



HOMEfires - Vol. 16 No. 1, September, 2021

Q: May a participating jurisdiction (PJ) grant or provide HOME funds for the acquisition, development, or rehabilitation of affordable rental housing to an entity that will then loan the HOME funds to the owner (i.e., limited partnership (LP) or limited liability company (LLC)) of the affordable rental housing?

A: No, a PJ may not grant or provide HOME funds to an entity that then lends the HOME funds to the owner of an affordable rental project because HOME statutory and regulatory requirements require the PJ to ensure compliance with HOME requirements through binding contractual agreements with the project owner. A PJ may only provide HOME funds to an entity to lend to the owner of an affordable rental project if the entity is a subrecipient to the PJ.

Background

Section 226 of Title II of the Cranston-Gonzalez National Affordable Housing Act, as amended (NAHA) requires the PJ to have a contractual relationship to the owner of the HOME rental project to ensure compliance with the HOME statutory and regulatory requirements. (42 U.S.C. 12756). Specifically, section 226 states,

Each participating jurisdiction, through binding contractual agreements with owners and otherwise, shall ensure long-term compliance with the provisions of [NAHA]. Such measures shall provide for (1) enforcement of the provisions of this title by the jurisdiction or by the intended beneficiaries, and (2) remedies for the breach of such provisions.

Section 226 requires the PJ ensure long-term compliance with the HOME statute and provide remedies for breach through both agreements with project owners and other such measures of enforcement of HOME requirements by the PJ or beneficiaries (e.g., deed restrictions, liens on real property, or covenants running with the land). (See 24 CFR 92.504(c); 92.252(e)(ii)). As specified in the HOME statute, these other measures to ensure compliance are in addition to the requirement that the PJ ensure long-term compliance through binding contractual agreements with project owners. Pursuant to 24 CFR 92.504, the PJ enters into a written agreement with the project owner to provide the HOME funds for the development or rehabilitation of affordable rental housing and to impose HOME requirements on the project to ensure compliance with the statutory and regulatory provisions.

When a PJ provides HOME funds to an entity that will then lend the HOME funds to the owner entity, the PJ is not providing HOME funds to the project owner but rather to an intermediary entity.

Even though the entity may impose HOME requirements on the owner entity, the PJ nonetheless violates the HOME statutory requirement to “ensure long-term compliance” through “binding contractual agreements with owners” by providing funds to an entity other than the owner.

Consistent with the statute, the HOME regulations require a PJ to enter into a written agreement with the owner when the owner is receiving the HOME funds for affordable rental housing. “Before disbursing any HOME funds to any entity, the [PJ] must enter into a written agreement with that entity” (24 CFR 92.504(b)). As the owner entity is the entity receiving the funds to use for a HOME eligible activity, the PJ must disburse the funds to the owner entity and, therefore, the written agreement must be between the PJ and project owner.

In addition, 24 CFR 92.504(c)(3) establishes the requirements for a written agreement with a project owner and states that the “project must meet the requirements of ‘commit to a specific local project’ in the definition of ‘commitment’ in 24 CFR 92.2. Pursuant to 24 CFR 92.2(2)(i), to have a valid commitment of HOME funds, the “[PJ] (or State recipient or subrecipient) and project owner [must execute] a written legally binding agreement under which HOME assistance will be provided to the owner for an identifiable project.” If the PJ provides HOME funds under a written agreement with an entity that is not the owner, it would not be a valid commitment of HOME funds under the HOME regulations.

The HOME statute and regulations do not permit HOME funds to be disbursed to any entity for the purpose of then loaning the HOME funds to the owner of the rental housing unless the entity loaning the HOME funds to the owner is a public entity or nonprofit acting as a subrecipient or State recipient of the PJ. Only then do the HOME regulations permit an entity other than the PJ to provide HOME funds under written agreements with owners to carry out HOME eligible activities. (See 24 CFR 92.2(2); 24 CFR 92.205; 24 CFR 92.504). If a public or nonprofit entity receives HOME funds under a written agreement with a PJ and loans the funds to the owner of affordable rental housing, the public or nonprofit entity must be a subrecipient, subject to the HOME requirements for a subrecipient. As a subrecipient, the entity may not award funds to an owner it owns or controls in whole or in part. (See 92.2; 92.201(b)(2)). Noncompliance and violations of HOME requirements may result in repayment of the HOME funds, remedies under 2 CFR 200.338, or other legally available actions against the PJ and subrecipient.

HUD has the discretion to pursue enforcement actions for any violations. For violations that occurred before publication of this guidance, HUD may require invalid agreements to be restated or non-compliant written agreements and associated documents (including deed restrictions, notes, and mortgages) to be assigned to the HOME PJ. HUD will pursue compliance actions for all agreements executed after this publication that do not comply with the above requirements.