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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated, Plaintiffs, v. STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawai'i; HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i.	CIVIL NO. CV04 00309 DAE KSC (Class Action) **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT; DECLARATION OF GAVIN K. THORNTON; EXHIBITS "1" - "3"; CERTIFICATE OF SERVICE** Hearing: Date: July 11, 2005 Time: 10:30 a.m. Judge: David Alan Ezra

Defendant.)
)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT

Plaintiffs RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER, by and through their counsel, Alston Hunt Floyd & Ing and Lawyers for Equal Justice, respectfully submit this reply in further support of their Motion for Partial Summary Judgment filed on March 16, 2005, and in opposition to Defendants' Counter-Motion for Summary Judgment filed on June 21, 2005.

I. INTRODUCTION

Defendants do not dispute that they violated Plaintiffs' federal rights by failing to comply with the U.S. Housing Act (Count I of Plaintiffs' Complaint) and Section 1983 (Count III). *Defendant's Counter-Motion for Summary Judgment, page 2; see also Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Counter-Motion for Summary Judgment.* Since there are no disputed issues of material fact with respect to Plaintiffs' claims, and since Defendants have admitted that they violated Plaintiffs' rights under these laws, summary judgment should be granted for Plaintiffs on Counts I and III of Plaintiffs' complaint.

Though Defendants do not dispute that they violated Plaintiffs' rights under federal law, in Defendants' cross-motion for summary judgment, they argue that there is no existing case or

controversy and that Plaintiffs' suit is moot. However, as the remainder of this memorandum demonstrates, Defendants' allegations of mootness are unfounded as they have yet to take all necessary measures to comply with federal law and have failed to meet their heavy burden of clearly showing that their unlawful actions could not reasonably be expected to recur.[1]

II. ARGUMENT

The U.S. Supreme Court has set forth the rule that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v.*

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[1]A related case, *Amone v. Aveiro,* Civ. No. 04-508ACK, United States District Court for the District of Hawaii, was filed in August 2004 by disabled public housing tenants who have been denied their rights to receive notice of and request increased utility allowances as a result of their need for medical devices using electricity. In *Amone*, as in the instant case, Defendants' argued in their counter-motion for summary judgment that the case had become moot. On May 31, 2005, the Honorable Alan C. Kay issued an order granting Plaintiff's Motion for Partial Summary Judgment and denying Defendants' Counter-Motion for Summary Judgment on the grounds that Defendants had not taken sufficient action to render Plaintiff's claims moot.

In its May 31st order, the Court acknowledged that the standard that Defendants had to overcome to prevail on their mootness argument was set forth in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000): "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Order Denying Defendants' Counter-Motion for Summary Judgment, Civ No. 04-508ACK* at 23. Although Defendants had updated the supplemental utility allowances that were to be given to qualifying disabled tenants, had notified public housing residents of their rights to receive such allowances, and had submitted proposed rules for public hearing, the Court found the Plaintiffs' claims in *Amone* were not moot. *See id.* at 18. With respect to Defendants' failure to satisfy the *Laidlaw* standard, the Court stated, "The burden is a heavy one and Defendants here have not established that the unlawful conduct alleged by Plaintiffs has been fully addressed nor have they shown that there is no reasonable expectation that such conduct will recur." *Id.* at 23. The present case is no different. Though Defendants have begun to take some corrective measures, their unlawful conduct has yet to be fully addressed, and Defendants have failed to show that there is no reasonable expectation such conduct will recur.

McCormack, 395 U.S. 486, 496 (1969)). However, the burden of demonstrating mootness "is a heavy one." *Davis*, 440 U.S. at 631 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)). To do so, the party alleging mootness must demonstrate:

(1) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation, *Davis*, 440 U.S. at 631 (1979); and

(2) that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000)(emphasis added)(quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)); *see also Davis*, 440 U.S. at 631.[2]

Defendants have not met their burden with regard to demonstrating that they have fulfilled either of these requirements. Plaintiffs claims are not moot.

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[2]In Defendants Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment Filed on March 21, 2005 and in Support of Counter-Motion for Summary Judgment, Defendants cite to *Green v. Joy Cone Co.*, 278 F.Supp. 2d 526, 543 (W.D.Pa. 2003) and *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), to imply that the burden is on the Plaintiffs to defend against an allegation of mootness by showing that there is a "great likelihood that the defendant will continue its illegal practices or will violation the same provisions again." As recognized in Judge Alan C. Kay's May 31, 2005 order in *Amone, supra*, this is not the appropriate standard. The true standard set forth in *Laidlaw* and *W.T. Grant Co.*, is that the defendant carries the burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 633. As discussed below, Defendants have not met this burden. The quotation used by defendants from *Green* does not pertain to mootness in cases of voluntary cessation of unlawful activity. *Green* does not consider the question of mootness, and the quote was made in the context of a discussion on standing. *See Green*, 278 F.Supp. 2d at 543.

A. Defendants Remain in Non-Compliance with the Laws upon which Plaintiffs' Claims are Based

1. Defendants Have Not Implemented New Utility Allowances Based on a Review of the Basis of the Allowances as Required by 24 C.F.R. § 965.507.

Defendants inaccurately claim in their counter-motion for summary judgment that the utility allowances have already been adjusted in accordance with 24 C.F.R. § 965.507. As alleged in Plaintiffs' Complaint, there are two components to 24 C.F.R. § 965.507 with which Defendants failed to comply. Subsection (b) requires that the utility allowances be regularly revised to account for changes in the utility rates.[3] Defendants claim that they have updated the utility allowances to account for changes in the utility rates and that public housing residents are now receiving these updated allowances (i.e. dollar allowances). However, subsection (a) of 24 C.F.R. § 965.507 requires that the Housing and Community Development Corporation of Hawaii ("HCDCH") annually review the *basis* on which utility allowances have been established (i.e. the estimates of resident utility consumption in terms of kilowatt hours

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[3]As discussed in Plaintiffs' Motion for Partial Summary Judgment, filed on March 16, 2005, for the sake of clarity, the term "utility allowance" can be separated into two distinct concepts: the "consumption allowance" and the "dollar allowance." The "consumption allowance" is the utility allowance provided to residents in terms of kilowatt hours of electricity or Therms of gas. It is an estimate of what an "energy-conservative household of modest circumstances" would reasonably consume "consistent with the requirements of a safe, sanitary, and healthful living environment." *See* 24 C.F.R. § 965.505(a). Once the consumption allowances are determined, they must be converted into terms of dollars so that residents who pay for their own utilities can be reimbursed in the form of a rent credit. This "dollar allowance" is calculated by determining how much it would cost for a tenant to purchase the quantity of utilities allotted for in the consumption allowances. While consumption allowances may stay fairly constant over time, the dollar allowances fluctuate according to fluctuations in the utility rates.

and Therms, hereinafter referred to as "consumption allowances") and revise these allowances where required. As indicated by HCDCH's proposal of new administrative rules, HCDCH has determined that new consumption allowances are required to comply with federal law governing the utility allowances. However, Defendants do not suggest that the new consumption allowances that HCDCH has proposed have been implemented. *See Defendant's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Counter-Motion for Summary Judgment.* Not a single resident of public housing receives the allowance that HCDCH has determined they should receive in order to be in compliance with 24 C.F.R. § 965.507(a). Defendants have yet to comply with federal law, and thus Plaintiffs' claims cannot be moot.

2. Defendants Have Not Fully Promulgated Rules Sufficient to Satisfy the Requirements of 24 C.F.R. § 965.507.

Defendants claim that they have promulgated rules that bring them into compliance with the utility allowance requirements of the U.S. Housing Act and its supporting regulations, rendering Plaintiffs' claims moot. This claim is false. Though Defendants appear to be *in the process* of adopting new rules regarding the utility allowance, by Defendants' own admission, the adoption of such rules are not yet complete. *Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment Filed on March 21, 2005 and in Support of Counter-Motion for Summary Judgment, pages 2 and 4-5.*

Pursuant to Hawaii's "Sunshine Laws" located in Chapter 91 of the Hawaii Revised Statutes, to adopt rules such as those governing utility allowances for public housing residents, Defendant HCDCH must comply with the requirements for a rulemaking.[4] These requirements include, *inter alia*, that HCDCH submit the rules for public notice and comment, and that HCDCH obtain the approval of the governor for adoption of the rules. *See* Haw. Rev. Stat. § 91-3. It is a legal impossibility for HCDCH to adopt a rule prior to satisfying the rulemaking requirements of Haw. Rev. Stat. § 91-3. Any rule not promulgated in accordance with Chapter 91 of the Hawaii Revised Statutes is invalid and unenforceable. *Aiona v. Unemployment Comp. Apeals Div.*, 62 Haw. 286, 614 P.2d 380 (1980). Defendants cannot claim that they have adopted valid rules regarding the utility allowances in public housing, and thus cannot claim that they are operating in accordance with federal law.

3. **Defendants Have Not Certified as to the Accuracy of the Utility Allowance Adjustments Provided to Residents.**

Defendants bear the formidable burden of showing that Plaintiffs' claims are moot. *Friend of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000). It is not sufficient for

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[4]Defendant HCDCH is subject to the requirements of Hawaii's Administrative Procedure Act at Chapter 91 of the Hawaii Revised Statutes. Haw. Rev. Stat. § 201G-4. Pursuant to Haw. Rev. Stat. § 91-1, a "Rule" is defined in part as "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency..." The utility allowance schedules for public housing residents fall within the definition of a rule. Pursuant to Haw. Rev. Stat. § 91-3, in order to promulgate a rule, HCDCH must satisfy certain requirements including the provision of a public notice and comment period and obtaining approval from the governor.

Defendants to claim that they took some action in an attempt to remedy non-compliance with federal law. Defendants must also provide assurances that the actions taken actually remedied the non-compliance. Defendants have not provided any assurances that the utility allowance adjustments provided to residents in October 2004 were based on accurate information. Plaintiffs do not dispute that adjustments to the utility allowances based solely on utility rate changes (i.e. adjustments to the dollar allowances) were made in October 2004 and that counsel for Plaintiffs were given an opportunity to review the proposed adjustments. However, the information provided by Defendants to counsel for Plaintiffs regarding utility allowances throughout the course of this dispute has been inconsistent and it is not clear that the allowances that all public housing residents are currently receiving are based on accurate information.[5] *See Declaration of Gavin K. Thornton* at ¶¶ 3 and 4. For example, Exhibit "AA" of Defendants' counter-motion for summary judgment (the document provided to counsel for Plaintiffs by Defendant prior to the October 2004 utility allowance adjustment) shows that tenants of the Kauhale Nani project living in one, two, and three-bedroom units were supposed to receive an additional $68, $79, and $92 per month respectively to account for the increased utility allowance. However, Exhibit "A" of Defendants counter-

[5] Defendants' counter-motion for summary judgment improperly includes two settlement communications from counsel for Plaintiffs, attached to Defendants' motion as Exhibits "BB" and "CC". Exhibit "BB" refers to a number of inconsistencies in the utility allowance information provided to Plaintiffs' counsel by counsel for Defendants. The clarifications requested regarding the inconsistencies were never provided.

motion, the utility allowance schedule purportedly put into effect on October 2004, shows the increases for Kauhale Nani tenants as being $77, $91, and $106 respectively. Plaintiffs filed this lawsuit to ensure that Defendants complied with the federal laws governing utility allowances with which Defendants, by their own admission, failed to comply. Plaintiffs are entitled to certification that Defendants adjustments to the utility allowances are accurate. Defendants should not be permitted to avoid such a requirement and tailor their own relief by claiming that the suit is now moot.

B. Defendants Have Not Met the "Heavy Burden" of Establishing that the Alleged Voluntary Cessation of their Unlawful Conduct has Made Plaintiffs' Claims Moot.

Even if Defendants' actions since the filing of this lawsuit put Defendants in compliance with federal law, a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. *United States v. W.T. Grant Co., supra* at 632; *County of Los Angeles v. Davis, supra* at 631. The standard announced by the U.S. Supreme Court for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000)(emphasis added)(quoting *United States v. Concentrated Phosphate Export Assn.*,

Inc., 393 U.S. 199, 203 (1968)).[6] "The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* Defendants have not come close to meeting their burden.

Prior to the filing of this lawsuit, Defendants were required by federal statute and U.S. Department of Housing and Urban Development regulations to regularly review the utility allowances and revise the allowances where required. For at least seven years, Defendants failed to comply with federal law by failing to review and revise the allowances. *See Separate and Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment filed on March 16, 2005, No. 9.* Even after this lawsuit was filed in May 2004, Defendants continued to provide insufficient utility allowances to tenants until October 2004 when the dollar allowances were updated, thereby overcharging families in public housing on their rent by as much as $156 per month. *See Exhibit "A" attached to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment Filed on March 21, 2005 and in Support of Counter-Motion for Summary Judgment, Filed on June 21,*

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[6]Defendants state that the standard for determining mootness in voluntary cessation cases set forth in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), is not applicable to the present case, though Defendants' memorandum does not state why. The standard set forth in *Laidlaw*, that a defendant claiming that its voluntary compliance moots a case bears the burden of showing that it is clear the allegedly wrongful behavior could not reasonably be expected to recur, *id.* at 190, is reiterated again and again in the cases cited by Defendants discussing mootness in voluntary cessation cases. *See e.g. United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1283 (2004). This is the standard that Defendants must, and cannot, meet.

2005. Even after the October 2004 update, Defendants remained, and continue to remain, in non-compliance with federal law because they have yet to provide public housing residents with a revision to their utility allowances that accounts for changes to the basis upon which the utility allowances were established (i.e. changes to the consumption allowances). After Plaintiffs' Partial Motion for Summary Judgment was filed on March 21, 2005, Defendants submitted proposed rules regarding changes to the consumption allowances for public comment, but these rules have yet to be implemented. *See Declaration of Gavin K. Thornton* at ¶ 5. In light of Defendants' blatant violations of federal law, the mere promulgation of new administrative rules that have yet to be implemented does little to show that Defendants have ceased their unlawful conduct and will not again fail to update the allowances in the future.[7] Nor does the Interoffice Memorandum (attached to Defendants' counter-motion as Exhibit "C") dated the day before Defendants filed their counter-motion for summary judgment provide adequate assurances that Defendants have complied, and will continue to comply, with federal laws governing the utility allowances.

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[7]It should be noted that even if Defendants were to comply with the proposed rules, the rules are not sufficient to guarantee compliance with federal law. 24 C.F.R. § 965.507(b) requires that revisions to the utility allowances based solely on utility rate changes are to be effective retroactively "to the first day of the month following the month in which the last rate change taken into account in such revision became effective." The rules proposed by HCDCH contain no similar requirement. Indeed, it appears from the proposed rules at § 17-2028-7(d) that the new allowances will be effective on July 1 of each year, not to be applied retroactively to the date of the rate change. Additionally, by the time that the new allowances were implemented, the utility rates upon which the new allowances were based would be 7 to 19 months old. *See* Proposed Rules § 17-2028-7(c)-(d).

The facts in this case differ significantly from the cases cited by Defendants where a plaintiff's claims were dismissed based on mootness. In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), a plaintiff's claims were determined to be moot by the U.S. Supreme Court where it was undisputed that the defendant had ceased its unlawful acts for a period of *five years* following the issuance of an injunction by the district court. The Court concluded that there could be no reasonable expectation that the defendant would use an invalidated civil service examination that had subsequently been replaced and that was only going to be used initially to address a temporary emergency shortage of workers. *Id.* at 632-33. The Court emphasized the fact that the earlier conditions were unique, no longer present, and unlikely to recur. *Id.* at 632. The case at hand is distinguishable from *Davis* because here Defendants have only recently begun to take corrective actions, these actions are not complete, and Defendants' compliance with the applicable statutes and regulations remains at issue.

Defendants also rely on *Troiano v. Supervisor of Elections in Palm Beach County, Florida*, 382 F.3d 1276 (11th Cir. 2004). In *Troiano*, a group of visually impaired voters brought a class action suit against the county elections supervisor, alleging that the county's failure to make auxiliary audio devices available in voting booths to assist visually impaired voters violated the Americans with Disabilities Act. *Id* at 1278. The United States Court of Appeals for the Eleventh Circuit held that the case had been rendered moot because there was ample evidence that defendant had

changed its unlawful policy and ceased its unlawful practices before even being served with the lawsuit. *Id.* at 1280-1281. In the present case, there has been no similar demonstration that Defendants have even begun to comply with the laws upon which this suit is based.

III. CONCLUSION

Based on the foregoing, Plaintiffs Motion for Partial Summary Judgment must be granted for Counts I and III of Plaintiffs' Complaint. Defendants violated Plaintiffs' rights under federal law and do not dispute doing so.

Defendants' contention that the Plaintiffs' claims are moot is unfounded. While Defendants have started to take corrective actions to attempt to bring themselves in compliance with federal law, they have yet to take the all the remedial action necessary to comply with the requirements of the U.S. Housing Act. Defendants have not sustained their burden of showing that their unlawful conduct has ceased and is unlikely to be repeated. Defendants counter-motion for summary judgment must be denied.

DATED: Honolulu, Hawaii, June 30, 2005.

SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

RODELLE SMITH, et al.,	) CIVIL NO. CV04-00508 ACK/BMK
	) Class Action
Plaintiff,	)
v.	) **DECLARATION OF GAVIN K. THORNTON; EXHIBITS "1"-"3"**
STEPHANIE AVEIRO, et al.,	)
	)
Defendants.	)
	)

DECLARATION OF GAVIN K. THORNTON

GAVIN K. THORNTON, under penalty of perjury, declares and states the following to be true and correct:

1. I am an attorney with the law firm of Lawyers for Equal Justice, counsel for Plaintiffs.

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. Throughout the course of this dispute, Defendants have provided counsel for Plaintiffs with information regarding the utility allowances in public housing that has been inconsistent and contradictory. Attached hereto as Exhibit "1" is a true and correct copy of a list of the utility allowances purportedly provided to public housing tenants submitted by HCDCH in an information request response dated November 5, 2003 (the cover letter for the response is attached as Exhibit 3 of the Separate and Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment that was filed on March 16, 2005). A comparison of this document to the "Current utility allowance" columns of Exhibits "A" and "AA" of

Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment Filed on March 21, 2005 and in Support of Counter-Motion for Summary Judgment, which was filed on June 21, 2005, provides an example of the inconsistency of this information.

4. Attached hereto as Exhibit "2" is a true and correct copy of a July 30, 2004 letter to counsel for Defendants requesting clarification on inconsistencies in information provided by Defendants regarding the utility allowances. No response by Defendants was provided.

5. Attached hereto as Exhibit "3" is a true and correct copy of the public notice of hearings on HCDCH's proposed rules regarding the utility allowances, which, according to the notice, was published on April 22, 2005.

I declare under the penalty of perjury the foregoing is true and correct.

Executed in Honolulu, Hawaii, June 30, 2005.

GAVIN K. THORNTON

Federal LIPH Utility Allowance

AttachmentD1

Project ID	Name	$ Utility Allowance					
		0	1	2	3	4	5
HI10P001003	Mayor Wright Homes		$27	$30	$34	$38	$43
HI10P001004	Lanakila Homes		$112	$68	$157	$179	
HI10P001005	Kalihi Valley Homes		$48	$64	$81	$102	$124
HI10P001007	Kuhio Homes						
HI10P001008	Palolo Valley Homes		$39	$49	$60	$74	$88
HI10P001009	Kaahumanu Homes			$30	$34		
HI10P001010	Kuhio Park Terrace						
HI10P001011	Punchbowl Homes						
HI10P001012	Makua Alii						
HI10P001013	Lanakila Homes		$112	$133	$157		
HI10P001014	Lanakila Homes		$112	$68	$157	$179	
HI10P001015	Wahiawa Terrace						
HI10P001016	David Malo Circle						
HI10P001017	Kahekili Terrace						
HI10P001018	Kapaa						
HI10P001019	Hale Hoolulu						
HI10P001020	Eleele						
HI10P001021	Hui O Hanamaulu						
HI10P001022	Kalaheo						
HI10P001023	Home Nani						
HI10P001024	Kalanihuia						
HI10P001025	Waimanalo Homes						
HI10P001026	Puuwai Momi						
HI10P001027	Hale Laulima			$56	$70		
HI10P001028	Punahele			$133			
HI10P001029	Pomaikai						
HI10P001030	Koolau Village		$76	$90	$105	$119	
HI10P001031	Hale Hauoli						
HI10P001032	Kaimalino						
HI10P001033	Maili I						
HI10P001035	Nanakuli Homes				$82		
HI10P001036	Paoakalani						
HI10P001038	Waipahu I						
HI10P001039	Waipahu II						
HI10P001042	Maili II			$67		$100	
HI10P001044	Piilani						
HI10P001045	Pahala						
HI10P001046	Makamae						
HI10P001047	Pumehana						
HI10P001050	Kupuna Home O'Waialua						
HI10P001051	Hale Aloha O Puna						
HI10P001052	Hale Olaloa						
HI10P001053	Hale Hookipa						
HI10P001054	Hale Nani Kai O Kea						
HI10P001055	Hale Hoonanea						
HI10P001056	Kauhale Nani		$34	$42	$51		
HI10P001057	Waimaha-Sunflower		$48	$64	$81		
HI10P001061	Ka Hale Kahaluu		$41	$50	$59	$71	
HI10P001062	Kalakaua Homes		$30	$37	$43		
HI10P001063	Nani Olu		$66				
HI10P001064	Kekaha Ha'aheo		$77	$93	$110		
HI10P001066	Salt Lake		$43				

EXHIBIT 1

Federal LIPH Utility Allowance

AttachmentD1

		$ Utility Allowance					
Project ID	Name	0	1	2	3	4	5
HI10P001069	Kaneohe Apartments		$48	$64			
HI10P001070	Kealakehe		$41	$50	$59		
HI10P001071	Noelani I		$56	$77			
HI10P001072	Hookipa Kahaluu		$43	$56	$70		
HI10P001073	Spencer House			$30	$34		
HI10P001078	Noelani II				$70		
HI10P001086	Kawailehua				$110		
HI10P001088	Kahale Mua				$129		
HI10P001090	Kauhale Ohana				$37		
HI10P001091	Kau'iokalani				$34		
HI10P001092	Makani Kai Hale I				$46		
HI10P001097a	Kauhale O'Hanakahi				$74		
HI10P001097b	Ke Kumu 'Ekolu				$74		
HI10P001097c	Makani Kai Hale II				$46		
HI10P001099	Kamehameha Homes		$56	$73	$97		

LAWYERS FOR EQUAL JUSTICE

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David Reber, Esq.
President, Board of Directors

Susan Dorsey, Esq.
Executive Director

FACSIMILE COVER SHEET

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TO: John Wong
OF: Office of the Attorney General
DATE: July 30, 2004
FAX: (808) 587-2938

FROM: Gavin Thornton
OF: Lawyers for Equal Justice
FAX: (808) 263-2591

RE: *Smith v. Aviero; Amone v. Aviero (not filed)*

DESCRIPTION OF DOCUMENT(S) TRANSMITTED: (# of Pgs. including cover):

3 Pages: Cover; July 30th Letter

REMARKS:

Please see the letter that follows.

(If you do not receive all pages or if they are illegible, please call (808) 322-3045)

EXHIBIT 2

LAWYERS FOR EQUAL JUSTICE

P.O. Box 4984
Kailua-Kona, HI 96745
(808) 322-3045

David Reber, Esq.
President, Board of Directors

Susan Dorsey, Esq.
Executive Director

July 30, 2004

Mr. John C. Wong Esq.
Office of the Attorney General
Facsimile: (808) 587-2938
Sent via Facsimile

Re: *Smith v. Aviero; Amone v. Aviero (not filed)*

Dear Mr. Wong:

I received the materials that you sent earlier this week. Thank you very much for putting them together and forwarding them to us. I spoke with Ms. Floyd yesterday, and she had mentioned that you might be willing to track down additional information regarding the issues with the utility allowance. There are a few additional items listed below that will be helpful in getting these issues resolved.

Ms. Floyd asked me to clarify regarding the disability information that will be needed. Along with the number of disabled tenants in public housing, we would like to know the following if HCDCH has such information:

1. Does HCDCH have data regarding the number of disabled tenants *by project*?
2. Is the information regarding disabled tenants only gathered upon application to public housing, or is it regularly updated during a resident's tenancy?
3. How far back in time has HCDCH kept such information?
4. Does HCDCH have projects with "check-metered" utility systems (i.e. the utilities are not billed directly to the tenants, but tenants are charged by HCDCH or management if their consumption exceeds the allowances in terms of kWh or Therms)? If so, disabled tenants of those projects would be entitled to an adjustment to their allowance as well those tenants paying their utilities directly. Would it be possible to get a list of such projects?

There are also a few inconsistencies that I noticed during a preliminary review of the information HCDCH provided that will eventually need to be cleared up. They are listed below.

Mayor Wright Homes

- Earlier information said tenants receive allowances for Basic only. Recent information says Basic + Individual Solar.

Lanakila Homes I

- Earlier information said tenants receive allowances for Basic + LPN Cooking + LPN Ind HW. Recent information says Basic + Electric Cooking + LPN Cooking + LPN Ind HW.

Maile I

- Earlier information did not have Maile I listed as receiving a utility allowance. Recent information says Maile I tenants pay Basic + Cooking + Ind Solar.

Waimaha-Sunflower

- Earlier information did not distinguish between Ph I, II, and III. Is there information about how many units are in each?
- What does "shared" mean under Ind Solar for Ph II?

Kalakaua Homes

- Is there information about how many units are in Kalakaua Homes versus Kalakaua Homes low rise?

Again, thank you for all of your help. If there is anything I can do to clarify the materials we sent earlier, please do not hesitate to call. I am looking forward to meeting you on Tuesday.

Sincerely,

Gavin Thornton
Staff Attorney

NOTICE OF PUBLIC HEARING

Pursuant to Sections 91-3 and 92-41, Hawaii Revised Statutes, notice is hereby given that the Housing and Community Development Corporation of Hawaii (HCDCH), Department of Human Services (DHS), State of Hawaii, will hold public hearings on May 23, 2005 at 6:00 p.m. to consider the adoption of Chapters 17-2021 "Grievance Procedure," and 17-2028 "Federally-Assisted Housing Projects", Hawaii Administrative Rules (HAR) and the repeal of Chapters 15-183 "Grievance Procedure," and 15-190, "Federally-Assisted Housing Projects", HAR.

Act 92, Session Laws of Hawaii 2003 transferred the HCDCH from the Department of Business, Economic Development, and Tourism (DBEDT) to DHS for administrative purposes. Act 92 became effective on July 1, 2003. As a result of the transfer the appropriate chapter for administrative rules promulgated by HCDCH, formerly Title 15, is now Title 17, the title allocated to DHS. Accordingly, HCDCH's existing rules must be renumbered. The means by which this will be accomplished is to repeal the relevant rule in Title 15 and repromulgate it in Title 17. At the same time, the HCDCH has reviewed these rules and made revisions where necessary.

Adoption of Chapter 17-2021 and Repeal of Chapter 15-183

The grievance procedure is a federal requirement for federally-assisted public housing to assure that a public housing authority (PHA) tenant is afforded an opportunity for a hearing if the tenant disputes within a reasonable time any PHA action or failure to act involving the tenant's lease with the PHA or PHA regulations which adversely affect the individual tenant's rights, duties, welfare, or status. The HCDCH has also extended the grievance procedure requirement to state-assisted family public housing.

The purpose and applicability sections of the rules were changed to clarify that the grievance rules are intended to govern grievance hearings for tenants of federally-assisted public housing projects and state-assisted family public housing projects.

The Housing Opportunity Program Extension Act, Public Law 104-120, requires public housing agencies to make illegal drug use, alcohol abuse, and drug-related criminal activity grounds for eviction and disqualification from public housing and Section 8 assistance. The proposed rules state that the HCDCH shall terminate a rental agreement for those reasons.

A new subchapter was added to create an expedited grievance hearing procedure. The expedited procedure would apply to any grievance concerning the termination of a rental agreement for criminal activity threatening the health, safety, or right to peaceful enjoyment of other residents, or drug-related criminal activity. Under the expedited procedure, the grievance hearing may be scheduled promptly.

EXHIBIT 2

References to "hearing panel" throughout the rules were deleted, as under the new hearing officer selection method, there is no need for a three-person panel to hear grievances.

Time limits throughout the rules were shortened, in response to HUD's recommendations, as follows:

a. For resident to commence grievance involving HCDCH's acts or omissions: within ten business days of the act or omission (formerly thirty calendar days). §17-2021-2(c).
b. For resident to commence grievance involving HCDCH's rules: within ten business days (formerly ninety calendar days). §17-2021-2(d).
c. For HCDCH to prepare written summary of informal settlement discussion: within five business days (formerly fifteen calendar days). §17-2021-10(b).
d. For resident to submit written request for hearing: ten business days after receipt of written summary (formerly thirty calendar days). §17-2021-11(a).
e. For hearing officer to prepare written decision: ten business days after hearing (formerly "a reasonable time"). §17-2021-21(a).
f. For HCDCH to overturn hearing officer's decision: ten business days after written decision is issued (formerly thirty calendar days). §17-2021(b).
g. In expedited grievances, for resident to request hearing: within five business days from written notice of violation (formerly proposed as ten calendar days). §17-2021-31.

In section 17-2021-2(e), where the HCDCH has discretion to waive the prescribed time limits for requesting a grievance hearing, such waiver is to be made in writing with reasons given for the waiver, to eliminate verbal waivers or potential for accidental waivers.

In section 17-2021-10, language is added to require residents to invoke their right to the grievance procedure explicitly at the project office, to eliminate potential for casual complaints to be construed as a request for formal grievance.

In section 17-2021-11(c), where HCDCH has discretion to waive the time limit for written hearing requests, it is clarified that such waivers must be in writing with reasons given.

In section 17-2021-11, a new subsection (d) is added clarifying that if the parties agree to a written resolution of the dispute, the grievance is terminated.

Section 71-2021-21(d) is amended to provide that requests for grievance made while an eviction proceeding is pending shall not interfere with the progress of the eviction. During the pendency of the grievance, the clock is stopped on the eviction. After the final decision, the eviction proceedings will continue from where it was, rather than reverting back to the start.

Section 17-2021-30(b) is amended to clarify that informal grievance settlement procedures are not available under the expedited grievance process.

Adoption of Proposed Chapter 17-2028 and Repeal of Chapter 15-190

In addition to renumbering these rules, Section 17-2028-7 of the proposed rules is amended to update the utility allowance schedule for residents of federally-assisted public housing projects administered by the HCDCH. It also adds new language detailing the methodology for calculating utility allowances, and provides for annual updates of the utility allowances.

The methodology to derive and update the utility allowance schedule is as follows:

1. The methodology for calculating utility allowances consists of two parts. The first is to determine the quantity allowance and the second is to determine the utility rate.
2. To update the quantity allowance, units of the various sizes in a ~~sampling~~ of different types of developments are surveyed to determine the types of existing equipment as well as to identify any factors affecting energy efficiency.
3. The allowances for lighting are developed based on a field survey of various units to determine the number of fixtures. All lighting was assumed to be incandescent until such time that all developments are converted to fluorescent lighting. The number of fixtures, watts per fixture and hours of use per day are factors used to determine the kilowatt hour per month for each unit size.
4. The allowances for miscellaneous electric equipment are developed based upon average usage of the following equipment: television, radio, small appliances and fans.
5. The allowance for refrigerators is based on a new, non-energy efficient model until energy efficient models are procured. A 14 cubic foot using 155 kilowatt hours per month is assumed for 0, 1 and 2 bedroom units and a 16 cubic foot model using 165 kilowatt hours per month is assumed for a 3, 4 and 5 bedroom units. When all refrigerators are replaced with energy efficient models, this allowance may be reduced.
6. Allowances for cooking are 930 kilowatt hours per year for 0, 1, and 2 bedroom units, and 1140 kilowatt hours per year for 3, 4, and 5 bedroom units, respectively.

2. The annual update will be completed no later than March 15th so that the new allowances can be utilized for the development of the operating budget approximately 90 days in advance of the fiscal year.

3. The new allowances shall be posted and noticed to residents at least sixty (60) days prior to the implementation date. Once the notice and comment period is complete, the new allowances will go to the Board of Directors for adoption. The implementation date for new allowances will be the first day of the State fiscal year, July 1.

4. Implementation of all allowances or components of allowances, by utility, is required when there is more than a 10% change from the existing to the proposed. In order to be able to keep track of cumulative changes, however, the Corporation will implement all changes each year. In cases when a utility is granted a substantial rate increase in between the annual review, a mid-year allowance adjustment may be required.

Public hearings will be held on May 23, 2005 at 6:00 p.m. at the places listed below.

Oahu — Lanakila School Cafeteria
717 N. Kuakini Street
Honolulu, Hawaii 96817

Hawaii — Lanakila Recreation Center
600 Wailoa Street
Hilo, Hawaii 96720

Kealakehe Elementary School
74-5118 Kealaka'a Street
Kailua-Kona, Hawaii 96740

Kauai — Hale Nana Kai O Kea Community Hall
4850 Kawahau Road
Kapaa, Hawaii 96746

Maui — Makani Kai Hale Hall
35 Koapaka Lane
Waiehu, Hawaii 96793

All interested persons are invited to attend the hearing and state their views relative to the proposed rule either orally or in writing. Should written testimony be presented, five copies shall be made available to the presiding officer at the public hearing or within seven days before the hearing to:

HCDCH
Attention: Mavis Masaki
677 Queen Street, Suite 300
Honolulu, Hawaii 96813

Copies of the proposed rules are available for review at the HCDCH administrative office located at 677 Queen Street, Suite 300 or 1002 N. School Street, Building J and at project area management offices during regular business days and hours between 7:45 a.m. and 4:30 p.m. Copies are also available on the HCDCH web site at http://www.hcdch.hawaii.gov, and regional public libraries. Copies of the proposed rules may also be mailed to any interested person upon advance payment of the following copying and postage costs:

Chapter 17-2021	$ 2.30
Chapter 17-2028	$10.68

Written requests for mailed copies of the proposed rules should be sent to the HCDCH at the address noted above or by calling the numbers listed below:

Honolulu	587-0634
Hawaii	974-4000, ext. 70634
Kauai	274-3141, ext. 70634
Maui	984-2400, ext. 70634
Molokai or Lanai	1-800-468-4644, ext. 70634

If special accommodations for the public hearings are needed (i.e., large print, taped materials, sign language interpreter, etc.), please make all requests to HCDCH at least ten (10) working days prior to the hearing by calling Ms. Medy Esmena at the phone number listed above.

STEPHANIE AVEIRO
EXECUTIVE DIRECTOR
HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII
STATE OF HAWAII

EQUAL HOUSING OPPORTUNITY

Date of Publication: April 22, 2005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawaii, addressed as set forth below:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RODELLE SMITH, SHEILA TOBIAS, BARBARA BARAWIS, and LEWIS GLASER individually, and on behalf of all persons similarly situated, Plaintiffs, v. STEPHANIE AVEIRO, in her official capacity as the Executive Director of the Housing and Community Development Corporation of Hawai'i; HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAI'I, a duly organized and recognized agency of the State of Hawai'i.	CIVIL NO. CV04 00309 DAE KSC (Class Action) **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT; DECLARATION OF GAVIN K. THORNTON; EXHIBITS "1" - "3"; CERTIFICATE OF SERVICE** Hearing: Date: July 11, 2005 Time: 10:30 a.m. Judge: David Alan Ezra