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MEMORANDUM

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TO: TRIBAL HOUSING CLIENTS

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

RE: ***HUD Tribal Regulatory Flexibilities During Presidentially Declared Disasters Update***

On January 5, 2022, the U.S. Department of Housing and Urban Development (HUD) published *Regulatory and Administrative Requirement Flexibilities Available to Native American Programs During CY 2022 and CY 2023 to Tribal Grantees To Assist With Recovery and Relief Efforts on Behalf of Families Affected by Presidentially Declared Disasters*, 87 Fed. Reg. 473 (2022) (Notice). This Notice describes waivers and flexibilities from HUD requirements for its Indian Housing Block Grant (IHBG), Indian Community Development Block Grant (ICDBG), and Native Hawaiian Housing Block Grant (NHHBG) grantees located in areas that are covered by Presidentially Declared Disasters (PDDs).¹ A PDD was declared by then-President Trump on March 13, 2020 due to the COVID-19 pandemic covering every state, territory, and Tribe. That PDD is still in effect. Thus, this notice and the regulatory waivers included therein are available immediately to all tribes and TDHEs.

I. IHBG Waivers (24 CFR Part 1000)

a. Total Development Costs

The current IHBG regulations at 24 CFR 1000.156, 1000.158, 1000.160, and 1000.162 require that Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) housing “be of moderate design with a size and with amenities consistent with unassisted housing offered for sale in the Indian tribe’s general geographic area to buyers who are at or below the area median income (AMI).” Notice at 474. Tribally Designated Housing Entities (TDHEs) may use HUD’s total development cost (TDC) limits to meet this requirement and establish the maximum amount of funds to develop or acquire/rehabilitate affordable housing. Generally, TDHEs may not exceed more than 10% the TDC maximum cost for a project without prior HUD approval.

HUD, recognizing supply chain disruptions, labor and contractor shortages, and overall increases in construction costs, is temporarily permitting waivers of the TDC requirements during

¹ A PDD is “a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act that activates an array of federal programs to assist in the response and recovery efforts.” Notice at 473–74.

a PDD. Under this waiver, a TDHE may exceed the current TDC maximum by 20% without HUD review or approval other than the notification process set out below in Section IV of this memorandum. TDHEs must still maintain documentation that the “dwelling units and non-dwelling structures developed, acquired, or assisted with this funding will, after the PDD, be for IHBG eligible families and the design, size, and amenities are moderate and comparable to housing in the area.” Notice at 474. TDHEs may also exceed the TDC limits by 20% with HUD approval. This waiver applies to both single-family and multi-family housing, as well as non-dwelling structures.

b. Income Verification

TDHEs must generally verify that a family is income-eligible for IHBG programs, and a TDHE must verify and document such eligibility. *See* 24 CFR 1000.128. HUD acknowledged that “families may be displaced during a disaster and may not have access to their income documentation,” and will allow waiver of income verification requirements. Notice at 474. TDHEs may therefore “deviate from their current written admissions and occupancy policies, and may allow less frequent income recertifications” as well as “carry out intake and other tasks necessary to verify income through alternative means . . . including allowing income self-certification over the phone (with a written record by the IHBG recipient’s staff), or through an email with a self-certification form signed by a family.” *Id.*

c. Assistance to Middle-Income Families

The IHBG regulations at 24 CFR 1000.104, 1000.106, 1000.108, and 1000.110 require that TDHEs to limit assistance to low-income Native American families, with some exceptions for non-low-income families at 80–100% of AMI, families over 100% of AMI, and certain “essential families” under Section 201(b)(3) of NAHASDA. NAHASDA regulations cap the percentage of IHBG funding to families at 80–100% of AMI to 10% of program funds and require HUD approval to provide assistance to any families over 100% of AMI. 24 CFR 1000.110(c).

During these disasters, HUD will waive these requirements and permit TDHEs to aid non-low-income families that are displaced due to a disaster with IHBG funds. Such aid includes temporary rental assistance, housing in hotels/motels and similar facilities, relocation assistance, and more. TDHEs in PDDs may therefore exceed the 10% cap on serving Native American families whose income falls within 80–100% of AMI without HUD approval, provided the TDHE determines that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance. TDHEs may also provide IHBG assistance to middle-income Native American families whose income is at or below 120% of AMI without HUD approval, provided the TDHE determines that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance. HUD will still require that assistance to these non-low-income families be temporary and still comply with 24 CFR 1000.110(d).² TDHEs must maintain records

² Under 24 CFR 1000.110(d), the amount of assistance non-low-income families may receive is calculated as follows: (1) The rent (including homebuyer payments under a lease purchase agreement) to be paid by a non-low-income

documenting that all these criteria were met at the time assistance is provided and also ensure that IBHG assistance does not result in a duplication of benefits.

II. ICDBG Waivers (24 CFR Part 1003)

a. Purchasing Equipment

Although TDHEs may not generally expend ICDBG funds on equipment, *see* 24 CFR 1003.207(b)(1)(i), HUD will allow TDHEs to use ICDBG funds “for the purchase of equipment necessary to carry out ICDBG eligible activities that assist with clearance, rehabilitation, construction, and other uses related to housing, public facilities, improvements, and works, and other disaster-recovery related purposes.” Notice at 475. Equipment, such as construction equipment, necessary for clearance, construction, rehabilitation, and other recovery efforts in the aftermath of a disaster, must be used for authorized program purposes, and HUD will consider any proceeds from the disposition of equipment to be ICDBG program income. HUD indicated that it may issue further guidance in the future on the disposition of program income after grant closeout.

b. Emergency Payments

TDHEs are also generally prohibited from using ICDBG funds for income payments, which are defined as “a series of subsistence-type grant payments made to an individual or family for items such as food, clothing, housing (rent or mortgage), or utilities.” 24 CFR 1003.207(b)(4). TDHEs may, however, make emergency payments over a period of up to three (3) months to the provider of such items or services on behalf of an individual or family. *Id.*

To provide additional relief to families impacted by disasters, HUD is waiving 24 CFR 1003.207(b)(4) to the extent necessary to allow ICDBG grant funds for emergency payments to low- and moderate-income individuals or families impacted by a disaster. ICDBG funds may be used for items such as food, medicine, clothing, and other necessities, as well as rental, mortgage, and utility assistance for a period not to exceed six (6) months, unless approved in writing by HUD on a case-by-case basis. TDHEs may also establish lines of credit with third-party providers, such as grocery stores, on behalf of specific beneficiary families, provided that the TDHE document all expenses and ensure ICDBG funds are expended only on eligible activities. HUD will require that TDHEs using this waiver flexibility document how they will determine the necessary and reasonable amount of assistance to be provided in their policies and procedures.

family cannot be less than: $(\text{Income of non-low-income family} / \text{Income of family at 80\% of median income}) \times (\text{Rental payment of family at 80\% of median income})$, but need not exceed the fair market rent or value of the unit; and (2) Other assistance, including down payment assistance, to non-low-income families, cannot exceed: $(\text{Income of family at 80\% of median income} / \text{Income of non-low-income family}) \times (\text{Present value of the assistance provided to family at 80\% of median income})$.

III. NNHBG Waivers (24 CFR Part 1006)

a. Assistance to Middle-Income Families

Similar to IHBG funds, NHHBG funds are income-restricted for Native Hawaiian families who are eligible to reside on the Hawaiian homelands. 24 CFR 1006.301(a). To help alleviate the impact of disasters on Native Hawaiian communities, HUD is waiving 24 CFR 1006.301(a) to allow the Department of Hawaiian Home Lands (DHHL) more flexibility to provide NHHBG assistance to families that are middle income (120% of AMI), provided that the assistance is for homeownership activities (which may include short-term rental assistance to displaced homeowners), is temporary in nature, and DHHL determines that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance. HUD would also require DHHL to maintain records documenting that all these criteria were met at the time assistance is provided and also ensure that IBHG assistance does not result in a duplication of benefits. HUD encourages DHHL to update its written policies to allow middle-income Native Hawaiian families who are impacted by disasters covered by a PDD to be considered eligible for NHHBG homeownership assistance and include a definition for 'temporary' assistance.

b. Income Verification

In line with the IHBG waiver of income verification, HUD will allow DHHL to modify its policy and procedures to streamline any income verification and documentation requirements for families impacted by PDDs, including allowing income self-certification over the phone (with a written record by the DHHL's staff), or through an email with a self-certification form signed by a family. HUD clarifies that this waiver applies only to families impacted by PDDs whose income documentation was destroyed or made difficult to access by the disaster.

IV. Use of Waivers and Special Requirements

To use the waivers or flexibilities discussed in this Notice, TDHEs or DHHL must provide notification in writing, preferably by email, to the Administrator in the Office of Native American Programs (ONAP) Area Office serving their area before using the waiver or flexibility. The written notification should include the following details:

- Requestor's Tribe/TDHE/DHHL, name, title, and contact information;
- Presidentially declared major disaster area(s) where the waivers will be used;
- Date on which the grantee anticipates the first use of the waiver or flexibility, and its expected duration (which must include a specific end date); and
- A list of the waivers and flexibilities the grantee will use.

TDHEs or DHHL may also request a waiver or flexibility of a HUD requirement not listed in the Notice and receive an expedited review of the request if they demonstrate that the waiver or flexibility is needed to assist its disaster relief and recovery efforts. HUD will only consider such

exception requests subject to NAHSDA statutory limitations and 24 CFR 5.110. HUD emphasized that the waivers and flexibilities in the Notice do not apply to the various COVID-relief related programs administered by HUD ONAP (IHBG-CARES, IHBG-ARP, ICDBG-CARES, ICDBG-ARP, and NHHBG-ARP) because HUD has issued separate waivers and alternative requirements that apply to those programs, as further outlined in the Implementation and Waiver Notices governing those programs.

HUD recommends that TDHEs and DHHL clearly document the need for each waiver and flexibility in their records and ensure that a specific time period for which they will use the waivers and flexibilities is reasonably set and ties back to the response and recovery effort. If an extension of time beyond the end date initially set by in an initial written notification is needed to aid in ongoing recovery effort, the TDHEs or DHHL should send HUD written notification of its intent to extend the end date and demonstrate that the new time period is reasonably set and ties back to the response and recovery effort.

Conclusion

If you have any questions about this memorandum, please contact Ed Clay Goodman at 503-242-1745 or at egoodman@hobbsstrauss.com.