will be unable to afford payments on the back rent that will have accrued by January. This increases the need to push for rental assistance to cover the rental payments, rather than having the payments deferred to 2021.

Mr. Walters commented that NAIHC will post a follow up report on the Moratorium after it is officially published and will continue the effort to push for additional rental assistance for tribes. He also encouraged all callers to reach out to their congressmen to make sure that tribes and TDHEs are included in any future COVID-19 relief package. NAIHC will send out further information on this issue via an advocacy alert or in the newsletter.

II. Congressional Updates

a. FY 2021 Appropriations, November Elections, and the "Lame Duck".

Both congressional chambers are set to return September 8 for an intense period of work where they will try to iron out differences in FY 2021 appropriations priorities before the end of FY 2020 on September 30, 2020. While the House has passed nearly all of its FY 2021 appropriations bills, including Transportation-Housing and Urban Development (T-HUD), it is

widely acknowledged that Congress is unlikely to reach an agreement on FY 2021 appropriations before the start of FY 2021 on October 1, 2020 (the Senate has yet to even release its draft bills due to partisan disagreements). Rather, the most likely outcome is that Congress will pass a Continuing Resolution (“CR”) to continue FY 2020 terms and conditions and spending levels just beyond the November 3, 2020, elections.

Congress will not be in session for most of October and is set to return on November 9, after the elections. This period of time after the elections but before January, when new Members of Congress (and/or a new Administration) are sworn in, is often referred to as the "lame duck" session. This will be another intense period of work but depending on the outcome of the elections, Democrats in Congress could try to pass another CR to fund the federal government until the new Congress is sworn in, thus giving the incoming Congress the opportunity to shape FY 2021 appropriations more to their liking.

b. Coronavirus Relief.

The Republican-held Senate will likely release a new proposal on a COVID-19 relief package in September. The package may be similar to the one proposed in July. We note that while the House Democrats' Phase 4 proposal, the \$3 trillion HEROES Act (HR 6800) would have included tribal housing set asides, the Senate Republicans Phase 4 proposal, the \$1 trillion HEALS Act did not include those set asides, and was much more narrowly tailored (see our memo of July 30, 2020). NAIHC is continuing to advocate to ensure that tribal housing is included in any new COVID-19 relief package.

c. ICDBG-CARES Act Approvals

On August 31, 2020, HUD released the final awards for ICDBG-CARES Act grants, providing a total of \$100 million to Tribes and tribal entities. One caller on the NAIHC call asked whether there will be an extended expenditure period for those Tribes and tribal entities that received ICDBG-CARES Act funding through the final round of funding. Mr. Walters noted that he had not heard anything addressing this issue but that there may be a statutory limitation that would prevent HUD from extending the deadline. Mr. Walters will raise this as a question in his communications with HUD and will provide an update when he receives more information.

d. NAHASDA Reauthorization and Tribal HUD-VASH Bill.

As of this writing, the House Native American Housing Assistance and Self Determination Act (NAHASDA) reauthorization bills in both the House and Senate have not moved forward since our last update. NAIHC will continue its efforts to advocate for both House and Senate version of the bills until one of them is passed. The Senate Committee on Indian Affairs is unlikely to hold a hearing on the bill due to health concerns about COVID-19, and such a hearing is not required for a bill to be considered as amendment to other bill. NAIHC hopes that tribes and tribal advocates provide as much support as possible for both bills, either as standalone bills or as amendments to other separate bills. NAIHC will be send out an advocacy

campaign after the Labor Day holiday weekend in the form of a letter for tribal advocates to send to their congressmen, highlighting the importance of the NAHASDA bill. We understand that during the lame duck session there will be another push to get a NAHASDA reauthorization bill passed.

There is also not much of an update on the Tribal HUD-VASH bill. The bill has passed the Senate twice and is now being considered in the House. There will be a similar push during the lame duck session this fall to have the bill pass in the House as a standalone bill. NAIHC is continuing its advocacy efforts on this bill and will be reaching out to HUD to see what support NAIHC can provide to move the bill forward.

e. One-Stop Shop for Title Status Reports (TSR) Draft Bill and Other Legislation.

As reported in our August memo, Senator Thune (R-SD) remains interested in introducing a one-stop shop for title status reports (“TSR”) bill. It was reported that he has been writing to the Department of Interior and the BIA on this topic. NAIHC is communicating with Senator Thune’s office to make sure that any changes to the TSR intended to benefit certain areas of Indian country do not have unintentional negative effects on areas where the TSR is already working.

Senator Elizabeth Warren (D-MA) and Deb Haaland (D-NM) continue their efforts, in response to the U.S. Commission on Civil Rights’ report, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, to enact legislation that would address the funding gaps, shortages, and inefficiencies in federal funding for Native American communities. As part of that effort, Senators Warren and Haaland will like be drafting a comprehensive bill for Indian Country that addresses various issues on lack of funding. The bill will likely include updated funds for IHBG and ICDBG grants and provisions relaxing restrictions in NAHASDA that prevents Tribes from accessing other HUD programs, among other provisions. The draft of the bill is expected to be released in the spring of 2021.

One caller raised the issue of the difficulty that tribes are having with applying for Section 8 vouchers for tax credit projects. The restrictions preventing tribes from accessing Section 8 funding make tax credit projects difficult to sustain. Mr. Walters noted that this issue is included in the Broken Promises effort of Senators Haaland and Warren. Numerous other congressmen have worked to introduce a tax credit bill addressing this issue as well. NAIHC will continue its ongoing advocacy on this issue in its communications with HUD and congressmen.

III. Other Matters

a. Legal Symposium.

The NAIHC Legal Symposium will be held, in some fashion, in Las Vegas, NV on December 7th, 8th, and 9th, 2020. Depending on the status of the COVID-19 pandemic, many of the Symposium’s sessions could be held virtually to allow greater (and safer) participation. Mr.

Walters emphasized that regardless of whether the Symposium is held in person, virtually, or by some combination thereof, it will be held. NAIHC has sent out a link to a survey to its membership and other affiliated parties, seeking input on the Symposium. Please check your emails and provide a response.

b. Announcements

NAICH is developing an updated website so that all bills related to COVID-19 relief will be listed for tribal members to look through. The next two NAIHC Legislative Committee meetings are scheduled for Thursday, October 1st and Thursday, November 5th. NAIHC will continue to host the call via a Zoom platform for the next call.

Conclusion

If you have any questions about this memo, please contact Ed Clay Goodman at 503-799-3924 or at egoodman@hobbsstrauss.com.