

**AIMS Washington Update
NAA/NMHC Joint Legislative Committee**

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FAVORABLE RULING ON ACCESSIBILITY STATUTE OF LIMITATIONS

The apartment industry scored a victory this month when the U.S. Court of Appeals for the Ninth Circuit ruled in favor of a multifamily developer in a very important Fair Housing accessibility case. At issue is the statute of limitations governing when "aggrieved persons" can file private civil actions alleging violations of the Fair Housing accessibility regulations. According to this ruling, such cases must be filed within two years of when the last certificate of occupancy is issued (*Garcia v. Brockway*, 503 F. 3d 1092 (Sept. 20, 2007)). NAA/NMHC had submitted a "friend of the court" brief arguing in support of such a ruling.

The court rejected the plaintiffs' argument that private litigants could file civil actions within two years of "encountering" an accessibility design violation (e.g., within two years of leasing or trying to lease an apartment) under the "continuing violation" theory. The court said that if the continuing violation theory were upheld, the Fair Housing Act's statute of limitations "would provide little finality for developers who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design and construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers."

The ruling applies to the states covered by the Ninth Circuit, which include: Alaska, Arizona, Northern California, Central California, Eastern California, Southern California, Hawaii, Idaho, Montana, Nevada, Oregon, Eastern Washington, Western Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. It is not clear whether the plaintiffs will seek a Supreme Court review.

Apartment firms should note, however, that this decision does not affect the Department of Justice's ability to bring a civil action if a defendant has engaged in a "pattern or practice of resistance" to Fair Housing rights. There is no statute of limitations for those actions.

GSE REFORM LEGISLATION NEARS PASSAGE

The six-year effort to create a new regulator for the Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac may finally be coming to a conclusion. On May 20, after a week of intense negotiations, the Senate Banking Committee passed a housing stimulus bill that includes GSE reform. GSE reform has cleared the House of Representatives twice since 2005, but has never reached the Senate floor because of longstanding differences between Committee Democrats and Republicans led by current Ranking Member Richard Shelby (R-AL).

The bill creates a single new regulator with authority over both the GSEs' financial safety and their affordable housing mission; currently those responsibilities are split between the Office of Federal Housing Enterprise Oversight and the U.S. Department of Housing and Urban Development, respectively. The measure gives the new regulator authority to set limits on Fannie and Freddie's combined \$1.4 trillion portfolios based on safety and soundness operations, but not on a stricter standard that would have considered the GSEs' systemic risk to the U.S. economy.

The legislation would also allow the new regulator to set higher capital requirements for the GSEs, including temporary increases due to specific market or other conditions. In addition, as currently written, the GSEs would have to seek approval by the regulator before offering any new product, although Senator Charles Schumer (D-NY) is expected to offer an amendment to the bill when it comes to the Senate floor that would allow the GSEs to implement some new products directly while putting others out for public comments.

The Senate bill also creates a controversial affordable housing fund capitalized by the GSEs. Republicans have long opposed the fund, but were persuaded to support the measure when lawmakers agreed to use the first year of revenues to offset a \$500 million foreclosure rescue effort. After that, however, the fund will be used to create rental housing for very low-income and extremely low-income households.

Thanks to NAA/NMHC's efforts, the bill does not contain onerous provisions included in earlier versions of the legislation that would have limited the types of investments the GSEs could retain in their portfolios. We successfully argued that such limitations would have severely restricted Fannie and Freddie's ability to purchase multifamily loans. This is critical to our industry's continued health, particularly given the current liquidity crisis. Thanks to the GSEs, the multifamily industry has not suffered from the lack of mortgage capital that has plagued most other commercial real estate sectors.

The full Senate is expected to consider the bill after its Memorial Day recess, after which it will be rolled into a larger package in conference negotiations with the House-passed housing stimulus package that also includes FHA reform and several housing-related tax breaks. (See "Housing Stimulus" below.) Lawmakers hope to have a final bill completed by July 4, and early indications suggest that the President will sign it despite earlier objections. In the interim, both companies are expected to continue to shore up their capital reserves to cover losses due to the deterioration of their single-family mortgage portfolios.

SENATE HOUSING STIMULUS PACKAGE MOVES FORWARD

Congress continues to seek a legislative solution to the foreclosure crisis. On May 20, the Senate Banking Committee passed a foreclosure prevention bill that also includes GSE reform (see above). The foreclosure provisions largely mirror a House measure that passed on May 8. Specifically, the bill would refinance \$300-\$400 billion of at-risk mortgages into FHA-insured mortgages as long as participating lenders agree to substantially write down the principal. Unlike the House bill, which would be taxpayer financed, the Senate measure finances its program using fees generated by the GSEs. Senate Banking Committee Chairman Chris Dodd (D-CT) hopes to bring the measure to the full Senate floor shortly, where it is likely to pass.

Assuming Senate passage, House and Senate lawmakers will then begin to negotiate a compromise housing bill that could combine the FHA foreclosure refinance program with housing tax incentives passed by each body. On April 11, the Senate passed a \$14.5 billion measure (H.R. 3221) that includes controversial changes to net operating loss (NOL) tax laws benefiting businesses--including the home building industry--and a heavily criticized \$7,000 tax credit for buyers of foreclosed houses.

The House, meanwhile, passed an \$11 billion tax measure that creates an income-restricted \$7,500 first-time homebuyer tax credit that functions as an interest-free loan, with taxpayers having to repay the credit to the government over 15 years. It also includes several provisions favorable to rental housing owners, including a temporary expansion of the Low-Income Housing Tax Credit (LIHTC) program, technical improvements to address the LIHTC program's credit crisis, a temporary increase in the mortgage revenue bond cap and several NAA/NMHC-supported provisions related to Real Estate Investment Trusts.

Lawmakers may also include FHA modernization legislation (H.R. 1852) that has now passed the House twice. Among other things, that measure would reject an NAA/NMHC-opposed FHA zero-downpayment mortgage program, and it would ban seller-financed downpayment "gifts." Sen. Dodd and House Financial Services Committee Chairman Barney Frank (D-MA) have indicated that it is highly likely they can develop a compromise package in the next month.

President Bush had previously threatened to veto the House measures after signaling opposition to the FHA refinance program and the homebuyer tax credits. That opposition appears to have lessened, however, now that the Senate bill includes GSE reform, a White House priority, and eliminates any direct cost to the taxpayers for the FHA refinance program. NAA/NMHC will continue to press legislators to enact a balanced stimulus package that does not include overly generous homebuyer tax incentives and also addresses the nation's rental housing needs.

NEW CAN-SPAM REGULATIONS ISSUED

On May 12, the Federal Trade Commission issued final rules implementing the 2003 CAN-SPAM Act and clarifying several elements of the law to make it easier for firms to comply. The CAN-SPAM law bans "spam" or unsolicited commercial e-mail and affects a wide range of apartment marketing activities as well as communications with residents and other consumers.

The law generally requires that certain commercial e-mail messages include: a valid return address, an opt-out option (that must be acted on within 10 days); and a clear and conspicuous notice if the message is an advertisement or solicitation.

Among other things, the new FTC rules address: who is covered by the law; whether a PO Box can be used as a valid address; how the law applies when multiple firms participate in a single marketing e-mail; and how the law applies to "forward-to-a-friend" e-mail marketing campaigns. Notably, the rules confirm that senders cannot charge a fee for opt-out services, and

they retain the 10-day window for processing opt-out requests. The FTC rejected requests by some groups to shorten it to three days and from other groups to lengthen it to 31 days to mirror federal Do-Not-Call requirements. The new rules are posted at www.ftc.gov/opa/2008/05/canspam.shtm. NAA/NMHC will update its compliance guidance with the new rules in the coming weeks. The rules go into effect on July 7, 2008.

NEW TOOLKIT: GETTING DENSITY RIGHT

Demand for walkable, compact development is at an all-time high thanks to rising fuel costs, changing lifestyles and pressure to manage inevitable population growth. To help communities meet this demand and encourage compact development, NMHC and the Urban Land Institute (ULI) have produced a new toolkit called *Getting Density Right*. The book is based on a series of forums NMHC and ULI convened where we brought together developers, elected officials, planning officials and even neighborhood activists to identify obstacles to compact development and brainstorm "best practices" to overcome them.

The book describes a wide variety of tools being used across the country to promote compact development, including visioning, planning and new regulations. It also includes case studies of eight successful communities, the policy tools they used to encourage compact development, and the development projects built using the new regulations. The book can be purchased from ULI's online bookstore at <http://tinyurl.com/6cnqto> or by calling 800/321-5011.

REPORT SAYS GOVERNMENT PUSHED HOMEOWNERSHIP TOO FAR

A new Congressional report examining the causes of the housing bubble finds that the government pushed home ownership too far, supporting NAA/NMHC's longstanding claim for a more balanced housing policy. The report, *The U.S. Housing Bubble and the Global Financial Crisis: Housing and Housing Related Finance*, was produced for Representative Jim Saxton (R-NJ), ranking member of the Joint Economic Committee.

The report details the various ways that federal policymakers have encouraged house purchases, and then states that prominent economist Robert Shiller began warning of an inflating bubble in the housing market as early as 2000. It says that "instead of warning American households that it might not be the best time to buy a home, officials at the Federal Reserve, the Treasury, and HUD ignored or downplayed troublesome signs." In issuing the report, Saxton said that while homeownership is an affordable goal for many households, "the evidence indicates that a combination of government policies pushed the rate of home ownership beyond sustainable levels." The full report is available at <http://tinyurl.com/3spb3z>.

QUARTERLY SURVEY PROMOTES PROFESSIONALLY MANAGED APARTMENTS

The apartment market shows signs of stability, although financing has become more difficult to secure according to NMHC's latest Quarterly Survey of Apartment Market Conditions. Demand conditions remain strong with more than 80 percent of survey respondents reporting a decrease in the number of renters leaving to become homeowners.

In a press release announcing the survey results, NMHC Chief Economist Mark Obrinsky noted that "even though there has been an increase in the number of condo and single-family rentals, these properties do not typically compete for the same renters as professionally managed apartments." He went on to explain that "professionally managed properties may become even more desirable in the current market as renters of many of these individually owned condos and houses find themselves without housing because the owners of these properties have lost the property to foreclosure."

The housing market downturn and financial market dislocation are affecting multifamily financing, and thus the volume of apartment property sales, however. Two-thirds of respondents noted that borrowing conditions had worsened compared with three months earlier, a reflection of the continued widening of spreads and tightening of credit standards. A record 76 percent of respondents reported that equity finance was less available. As a result, the Sales Volume Index declined to 13 this quarter, the second-lowest reading in the NMHC Quarterly Survey's history. Full survey results are posted at www.nmhc.org/goto/QuarterlySurvey08.

FLOOD INSURANCE REFORM PROGRESSES WITH HIGHER MULTIFAMILY POLICY LIMITS

Congressional efforts to reform the National Flood Insurance Program (NFIP) and restore it to solvency moved forward on May 13 when the Senate passed a flood insurance bill. The House passed its version of NFIP reform last September. A conference committee must now resolve differences between the two measures. Of interest to apartment firms is the desire of lawmakers to phase out below-market premiums. The Senate version phases out subsidies for all properties other than primary residences by raising premiums 25 percent per year until an actuarial rate is achieved. As a result of NAA/NMHC's actions, the House measure retains subsidies for commercial properties, including apartments, and adds business interruption coverage for multifamily properties.

Both measures also include an NAA/NMHC-supported provision to increase coverage limits, although the Senate rejected a controversial plan to add wind coverage to the program. NAA/NMHC will continue to educate lawmakers that eliminating subsidized premiums for apartment properties will increase housing costs and aggravate the affordable housing shortage. We will also continue to press Congress to undertake efforts to improve the marketplace for catastrophic property insurance.

GREEN RESOURCES

The Natural Resources Defense Council has created a new "Greening Advisor" web site (www.nrdc.org/enterprise/greeningadvisor/) to help firms "green" their operations from supply chain to day-to-day operations. The web site includes tips on finding environmentally friendly sources of supplies; promoting a bicycle-friendly workplace; reducing paper waste; using less-toxic cleaning products; and planting drought-tolerant plants and those native to the locale. It also provides examples of how to develop corporate environmental policies and sustainability reports and suggests environmentally friendly language that companies can write into contracts with their suppliers. The site is particularly useful for small- and mid-sized businesses that want to improve their environmental performance without hiring consultants.

In addition, the Environmental Defense Fund has published a new report on the best environmental sustainability practices for businesses. The report, *Innovations Review 2008: Making Green the New Business as Usual*, covers practices ranging from reducing waste and the use of toxic adhesives to getting breaks on insurance premiums for energy-efficient buildings. The report is posted at <http://tinyurl.com/3h3e6d>.

Finally, the U.S. Environmental Protection Agency (EPA) has launched a new initiative to encourage the building industry to adopt green building practices and to enhance public awareness of the benefits of green buildings. As part of the effort, the EPA has created a new web site (www.epa.gov/greenbuilding) with useful links to help property owners and developers deploy more resource-efficient models of construction, renovation, operation, maintenance and demolition.

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