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PROGRAM GUIDANCE

PROGRAM: Indian Housing Block Grant (IHBG)

FOR: Tribal Government Leaders and Tribally Designated Housing Entities
(TDHE)

R.B.S.

FROM: Rodger Boyd, Deputy Assistant Secretary, PN

TOPIC: Local Cooperation Agreements

Purpose: This Guidance is intended to provide information regarding the submission of waiver requests to Indian Housing Block Grant (IHBG) recipients that have been unable to obtain a cooperation agreement and tax-exempt status from a local government for existing or proposed housing.

References: Section 101(c), (d) and (e) of the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), and 24 C.F.R. 1000.240 and 1000.242.

Requirement: Section 101(c) and (d) of NAHASDA prohibits IHBG recipients from spending IHBG funds on rental or lease-purchase homeownership units that are owned by the tribe or the TDHE for which: (1) the recipient has not entered into a cooperation agreement for services for those housing units with the local government; and (2) the housing units have not been granted tax-exempt status. A cooperation agreement is not needed for such programs as rental assistance or mortgage and down payment assistance where the housing unit is owned by someone other than the tribe or TDHE.

The two items (cooperation agreements and tax-exempt status) are intended to go hand-in-hand as a protection for publicly owned low-income housing. The cooperation agreement is a contract between the local government and the IHBG recipient (HUD is not a partner to the agreement.) that is intended to ensure that local governmental services will be provided to the housing in exchange for payments in lieu of taxes (PILOT). The requirement for tax-exempt status is to ensure that scarce funding be spent directly on the development of low-income housing.

Raw land for future development may be purchased without a cooperation agreement or tax-exempt status in place. However, a cooperation agreement must be obtained prior to the actual start of the development of housing units. As a cautionary note, the acquisition of land is only an eligible activity if it is to ultimately be used for the development of affordable housing [NAHASDA Sec. 202(2)] or an approved model activity [NAHASDA Sec. 202(6)]. Any plan to acquire raw land and its intended use for affordable housing activities must be specified in the one-year and five-year sections of the Indian Housing Plan (IHP). Recipients should not use IHBG funds to purchase raw land in areas where there is good reason to believe that they will not be able to obtain a cooperation agreement or when the intent is not to use the land for a NAHASDA eligible activity as such expenditures are subject to recapture.

Waivers: On December 27, 2000, NAHASDA was amended, in part, by the Omnibus Indian Advancement Act (P.L. 106-568) by adding language to Section 101(c) allowing the Secretary to waive the requirement for a cooperation agreement and tax-exempt status if the recipient has made a good faith effort, but has been unsuccessful in fulfilling these requirements through no fault of its own. The new statutory language reads as follows:

The Secretary may waive the requirements of this subsection and subsection (d) if the recipient has made a good faith effort to fulfill the requirements of this subsection and subsection (d) and agrees to make payments in lieu of taxes to the appropriate taxing authority in an amount consistent with the requirements of subsection (d)(2) until such time as the matter of making such payments has been resolved in accordance with subsection (d).

Upon passage of the December 2000 amendments, the Department originally determined that this amendment would require an implementing regulation. HUD has modified its original position and will implement this amendment by administrative means and immediately accept request for waivers of the requirements of Section 101(c) and (d).

Procedure: Waiver requests must be in writing and must detail the good faith effort undertaken by the recipient, which merits granting the waiver. The waiver request should identify the housing units involved and should include all pertinent background information about the housing units or proposed development.

The request should be sent to the recipient's Area ONAP. The Area ONAP will forward the request with its recommendation, comments and any additional relevant documentation to the Deputy Assistant Secretary for Native American Programs for processing to the Assistant Secretary. Requests for a cooperation agreement waiver will be treated, as are most waivers, on a case-by-case basis with the Department determining if good cause exists to grant a waiver.

Documentation: It is the recipient's responsibility to make its case for a waiver by presenting to the Assistant Secretary, through documentation, the complete history of its efforts. Since the details of each recipient's situation regarding its inability to obtain a cooperation agreement and tax-exempt status are unique, the recipient should submit sufficient documentation with its waiver request to show that it has pursued and exhausted all reasonable channels available to it to reach an agreement and obtain tax-exempt status, and that the failure to obtain the required agreement and tax-exempt status has been through no fault of its own.

Such documentation may include, but would not necessarily be limited to: a copy of the cooperation agreement that was submitted to the local government; written correspondence; memoranda-for-the-record of conversations; meeting minutes; court records; and/or recorded documents evidencing the recipient's attempts and the local government's response.

The statute requires that PILOT continue to be paid to the local government and that the tribe or TDHE continue to attempt to resolve the issues preventing it from obtaining tax-exempt status. It would be helpful to the Department in reviewing a recipient's waiver request to include any documentation, information or plans regarding the payment of PILOT. For instance, the recipient is advised to make at least tentative plans as to how it might address various possible situations during the waiver period. Such situations would likely include: planning for the payment of PILOT should the local government refuse to accept such payments; ensuring that the property is not lost through a tax-foreclosure sale; and providing for services to the units.

Disposition of Waiver Request:

If the waiver is not granted, the applicant will be notified of the denial and the reasons for the denial in writing. IHBG funds may not be spent on the housing units. If the recipient has spent IHBG funds on the development, for instance in the case of where raw land was purchased for a proposed development, the recipient must reimburse their grant for all IHBG funds expended. The recipient should work closely with its Area ONAP to properly process the return of these funds.

If a waiver is granted, the recipient will be notified in writing of the waiver and any special conditions or deadlines with which it must comply. The recipient may then spend IHBG funds on the project in accordance with an Indian Housing Plan (IHP), or an IHP amendment, that has been found to be in compliance and only on activities that are permitted under applicable state and local laws. As stated above, the recipient must continue to pay PILOT and continue to make reasonable attempts to obtain the statutorily required tax-exempt status for the units. The Area ONAP will continue to work with the applicant to resolve the dispute over the cooperation agreement.

If you have any questions, please contact your local Area ONAP office.