

Doubling of Capital Fund Appropriations Offers Opportunities for Housing Authorities and Residents

After years of volitional neglect, Congress is providing public housing authorities (PHAs) with substantial and new funds for capital improvements¹ to public housing. Residents and advocates should engage with their PHA on the use of these capital funds.²

Funds are available both from the annual appropriation process and from the recovery act. For Fiscal Year (FY) 2008³ Congress appropriated \$2.439 billion for capital funds.⁴ For FY 2009, the appropriation is \$2.45 billion.⁵ The American Recovery and Reinvestment Act of 2009 (ARRA)⁶ appropriated \$4 billion in public housing capital funds of which \$3 billion has been allocated by the same formula used for FY 2008⁷ and \$1 billion is to be awarded through competitive grants.⁸ Additionally, the FY 2009 bill provides \$3,641,966,875 for carrying out the community development block grant (CDBG) program⁹ and ARRA appropriates an additional \$1 billion in CDBG funds to be distributed to grantees that received CDBG funding in 2008.¹⁰ Depending upon local consolidated plans and PHA Five-Year and Annual Plans, portions of the CDBG money may be available for public housing rehabilitation or new construction programs. HUD has posted on its website the amounts available to each local PHA and each state from ARRA for capital funds and that each local jurisdiction

will receive in CDBG funds.¹¹ The ARRA capital fund allocation is more than 120% of either the FY 2008 or the FY 2009 allocation. By combining FY 2009, ARRA and other applicable recovery funds, many PHAs will have more than twice the amount available in prior years to obligate for public housing capital improvements.¹²

Time Table

The expenditure of ARRA funds is subject to strict time tables. Congress directed that formula allocation awards of the \$3 billion ARRA capital funds happen within thirty days of the bill's February 17, 2009, enactment.¹³ HUD acted quickly and announced the award amounts on HUD's website.¹⁴ HUD must obligate the \$1 billion ARRA competitive capital funds by September 30, 2009.¹⁵ The HUD webpage currently states that HUD will issue a Notice of Funding Availability (NOFA) seeking applications.¹⁶ This NOFA will most likely be published by early May 2009. Residents and advocates should watch the HUD website and the Federal Register for this NOFA. All of the ARRA capital funds must be obligated by March 17, 2010.¹⁷ These funds must then be expended upon a schedule of 60% within two years and 100% within three years.¹⁸ HUD has warned PHAs: "Please note that under the ARRA the Department has no flexibility whatsoever to extend or alter the 1-year obligation deadline or the 2- and 3-year expenditure deadlines."¹⁹ HUD will recapture and

¹See 42 U.S.C.A. § 1437g(d) (West 2003).

²For a primer on capital funds see NHLP, *The Public Housing Capital Plan: Basic Information for Advocates*, 34 HOUS. L. BULL. 223 (Nov.-Dec. 2004).

³October 1, 2007, through September 30, 2008.

⁴Pub. L. No. 110-161, Div. K, tit. II, 121 Stat. 1844, 2416-17 (2007) (Consolidated Appropriations Act, 2008, H.R. 2764-573, 574, which appropriated funds for the Public Housing Capital Fund Program to carry out capital and management activities for public housing agencies, as authorized under Section 9 of the United States Housing Act of 1937 (42 U.S.C. 1437g).

⁵Pub. L. No. 111-8, tit. II (2009) (FY09 Omnibus Spending Bill, H. R. 1105-432).

⁶Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁷*Id.* at 214. The Secretary has discretion not to award funds to troubled PHAs or to PHAs that refuse to accept the funds. For an explanation of the FY 2008 allocation formula see: Information and Procedures for Processing American Recovery and Reinvestment Act Capital Fund Formula Grants, PIH 2009-12 (March 18, 2009), IV, available at <http://www.hud.gov/offices/pih/>, hereinafter referred to as "PIH 2009-12."

⁸*Id.*

⁹Pub. L. No. 111-8, tit. II (2009).

¹⁰Pub. L. No. 111-5, 123 Stat. 115, 217 (2009), under title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 et seq.).

¹¹<http://www.hud.gov/recovery/>. Nearly every prompt under "Learn More About HUD Recovery Act Programs" can be followed to a wealth of detailed jurisdiction-level data. Also listed on the HUD website is the amount of funds allocated by state for LIHTC properties to use under the HOME program and for funds allocated by state and local jurisdiction for homeless prevention, and the names of the recipients of the funds for lead hazard reduction.

¹²Note that: "the Secretary may determine not to allocate funding to public housing agencies currently designated as troubled or to public housing agencies that elect not to accept such funding." Pub. L. No. 111-5, 123 Stat. 115, 214 (2009).

¹³Pub. L. No. 111-5, 123 Stat. 115, 214 (2009).

¹⁴See HUD, HUD Speeds Nearly \$3 Billion to Nation's Public Housing Authorities to Improve Housing (March 24, 2009), available at <http://www.hud.gov/recovery/2009/03/24/comms/pr09-027.cfm?CFID=16470960&CFTOKEN=60483115>.

¹⁵Pub. L. No. 111-5, 123 Stat. 115, 214 (2009).

¹⁶HUD webpage: Public Housing Capital Fund Stimulus (Competitive) at <http://www.hud.gov/recovery/phcapfundh.cfm> and Recovery Act Capital Fund Formula Grant Frequently Asked Questions As of April 10, 2009, available at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir/rcryact-faq.pdf>, hereinafter referred to as "Capital Grant FAQ."

¹⁷Pub. L. No. 111-5, 123 Stat. 115, 215 (2009).

¹⁸*Id.* Committed means generally that a contract has been signed governing the project, while expenditure requires that the PHA has actually spent the funds.

¹⁹Notice posted on HUD website on March 13, 2009, (emphasis in original) at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir/stimulusannounce.pdf>.

reallocate ARRA capital funds not used according to the schedule.²⁰ Recaptured funds will be reallocated to PHAs that are in compliance with expenditure schedules.²¹

The ARRA CDBG funds have no similar expenditure schedule, but are available only until September 30, 2010.²² The FY 2009 CDBG money is available until September 30, 2011.²³

Capital funds made available through the annual appropriation process also have time limits for obligation and expenditure. The normal process is that such funds must be obligated by a PHA within two years and expended within four years.²⁴ HUD may extend the time period for obligating and expending the funds for specific reasons.²⁵ For FY 2009, the appropriation of \$2,450 billion will remain available until September 30, 2012, but extensions of time must be approved by either the Deputy Secretary or the Assistant Secretary for Public and Indian Housing.²⁶

When PHAs make significant changes to their annual plans, as they must do to properly authorize projects and expenditures with this new capital money, they must provide advance publication, hold public hearings, solicit public comment and obtain PHA Commission approval.²⁷ Importantly, all PHAs were notified on March 18, 2009, that the Secretary has “used the waiver authority in the [ARRA] to reduce [the otherwise required 45 day] public notice period to 10 calendar days” so that PHAs may “continue planning and ultimately obligate and expend these funds as intended.”²⁸ This Notice contains a wealth of information and should be studied by anyone about to engage on these topics. If the work items for which a PHA intends to use newly available capital funds were not included in their approved Annual or Five-Year Action Plan, PHAs were required to inform HUD of the changes by submitting a Capital Fund Annual Statement Parts I & II, form HUD 50075.1 and a supporting Board Resolution to the local HUD field office no later than twenty-one days after the effective date of the grant.²⁹

The various time constraints and the threat of reallocation of funds mean that residents must be vigilant in tracking their PHA’s progress, particularly in PHAs with a historic lack of capacity to initiate and execute capital projects.

Recovery Package Sets Priorities for Funding Certain Projects

With respect to all expenditures of ARRA capital funds, Congress directed PHAs to give a priority to projects, including:

- 1) “capital projects that can award contracts based on bids within 120 days from the date the funds are made available to the public housing authorities” (so called “shovel ready”);
- 2) “the rehabilitation of vacant rental units;” and
- 3) “capital projects that are already underway or included in the [PHA’s] 5-year capital fund plans.”³⁰

In obligating the competitive \$1 billion of capital funds provided for in the ARRA, Congress directed the Secretary to consider “investments that leverage private sector funding or financing for renovation and energy conservation retrofit investments.”³¹ HUD has posted explanations of these bills on its website, including extensive frequently asked questions regarding the ARRA capital funds.³² HUD states that PHAs can use ARRA capital funds for such things as renovation of existing units which are not now rentable, new construction of ACC-funded units, acquisition of land and acquisition of PHA units.³³ The ARRA capital funds are to be used “to supplement and not supplant expenditures from other Federal, State or local sources or funds independently generated by the grantee.”³⁴ PHAs will be required to report to HUD quarterly on their expenditure of ARRA funds.³⁵

The only requirement imposed upon grant recipients of CDBG funds from the ARRA is that they must give priority to shovel-ready projects.³⁶

Engage the Local PHA

Every PHA has already made many decisions about how to spend portions of their newly available capital funds. “PHAs [were] to submit a Capital Fund Annual Statement form 50075.1 describing the specific activities that they will undertake with the ARRA Formula grant funds no later than April 10, 2009.”³⁷

There remain, however, many issues and decisions regarding use of the new ARRA capital funds as well as the regular fiscal year appropriations. Residents and

²⁰Pub. L. No. 111-5, 123 Stat. 115 (2009).

²¹Capital Grant FAQ, *supra* note 16.

²²*Id.* at 21.

²³Pub. L. No. 111-8, tit. II (2009).

²⁴42 U.S.C. § 1437g(j)(1) and (5)(2007) and 24 C.F.R. § 905.120 (2008).

²⁵*Id.*

²⁶Pub. L. No. 111-8, tit. II (2009), H. R. 1105—432.

²⁷24 C.F.R. § 903.21(b) (2008).

²⁸PIH 2009-12, *supra* note 7 (The Notice cross references 24 CFR Parts 905, 941 and 968).

²⁹*Id.* The grants are considered to have been effective on March 17, 2009.

³⁰*Id.*

³¹Pub. L. No. 111-5, 123 Stat. 115, 214 (2009).

³²See Capital Grant FAQ, *supra* note 16.

³³*Id.*

³⁴Pub. L. No. 111-5, 123 Stat. 115, 215 (2009).

³⁵See Capital Grant FAQ, *supra* note 16.

³⁶Pub. L. No. 111-5, 123 Stat. 115, 217 (2009).

³⁷Notice posted on HUD website on March 13, 2009, (emphasis in original) available at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir/stimulusannounce.pdf>.

advocates should engage their PHA, through the plan process or otherwise, to ensure:

- that the allocated funds are used in the most productive and timely manner to benefit residents consistent with the required priorities;
- that the PHA complies with Section 3 obligations (designed to require grantees and contractors using these funds to hire public housing residents and low-income individuals and contract with Section 3 businesses³⁸ as well as local and minority and women owned business);³⁹ and
- that the PHA engages the residents in key decisions regarding the contracting for and expenditure of the funds.

Proper identification of capital needs requires residents to obtain and analyze both PHA documents and hard information about the conditions within their communities. The five-year capital fund plan is an attachment to the PHA's Annual Plan that should be available for each PHA at <http://www.hud.gov/offices/pih/pha/>. It may also be available in an updated format as an attachment to the PHA's proposed annual plan. Within the five-year capital fund plan, the five-year action plan lists any anticipated large capital items for the next five-year period by development name, development number, description of the item, estimated cost and planned start date, as well as the total cost of all large capital items per development.⁴⁰

To ensure that the objectives of the recovery package are met and the benefits of the annual appropriations for capital funding are maximized, residents and advocates should consider acquiring and reviewing relevant documents and information, including:

- a copy of the most recent Capital Fund Program Five-Year Action Plan, if it is not available or legible at <http://www.hud.gov/offices/pih/pha/>;
- a copy of any amendments to the most recent (FY 2008 or FY 2009) Capital Fund Program Five-Year Action Plan;
- the most recent Capital Fund Annual Statement Parts I & II
- any additional plans for allocation of the capital funds in 2009, 2010, 2011 and 2012;
- the amount of carry over capital funds currently

³⁸12 U.S.C. § 1701u (West 2001); 24 C.F.R. Part 135 (2008).

³⁹Memo. from Peter R. Orszag, Director OMB, for the heads of departments and agencies, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, M-09-15 (April 3, 2009), Attachment, § 1.6, available at <http://www.hud.gov/offices/pih/programs/ph/capfund/ocir.cfm>.

⁴⁰See n. 2, *supra*.

available to the PHA, including the dates that such funds were received, must be obligated and must be expended;

- the number, location and estimated cost of repair of each vacant public housing unit;
- an estimate of the time necessary to put contracts for the repair of these vacant units out to bid;
- the number, types and dollar value of capital contracts underway;
- a time table for committing and expending both the ARRA capital funds and the available annually appropriated capital funds.

Due to the speed with which these funds are to be encumbered and expended, HUD and PHAs continue with the process of allocating funds and entering into contracts. In this process the Secretary has statutory authority to "waive or specify alternative requirements for any provision of any statute or regulation in connection with the obligation by the Secretary or the use of [ARRA capital or community development funds]."⁴¹ This potentially gives PHAs great leeway in structuring their capital programs for the maximum benefit of the residents and improvement of the public housing stock. Whether this waiver authority could be challenged by residents if they believe their PHA is abusing its authority is an open question.⁴²

Section 3 Opportunities

The availability of large sums of capital funding presents important opportunities to obtain Section 3 mandated economic opportunities.⁴³ As the capital improvement priorities are being discussed and negotiated between residents and the PHA, residents must continuously pursue incorporation of Section 3 employment and contracting requirements in all projects.⁴⁴ PHA requests for qualification (RFQs) and requests for proposals (RFPs) must inform prospective contractors of the Section 3 requirement to employ public housing residents and other low-income residents of the affected communities and to engage Section 3 businesses as well as minority- and women-owned businesses under contracts using the federal funds discussed herein.

⁴¹Pub. L. No. 111-5, 123 Stat. 115, 215 (for capital funds) and 123 Stat. 115, 217 (for community development funds) (Feb. 17, 2009).

⁴²HUD explains the authority as permission to assist PHAs to expedite and facilitate the use of the funds. PIH 2009-12, *supra* note 7 at IX.

⁴³So called because it is authorized by Section 3 of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 3, 82 Stat. 476, (Aug. 1, 1968), now codified at 12 U.S.C. 1701u (West 2001). The HUD website contains pages and forms related to Section 3 at <http://www.hud.gov/offices/fheo/section3/section3.cfm>. Note there the "Helpful Tools" link to the "Section 3 Plan," which is a "model" Section 3 plan.

⁴⁴See NHLP, *An Advocate's Guide to the HUD Section 3 Program: Creating Jobs and Economic Opportunity* (February 2009).

Residents should review, with their PHAs, the content of the RFQs and RFPs, how the contracts offered to successful contractors will bind the contractors to this obligation, what penalties will be imposed for non-compliance and how the obligations will be monitored and enforced from day to day as the work progresses. Residents can work with their PHA to conduct employment-needs surveys of their developments asking all employable residents to fill out simple questionnaires about their job skills and aspirations, partner with local workforce investment programs or local unions to facilitate training and apprenticeships, and form a committee to continuously monitor compliance. If a PHA declines to take these actions, the resident councils or Resident Advisory Boards could allocate some of the \$25 per unit per year fees for resident participation to fund such efforts by the residents or a contractor of the residents.⁴⁵ Residents should keep in mind that when PHAs spend annual appropriation or recovery funds themselves, without engaging outside contractors, they are bound by Section 3.

In preparation for Section 3 negotiation and implementation, residents should consider locating and developing information helpful to determine compliance, including:

- A copy of the PHA's Section 3 plan.
- Bid packages that require contractors to provide information (certified payroll) with the name and position (skill level) of the contractor's employees at the time of the bid, and an estimate of the number of new hires that the contractor will require to fulfill the contract.
- Contract provisions that specify the number of new employees by job title or skill level and the number of Section 3 employees that the contractor anticipates hiring.
- Contract provisions that require bi-weekly⁴⁶ or monthly reports setting forth the number of employees of the contractor, the number of new hires during the period, and the number of Section 3 hires by position (skill level).
- Information regarding any new hiring that the PHA anticipates as a result of the increased capital funds, as these new employees must be hired in accordance with the Section 3 preferences.

- Information regarding the dollar value of all contracts entered into by the PHA and by any contractor with a Section 3 business.

Section 3 compliance offers an opportunity for direct resident engagement in resident empowerment.

Conclusion

For many reasons it is important that residents and their advocates monitor the use and expenditure of the capital funds. The need for such funds is great, as much of public housing is suffering from years of deferred maintenance and the wise expenditure of such funds will benefit residents. In addition, in some jurisdictions the expenditure of the funds will result in an increase of affordable housing by placing vacant units back on the market or through the acquisition or development of public housing units. There are also jobs to be had from the expenditure of the funds, which should benefit public housing residents, other low-income residents and Section 3 businesses, as well as, local, minority and women owned businesses through the enforcement of Section 3, and these new jobs and contracts created will stimulate economic activity in the community. Capital funds not expended in the community will be recaptured and distributed to other communities. ■

⁴⁵See Interim Instructions on Distribution and Use of Operating Subsidy Funds Received for Resident Participation Activities, PIH 2001-3 (HA) (Jan, 18, 2001); NHLP, *\$27 Million Available for Tenant Participation Activities*, 31 HOUS. LAW BULL. 87 (April 2001).

⁴⁶If employees are paid bi-weekly, then the general contractor will have matching wage disbursement reports listing each employee. These are ready-made compliance tools that do not require the contractor to prepare any special report. The hours worked by each Section 3 employee can then be determined and compared to the general employee pool.