



U.S. Department of Housing and Urban Development

**Office of Inspector General**

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Issue Date

June 16, 2009

Audit Report Number

2009-LA-0801

MEMORANDUM FOR: Dominique G. Blom, Deputy Assistant Secretary, Office of Public Housing Investments, PI

*Joan S. Hobbs*

FROM: Joan S. Hobbs  
Regional Inspector General for Audit, 9DGA

SUBJECT: Corrective Action Verification  
Housing Authority of Maricopa County – Mixed-Finance  
Development Activities, Phoenix, Arizona  
Audit Report 2005-LA-1002

### **INTRODUCTION**

We performed a corrective action verification for audit recommendation 1F of Audit Report 2005-LA-1002: Housing Authority of Maricopa County – Mixed Finance Development Activities. The purpose of the corrective action verification was to determine whether U.S. Department of Housing and Urban Development (HUD) officials appropriately closed audit recommendation 1F in accordance with the management decision dated July 12, 2005.

### **SCOPE AND METHODOLOGY**

Our corrective action verification focused on recommendation 1F from Audit Report 2005-LA-1002: Housing Authority of Maricopa County – Mixed Finance Development Activities, issued March 14, 2005. We reviewed the audit report and associated supporting documentation, as well as the HUD management decision. We also reviewed applicable HUD regulations and the recorded documents at the Maricopa County Recorder's Office. Finally, we consulted with officials at the HUD Office of Inspector General (OIG) Office of General Counsel.

## **BACKGROUND**

On March 14, 2005, we issued audit report 2005-LA-1002 on the Housing Authority of Maricopa County's (Authority) management and development of two mixed-finance housing projects—Rose Terrace and Maricopa Revitalization. The audit report noted that the Authority did not obtain required HUD approval of its mixed-finance proposals for Rose Terrace and Maricopa Revitalization. The Rose Terrace project was completed in December 2002, and the Maricopa Revitalization project was completed around October 2003. The audit determined that, because the Authority did not obtain HUD approval for the mixed-finance projects, it also did not or could not make amendments to its declaration of trust, which were required by HUD to protect the low-income character of the developments and HUD's interest. The report included six recommendations, and recommendation 1F specifically addressed the Authority's failure to appropriately amend the declarations of trust as follows:

We recommended that the Deputy Assistant Secretary for Public Housing Investments

- 1F. As part of the ongoing approval process, require the Authority to prepare and submit to HUD for approval the appropriate amendments to its declaration of trust for the units included in these projects.

## **RESULTS OF REVIEW**

Our corrective action verification found that HUD officials inappropriately closed audit report 2005-LA-1002 recommendation 1F. Although the declarations of restrictive covenants were not properly recorded, HUD officials closed the recommendation without obtaining an opinion from HUD's Office of General Counsel which stated that this condition posed no significant risk to HUD.

### **Criteria**

Our audit recommendation was based on guidance for mixed-finance evidentiary materials and criteria in the mixed-finance amendment to the consolidated annual contributions contract. The guidance stated that the housing authority should submit to HUD for review evidentiary materials required in conjunction with a mixed-finance public housing development. A declaration of restrictive covenants (declaration) is the first document to be recorded and assures HUD that the public housing units will be subject to a covenant obligating the owner entity and public housing authority (and any successors in title) to

- (1) Maintain and operate the public housing units for the period required by law in compliance with all applicable public housing requirements, including the annual contributions contract and the mixed-finance annual contributions contract amendment, and
- (2) Not to encumber, demolish, or sell the public housing units without HUD approval.

The mixed-finance amendments to the consolidated annual contributions contract stated that the Authority shall require the owner entity to execute and file for record against the development, before recording any other encumbrances, a declaration of restrictive covenants in the form approved by HUD.

Recorded Documents

We reviewed documents recorded with Maricopa County to verify that the Authority appropriately executed and recorded declarations when it obtained retroactive approval of the projects from HUD. For each of the two mixed-finance projects, the declarations were not filed in the first position, and the declaration of affirmative land use and restrictive covenants agreements<sup>1</sup> were not subordinated to HUD’s declaration. The recorded documents for the two mixed-finance projects with the Maricopa County Recorder’s Office showed that the Arizona Department of Housing’s declaration of affirmative land use and restrictive covenants agreements for both projects were recorded before the HUD declaration of restrictive covenants. There was a subordination recorded in June 2008 for the Maricopa Revitalization project (subordination of deed of trust); however, this document subordinated the deed of trust and not the declaration of affirmative land use and restrictive covenants agreement. The following table lists the pertinent recorded documents.

<b>Project</b>	<b>Document recorded</b>	<b>Date recorded</b>
Maricopa Revitalization	Deed of Trust <sup>2</sup>	Aug. 14, 2003
Maricopa Revitalization	Declaration of Affirmative Land Use and Restrictive Covenants Agreement	Jan. 8, 2004
Maricopa Revitalization	Declaration of Restrictive Covenants	Aug. 24, 2007
Maricopa Revitalization	Subordination of Deed of Trust	Jun. 19, 2008
Rose Terrace	Declaration of Affirmative Land Use and Restrictive Covenants Agreement	Aug. 8, 2003
Rose Terrace	Declaration of Restrictive Covenants	Apr. 11, 2007

HUD’s Retroactive Approval

We reviewed allegations that HUD officials retroactively approved the Maricopa Revitalization and Rose Terrace projects despite advice from the HUD Office of General Counsel that the declarations should be filed in the first position. Internal HUD documents showed that the Authority requested a waiver of the requirement to subordinate the declaration of affirmative land use and restrictive covenants agreement to the declaration. HUD’s Office of General Counsel denied the waiver, stating that HUD would incur significant legal risks if the document

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<sup>1</sup> Agreement between the owner entity of the projects (Maricopa Revitalization Partnership/Rose Terrace Development Partnership) and the Arizona Department of Housing regarding federal low-income housing tax credits to the projects.

<sup>2</sup> Between Maricopa Revitalization Partnership and the Housing Authority of Maricopa County.

was not subordinated to the declaration. According to the reply from HUD's Office of General Counsel, because the tax credit declaration of affirmative land use and restrictive covenant was recorded before HUD's declaration, the owner could sell the project without retaining HUD's restrictions. Specifically paragraph 2(g) of the declaration of affirmative land use states that the owner may sell the project as long as it notifies the buyer in writing that the project is subject to the declaration of affirmative land use. Additionally, paragraph 2(j) prohibits the owner from encumbering the project unless the encumbrance complies with tax credit restrictions and loan documents.

### Conclusion

HUD officials closed recommendation 1F despite concerns by HUD's Office of General Counsel that the recorded status of the declaration posed a significant risk to HUD. HUD OIG Office of General Counsel agreed with this conclusion. If HUD program officials determined that it was appropriate to grant retroactive approval in this manner, they should have requested a revised management decision to reflect the conditions of HUD's retroactive approval. Moreover, HUD's 2005 management decision stated that additional review of the revised project documentation was required to ensure legal sufficiency. Because HUD's Office of General Counsel did not concur, we question whether legal sufficiency was ensured.

### **RECOMMENDATION**

Based on the results of our review, we are reopening recommendation 1F from Audit Report 2005-LA-1002 because HUD program officials inappropriately closed the recommendation without an opinion from HUD's Office of General Counsel that stated the recorded status of the covenants posed no significant risk to HUD. In accordance with Audits Management System Handbook 2000.06, REV-3, paragraph 8-1C, the reopened recommendation should have the final action taken within 180 calendar days of the date of this memorandum. Within 30 days, please prepare an action plan with target dates for implementing the corrective action for the reopened recommendations. The plan should be provided to HUD OIG for review and concurrence.

### **AUDITEE'S RESPONSE**

We provided a discussion draft report to your office on April 23, 2009, and held an exit conference with your representative on May 6, 2009. Your department provided written comments on May 22, 2009. It generally disagreed with our findings.

The complete text of the auditee's memorandum response, along with our evaluation of that response, is in appendix A of this report. Appendix A also reprints Attachment number 7 to the auditee's memorandum. The remaining attachments contain confidential correspondence or are too voluminous to attach. Attachments numbered 8 and 9, the Regulatory and Operating Agreements for Rose Terrace Apartments and the Maricopa Revitalization project, are available on request.

# Appendix A

## AUDITEE COMMENTS AND OIG'S EVALUATION

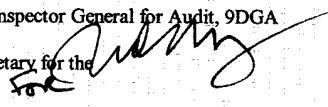


U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-5000

OFFICE OF THE ASSISTANT SECRETARY  
FOR PUBLIC AND INDIAN HOUSING

MAY 22 2009

**MEMORANDUM FOR:** Joan S. Hobbs, Regional Inspector General for Audit, 9DGA

**FROM:** Dominique Blom, Deputy Assistant Secretary for the Office of Public Housing Investments, PI 

**SUBJECT:** Corrective Action Verification Housing Authority of Maricopa County  
Mixed Finance Development Activities, Phoenix, Arizona  
Audit Report 2005-LA-1002-Recommendation 1F

This is in response to your April 23, 2009, Discussion Draft Memorandum Report, on the subject audit and a telephone meeting that was held May 5, 2009 to discuss the corrective action verification on Audit Report 2005-LA-1002, which was officially closed August 30, 2007. Based on a hotline complaint, your office performed a corrective action verification on audit recommendation 1F of the subject audit to determine whether U.S. Department of Housing and Urban (HUD) officials appropriately closed audit recommendation 1F in accordance with the management decision, dated July 12, 2005.

Recommendation 1F was as follows: As part of the ongoing approval process, require the Authority to prepare and submit to HUD for approval the appropriate amendments to its declaration of trust for the units included in these projects.

The audit report 2005-LA-1002 concluded that the Housing Authority of Maricopa County (HAMC) failed to obtain the proper HUD approvals prior to the closing of two mixed-finance housing projects, Rose Terrace Apartments and Maricopa Revitalization Project. The audit determined that because the Authority did not obtain HUD approval for the mixed-finance projects, it also did not make the necessary amendments to its declaration of trust, which was required by HUD to protect the public housing units in the development. Your office and this office mutually agreed to the management decision on audit recommendation 1F.

### **Corrective Action Taken**

On August 29, 2007, this office provided the corrective action taken to close the above recommendation as follows:

"Deputy Assistant Secretary for Public Housing Investments, Dominique Blom, delegated authority to Mary Kuhn, Grant Manager, to work with HAMC to prepare and submit to HUD for approval the appropriate amendments to its Declaration of Trust (DOT) for the public housing units in the Rose Terrace Project and the Maricopa Revitalization Project. HAMC submitted, for HUD's review, the DOTs along with other evidentiary documents for both the Rose Terrace Apartments Project and the Maricopa Revitalization Project. In the letters approving the Proposal and evidentiary documents (Attachments 1 and 2 to

8/29/07 memo), HUD instructed HAMC to execute the DOTs and return copies to HUD along with the other evidentiary documents for each project. The DOT for Rose Terrace (Attachment 5 to 8/29/07 memo) was executed by HAMC on November 17, 2006 and was recorded on April 11, 2007. The DOT for the Maricopa Revitalization Project (Attachment 6 to 8/29/07 memo) was executed by HAMC on August 21, 2007 and was recorded on August 24, 2007. OPHI requests that Recommendation 1F be closed and appropriately recorded in ARCATS.”

As a part of the corrective action verification you determined that audit report 2005-LA-1002 recommendation 1F was closed inappropriately because the DOTs were not recorded in first position and that HUD officials closed the recommendation without obtaining an opinion from HUD’s Office of General Counsel, which stated that this condition posed no significant risk.

**Rose Terrace**

For the Rose Terrace, this office, the Office of Public Housing Investments (OPHI) was well aware that the Declaration of Affirmative Land Use and Restrictive Covenant, originated by the Arizona Housing Finance Agency (AHFA), was recorded in first position several years prior to the HUD approval. In addition, prior to the closing of this project, AHFA had communicated that it was unwilling to subordinate its use agreement. As a result, there was significant discussion between Mary Kuhn, the OPHI Grant Manager; Sue Wilson, at the time OPHI Team Leader; Chris Hornig, attorney representing HAMC; and Rori Bailin and Althea Forrester, Office of General Counsel, Assisted Housing Division, on how to handle this and whether or not it would be acceptable. The following are some of the electronic mail discussions concerning the Rose Terrace request for final evidentiary approval.

- o August 1, 2007 – Mary Kuhn, via electronic mail (Attachment 1), forwards a request from Chris Hornig requesting that a waiver for Rose Terrace’s DOT be recorded in second position. This message contains additional email discussion between Dominique Blom, Deputy Assistant Secretary, and Chris Hornig.
- o August 2, 2007 – Dominique Blom and Althea Forrester, via electronic mail (Attachment 2), agree that there is nothing to waive as there is no regulatory requirement regarding the position of the DOT, and are determined to find a way to make both documents work together to close the deal and protect HUD’s interest.
- o August 2, 2007 – Mary Kuhn, via electronic mail (Attachment 3), communicated to Chris Hornig that HUD had serious concerns about the DOT potentially being recorded in second position. On August 3, 2007 (also Attachment 3), Chris Hornig responded with an opinion from William Simms, an attorney with expertise in Arizona State Law, which states that under Arizona state law the order of recordation does not affect the enforceability of public housing regulations (also located in Attachment 5).

Comment 1

- August 3, 2007 – Chris Hornig, via email (Attachment 4), provides his own letter regarding this matter.
- August 22, 2007 – Sue Wilson, via electronic mail (Attachment 6), summarizes the status of the audit and a series of conversations that were held verbally with the OGC:
  - Specifically, for the Maricopa Revitalization project, HAMC is now signing and recording the documents so that they can return the mixed finance amendments and the recorded DOT....recorded in first position.
  - On Rose Terrace, Sue Wilson directed Mary Kuhn and Gwen Watson to approve the final evidentiaries with the public housing DOT subordinate to the state's use agreement with the following justification:
    - While it is HUD's practice to require that the DOT be recorded in first position, there is no regulatory requirement to this effect.
    - Letters from Chris Hornig and William Simms state that under Arizona state law, the subordination does not effect the requirement that the public housing units remain as public housing for 40 years.
    - The project originally closed over 3 years prior (to 2007) and it would take much time and effort to get the state to agree to allow HUD's DOT to be recorded first.
    - There is no regulatory requirement that the DOT be in first position, only a requirement that a DOT must be recorded on the property requiring that the units remain as public housing for 40 years. OGC (Althea Forrester) has communicated to Sue Wilson that it would be a program decision to approve the project with the DOT in second position.

**Maricopa Revitalization Project**

For the Maricopa Revitalization Project, it was the OPHI's understanding that the project would be closed in accordance with the direction provided in HUD's approval letter, dated August 17, 2007, which specifically stated that the DOT should be recorded in first position. Final evidentiary documents were submitted to Mary Kuhn on October 7, 2007. After a number of inquiries to HAMC, title information was received by Marcel Insua, Field Office General Counsel for Los Angeles in August 2008. He reviewed the title information and at this point, determined that the DOT was in second position and that the Declaration of Affirmative Land Use and Restrictive Covenants Agreement had been recorded on January 8, 2004. Mr. Insua informed OPHI of this problem on October 2, 2008. At Ms. Wilson's request, Ms. Kuhn followed up with a longer memo on this situation on October 28, 2008.

**OPHI Actions**

HAMC did not comply with OPHI's instructions regarding the Maricopa Revitalization Project and did not notify OPHI that it was unable to comply with these instructions. Following the receipt of OIG's Corrective Action Verification memo of April 23, 2009, OPHI conducted a review of the facts surrounding this case and had additional discussions with Althea Forrester.

Comment 2

### Comment 3

In response to OPHI's request, Ms. Forrester provided OPHI with the opinion found in Attachment 7. She opined as follows regarding the Maricopa Revitalization Project, "As discussed in the above paragraph, the fact that the Tax Credit Covenant was recorded ahead of HUD's DORC did not result in a per se violation of these requirements." The above paragraph states the following, "The regulation at 24 CFR 941.610(a)(2)(i) requires that HUD approve an arrangement of public record that will assure to HUD's satisfaction that the public housing units will be available for use by eligible low-income families in accordance with all applicable public housing requirement for the maximum period required by law. The determination as to whether something is to HUD's satisfaction is political rather than legal. While OGC identified some risk to HUD's interests in allowing the DORC to be recorded in second position, it was within OPHI's discretion to evaluate those risks and determine how to proceed."

In the discussion held with your office May 5, 2009, it appeared that the OIG's primary concern was whether there is risk to HUD if our DOT for both projects remain in second position in the event that the current ownership entity sells the property. After reviewing all aspects of this situation, OPHI's position is that risk to the public housing units is minimal. The Regulatory and Operating Agreement for Rose Terrace was recorded on April 11, 2007 and on August 24, 2008 for Maricopa Revitalization. These recorded documents clearly state that the public housing units must be available for use by eligible low-income families for a term of 40 years. Further, Article 9, Disposition and Encumbrance, requires that HUD be notified and approve in writing any change in the event of disposition of the property. These documents have been attached for your review (Attachment 8 and 9).

We have also considered the opinion from attorney William Simms, dated August 3, 2007 (Attachment 5). He opined that under Arizona State Law that the use restrictions, regardless of position recorded, would be enforceable. Should the property be sold and should AHFA remove its use agreement, meaning that the units would no longer be Low-Income Housing Tax Credit units, HUD's Declaration of Trust would still be recorded on the property and would still be in effect. At this point, HUD would still have the ability to enforce its use restriction so that the units are operated as public housing.

As a final measure, we have also reached out to the AHFA. On May 13, 2009, Sue Wilson and Belinda Bly, contacted Dana David, Assistant Attorney General, at AFHA. Mr. David reconfirmed that AHFA would not subordinate its use agreement. He indicated that his agency would be willing to work with us to record an amendment to the Declaration of Affirmative Land Use and Restrictions Covenants to include a notification to HUD in the event of a sale or ownership interest change (Attachment 10). He indicated that he would review this matter with his colleagues and then get back to us. At this point, we have not heard back from him.

Based on all information reviewed in this case and reconfirmation from the AFHA that it is still unwilling to subordinate their use agreement, and in the interest of preserving valuable low income housing, the following contains several options that should mitigate the concerns raised by your office in the draft corrective action verification report transmitted on April 23, 2009:



**Proposed Management Decision Options**

**Comment 4**

Option (1) - The OPHI does not believe that it closed the OIG Recommendation of the subject audit inappropriately or without significant discussion with OGC regarding our authority to make decisions based on the unusual situations that were presented with the closing of each of these mixed-finance projects. Based on the discussion above and documents provided that may not have been included in the OIG initial review, we respectfully request that the closure of Recommendation 1F not be reopened.

**Comment 5**

Option (2) - The final evidentiary submissions of executed documents for both projects were not submitted directly to this office. Instead, the documents were submitted directly to Mary Kuhn, who is an out-stationed OPHI Grant Manager in HUD's Santa Anna Office. On May 19, 2009, OPHI confirmed that Ms. Kuhn has the complete set of executed, recorded final evidentiary documents for both projects in the Santa Ana Office and these documents have not yet been submitted to Headquarters for archiving. Due to the volume of paper, we recommend that the OIG consider reviewing the final evidentiary documents in the Santa Ana Office, to get assurance that it is the intention of the housing authority, HUD and the current owner to operate the projects pursuant to the terms of HUD's DOT. If the OIG prefers we will have the documents photocopied and submitted to your office on or before June 30, 2009. Following your review, we would anticipate that the reopening of Recommendation 1F be closed.

**Comment 6**

Option (3) - This office proposes to request that AFHA record an amendment to its Declaration of Affirmative Land Use and Restrictions Covenants that will require the owner to notify the Department if the property is sold. Although there are notification provisions currently in the Mixed-Finance Amendment (Section 9), and the DOT, by taking this action, OPHI will further ensure that it is notified if there is a change in ownership or use of the property. The Department would be able to take remedial actions if necessary in the event that the new owner instituted any changes that would conflict with the DOT. Our office proposes that this action be completed by December 1, 2009. In the event that the document is recorded any earlier, our office would notify you immediately for closure of the reopen of Recommendation 1F.

If you or your staff have any questions or concerns, please contact Belinda Bly, Team Leader, or Sue Wilson, Director, Office of Urban Revitalization, on extensions, 4104 or 4500, respectively.

**Attachments**

- (1) August 1, 2007 electronic mail from Mary Kuhn to Sue Wilson
- (2) August 2, 2007 electronic mail between Dominique Blom and Althea Forrester
- (3) August 2, 2007 electronic mail from Mary Kuhn to Chris Hornig
- (4) August 3, 2007 electronic mail from Chris Hornig to Mary Kuhn
- (5) Letter dated August 3, 2007 from William Simms
- (6) August 22, 2007 electronic mail from Sue Wilson to Gwen Watson and Mary Kuhn
- (7) May 13, 2009 electronic mail from Althea Forrester to Sue Wilson

- (8) Regulatory and Operating Agreement for Rose Terrace Apartments, recorded April 11, 2007
- (9) Regulatory and Operating Agreement for Maricopa Revitalization project, recorded August 24, 2007
- (10) May 13, 2009 electronic mail from Sue Wilson to Dana David

cc: Peter Schmiedel, Audit Liaison Officer for PIH Audit, Evaluations, and Risk Management Division, PCE



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

MAY 19 2009

NOTE TO: Susan Wilson, Director, Urban Revitalization Division, Office of Public Housing Investments, PIU

From: *Althea M. Forrester*  
Althea M. Forrester, Assistant General Counsel, CDH

SUBJECT: Housing Authority of Maricopa County Rose Terrace and Maricopa County Revitalization Mixed-Finance Projects; recording position of Declaration of Restrictive Covenants

Two mixed-finance projects conducted between the Housing Authority of Maricopa County (HAMC) and HUD, Rose Terrace (closed 12/29/06) and the Maricopa County Revitalization Project (closed 08/17/07), were closed with a Declaration of Affirmative Land Use and Restrictions Covenants (the Tax Credit Covenant) originated by the Arizona Housing Finance Authority recorded in first priority on the respective properties over HUD's Declaration of Restrictive Covenant. As will be discussed below, this is contrary to standard HUD policy but not an inherent violation of legal requirements or regulations.

During the final evidentiary submission phase of the Rose Terrace deal in August, 2007, counsel for the investor, the law firm of Klein Hornig, requested that HUD not require the Tax Credit Covenant, which was already recorded in first position, to be subordinated to HUD's Declaration of Restrictive Covenants (the DORC). The Office of Public and Indian Housing (OPIH) sought the advice of the Office of General Counsel (OGC) via email on whether to permit this. OGC attorneys reviewed the Tax Credit Covenant and advised OPIH that there were several provisions in the Tax Credit Covenant, which could, if recorded prior to HUD's DORC, compromise HUD's interest in the property and, accordingly, recommended that the OPIH require that the Tax Credit Covenant be subordinated. OPIH conveyed these concerns to the investor's counsel and received in response an opinion from HAMC's counsel, William Simms of Moyes Storey, that both sets of restrictive covenants (HUD's Declaration of Restrictive Covenants and the Tax Credit Covenant) would be equally enforceable and applicable regardless of their recording order. In a subsequent discussion with OPIH, OGC attorneys informed PIH that the opinion espoused in the Simm's letter was a matter of local law to be evaluated by HUD's field counsel. In that conversation, OGC again recommended subordinating the Tax Credit Covenant to the DORC, but advised that it was ultimately a business and policy decision as to whether recording the DORC in second position was satisfactory. The regulation at 24 C.F.R. 941.610(a)(2)(i) requires that HUD approve an arrangement of public record that "will assure to HUD's satisfaction that the public housing units will be available for use by eligible low-income families in accordance with all applicable public housing requirements for the

Comment 7

[www.hud.gov](http://www.hud.gov)

[espanol.hud.gov](http://espanol.hud.gov)

maximum period required by law." While OGC identified some risk to HUD's interests in allowing the DORC to be recorded in second position, it was within OPIH's discretion to evaluate those risks and determine how to proceed.

The Maricopa Revitalization Project was closed and completed the final evidentiary submission and approval phase without HUD's knowledge of a Tax Credit Covenant being recorded in first position over HUD's DORC due to an issue HUD's field counsel had with getting the current title documents. The recording order was not noted until updated title documents were received after closing. OGC was asked to weigh in on this issue and advised that various remedies could be taken if the actual recording order resulted in a violation of the Applicable Public Housing Requirements, specifically the ACC and the regulations at 24 C.F.R. 941 Part F. As discussed in the above paragraph, the fact that the Tax Credit Covenant was recorded ahead of HUD's DORC, did not result in a per se violation of these requirements. However, the lack of disclosure about the recording order and the fact that the approval letter written by HUD likely assumed that the DORC was recorded first (as is standard HUD policy) generated a new set of concerns and potential remedies.

## OIG Evaluation of Auditee Comments

### Ref to OIG Evaluation

### Auditee Comments

- Comment 1** The attached electronic mail (Attachment 2) did not provide evidence that, at that time, Ms. Forrester, HUD OGC, agreed that there was nothing to waive as there is no regulatory requirement regarding the position of the declaration of trust. The electronic mail only provided evidence that Ms. Forrester stated that she did not believe it is a waiver that can be granted.
- Comment 2** We acknowledge that title information (which showed the declaration of trust was in second position) for the Maricopa Revitalization Project was not received until after the recommendation was closed in August 2007. This information supported our conclusion that the declarations of restrictive covenants were not recorded in the first position as required and, therefore, the reason we recommend reopening recommendation 1F from Audit Report 2005-LA-1002.
- Comment 3** We agree with Ms. Forrester's opinion dated May 19, 2009 in Attachment 7 that 24 CFR 941.610(a)(2)(i) requires that HUD approve an arrangement of public record that will assure to HUD's satisfaction that the public housing units will be available for use by eligible-low income families in accordance with all applicable public housing requirements for the maximum period required by law. We also note that language in the mixed-finance amendments to the consolidated annual contributions contract between HUD and the Housing Authority of Maricopa County was more restrictive, and stated that the Authority shall require the owner entity to execute and file for record against the development, before recording any other encumbrances, a declaration of restrictive covenants in the form approved by HUD.
- Comment 4** We do not agree with option (1) because the Office of Public Housing Investments closed the audit recommendation 1F without notifying OIG that HUD OGC had concerns regarding the filing of the declarations of restrictive covenants in the second position. The Deputy Assistant Secretary for Public Housing Investments should have made HUD OIG aware that, although HUD OGC had concerns, a program decision was made to approve the closing documentation despite this condition. The basis of the program decision should also have been provided to OIG at that time.
- Comment 5** Option (2) does not address our concerns that the declarations of restrictive covenants were not properly recorded.
- Comment 6** Option (3) presents a possible solution. We could accept a revised management decision that states the Deputy Assistant Secretary for Public Housing Investments should request an amendment to the Declaration of Affirmative Land

Use and Restrictive Covenants for Rose Terrace and Maricopa Revitalization to require the owner to notify the Department if the property is sold.

Alternatively, the Office of Public Housing Investments could submit a revised management decision for recommendation 1F to explain that the declarations of restrictive covenants for Rose Terrace and Maricopa Revitalization were not recorded in first position and include the reasons this condition was determined to be acceptable. In addition the revised management decision and corrective action plan should disclose the communications with HUD OGC.

**Comment 7** When HUD closed recommendation 1F in August 2007, it did not disclose the fact that HUD OGC identified some risk to HUD's interests in allowing the declaration to be recorded in second position but ultimately advised that it was a business and policy decision as to whether recording the declaration in second position was satisfactory. This information, provided here in the May 19, 2009 letter from HUD's Assistant General Counsel, should have been disclosed to the OIG.