

Ensuring NAHMA Members Receive the Latest News and Analysis of Breaking Issues in Affordable Housing

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H.R. 4868: Housing Preservation and Tenant Protection Act

Background

Maturing mortgages and the need to recapitalize and rehabilitate properties to preserve their affordability for low-income families drove Congressional interest in legislation to help preserve the existing affordable housing stock. As a result, NAHMA worked with Congressional staff on drafting such affordable housing preservation legislation.

Over the last three years, several versions of the legislation were circulated for stakeholders' consideration; however, each version contained recurring troublesome provisions. These provisions included the Federal first right of purchase/refusal to buy affordable properties, additional penalties for violating housing quality standards, third-party beneficiary status for tenants, and the release of owner and agents' private information. NAHMA consistently opposed these measures in our testimony before the House Financial Services Committee and other correspondence with Members of Congress.

On June 19, 2008, Ken Pagano, President and CEO of Essex Plaza Management, testified on behalf of NAHMA at the "Affordable Housing Preservation and Protection of Tenants" hearing. A copy of his testimony can be found here:

<http://www.nahma.org/Leg%20area/NAHMA%20Preservation%20Testimony%20Ken%20Pagano.pdf>

On July 15, 2009, Kris Cook, NAHMA's Executive Director, submitted written testimony to the House Financial Services Housing and Community Opportunity Subcommittee on the draft affordable housing preservation legislation. A copy of her testimony can be found here:

<http://www.nahma.org/Leg%20area/NAHMA%20Preservation%20Testimony%20Kris%20Cook%207.15.09.pdf>

On March 17, 2010, House Financial Services Committee Chairman Barney Frank introduced H.R. 4868, the Housing Preservation and Tenant Protection Act. The legislation intends to help preserve government-subsidized apartment communities, protect affordable housing residents, maintain housing affordability, and reform the senior and rural housing programs. However, the

initial legislation included five provisions that NAHMA felt would violate owners' contractual rights, privacy rights, and the right to maintain confidential or proprietary information. These provisions were:

- Section 107, the federal right of first refusal, which allowed HUD or its assignee multiple opportunities to purchase an assisted property before it could be sold to a third party;
- Section 108, which provided a vague blanket exemption of state and local preservation laws from federal pre-emption;
- Section 302, which allowed HUD to withhold assistance and tenants to withhold their rent contributions when violations of housing standards or program requirements arise;
- Section 303, which allowed residents to enforce housing agreements with HUD through lawsuits; and
- Section 304, which allowed residents to access owners' private and sensitive information, including 2530/APPS filings, as well as confidential building documents.

As a result, NAHMA members voted at NAHMA's 2010 Winter Meeting in Washington, D.C., to oppose the bill until Congress removed the five problematic provisions.

On March 24, 2010, George Caruso, Vice President of Edgewood Management, presented NAHMA's testimony on H.R. 4868 before the Subcommittee. He highlighted our opposition to the legislation based on the five troublesome provisions. He said NAHMA believed they would work against successful preservation of affordable housing and discourage private sector participation in HUD programs. Mr. Caruso also discussed NAHMA's support for the 60 other provisions, which NAHMA believed will help ensure the preservation of the most affordable housing units. These provisions included:

- Section 406, which required HUD to pay an interest penalty on late housing assistance payments (HAP) to property owners;
- Section 501, which extended the Mark-to-Market Program restructuring authority;
- Section 508, which provided budget-based rent adjustments and met rehabilitation needs;
- Section 512, which increased the Mark-to-Market cap on exemption rents;
- Title VII, which reformed the Section 202 elderly housing program; and
- Title VIII, which provided for rural housing preservation.

A copy of George Caruso's testimony can be found here:

<http://www.nahma.org/Leg%20area/GCaruso%20NAHMA%20Preservation%20testimony%20March%202010.pdf>

Over the last few months, NAHMA and our industry colleagues met with the House Financial Services Committee members' staff to request their assistance in removing the problematic provisions from the legislation during the mark-up.

The Committee marked-up, amended, and approved H.R. 4868 on July 27, 2010.

Summary of Committee Changes to H.R. 4868

The Committee made changes in the mark-up that mitigated some of the troublesome sections of the bill. However, these changes did not go far enough to alleviate the major problems with H.R. 4868. In addition, the Committee added a few amendments to the legislation that raised new concerns.

A section-by-section summary of the changes is available below.

Title I, Sec. 106: Preservation Exchange Program

An amendment from Representative Gwen Moore (D-WI) created an additional incentive in Section 106 for property owners to sell their property to a preservation entity by providing payment of exit taxes from a property's reserve for replacement funds on a case-by-case basis.

Status: The Committee approved the amendment by a voice vote, and it was included in the bill approved by the Committee.

Title I, Sec. 107: Federal First Right of Refusal

In the underlying bill, Section 107 gave HUD or HUD's assignee the right to purchase assisted properties before third-party buyers.

Chairman Frank's manager's amendment changed the underlying bill by substituting a state agency right of first refusal in place of a federal right of first refusal. In other words, state agencies or their assignees, rather than HUD or its assignee, received the first right of refusal. The Chairman said he hoped that the change would address the cost concerns associated with a federal first right of purchase. The Committee accepted this amendment.

Representative Shelley Moore Capito (R-WV), the Ranking Republican on the Housing and Community Opportunity Subcommittee, argued that the philosophical objections to a first right of refusal remained even if it is given to state agencies instead of HUD. She offered an amendment to strike this section, which failed by a vote of 30-39.

Status: Because Mrs. Capito's amendment to remove Section 107 failed, Chairman Frank's revised language giving the first right of refusal to the state housing agencies remained in the bill approved by the Committee.

Title I, Sec. 108: Amendment to Low-Income Housing Preservation & Resident Homeownership Act of 1990

This vague, blanket exemption in the underlying bill allowed state and local preservation laws to preempt Federal law.

The manager's amendment changed the title of Section 108 to "Clarification of State and Local Authority." An additional amendment by Chairman Frank narrowed the scope of state and local laws that would prevail over federal laws. The Committee approved both of these amendments.

Representative Capito offered an amendment to strike Section 108, arguing that the clarifying amendment did not clarify much. Her amendment failed on a voice vote.

Status: Because the Capito amendment failed, the amended Section 108 remained in the Committee's bill. The title of Section 108 was changed, and the scope of state and local laws that would preempt Federal law was narrowed.

Title II, Sec. 206: Green Retrofit Grant and Loan Program

An amendment from Representative Jim Himes (D-CT) inserted a modified version of his legislation, H.R. 4106 the Green Affordable Housing Act of 2009, into H.R. 4868. The amendment authorized HUD to create a program to offer grants and loans to owners of federally assisted housing projects for costs of making green retrofit improvements.

Status: The Committee approved the amendment by a voice vote, and included it as part of the bill approved by the Committee.

Title III, Sec. 302: Maintenance of Housing

In the underlying bill, this section allowed HUD to withhold subsidy payments and permitted tenants to withhold their rent (in escrow) to enforce housing quality standards. The section also required HUD to conduct physical inspections or management reviews of properties upon request of the local government in which the project is located or when 25 percent of the residents sign a petition.

The manager's amendment clarified that this section applies to projects with HAP contracts or contracts renewed under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA). It prohibited owners from evicting or retaliating against tenants for withholding rent, petitioning for a property inspection, or petitioning for a management review. Likewise, it required HUD to provide written notice to residents within 14 days of determining a property had committed serious, substantial or repeated violations of program requirements. The Committee accepted this amendment.

Representative Joe Baca's (D-CA) amendment to Section 302 added that HUD must notify tenants when there are "violations by the owner of project requirements and standards. Such notice shall contain a description of the violations and the rights and remedies afforded to tenants as provided under this section." This amendment was also adopted.

Late in the day, the Committee approved Representative Dennis Moore's (D-KS) amendment, which struck the paragraph in Section 302 that authorized escrow of tenant rents. It also removed language from the manager's amendment to Section 302 that required HUD to provide written notice to affected residents within 14 days of determining there are substantial or repeated

violations or program requirements. Instead, Mr. Moore's amendment required HUD to submit a report to Congress six months after enactment of the bill:

“That analyzes the feasibility of establishing, for tenants receiving rental assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), tenant rent escrow accounts as a means of improving housing conditions, and that proposes and analyzes variations or alternatives to such a tenant rent escrow account that could be efficiently administered by the Department while improving housing conditions.”

Status: After all the changes to this section, Committee-approved bill:

- Allowed HUD to withhold HAP payments to enforce housing standards;
- Required HUD to conduct physical inspections or management reviews of properties upon request of the local government or when 25 percent of the residents;
- Required HUD to notify tenants when violations of housing quality standards occur; and
- Required HUD to submit a report to Congress which analyses the feasibility of allowing tenants to hold their rent in escrow.

Title III, Sec. 303: Resident Enforcement of Public Housing Agency or Project Owner Agreements

This section of the underlying bill allowed tenants to enforce owners' housing agreements with HUD through lawsuits if HUD or its designee failed to issue a determination regarding an enforcement request within 90 days after receipt of the petition.

The manager's amendment made technical changes to the underlying bill and added a new paragraph stating that nothing in this section shall diminish other rights provided to tenants under other provisions of law. The Committee approved this amendment.

Representative Randy Neugebauer (R-TX) offered an amendment to strike Section 303. He recalled his previous experience managing affordable housing, and noted that residents' expectations can be unrealistically high. He argued that it is appropriate to hold owners to their agreement, but the remedy proposed—lawsuits by third parties—is flawed. The Committee rejected this amendment.

Status: Because the Neugebauer amendment failed, the bill approved by the Committee included Section 303 with the Chairman's technical corrections. It allows tenants to enforce owners' housing agreements with HUD when HUD or its designee does not issue determinations regarding enforcement requests within 90 days.

Title III, Sec. 304: Resident Access to Building Information.

The underlying bill required HUD to release confidential personal and proprietary information about owners, management agents and the properties to the tenants' associations. The documents for release included previous participation certifications.

The manager's amendment made significant changes to the underlying bill. It removed the requirement for HUD to release 2530 certifications, project budgets, capital needs assessments and an annual statement of balances and expenditures for replacement reserves and escrow funds. The revised Section 304 requires HUD to release the following information to tenants associations upon request:

- Information identifying the legal entities that own and manage the property, including identification of general partners and other principals;
- An annual operating statement of profit and loss of the ownership and management entities;
- Any subsidy contracts and regulatory agreements, use agreements, or other contracts... between the ownership entities and HUD, including correspondence between such ownership entities and HUD;
- Any management reviews and physical inspection reports of conducted by HUD or its contractor.

The new language also required HUD to redact any information that identifies, or could be used to identify, a resident of the property.

Representative Capito offered an amendment to strike Section 304. However, because the vote appeared unlikely to succeed, and the Chairman had made some substantive changes, she asked if Chairman Frank would continue working to improve this section. The Chairman thanked her, gave his commitment, and stated, "We do not want to release proprietary information." Having secured the Chairman's commitment, Representative Capito withdrew her amendment.

Status: The revised Section 304 described above was included in the language of HR 4868 approved by the Committee. There is no requirement for HUD to disclose 2530 information in the new version of Section 304.

Title XIII, Sec. 807: Rural Housing Service Coordinators

Representative Rubén Hinojosa's (D-TX) amendment to Section 807 authorized the use of service coordinators in rural housing properties.

Status: The Hinojosa amendment accepted by voice vote, and it was included in the Committee's approved version of the bill.

Price Amendments

Representative Tom Price's (R-GA) first amendment to H.R. 4868 created a new title within the bill called the Prohibition on Firearm Restriction. It prohibited HUD, PHAs and federally-assisted property owners from barring gun ownership by tenants in their properties, except for sex offenders. The Committee accepted this amendment.

Representative Price's second amendment created a new title within the bill called the Housing Assistance Requirement. In order to receive housing assistance, this section required all adult members of a household to show:

- A social security card with a photo identification card or REAL ID Act identification;
- A passport; or
- A United States Citizenship and Immigration Services Photo ID card.

The Committee approved this language by a vote of 38-30.

Status: Both Price amendments--permitting gun ownership in public and assisted housing and requiring all adult household members to show ID as a condition of assistance for the household--were included in the Committee's approved version of the bill.

Adler Amendment

An amendment offered by Representative John Adler (D-NJ) changed the rent calculations within the Section 8 housing choice voucher program. A single-person household would receive a subsidy equal to the market cost of an efficiency apartment instead of a one-bedroom apartment. Current tenants would receive an exemption from this rent allocation change unless and until they move out of their current residence. The amendment allowed local PHAs to request an exemption when there are not a sufficient number of efficiencies to house all single-person households in the area and only one-bedrooms are available.

Status: The Adler amendment was included in the Committee approved version of the bill by a voice vote.

Positive Aspects

NAHMA is pleased that the manager's amendment removes the 2530/Previous Participation Certification from the list of documents available for release to tenants' organizations in Section 304. This document contains personal and proprietary information that should not be released to the public. The Chairman's verbal commitment to work with Representative Capito on improving Section 304 encourages us. We hope Congress will work out a compromise to ensure that personal and proprietary information remains confidential under this provision. Nevertheless, the current language still requires the release of the owner and agents' statement of profit and loss and disclosure of contracts and property information, which also contains proprietary and/or non-public information. Therefore, we continue to advocate for the removal of this section.

Another area of improvement is the revised Section 302, which no longer authorizes rent withholding by tenants. The proposed rent escrow language would have been administratively burdensome for HUD, which already has authority to deal with serious violations of housing standards in a timely manner. The resident rent escrow would have also been disruptive to effective property operations. Instead, Representative Dennis Moore's amendment requires HUD to submit a study on the impact of the tenant rent escrow proposal within six months after enactment of H.R. 4868. Despite the removal of the most egregious provision of Section 302, we remain concerned by other requirements in this section.

Representative Gwen Moore's approach to the exit tax problem intrigues us. Her amendment to the Preservation Exchange Program in Section 106 allows reserves for replacement to be used for exit tax relief. NAHMA strongly supports the inclusion of exit tax relief into H.R. 4868. While we welcome this innovative approach, are concerned that small reserve for replacement balances might prevent properties using this incentive.

To ensure that more properties are voluntarily preserved, NAHMA continues to support the comprehensive exit tax relief bill H.R. 2887, the Affordable Housing Preservation Tax Relief Act of 2009. Although this tax legislation falls within the jurisdiction of the House Ways and Means Committee, we would like to see it added as an amendment to H.R. 4868 when the full House considers the bill.

Although a handful of troublesome provisions in H.R. 4868, prevent NAHMA from supporting the bill as a whole, there are many individual sections that we do support.

For example, NAHMA supports Section 101, which allows properties with RAP and Rent Supp contracts to convert to Project-Based Section 8 rental assistance. Currently, HUD lacks the authority to preserve these properties when their contracts expire. HUD also lacks the authority to renew the Rent Supp or RAP contracts or to offer owners new project-based assistance. We encourage both Congress and HUD to adopt this approach to preserve these multifamily housing orphan programs rather than HUD's proposed hybrid project-based rental assistance program in the draft Preservation, Enhancement, and Transforming Rental Assistance Act.

NAHMA generally supports Section 102, which provides the rehabilitation and acquisition funds to preserve properties with expiring use restrictions. Likewise, we strongly support the authorized enhanced vouchers to protect tenants residing in these properties when the mortgage or affordability restrictions expire or the rental assistance contract is not renewed.

We also support Section 103, which offers enhanced voucher assistance to eligible tenants upon the prepayment or maturity of an affordable property mortgage financed through a state housing finance agency.

NAHMA strongly supports Section 106, the Preservation Exchange Program, which provides a number of incentives for owners to sell their affordable properties to preservation entities. We believe that this voluntary incentive-based preservation program will be much more effective at preserving affordable properties than Section 107. Incentives include:

- Exit tax payments;
- Suspension of physical inspections and management reviews of the project during the transaction, providing grants or loans to a preservation purchaser,
- Streamlining the approval of requests for prepayment, assignment of Housing Assistance Payments contracts, transfer of physical assets, etc. in order to facilitate the sale or transfer to a preservation purchaser;
- Providing advances or project resources to the selling owner for pre-development and transaction costs in order to sell the property; and

- Providing grants or loans to the preservation purchaser for purchase or rehabilitation of the property.

We are extremely pleased the Committee has included Section 406, which requires HUD to pay an interest penalty on late housing assistance payments (HAP) to property owners. In fact, NAHMA specifically requested this provision. Ensuring that HUD pays HAPs on time and in full has been our top advocacy priority since 2003. Although properly funding the project-based Section 8 program has eliminated most of the problems with late payments, the interest penalty is still necessary to prevent underfunding in the future.

NAHMA is also encouraged to see the inclusion of Sections 501 and 508. Section 501 extends the Mark-to-Market Program restructuring authority through FY 2015. This allows affordable owners to restructure their FHA mortgages on properties with above market-rents and preserve the affordability of low-income rental housing while reducing the long-term costs of Federal rental assistance. Section 508 allows for budget-based rent adjustments and permits a second restructuring of early Mark-to-Market projects. Many of the underwriting assumptions are now obsolete for these properties, which were restructured before October 1, 2001. Furthermore, the tight underwriting left very little financing available for rehabilitation. Section 508 will allow struggling early Mark-to-Market deals to have their rents and financing adjusted to assure their continued viability.

We are also pleased with Section 512, which gives HUD Broader Exception Rent authority under MAHRA. It will be useful in preserving housing in high cost markets.

NAHMA continues to support all of the provisions of Title VII, Section 202 Supportive Housing for the Elderly, and Title VII, Rural Housing Preservation. These titles contain important tools that will help preserve and recapitalize both elderly and rural properties.

NAHMA Concerns

NAHMA still opposes Section 107, the first right of refusal. NAHMA continues to view this provision as a property taking, despite the fact the first right of refusal is now offered to the state housing agencies instead of HUD. A first right of refusal violates owners' rights in existing contracts, regardless of whether it is a state or federal right. We still believe the lengthy negotiation process associated with this provision would drive away potential third-party buyers and equity providers and jeopardize transactions with LIHTCs. We will continue to working to remove this section.

Although the committee included an amendment to Section 108 to clarify the types of state and local preservation laws that could preempt Federal law under H.R. 4868, the amendment is still vague and confusing. This may make it difficult for HUD to interpret which laws qualify for Federal pre-emption and which do not. As a result, NAHMA continues to recommend the removal of this section.

The Baca amendment to Section 302, which allows HUD to withhold HAPs for housing quality standard violations, still requires HUD to give written notice to tenants when violations occur. However, chances are likely that any serious violation will have been resolved before HUD even

sends the notice. If the notice is sent before REAC appeals are resolved, HUD may be required to inform residents of non-existent violations. REAC provides multifamily owners and agents 30 days to submit a request for a technical review and 45 days to submit a request for a database adjustment.

We are also dismayed that Section 303, which allows tenants to enforce owners' housing agreements with HUD through lawsuits, remains in the legislation. During the mark-up, Chairman Frank spoke against the Neugebauer amendment to remove Section 303 from the bill. The Chairman noted that most owners are fine people, but there are bad actors. He said the legislation does not give residents the right to make new agreements, but only the right to sue for enforcement of current agreements if HUD does not act in 90 days. He also said, "Tenants aren't the third party, they're the first party; they live there." This statement suggests a philosophical difference between the multifamily industry and the Committee's majority about the rights and responsibilities of owners, lease holders, and law enforcement agencies. NAHMA will continue working to remove Section 303 from the final bill.

NAHMA tirelessly advocated against Section 304, which requires HUD to release confidential, non-public information to residents' organizations. We repeatedly requested that it be removed from the bill. While the manager's amendment made some positive changes, most notably by removing the 2530/APPS disclosure, the new language does not go far enough to protect proprietary and non-public information. We oppose the release of the owner and agents' statement of profit and loss; we consider this confidential business information. We also oppose the requirement for HUD to release contracts and sensitive property information such as inspection and management review reports. Releasing such information in the absence of a bona fide purchase offer is contrary to standard real estate practice. NAHMA will continue engaging Congress and working to defeat any statutory requirement for HUD to disclose private or confidential business information, or sensitive property information.

NAHMA recommended several changes to Rep. Himes' office about the Green Retrofit Grant and Loan Program amendment. Our primary requests were to place a maximum three-year time limit on reporting requirements associated with the grant/loan and to measure consumption savings rather than cost savings. NAHMA is disappointed that these changes were not included in the amendment. However, Himes's office indicated our recommendations could be included as an amendment when the full House considers H.R. 4868.

Some NAHMA members are concerned about Representative Price's gun ownership amendment, which prohibits HUD, PHAs and federally-assisted property owners from barring gun-ownership by tenants in their properties. During the mark-up, Representative Price said he felt that assisted-tenants were being discriminated against and denied their constitutional rights through anti-gun-ownership rules. The amendment would force property owners and managers to change any property rules that bar gun ownership.

NAHMA is also concerned that Representative Price's second amendment to H.R. 4868 would make substantial changes to HUD's Rent and Income Determination Rule. In order to receive housing assistance, the amendment would require applicants and existing tenants to show:

- A social security card with a photo identification card or REAL ID Act identification;

- A passport; or
- A United States Citizenship and Immigration Services Photo ID card.

Currently, HUD allows the following documentation to be used to verify a social security number:

- A valid SSN card issued by the Social Security Administration;
- An original document issued by a federal or state government agency, which contains the name, SSN, and other identifying information of the individual; or,
- Other evidence HUD may prescribe in administrative instructions.

This provision would limit HUD's flexibility to permit other acceptable documents to verify SSNs. While the current HUD regulation provides exemptions for the elderly residents who were receiving assistance before the rule took effect, this new section does not. The current HUD rule also exempts persons who do not claim eligible immigration status from the social security disclosure and verification requirements; the Price amendment does not. The language requires *all adult household members* to present an ID or *no one in the household* may receive assistance. We believe this section would effectively end pro-rated assistance to families in which a household member does not claim eligible immigration status.

Finally, we are troubled with Representative Adler's amendment to H.R. 4868, which would change the rent calculations within the Section 8 housing choice voucher program. The language of the amendment does not provide exemptions for special needs or elderly single-person households who may require amenities that might not be available in older efficiency units. This may result in elderly and disabled individuals relinquishing their vouchers because they cannot find a suitable place to live.

NAHMA's Position

Although we support most of the provisions in the preservation legislation, NAHMA remains opposed to the Housing Preservation and Tenant Protection Act (H.R. 4868) because of the troublesome Sections 107, 108, 302, 303, and 304. We believe these sections will drive away equity investment, infringe on owners' property rights, inappropriately inject HUD into landlord-tenant law, and require HUD to release housing providers' confidential and proprietary information. These sections not only work against successful preservation of affordable housing, but also discourage private sector participation in HUD programs.

NAHMA will continue working with Congress and seeking changes to address our concerns when the full House considers H.R. 4868 on the floor.