April 13, 2018

Ms. Joyce Allen  
Deputy Administrator  
Multi-Family Housing Programs  
Rural Housing Service  
1400 Independence Ave., SW  
Room 1271  
Washington, DC  20250

Dear Ms. Allen:

The Council for Affordable and Rural Housing (CARH) would like to take this opportunity to provide comments and recommended changes to the Unnumbered Letter (UL) on “Allowable Project Expenses in Multi-Family Properties.” This UL was dated April 28, 2017, and since the UL will expire at the end of the month, it is our understanding that the agency is in the process of reviewing and rewriting the UL. Before a new UL is issued, we would like to make some recommended changes based on feedback from CARH’s members, as well as procedures which reflect best practices and operations by management companies across the country.

First, we commend the agency on clarifying many tasks that in previous ULs and Administrative Notices (ANs) did not reflect industry operations or were detrimental to the economic viability of the properties in the rural housing portfolio. For instance, we continue to support language in Attachment A, page 6, Section M that allows record retention and storage of resident files as an allowable project expense. This is a procedure that is followed by the industry and other agencies within the federal government that administer housing programs. Document retention is a common project operation and Rural Development (RD) requirements, as well as compliance for RD’s OIG or audit standards, should be a project expense.

While the UL made several clarifications, there remain some items which we believe should be allowable expenses to the properties by management companies. We would like to pinpoint these items and ask that you consider the changes recommended as outlined below.

**Sales Tax**

On page 1 of Attachment A, page 1, Subsection “i” the UL indicates that sales tax on management fees is not an allowable project expense. However, this should be modified to make locally required sales taxes, like any other locally required tax, arising from project operations a project expense. CARH is very aware of cost containment and has helped educate members about reducing costs such as real estate taxes for affordable housing. Sales taxes levied on project operations, specifically on providing management and professional services to an RD assisted property, is by its very nature a project expense. This is no different than if a locality
requires a sales tax for a need, good or service like a dishwasher or plumbing services. CARH believes that in instances where states are proposing to add sales tax to management fees, that this expense should be a project expense. We would ask to work with RD to see if a letter or certificate from RD can preempt local taxes, passing the savings on to the project. A similar process exists for mortgage recording taxes, where RD supplies a letter or certificate to local government.

**Legal Fees**

On page 8 of the UL, Section 2, subsection iv, you indicate that settlement agreements, court order decrees, legal fees, or other cost result from the filing of civil rights complaints or legal action alleging a borrower, or representative of the borrower, has committed a civil rights violation are not allowable project expenses. CARH disagrees with this subsection as written, which does not fully address the point that such fees are project expenses unless there is a judgment or agreement of fault against the owner. Regardless of the context, Handbook 3560 guidance is clear as to the treatment of legal fees. In sum, legal fees related to project operations should be treated as project expenses where there has ultimately been no finding of fault, guilt, or liability by the owner, where the fees are reasonable in amount and the legal issue concerns project operations.

The 3560 regulations at 7 C.F.R. § 3560.303(b)(2), provide that legal fees are not allowable where either the borrower “has committed” a civil rights violation or “has been found guilty” of various violations:

(iv) Settlement agreements, court ordered decrees, legal fees, or other costs that result from the filing of civil rights complaints or legal action alleging the borrower, or a representative of the borrower, has committed a civil rights violation.

(v) Fines, penalties and legal fees where the borrower or a borrower’s representative has been found guilty of violating laws, including, but not limited to, civil rights, and building codes.

(emphasis added)

The issue of guilt is essential to whether or not legal fees are allowable. Clearly, RD has concluded, understandably, that federally regulated funds should not be used where a violation of law has occurred. The preamble to the 3560 rule, published along with the 3560 rule and providing clarifying materials, states clearly that § 3560.303 has been revised and “now states only that borrowers must pay for fines, penalties, and legal fees when they are found guilty of civil rights or other violations.” 69 Fed. Reg. 69075 (Nov. 26, 2004).

The preamble statement is carried over to the RD guidance instructions at HB-2-3560, Appendix 1, page 69, which states “[w]here there is no finding of a borrower’s fault, commercially reasonable legal expenses and costs for defending or settling lawsuits (without admission of

[1] While the Agency takes civil rights abuses very seriously, it acknowledges that the borrower should not be required to pay for costs associated with frivolous lawsuits. Section 3560.303(b)(2)(v) has been revised to remove the term evictions and now states only that borrowers must pay for fines, penalties, and legal fees when they are found guilty of civil rights or other violations.
liability) are allowable.” This is also wholly consistent with other provisions of § 3560, specifically § 3560.58, § 3560.62, and § 3560.102, which generally provide for a payment of legal fees that affects the property.

This treatment is also consistent with AN 3911, which previously addressed project-related costs. That AN provided:

It is inappropriate to authorize payment for legal services to represent any interest other than the borrower’s interest (i.e., representing a general partner or limited partner to defend their individual owner interests is not allowable.) Where there is no finding of a borrower’s fault, commercially reasonable legal expenses and costs for defending or settling lawsuits (without admission of liability) are allowable. (emphasis added)

That language is essentially restated at § 3560.102(i) (4) (ii), which states:

(ii) It is inappropriate to charge for legal services to represent any interest other than the borrower’s interest (i.e., representing a general partner or limited partner to defend their individual owner interest is not allowable). Where there is no finding of a borrower’s fault, commercially reasonable legal expenses and costs for defending or settling lawsuits (without admission of liability) are allowable. (emphasis added)

The legal authority allowing RD to restrict funds is a larger question, but within the narrower issue of RD-approved use of funds, it is clear that absent guilt, reasonable legal fees relating to operating a property are a project expense.

**Section 504 Transition Plans**

On page 3, Section H of the UL, you have language regarding Section 504 transition plans which we believe needs to be modified. CARH believes that proper self-evaluation and transition plans are project expenses. The self-evaluation and transition plan should be performed by a trained, knowledgeable party and is a project expense. Per prior RD guidance, the self-evaluation and transition plan should be updated if there is a change in applicable standards or a change of circumstances at the property. Management is supposed to review the transition plan annually, and if no items have been completed since the initial plan and there is no change in circumstances, confirm viability with a year-end update. However, unless apparent from the RD approved budget (i.e., no funds for additional work) an explanation for the lack of work and not following the transition plan schedule should be provided. The Servicing Official should also determine if the borrower’s financial situation has changed such that completion of transition plan items can be accomplished. No further self-evaluation is needed if it is clear that the transition plan is completed, and all items have been addressed. Future changes may occur to the property as a result of maintenance work, at which point, if it is not clear the proper work is completed, a further self-evaluation and transition plan may be needed.
**Project vs. Properties**

We note the term “project” is used throughout the UL, and indeed in places in this letter, as it is an old term and habit we all fall into. However, CARH believes whenever feasible that “project” should be changed to “property.” Referring to multifamily properties as “projects,” results in negative connotations and unnecessary stigma regarding affordable housing and residents who live in this important housing sector. “Property” is a superior term and is how conventional multifamily properties are referenced.

To go further, we would suggest all future RD correspondence, ANs, ULs, notices, and regulations, as well as national and state RD personnel, consistently use the terms “properties” or “apartment properties” and no longer use the term “projects.” This would also require many current regulations be changed and updated over time.

We thank you for your willingness to consider our concerns. Our members would be happy to discuss with you in more detail any of the issues raised throughout this letter.

Sincerely,

Colleen M. Fisher  
Executive Director

cc: Janet Stouder, Deputy Director  
Multi-Family Housing Programs  
Portfolio Management Division