

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

RULES COMMITTEE MEETING

William B. Travis Building
Room 1-111
1701 Congress Avenue
Austin, Texas

October 9, 2019
6:30 p.m.

MEMBERS:

LEO VASQUEZ III, Chair
LESLIE BINGHAM ESCAREÑO, Member
PAUL A. BRADEN, Member

ON THE RECORD REPORTING
(512) 450-0342

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MR. VASQUEZ: All right. Let's get started. Call to order the meeting of the Texas Department of Housing and Community Affairs Rules Committee. It is 6:32, according to my clock.

All members of the Committee are present, so we have a quorum and will continue the meeting.

Today at this meeting, we're going to take stakeholder input and discuss three rules on the Agenda today and we'll take input and suggestions on potential changes -- proposed changes to the proposed rules and we'll present that. So there will be no action taken today.

We'll present the rules as potentially amended to the full Board tomorrow, and then those rules, as proposed, will then be published in the Texas Register for further comment. So lots of time to get input here. Staff, I'm sure, will take close notes as to any changes or suggested recommendations that we put.

We'll have staff present and pause for breaks kind of like we did on the last Rules Committee meeting, and so we will ask you if you want to comment on that section as we go along.

So first item is Presentation, Discussion, and Possible Action to Make Recommendations to the Governing

1 Board on the Migrant Labor Housing Facilities Rule,
2 Entailing the Proposed Repeal, and Proposed Repeal, and
3 Proposed New 10 TAC Chapter 90, and Tom is going to be our
4 first presenter.

5 MR. GOURIS: Excellent. Good afternoon, Board
6 Members. My name is Tom Gouris. I'm the Director of
7 Special Initiatives, and for the past year and a half or
8 so, I've been implementing and overseeing Department's
9 efforts on licensing migrant farmworker housing or migrant
10 labor housing.

11 Let me start by giving you a little background
12 on this activity.

13 MR. VASQUEZ: Can everyone hear Tom?

14 MR. GOURIS: I'll try to speak a little louder,
15 too. Subchapter LL of the Texas Government Code is the
16 governing statute for this activity, and it requires that
17 this Board adapt rules to lay out the details for the fees
18 and standards in which migrant labor housing gets licensed
19 and inspected in the state of Texas.

20 The statute prescribes that only housing
21 facilities providing housing for three or more temporary,
22 seasonal, or migrant workers for three or more days must
23 adhere to the Department's rules and be licensed. The
24 Department has been responsible for this activity since
25 2005 after the passage of the Texas Migrant Labor Housing

1 Facilities Act of 2004.

2 At that time, there were approximately 20
3 licensed facilities. That number has grown over the years
4 to total about 48 as the middle of last year. The rules
5 for this activity were originally adopted by this Board in
6 2006, and last reviewed and modestly amended in 2014.

7 Over a year ago we began a robust review of
8 these rules and looked over in particular for ways that we
9 could make the process more efficient for everyone
10 involved. We became aware that the federal immigration
11 program for agricultural workers, known as the H2A visa
12 program, requires that employers sponsoring workers for
13 visas provide their workers with housing.

14 We also became aware that most, but not all, of
15 the H2A facilities had a separate inspection process based
16 on the federal ETA or OSHA standards and that the Texas
17 Workforce Commission, TWC, was the state agency
18 responsible for most of those inspections.

19 So we reached out to TWC to work with them and
20 work out a process to get copies of those inspections and
21 determined that their inspections and requirements were
22 very similar to ours.

23 Also about a year ago we began an outreach
24 campaign to contact employers who use the H2A visa
25 program, because we became aware that another feature

1 requirement of the H2A program is that employers post
2 their job opportunities to American workers.

3 One of the places they do this is a public web
4 site called iCERT, which is hosted by the U.S. Department
5 of Labor. So we reached out to employers that posted jobs
6 for three or more employees on this website and sent them
7 a letter with information about the licensing requirement.

8 We've sent out letters covering about 380
9 properties so far, and about half of them have responded
10 back to us. We've also tried to raise awareness of this
11 not-very-well-known licensing requirement by creating a
12 branding campaign, participating in conferences and
13 workshops, and meeting with the people in the agricultural
14 industry.

15 As a result, we have today -- over the last 12
16 months, that is, -- I had 240 applications for license.
17 So we've increased the numbers of licensees considerably.

18 We believe that we have about half of the
19 current H2A employers in Texas who hire three or more
20 workers in our pool of licensees. That's hard to know for
21 sure, but that's where we think we are.

22 The rule changes proposed would make it easier
23 for an H2A employer to get licensed, in that it would
24 eliminate the redundant inspection and reduce the fee in
25 such cases where we can rely on a TWC inspection and

1 reduce that fee from \$250 a year to \$75.

2 At the same time, we want to make sure that the
3 Texas quality standards that have been in place for over
4 ten years would remain so.

5 So we identified the 11 standards that are in
6 the existing Texas rule, but were not in both the ETA and
7 OSHA rule, and spelled those out in the proposed rule. So
8 you see a lot of redlining of the proposed rule.

9 We maintained 11 standards. The other
10 standards are either in the OSHA or ETA requirements I
11 should say in both of them -- or they were deemed to be
12 too vague to enforce, so we thought they would be better
13 to not add as an extra step.

14 Under the new rule, in order to use the TWC
15 inspection to garner a license, a provider would have to
16 certify that they're meeting those 11 standards, and we'd
17 have to get a copy of their ETA or OSHA-based inspection.

18 We've heard from many and may hear today from
19 some additional workers and worker advocates who
20 appreciate the need for and protections provided by this
21 statute in these rules. But we've also heard from many
22 employers who are justifiably frustrated with the existing
23 obvious redundancy and imperfections in our current rules.

24 In other words, they're frustrated with the
25 double inspections and the fees from the two separate

1 state agencies, which we are attempting to remedy, to the
2 extent that we can, with the proposed rules.

3 If I might, I'd like to read a letter for you
4 that I received. It's a handwritten letter received
5 earlier this year from a Texas beekeeper in response to
6 our letter informing him of licensing requirements. I
7 keep this letter on my board over my desk, alongside with
8 a photo of one of the facilities that provided less-than-
9 acceptable accommodations.

10 And side by side, they sort of encapsulate for
11 me some of the difficulties in regulating this activity
12 and keep me mindful of that. So if I can, the letter
13 reads as follows.

14 "Dear Sirs. The following is not directed at
15 any one individual. To obtain visas for migrant workers,
16 I am required to provide housing that meets all federal,
17 state, and local codes and provide for an inspection that
18 meets the U.S. Department of Labor regulations 30 days
19 prior to workers' arrival. I'm enclosing a copy of this
20 inspection. The license that you are requiring is for
21 three or more workers.

22 If you are really trying to help the worker,
23 what about number one and number two? I feel like a
24 victim of extortion, since I or my workers actually
25 receive no additional protection or benefit except from

1 the threat of civil injunction and fines. However, if you
2 feel that the \$250 license fee is justified, I've enclosed
3 a check.

4 Also, if you feel that a state inspection is
5 needed as well as the current U.S. Department of Labor
6 inspection, please set it up and let me know when.

7 Thanks."

8 Then he signed it, and he gave me his phone
9 number, and we talked, and we ultimately did do the
10 inspection and did license his property.

11 Earlier this week, we sent out another notice
12 of the proposed rule changes to over 400 advocates,
13 employers, and interested parties, and received several
14 more emails from employers, and they reiterate the general
15 concern not to overburden agricultural producers if we
16 must regulate the housing at all, which we do, because
17 it's a state statute.

18 The Department uses the fees for this licensing
19 and regulatory enforcement activity. The use of it has
20 been capped at historically \$10,500 for the last biennium,
21 and was raised to an estimated \$35,000 for the current
22 biennium.

23 These fees are used for licensing processing,
24 which includes the inspections, and to support our
25 marketing and outreach efforts that we're now doing, which

1 includes a dedicated hotline number and informational
2 posters, calling cards, and other materials that are being
3 distributed throughout the state.

4 These tools have been created so that
5 employers, workers, public officials, and advocates can
6 know how to reach us and let us know about concerns with
7 licensed and unlicensed facilities. I have copies of
8 those if you want to see them.

9 Finally, in addition to the reduction or
10 elimination of duplication of inspections, clarifying the
11 11 Texas inspection standards, and the reduction of a fee
12 for facilities inspected by TWC, a couple of other
13 substantial changes include providing clarification for
14 who is responsible for getting a license by creating a
15 definition of what we're calling a provider of migrant
16 housing; allowing a prospective licensee to provide
17 evidence of a corrective action in lieu of having another
18 inspection, or they can accept the finding of
19 noncompliance as a denial of the application for license.

20 That wasn't a provision originally in the rule.

21 And then aligning the rule with a statute in
22 regards to civil penalty of up to \$200 per day for each
23 day a violation occurs.

24 So that kind of wraps up my remarks and
25 presentation on this, but I'm glad to answer any

1 questions, or listen to any of the comments that we get
2 and respond to those.

3 MR. VASQUEZ: Okay. Well, there are people
4 wanting to make comments.

5 MR. MAUCH: I think there are possibly two.

6 MR. VASQUEZ: Okay. Yeah. Let's --

7 MR. GOURIS: Okay.

8 MR. VASQUEZ: -- to the comments first, and
9 then we can work them all back in. Is there a sign-in
10 sheet here, or not?

11 MR. MAUCH: I've got written comments as well
12 with my contact information.

13 MR. VASQUEZ: Okay. Great.

14 MR. MAUCH: Good evening, everybody. My name
15 is Dave Mauch. I'm an attorney with Texas Rio Grande
16 Legal Aid. We're a nonprofit that provides free legal
17 services to migrant farmworkers in Texas and six other
18 states.

19 I want to start out with a little bit of
20 background on where we're at with the state of play in
21 farmworker housing in Texas. I started about three and a
22 half years ago working on this project to increase
23 enforcement of the Migrant Labor Housing Facilities code.

24
25 There was a report in the Austin American

1 Statesman called, "Unlivable: How Texas Fails Farmworkers"
2 that found that at that time, in 2015, TDHCA was spending
3 2500, not 25,000, \$2500 per biennium on enforcement, and
4 that upwards of 90 percent of farmworkers were living in
5 housing that was unlicensed.

6 In the past three and a half years, I commend
7 Tom and Homero, and other folks at TDHCA who have done a
8 lot to bring more people into the system, but we're still
9 at a state of play where farmworker housing in Texas is
10 often very severely inadequate.

11 We have workers who complain about pest
12 infestations. We have workers who are living in hotels,
13 and forced to share beds. We have workers who are living
14 in abandoned housing. I have one case I just filed -- we
15 filed a couple big bedbug cases recently. So there's a
16 lot more to be done in terms of enforcement.

17 The general thrust of these proposed
18 regulations, as we discussed last year in September at the
19 Rules Committee meeting, is asking for a reduction in
20 funding for this program and a reduction in inspections
21 that would be delivered, and both of those would lead to
22 negative outcomes for farmworker housing in the state of
23 Texas.

24 I want to start out talking about 90.5, which
25 is the licensing section, because this is the section that

1 the Rules Committee had the most objection to last
2 September when we discussed the last round of proposed
3 revisions to these regulations.

4 TDHCA, the last round, proposed exactly what
5 they're proposing this time, which is, instead of
6 inspecting folks who have not had an inspection under
7 state standards, they will accept an inspection from the
8 Texas Workforce Commission to the federal standards and
9 then ask the employer for an attestation that they meet
10 the additional 11 standards that are now in 90.4.

11 As we pointed out last time, there are a lot of
12 problems with this. The biggest problem is that
13 attestations don't work, and that's been proven in the H2A
14 system already. At three and a half years ago, perhaps
15 more recently than that, not a single one of the upwards
16 of 350 H2A employers in the state of Texas had a state
17 license, yet every single one of those employers, under
18 penalty of perjury, on their H2A application to the
19 federal government certified that they were complying with
20 all state, local, and federal regulations.

21 In other words, every single one of the almost
22 400 H2A employers in Texas were committing perjury. The
23 reason is there was no enforcement. They know that
24 there's no enforcement and they can get away with it. So
25 attestations are not useful, and we found that

1 attestations don't drive compliance.

2 The second issue with 90.5, the licensing
3 section, is that it provides a reduced fee for folks who
4 are already in the H2A program of \$250 down to about \$75.

5 These fees are -- even though they're not swept back into
6 TDHCA -- the amount of fees gathered the past two
7 legislative sessions has been used to appropriate funds
8 specifically for this enforcement program.

9 And so by creating a lower application fee,
10 TDHCA is going to limit the amount of funds that it has to
11 enforce this program going forward. Based on the current
12 number of licensees, you'd be looking at a decrease in
13 about \$30,000 in funds for a year, which is obviously
14 very, very substantial, given that right now they're
15 working on about 35,000 for the biennium.

16 I want to skip back to 90.3, which is the
17 applicability section Tom mentioned where they're defining
18 this term "provider."

19 MR. VASQUEZ: Hang on.

20 MR. MAUCH: Yeah.

21 MR. VASQUEZ: Let's try to address some of
22 these before we --

23 MR. MAUCH: Okay.

24 MR. VASQUEZ: -- get buried through a bunch of
25 other.

1 MR. MAUCH: Sure.

2 MR. VASQUEZ: Okay. So on, I guess, 90.5
3 you're concerned about attestation without enforcement.

4 MR. MAUCH: Right.

5 MR. VASQUEZ: Which has been the situation in
6 the past.

7 MR. MAUCH: Uh-huh.

8 MR. VASQUEZ: But I think the point of this
9 whole thing is that we are starting to have actual
10 enforcement, and if we hear about -- or if we, TWC, and
11 OSHA and all of these start hearing about violators,
12 that's what we're here for. Then they're going to start
13 realizing there is enforcement and be encouraged to change
14 their ways.

15 MR. MAUCH: Yeah. And I absolutely understand
16 that.

17 MR. VASQUEZ: I think three years ago, I give
18 your comment 100-percent credence. Now going forward I
19 think there's confidence that it's going to be different.

20 I think even staff is going to agree with that assessment
21 that it's a different world going forward.

22 MR. MAUCH: Oh, and I agree as well.

23 MR. VASQUEZ: Do we have a -- I guess this is a
24 question to staff.

25 Do we have a mechanism for when employers are

1 reported for still having substandard, even though they
2 claimed that they've met all the regulations? I mean,
3 how -- and I know you just talked about all those public
4 outreach and --

5 MR. GOURIS: Right. So we have a tool in place
6 to get that information. We have the hotline, and we have
7 information out there. We're putting more information out
8 there so folks can be aware to contact us. Then when we
9 do get contacted, we have a process that we follow to try
10 to first get the employer or provider to comply with the
11 law.

12 The difficult thing for us in that instance is
13 that unless it's a requirement that they have from
14 somewhere else to provide the housing, they have the
15 capacity to say, well, we just won't provide housing
16 anymore. Worker, go find housing someplace else.

17 Now if it's an H2A employer, they have to
18 provide housing, so they're going to comply, and we've had
19 real good success at getting them to comply. But others
20 have that choice, and so some have been willing to change
21 their ways or whatever and make the housing compliant.

22 But those that aren't H2A will still be charged
23 a \$250 fee, and historically that has been a fairly small
24 number of facilities, because it's so hard to get them --
25 it's so hard to find them. So the resources to find folks

1 are increasing because we have these tools now, but
2 they're not increasing like -- we don't have a law
3 enforcement arm to go out and round folks up or anything
4 like that.

5 We still are dependent on people coming in to
6 us and saying, hey, we have housing, we want to be
7 licensed. So we've taken an approach that would send it
8 in a more positive way, hopefully, with the branding and
9 otherwise. But where necessary, where we get informed
10 about a violation or of someone, we've gone out and talked
11 to them, tried to get them to comply, and in most cases,
12 we've gotten it to happen.

13 MR. VASQUEZ: And do we coordinate with other
14 agencies?

15 MR. GOURIS: Well, thus far, our coordination
16 with TWC has been in getting their inspections, and we're
17 getting them --

18 MR. VASQUEZ: When we receive reports of
19 violations?

20 MR. GOURIS: On enforcements, we haven't had
21 any coordinated efforts on that with other agencies yet.
22 We've handled that ourselves. We've had three, that I can
23 recall, instances. Two of them complied; the third one
24 was determined that they weren't required to comply
25 because they didn't meet the requirements.

1 But they were made aware of the requirements.
2 Most folks want to try to comply if they are really trying
3 to provide housing for their workers and need to provide
4 housing for their workers.

5 MR. VASQUEZ: Okay. I see Homero has
6 questions.

7 MR. CABELLO: Just a couple of comments. The
8 other thing I wanted to point out was that Internal Audit
9 went out and audited this program, the processes for
10 licensing. They went out to several employers to check on
11 the standards, and they all passed the internal audit
12 inspection.

13 But then at your request, Mr. Vasquez, they
14 went back out again. I think after the last Board meeting
15 or the one before, they went back and checked some other
16 employers, and they met the standards.

17 I just wanted to emphasize what Tom said. The
18 housing is voluntary, you know?

19 MR. VASQUEZ: For non-H2A.

20 MR. CABELLO: For non-H2A. And we're pushing
21 compliance, we're trying to get the word out on the
22 licensing requirements, but if we push too hard and start
23 fining these employers, they're going to say, Workers, go
24 find your own housing and come back in the morning. So
25 we're trying to find that balance between compliance and

1 enforcement.

2 MR. VASQUEZ: Right. And again, we are set up
3 better now --

4 MR. CABELLO: Yes.

5 MR. GOURIS: Yeah.

6 MR. VASQUEZ: I mean, compared to how it was.

7 MR. CABELLO: The hotline comes in to Tom, and
8 if Tom's not available, it rolls to my line. So we're the
9 ones that handle the hotline.

10 MR. VASQUEZ: Okay. Are there comments on
11 attestation?

12 MR. GOURIS: Let me also add that the penalties
13 are a little bit more clear now, and consistent with the
14 rule -- with the statute in that we can charge now a daily
15 fine, not just a one-time fine. So we've cleared that up,
16 so will give us a little bit more teeth to pursue folks.

17 MR. VASQUEZ: Yes. Okay, then on the fee
18 sweeps and fee levels, it's my understanding that due to
19 the limited appropriation made, we can only legally spend
20 a certain amount of money. So even if we collected fees
21 above that, that all just goes back into the state
22 coffers?

23 MR. GOURIS: That's correct.

24 MR. CABELLO: That's correct.

25 MR. VASQUEZ: Is there anything related -- I

1 think --

2 MR. GOURIS: It would --

3 MR. VASQUEZ: -- Dave mentioned that if we over
4 collect, then next time, I guess, we'll get a higher
5 allocation?

6 MR. GOURIS: I think what we're still
7 struggling to do is find out how many employers -- how
8 many providers of housing there are out there. And I
9 think our goal ought to be to try to get everyone
10 licensed. Because once we know what the licensing
11 population really is -- because that's been a really hard
12 thing for us to nail down --

13 MR. VASQUEZ: Then we can set up the budget
14 more.

15 MR. GOURIS: Then we can figure out
16 budgetarily where we need to be and what we need to do.
17 Right now I think the incentives are geared toward getting
18 people licensed so that we know where they are and not be
19 overburdensome in doing so by not charging an extra
20 inspection trip. TWC already does an inspection. It's
21 relatively the same thing that we do.

22 The attestation is a concern, but again, when
23 we send out the license, we send out informational
24 material so that a worker has the ability to anonymously
25 call us and tell us, hey, they're not following this, or

1 this housing is of poor quality.

2 In fact, we had a call last month on that very
3 subject and have worked with that employer to get their
4 facility back up to standards. So it's working from that
5 perspective. That's what it's supposed to be doing.
6 That's the intent.

7 MR. VASQUEZ: Yes.

8 And, Mr. Mauch, I can assure you that both the
9 Board and Mr. Wilkinson are very aware of unfunded
10 mandates from the legislature, so we're going to be trying
11 to up that budget as well.

12 MR. CABELLO: And the reduction of the fee to
13 \$75, we still anticipate meeting our cap of \$35,000 as
14 well.

15 MR. VASQUEZ: Okay. You said 90.3 is next?

16 MR. MAUCH: Oh. Yes. And if I -- just two
17 quick words on enforcement, actually, to the extent that
18 we are in a different place than we were three years ago.

19 I mean, I think, number one, there just hasn't
20 been any enforcement. Tom mentioned they sent out letters
21 to H2A employers across the state a year ago, and I did
22 the math on this two weeks ago. It's 38 percent of H2A
23 employers are in compliance. I'm not sure what's -- if
24 anything's been done with the other 62 percent. We
25 certainly haven't seen anything -- and I think right now

1 we do have a system that is voluntary, basically.

2 In terms of 90.3, I think this is probably the
3 next biggest issue on these regulations. So one of the
4 biggest things that the state law does that's more
5 protective for workers than the federal law is it doesn't
6 have this exemption that federal law has for what are
7 called public accommodations, which are hotels, motels,
8 apartment complexes, mobile home parks, things like that,
9 that provide housing to migrant farmworkers on the same
10 terms and conditions as they do to the general public.

11 Those, under federal law, even if they're H2A,
12 they don't have to get an inspection prior to occupancy,
13 and they don't have to meet federal housing standards.
14 The DOL actually just recently promulgated a new set of
15 proposed regulations on the H2A program that increased the
16 housing standards for public accommodations, because they
17 noted in the preamble to these regulations -- and this is
18 a very anti-regulation administration -- that they were
19 finding the most violations in public accommodation
20 housing because there were not inspections, and that's
21 been our experience in Texas, as well.

22 So what these regulations do is they add this
23 definition of provider. I think the definition of
24 provider is useful because it sort of gives you a
25 shorthand to kind of figure out all the different ways

1 that migrant farmworkers do get housing, whether it's
2 provided directly by the employer, whether the employer or
3 the farm labor contractor contracts with a hotel, a motel,
4 a mobile home complex, or whether the workers find housing
5 on their own, typically at places that market to and
6 target specifically migrant farmworkers.

7 It's that last category, the people who are
8 providing public accommodations but that aren't
9 contracting directly with employers or labor contractors
10 that would not be subject to the rule after these changes
11 in the regulations, and I think that is problematic for a
12 couple of reasons.

13 First, as I mentioned, there are a number of
14 places where there are mobile home parks, hotels, things
15 like that, that run seasonally. They market exclusively
16 to farmworkers. They house pretty much exclusively
17 farmworkers.

18 And because they do that and because they know
19 they're dealing with a vulnerable and desperate population
20 that's just there for a job, they're only going to be
21 there for a little bit of time, they know that they can
22 get away with substandard housing. And we've found that
23 to be the case when we do outreach.

24 The second issue with 90.3 is that it does --
25 it also would give employers an end run around enforcement

1 of the actual rules because again, if the employer isn't
2 contracting directing with the housing provider or the
3 owner of the housing, then there is no requirement that
4 the housing be licensed.

5 Let me give you an example. Let's say right
6 now an employer brings workers up from the Valley up to
7 north Texas and houses them in a hotel that's seasonal and
8 operates basically to provide housing to farmworkers.
9 Now, let's say right now this employer is booking the
10 hotels directly for the farmworkers just on a block rate
11 because it's simpler that way.

12 If the employer wanted to avoid compliance, all
13 they would have to do would be to give the labor
14 contractor extra money, say, Give this to the workers to
15 pay for housing, and then require, as a condition of their
16 employment, that the workers stay at that particular
17 housing.

18 You have exact same situation where the workers
19 are staying at that same housing in the same poor
20 conditions, but the difference is that legally, they're
21 not required to follow the law. So I'm worried this
22 loophole might swallow up the entire public accommodations
23 exemption.

24 Ultimately, I think TDHCA obviously, by the
25 language of the regulations, has the ability to exercise

1 discretion in terms of enforcement. And so if they find
2 that there's a situation where there's a hotel operator
3 who really just has no idea that there are migrant
4 farmworkers staying, and really is not doing anything
5 that's meant to screw people over or to provide poor
6 conditions for farmworkers, they can say, Hey, you know
7 what? I totally understand. No harm, no foul. Let's not
8 assess a fine.

9 I just worry that by creating this loophole in
10 the regulations itself, they would shoot themselves in the
11 foot in terms of future enforcement opportunities.

12 And then I've got stuff on 90.4 --

13 MR. VASQUEZ: Okay.

14 MR. MAUCH: -- but I expect you want to hear
15 from --

16 MR. GOURIS: So we included the definition of
17 provider on purpose and I wish General Counsel were here,
18 because it was a collaborative effort to try to define and
19 refine who is -- because the way the statute is written,
20 it is possible to conceive of any homeowner or motel owner
21 or hotel operator or campground operator who just happens
22 to have three or more residents who are migrant workers or
23 seasonal workers or temporary workers be required to be
24 licensed and be fined if they're not licensed, not even
25 knowing that they are agricultural workers.

1 So what we were trying to do is trying to
2 connect the intent of the legislation into the rule by
3 creating this definition of provider, which could be a
4 hotel operator if they market to migrant workers and say,
5 hey, we are providing migrant housing.

6 MR. VASQUEZ: Is there a distinction between
7 whether they're just a group of workers that are staying
8 there versus -- without any direct payment from the
9 employer to the hotel/motel?

10 MR. GOURIS: The regulation doesn't talk about
11 that. I mean, I can read you the definition of provider.
12 It's pretty simple and quick, and you can hear from it
13 what it requires, if you'd like, and that might clear it
14 up.

15 We don't go into a lot of that who gives money
16 to who or what have you. We say who's providing the
17 housing, and if it's someone that's providing the housing,
18 that might be someone who markets the housing as a migrant
19 farmworker housing. If they go and advertise to it,
20 they'd be providing migrant farmworker housing. I think
21 we'd pursue that.

22 If they're just a hotel operator that happens
23 to have some folks, they may be providing it to them as
24 they're providing to everyone else.

25 MR. VASQUEZ: Or if I own a mobile home park,

1 and I do a three-month lease to these four people who I
2 know that they're migrant farmworkers -- I know they're
3 working at the farm. And then all of a sudden, I'm going
4 to be responsible, in essence?

5 MR. GOURIS: Well, that's what we're -- we're
6 trying to avoid the casual or not -- someone who didn't
7 know what they were doing kind of situation. We're trying
8 to address the situation where a mobile home provider was
9 actively targeting and marketing to employees of any
10 particular agricultural company.

11 So if the situation occurred that Dave was
12 talking about, the employer who's providing the funds for
13 that might be the one that needs to be licensed. But it's
14 more likely that the actual person receiving those funds,
15 knowing that they're for migrant workers, would be the
16 provider.

17 That would be something that our attorneys
18 would have to ferret out, but I think that we could get
19 there. I don't think this -- the way the regulations are
20 written would prevent this from ensuring that one or the
21 other or both got licensed.

22 MR. CABELLO: I think the intent -- and it's at
23 the beginning of 90.3 -- it's if it's owned or contracted
24 by the employer to provide the housing. So if they're
25 going to one of those places -- if the migrant farmworker

1 goes and gets their own hotel, and there's ten of them,
2 the hotel operator is not required to be licensed, unless
3 the employer pays for it and provides the housing. Then
4 it has to be licensed. But if its employer paid or owned,
5 they have to be.

6 MS. BINGHAM ESCAREÑO: Sure. Is there any -- I
7 know we're pending counsel, but so, owned or contracted?
8 And when I heard the scenario that Mr. Mauch kind of gave
9 us and I heard him say that about discretion -- but I
10 would have loosely defined that in some way as contracted,
11 contract with --

12 MR. CABELLO: Right.

13 MS. BINGHAM ESCAREÑO: -- like a contractual.
14 But even if it was secured, instead of owned or
15 contracted. Is secured a word that would kind of --

16 MR. CABELLO: Procured?

17 MS. BINGHAM ESCAREÑO: Procured, maybe?

18 MR. CABELLO: Well, maybe.

19 MR. GOURIS: Maybe reading the definition will
20 kind of alleviate some of the issues. Okay?

21 MS. BINGHAM ESCAREÑO: I read everything, but
22 yeah.

23 MR. GOURIS: Any person who provides for the
24 use of a migrant labor housing facility by migrant
25 agricultural workers, both defined terms, whether the

1 facility is owned by the provider or is contractually
2 obtained for or otherwise arranged by the provider.

3 So if -- in Mr. Mauch's example, if the
4 employer says, Here's a couple hundred dollars, go and
5 find your own housing at this place. And they've talked
6 to at this place to say, they're coming your way, they've
7 arranged the housing. So I think they would be the
8 provider. I think we would have pretty clear guidance
9 from the rule to say that they're the provider and we need
10 to have them licensed.

11 MR. MAUCH: I agree. If I can, just one brief
12 response.

13 MR. VASQUEZ: I'm also wondering if there's any
14 way to tighten up the language --

15 MR. GOURIS: Sure.

16 MR. VASQUEZ: -- a little bit more.

17 MR. MAUCH: Yeah. I think the definition of
18 provider in 90.2 is great. That actually -- I think,
19 seems like it was modeled on some proposed legislation
20 from the last session, which tried to put this definition
21 of provider in there because it, I think, sort of
22 recognizes who should be responsible.

23 But I think the way 90.3 is written now, it
24 says, migrant labor housing facilities in the state, which
25 may include hotels and other public accommodations if

1 owned by or contracted for by employers. So that's the
2 limitation: It has to be owned or contracted. Let's go
3 back to my hypothetical.

4 MR. VASQUEZ: Just give me cash and say --

5 MR. MAUCH: Yeah. That's not -- I mean, a
6 first-year law student in a contracts class will tell you
7 that's not a contract between the owner and the hotel,
8 because there's no meeting of the minds between the
9 employer and the hotel owner.

10 So that, I think, is not the intent, obviously,
11 of the regulations. Just a point where I think it could
12 use a little bit of tightening up.

13 90.4, then? I can proceed to that? The issue
14 on 90.4 -- so, as Tom mentioned, 90.4 is sort of the
15 new -- I think it was 90.2 in the way the regs currently
16 are, which is the state-level standards.

17 90.4, as Tom mentioned, basically keeps most of
18 90.2 intact, depending on which federal standards apply.
19 There are two things, though, that are missing that Tom
20 pointed out.

21 The first one is requirement for four-burner
22 stoves in housing. Without that requirement, you fall
23 back on the requirement in federal law, which is two-
24 burner hot plates. And I know it kind of sounds like a
25 weird and esoteric and minor issue, but hot plates are

1 actually a large issue for workers who live in hotels,
2 particularly during the season.

3 Not only are they a huge fire hazard, but
4 they're staying in hotels. Hotels don't have windows that
5 open. Hot plates tend to smoke up rooms. And so we have
6 clients literally who have respiratory issues because
7 they're using hot plates instead of an actual cooking
8 facility with an actual stove.

9 The other part that didn't make it into 90.4 is
10 a vector-control plan for pest infestation, which I
11 suspect the Department's opinion is probably too vague to
12 enforce. I'll just say pest infestation is big issue in a
13 lot of our cases.

14 I had one case which, you know, my client
15 collected a jar of scorpions that he picked up from his
16 housing. I've had other clients that have had literally
17 shown me pictures of bowls full of tarantulas they've
18 gathered. I've had clients who taped themselves inside
19 their sleeping bags because they didn't want bugs crawling
20 in.

21 As I've mentioned, we filed a few bedbug cases
22 recently; one out in Monahans in West Texas, and a couple
23 in other parts of the country. Bedbugs are an issue in
24 farmworker housing right now.

25 So I think requiring the employer at least to

1 have a plan to address pest infestation, that way if
2 something goes wrong, the employer can go, Well, I
3 followed the plan. Or the workers can say, No, you had a
4 plan, and you didn't follow it.

5 It lets you have a situation where you're able
6 to determine whether or not the employer was acting
7 reasonably in letting the pest infestation happen, because
8 again, it is a big health risk.

9 MR. VASQUEZ: There's nothing in the federal
10 regulations that addresses --

11 MR. GOURIS: Yes. There is, actually. Yeah.
12 Let me speak to that, if I can.

13 MR. VASQUEZ: And we'll get back to --

14 MR. GOURIS: So that particular one is both a
15 little vague -- it's additionally vague, I guess is what
16 it would be. So in ETA standard, there is -- under
17 654.415(a) the question is asked, are housing and
18 facilities free of insects, rodents, and other vermin? So
19 it doesn't require a plan, but does require that it's free
20 of that problem.

21 So in fact, we got a call, like I said, a
22 little over a month ago about a particular property that
23 had bedbugs. The vector control plan wouldn't have
24 stopped the bedbugs, but the fact that they had bedbugs
25 gave us the opportunity to contact them and say, hey, this

1 is what's happening. Can you help us understand what's
2 going on?

3 The facility owner said, yeah, it's a problem.
4 We're going to take care of it. They've replaced the
5 beds. They've been re-inspected, and they, you know, now
6 are back on board.

7 It's also listed in the OSHA standard under
8 1910.142(j), Effective measures shall be taken prevent
9 infestation by and harborage of animal or insect vectors
10 or pests.

11 So it's covered in both, not with the
12 specificity we had in the old rule, but the specificity in
13 the old rule wasn't all that great.

14 MR. VASQUEZ: This sounds like an enforcement
15 issue more than --

16 MR. GOURIS: That's right.

17 MR. VASQUEZ: The language is in there.

18 MR. GOURIS: How we go about getting it done.
19 Right. Again, getting the word out about, you know,
20 you're living in an unsafe place, or unhealthy place, or a
21 place that's -- call us; we'll help you work it out. That
22 is the message that we're trying produce here.

23 MR. MAUCH: There was another issue.

24 MR. VASQUEZ: Okay. I think that's -- we've
25 got to make sure that's included high on the enforcement

1 list.

2 MR. GOURIS: Right.

3 MR. VASQUEZ: Stoves versus hot plates?

4 MR. GOURIS: That's a tough one. I believe
5 it's in one of the two federal standards, but not in the
6 other, and I didn't find that. But a four-burner stove is
7 going to eliminate most of the hotel --

8 MR. VASQUEZ: Mm-hm.

9 MR. GOURIS: -- accommodations that could be
10 available, because they're not going to have four-burner
11 stoves. And they may be perfectly adequate or even nicer
12 than some of the things that they could alternatively live
13 in that would have a four-burner stove.

14 So the way that the federal regulation gets out
15 of that is a hotel doesn't have to be inspected, and so
16 they can stay there without having to have a four-burner
17 stove.

18 For us, we want to make sure we inspect every
19 facility, because that's what we think the statute
20 requires us to do, or have it inspected.

21 So if an H2A employer is going to use a hotel
22 and they wouldn't get inspected because they get that
23 exception, we will go out and inspect the hotel. We want
24 to make sure that standard doesn't eliminate their ability
25 to use a hotel that may be perfectly fine in every other

1 way but not have a four-burner stove. That's the reason
2 we didn't include it.

3 MR. VASQUEZ: I don't know if I should ask
4 this.

5 MR. GOURIS: Go for it.

6 MR. VASQUEZ: Is there anything in the
7 provisions for microwave ovens? I mean, just as an
8 alternative to either of those, being that we're trying to
9 upgrade -- update.

10 MR. GOURIS: I think there are catchalls in
11 providing for accommodations for cooking and eating, and
12 those provisions are going to be implied. That might be a
13 microwave or it might be burners or, you know, it might be
14 a stove.

15 It's just you're providing for the ability for
16 a worker to be able to make their own meal or make sure
17 that they have provisions for a meal being provided for
18 them. Those are kind of important features for us to, you
19 know -- those are things that we would go back and say,
20 hey, you're not providing this. This is something you
21 need to be doing.

22 MR. VASQUEZ: Okay.

23 MR. MAUCH: So two very quick -- I wanted to
24 end on a positive note.

25 I just wanted to point out a couple of good

1 things in these regulations. 90.6, the records section,
2 requires a posting at the housing site with a poster that,
3 you know, is in Spanish and gives the worker the hotline
4 number. That's a great thing. That's required under
5 federal law as well, and that's something that does lead
6 to enforcement. So we commend the Department on that.

7 And 90.8, the administrative penalty as Tom
8 mentioned just clarifies that the penalty can be assessed
9 on per-violation per-day basis. Again, \$200 on its own is
10 nothing, but giving the Department the ability to scale
11 the fine is, I think, meaningful.

12 And so both of those are good, you know,
13 helpful in terms of enforcement. So that's all I have.
14 Thank you.

15 MR. VASQUEZ: Thank you.

16 MR. GOURIS: Just so you know, this is the
17 poster we devised, and like I said, calling cards that we
18 can pass out or have available for folks that give them
19 the information that they need to be able to contact us if
20 they have something that's not safe.

21 MR. VASQUEZ: Did we have anyone else on
22 migrant labor?

23 (No response.)

24 MR. VASQUEZ: Okay. All right. Well, I think
25 we've -- and again, obviously this was not the only

1 discussion leading up to putting together these proposed
2 rules.

3 And again, we're going to make a recommendation
4 to the full Board tomorrow to publish those rules for
5 further comment, so there's still going to be some
6 tweaking, although I think once when it gets published in
7 the *Texas Register*, it can only be relatively minor
8 adjustments; it can't be wholesale big changes.

9 So great. Let's move on to the second item on
10 the agenda: more rules. Presentation, Discussion, and
11 Possible Action on an Order Proposing the Repeal of 10
12 TAC, Chapter 10 -- it says 10 TAC, Chapter 10, Subchapter
13 E, Post Award and Asset Management Requirements and New
14 Order Proposing New 10 TAC Chapter 10 Subchapter E Post
15 Award and Asset Management Requirements, and directing
16 their publication for public comment in the *Texas*
17 *Register*.

18 MR. BANUELOS: That is correct.

19 MS. BAST: Thank you.

20 MR. VASQUEZ: Is that right, Rosalio?

21 MR. BANUELOS: Good evening. Rosalio Banuelos,
22 Director of Multifamily Asset Management, and I'm here for
23 Item 2, regarding the Post Award and Asset Management
24 requirements.

25 So several changes that have been proposed by

1 staff are corrections and/or are clarifying in nature, but
2 the following are the more significant recommendations
3 made by staff.

4 Under Section 10.402(e) and (g), regarding post
5 bond closing requirements and 10-percent test requirements
6 respectively, staff has proposed clarification of
7 requirements for fair housing trainings at the request of
8 staff and the Fair Housing division.

9 The clarifications include a statement that
10 attendees must pass such trainings for the certificate to
11 be considered valid, and that duplicate certificates for
12 the same training course taken on separate dates cannot be
13 submitted to meet the required number of minimum training
14 hours.

15 Under Section 10.402(g) regarding 10-percent
16 test, staff also proposes the removal of the requirement
17 for 9-percent awardees to submit a development owner's
18 preliminary construction schedule, as this information is
19 gathered from other documentation submitted and also
20 tracked through the quarterly construction status reports.

21 In the section for cost certification, Section
22 10.402(j), the following changes are proposed. Staff has
23 proposed revised language to reflect changes made to the
24 owner certification exhibit in the cost certification
25 package, as recommended by the Department's internal

1 auditor during the review of the cost certification
2 process.

3 The recommendation is to obtain verification
4 from the development owner that the certified public
5 accountant hired for the independent auditor's report
6 required under the Internal Revenue Code and by the
7 Department is licensed to practice public accountancy, is
8 in good standing, and has satisfied any restrictions that
9 may have been placed upon the CPAs firm practice by any
10 licensing board.

11 Staff also proposes removal of the requirement
12 for a financing narrative, which previously accompanied
13 the Summary of Sources and Uses exhibit. Most of the
14 information supplied in this exhibit is gathered through
15 other submission items within the costs certification
16 package, and it usually didn't provide much more value to
17 the packet.

18 Staff also proposes an additional requirement
19 for housing tax credit deals layered with National Housing
20 Trust Fund, in accordance with federal requirements under
21 the NHTF program, which requires an additional cost
22 certification be completed by an independent licensed
23 certified public accountant to certify all development
24 costs subject to the conditions and limitations under the
25 program's current federal requirements.

1 Little guidance has been released under the
2 NHTF interim rule regarding the requirements of the cost
3 certification, but in order to meet the federal rule,
4 staff is planning to issue a form that a CPA can use to
5 certify development costs.

6 Staff also proposes removal of the requirement
7 for a completion certificate for TDHCA bond developments.

8 The completion certificate is currently received
9 separately, and therefore collecting it at cost
10 certification is not necessary.

11 The last change proposed in the cost
12 certification section is to remove the language that
13 allows 8609 issuance to be delayed before a compliance
14 monitoring report is available to the owner and before the
15 owner has the ability to correct any events of
16 noncompliance.

17 This section still keeps the requirement for
18 owners to correct any noncompliance within or outside of
19 the corrective action period prior to the issuance of
20 8609s but will allow timely issuance of the 8609s when a
21 monitoring or report has not yet been issued to the owner.

22 Moving on to section 10.403, regarding the
23 review of annual HOME, NSP, and National Housing Trust
24 Fund grants, while staff had not previously included the
25 non-federal resource TCAP RF program in this requirement

1 for annual rent reviews.

2 The section states that the Department is also
3 required to approve rents where multifamily direct loan
4 funds are used as HOME match.

5 After discussion with the legal and multifamily
6 direct loan staff, it has become apparent that nearly all
7 TCAP RF loans are used as HOME match. So in order to
8 avoid noncompliance with the federal requirements and to
9 remove the complication for external stakeholders of
10 having to determine whether loan funds were used
11 internally as HOME match, staff proposes the updating of
12 the section to include TCAP RF as one of the programs for
13 which annual rent reviews will be required.

14 Under section 10.404, regarding reserve
15 accounts, staff has proposed the removal of the
16 requirement for review and approval of the special reserve
17 account -- special reserve plan.

18 This section requires that a Department-
19 approved plan be established at the time a special reserve
20 account is created and that disbursements from the fund
21 will only be approved by the Department if they are in
22 accordance with the current approved plan.

23 However, since staff reviews all of the
24 disbursement requirements, an additional review and
25 approval of the special reserve plan is unnecessary.

1 Staff has also proposed a removal of the
2 requirement that the special reserve account agreement be
3 executed by the finance institution representative. As
4 the signature was mainly for acknowledgment purposes and
5 has created challenges for owners, which delayed the full
6 execution of these agreements.

7 MR. VASQUEZ: Let me reiterate, if anyone has
8 any comments on any of these sections, please -- that
9 we've already done? I'm glad I brought that up.

10 Let's take a moment for Ms. Bast.

11 MS. BAST: Thank you. Cynthia Bast of Locke
12 Lord, here not representing any particular client today.

13 And I would like to talk to you a little bit
14 about special reserve accounts. Special reserve accounts
15 are used most significantly in the context of the exchange
16 program, which was of course developed in the recovery act
17 and turned TDHCA into a syndicator overnight.

18 And what your rule says about these special
19 reserve accounts is that the funds will come in either at
20 closing, or they can also come in as a portion of net cash
21 flow each year.

22 And then the account is supposed to be used,
23 according to the rule, for the purpose of assisting
24 residents at the development with expenses associated with
25 their tenancy.

1 So I have two comments. One is that one of the
2 things that we're finding with some of our owner clients
3 is that these accounts are really just sort of sitting
4 there, and they're not being utilized very fully, they're
5 not getting a lot of requests for assistance from the
6 tenants for, you know, emergency utilities or even
7 emergency rent in the event that there's been like a
8 medical hardship or something like that.

9 So the first question is what can we do about
10 that to make these funds more useful? And one thing could
11 potentially procedural. For instance, we could allow an
12 owner -- and it may already be allowed. An owner could
13 say, you know what? Anybody on this property that's a
14 veteran, we're going to subsidize their utilities, just
15 because they're a veteran; not because they need it, just
16 because we want to.

17 Maybe, though, you could go beyond and do
18 something like providing a scholarship fund for resident
19 children, or even resident adults who want to go back to
20 school or something like that, which I'm not sure that
21 that fits within the rule of assisting residents with
22 expenses associated with their tenancy.

23 So I just wanted to bring this question up and
24 have it open to thinking about what can we do to make sure
25 that these funds are being best utilized for the tenants'

1 needs.

2 I don't know if you want to do any response to
3 that, and then I'll take -- I have one more question.

4 MR. BANUELOS: Right. So as it relates to
5 providing assistance to veterans, I think that the rule
6 can be -- doesn't need to be modified to serve that
7 purpose. If they're providing assistance with utilities,
8 it would be considered an expense associated with their
9 tenancy.

10 Providing a scholarship fund I think would be
11 most appropriately served by revising the rule, since it
12 doesn't fall within that category.

13 We haven't had any owner approach us about
14 doing that type of assistance; generally it has been for
15 medical needs, rent payments, something to the effect of
16 helping pay for rent.

17 So it hadn't been considered or proposed
18 previously, so if there's any language that we could
19 add --

20 MR. VASQUEZ: Do we have any statistics as to
21 what average dollar amounts are usually in these?

22 MR. BANUELOS: It ranges significantly, and
23 part of the problem with these accounts, it seems to be --
24 based on what I have seen -- I don't know how much
25 marketing is being offered as it relates to the reserve

1 accounts being there.

2 So I don't know if all the tenants know about
3 it. In some cases a property will have probably upwards
4 of \$100,000 worth in this account. Some other properties
5 may have a lower amount.

6 And very few properties seem to actively be
7 using the account. Some owners come in and do events for
8 their residents, like Halloween parties or whatever, just
9 use it for that purpose.

10 But the large majority of the developments
11 don't reach out to us with proposed uses for that account,
12 so it's just adding up every year, but, yeah, it's
13 probably in the hundreds of thousands, at the most, and
14 then on lower developments it would be a few thousand
15 dollars.

16 Once the -- it varies by -- now the special
17 reserve account option is available to tax-credit
18 developments as well. It started with the exchange
19 program, but now it's available for the tax-credit
20 developments.

21 For the exchange deals, the requirement is
22 throughout the LURA, I believe, so it stays there for at
23 least 30 years. For the other developments it's
24 throughout the term of the compliance period, which would
25 be for 15 years.

1 Once -- unless the rules change, once that
2 period is over, the funds are going back to the developer.

3 So I think that part of that is the incentive as to not
4 use it as much, because it's not going back to the tenants
5 at the end of the day; it's available to the property.

6 MR. VASQUEZ: Thank you. I'm just talking out
7 loud here. Would it be possible to have something sort
8 of -- like private foundations have a rule you have to
9 spend 5 percent of your principal at least every year.

10 Could something like that be a rule that goes
11 in to say you got to give everyone at least 5 percent of
12 that value as a rent credit or something?

13 MR. BANUELOS: I think it could, if that's
14 something that the committee would like to see in the
15 rule.

16 MR. VASQUEZ: I mean, just -- it's surprising
17 to me to hear that there's a pile of money there.

18 MR. BANUELOS: Right. So, yeah, I don't know
19 that that's something that we want to add for this
20 rulemaking cycle or if it's something that we should
21 propose before a subsequent one, given the implications
22 that it would have.

23 MR. VASQUEZ: Were there any other comments on
24 this subject? I think I have one more behind you.

25 MS. LONEY: My name's Lauren Loney. I am an

1 attorney with Texas Housers and a relatively new addition
2 to the team. I started a week ago.

3 I wasn't actually planning on commenting on
4 this, but I would be interested to see how much tenants
5 are notified of this opportunity. We're obviously talking
6 about Texas' most vulnerable renters here. They're
7 dealing with a lot of job insecurity, not a lot of
8 disposable income to deal with emergencies that come up.

9 So I just simply can't imagine that this money
10 couldn't be used to support tenant services if tenants are
11 actually being, you know, regularly made aware of this as
12 an option.

13 Thank you.

14 MR. VASQUEZ: So I'm looking at staff, just
15 wondering -- putting in like that 5 percent rule. Is that
16 too much of a change to squeeze in right now, or --

17 MR. BANUELOS: I think that if we want to
18 propose it now, we would come up with proposed language --
19 we would have to come up with proposed language and
20 present it tomorrow for consideration and then allow for
21 public comment after that. So it can be done, I believe.

22 MR. VASQUEZ: I'm seeing lots of nodding. And,
23 again, I'm just using it as foundation --

24 MS. BOSTON: Channeling Mr. Eccles, he would
25 say that now is the time for you to make any changes you

1 want, because it hasn't even gone out for comment, so this
2 is the meeting and the time -- well, tomorrow, but through
3 what you're discussing now -- to get in a change, and then
4 that way if people don't like it, they can ask for it to
5 come back out.

6 It would be harder for you to do something kind
7 of big and different like this once it's out for comment.

8 MR. VASQUEZ: Definitely.

9 MS. BOSTON: Yeah.

10 MS. BAST: I just had another thought. At
11 least as it relates to the exchange deals, all of those
12 properties have special reserve contracts with TDHCA, so
13 there's already a contract that says what we're going to
14 do.

15 So I do think we need to think about, for
16 instance, if the 5-percent recommendation -- it that's
17 problematic, given that you have a contract with one and
18 if that would be inconsistent with the contract.

19 So just pointing that out, but I'm not Mr.
20 Eccles.

21 MALE VOICE: I don't think those contracts have
22 that 5 percent.

23 MR. VASQUEZ: No, I'm sure it doesn't, but it
24 doesn't preclude it.

25 MS. BAST: Right. That's my question.

1 MR. BRADEN: You'd have to read the contract to
2 see what it says. I don't know if we could make a
3 regulation that would affect our contract.

4 MR. BANUELOS: Yeah, and I can tell you that
5 the agreement says that -- well, there's the subordinate
6 agreement which calls for this special reserve account,
7 and it simply says that it's going to be intended to
8 assist with the expenses associated with their tenancy.

9 The special reserve account agreement, which is
10 what we sign with the owner once the account was
11 created -- and I will say there are some developments out
12 there that still don't have a contract per se in the form
13 of that agreement.

14 But the agreement elaborates a little bit more
15 as to the uses that were preapproved, based on the plan
16 that they submitted.

17 I think it would still be serving that purpose,
18 and it would be an extension of using those funds for the
19 intended purpose but at an expenditure level. I don't
20 know from a legal perspective if that would create a
21 problem, but it's just an extension of what we have now.

22 MR. VASQUEZ: Let's let another attorney come
23 up here.

24 MS. SYLVESTER: Well, I'm not Mr. Eccles,
25 either.

1 (General laughter.)

2 MS. SYLVESTER: I think we could probably write
3 something in the rule that says, "absent a contractual
4 memorialization to the contrary," and then put the
5 5-percent language in, if that's something you wanted to
6 do.

7 MR. BRADEN: That's helpful, but if you have
8 the contract prohibit it --

9 MS. SYLVESTER: I came to the Department right
10 after this exchange program, so I don't have a lot of
11 experience with it, but I have reviewed a couple of them,
12 and they're pretty vague, generally.

13 MR. BRADEN: And do they have to be amended by
14 both parties to the agreement?

15 MS. SYLVESTER: I think I would have to look.
16 It's probably been -- Jeff, do you remember the last time
17 we got asked to look at one of these?

18 MALE VOICE: 2009?

19 MS. SYLVESTER: Yeah. I came to the Department
20 in 2010, so, yeah, I mean, I think I dealt with a couple
21 right at the beginning.

22 But we'd have to kind of look and see.

23 MR. BRADEN: What about an affirmative
24 obligation to make the tenants aware of this?

25 MS. BAST: Yeah. That might be --

1 MR. BRADEN: Can we require that the
2 contract -- that the agreement that they sign with the
3 tenants has some kind of big, bold, layman's, this is here
4 and --

5 MS. BAST: I think notification is reasonable,
6 and that's why I was also suggesting sort of potentially
7 broadening the uses, because if the uses aren't there for
8 just tenancy expenses, then there may be way to improve
9 the lives of the residents in other ways.

10 And that, I think, is not necessarily as risky
11 in terms of being inconsistent with a contract, because if
12 you give the owner, you know, a bigger opportunity to
13 utilize the funds, it's different than restricting it and
14 say, You have to use this much every year.

15 MR. BRADEN: I actually like the 5 percent. I
16 think that's a good idea. It forces sort of a paydown
17 and use, but I'm not sure we could do it at this point.

18 MR. CABELLO: And putting my compliance hat on,
19 we also -- how are we going to enforce this? Are we going
20 to get them out of compliance and -- I mean, there's a
21 whole bunch of issues that come on that side, on the
22 enforcement of this piece.

23 MR. BRADEN: It's a new concept to introduce an
24 appropriate place, but it would be nice if we were to go
25 through with the preliminary rule and --

1 MS. BINGHAM ESCAREÑO: We could work on it with
2 a roundtable and do it next time around.

3 MR. BRADEN: And what about -- I mean, right
4 now could we put something in that says it's an
5 affirmative to tell residents about this? That's novel
6 but common sense.

7 MR. VASQUEZ: But it gets the ball rolling.

8 MS. BINGHAM ESCAREÑO: It doesn't really have
9 teeth, but it would -- my concern would be on the 5
10 percent, if there -- if some of the pools are fairly large
11 but some of the pools are fairly small -- and being in
12 healthcare, you can wipe out your -- if you spend down 5
13 percent -- I mean, if it's interest bearing and it's --

14 MR. VASQUEZ: But I'm also saying if -- towards
15 the future --

16 MS. BINGHAM ESCAREÑO: Yes.

17 MR. VASQUEZ: -- if you have not spent 5
18 percent --

19 MS. BINGHAM ESCAREÑO: Yes.

20 MR. VASQUEZ: I mean, you know, if you've spent
21 3 percent, then you have 2 more percent that goes -- you
22 give a rent credit.

23 MR. BRADEN: Maybe over a certain amount it's
24 capped. I mean, if they've got \$10,000, maybe you don't
25 do that.

1 MR. VASQUEZ: I think this will be great for
2 staff to work on in the next round. It's a great idea. I
3 mean, this is sitting out there, and it's for the tenants.
4 Let's use it.

5 MS. BAST: One more thing. This is easier I
6 think. Sorry.

7 MR. VASQUEZ: No, that was good.

8 MS. BAST: Okay. One more thing. So because
9 many of these are, for instance, exchange fund deals circa
10 2010 or so, natural course of real estate cycle, they're
11 getting to a point where they may want to refinance,
12 because interest rates are lower, they may need
13 renovations, they may have been struggling all along. You
14 don't know what could be any particular scenario.

15 There's a statement in here that says, Proceeds
16 from any refinancing or other fund raising from the
17 development will be considered net cash flow for purposes
18 of funding the special reserve account.

19 So if I'm an owner and I have an obligation to
20 put 20 percent of my net cash flow in the special reserve
21 account every year, and if I go refinance my property and
22 I have proceeds from that refinance, then this requires me
23 to put 20 percent of those proceeds in the special
24 reserve.

25 What I would like to propose is that we change

1 that word "will" to the word "may," so that the Department
2 can accommodate situations like if the refinance if
3 intended -- the proceeds are intended to renovate the
4 property or if the proceeds are intended to address
5 something else that is a legitimate need, then the
6 Department could allow that to be used so that it -- the
7 requisite percentage would not need to go into the special
8 reserve account.

9 So that's my specific request there.

10 MR. VASQUEZ: So with Department approval --

11 MS. BAST: Yes. So --

12 MR. VASQUEZ: -- it could be less than 20
13 percent.

14 MS. BAST: Yes. So proceeds from any
15 refinancing or other fund raising from the development
16 may -- you could say, at the Department's discretion -- be
17 considered net cash flow for purposes of funding special
18 reserve account.

19 MR. BRADEN: I think that would be up to the
20 Department to verify that.

21 MR. VASQUEZ: Right. And just that we approved
22 that -- it's being documented, showing that it's going to
23 be used for reroofing the whole place or whatever it is,
24 and there's not going to be 20 percent left over. Can we
25 do that?

1 MS. SYLVESTER: Yes, but. I think from a
2 compliance standpoint, it would be easier to phrase it the
3 other way: Unless otherwise approved by the Department,
4 this will contain -- that way somebody has to come to the
5 Department to say, I don't want to have to do this, and
6 here's why.

7 MR. BRADEN: That works.

8 MR. VASQUEZ: Got that, Brooke?

9 MS. BOSTON: Yes.

10 MS. BAST: Thank you.

11 MR. VASQUEZ: Very good. Thank you.

12 MR. BANUELOS: All right. So --

13 MR. VASQUEZ: 10.405.

14 MR. BANUELOS: 10.405. Yes.

15 Under section 10.405, regarding amendments and
16 extensions, staff has proposed the removal of
17 notifications and nonmaterial amendments for general
18 contractors or guarantors providing guarantees only during
19 the construction period.

20 The removal of this requirement should result
21 in fewer notifications and nonmaterial amendments being
22 submitted for external stakeholders and staff, and
23 occasionally we find out about these guarantors after the
24 construction is completed, so we don't know about them in
25 a timely manner.

1 Also in this section, a rule applicable only to
2 exchange developments was moved from subchapter F, but
3 this is not a new requirement; it's just changing from
4 subchapter F to subchapter E.

5 In the section for amendments, staff also
6 proposed the removal from the section relating to material
7 LURA amendments of the reference to request to implement a
8 revised selection under Section 42(g) of the Internal
9 Revenue Code.

10 This mainly relates to changes into the average
11 income set-aside. This type of material LURA amendment is
12 really considered under two other sections within that
13 section of the rules, so we just didn't want to be
14 misleading and having it in one area only.

15 Under Section 10.406 relating to ownership
16 transfers, staff has proposed the additional clarifying
17 language for transferees who have been certified as CHDO
18 by TDHCA prior to 2016, or have not yet been certified as
19 a CHDO for purposes of assisting transferees wishing to
20 qualify for CHDO status or satisfying the right-of-first-
21 refusal requirements under a seller's LURA.

22 While a self-certification form declaring that
23 the CHDO still meets the requirements under the HOME final
24 rule can be accepted for entities that were certified
25 after 2016, provided that federal guidance and rules have

1 not changed at the time that the certification is
2 reviewed, the CHDO package prior to 2016 did not include
3 all of the items required to determine CHDO status under
4 the revised HOME final rule and therefore cannot be
5 accepted for recertification or current certification
6 processes.

7 Under Section 10.407, relating to right of
8 first refusal, or ROFR, based on public comment received
9 during an Asset Management and Qualified Allocation Plan
10 roundtable on May 22, 2019, and additional input received
11 by the Department in July, staff has proposed substantial
12 changes to the required documentation to be submitted to
13 the Department as part of the notice of intent.

14 Previously, only tenants and potential buyers
15 on a Department listserv were notified of the
16 development's notice of intent to sell through the ROFR
17 process.

18 But based on stakeholder comment, staff has
19 proposed expanding the list of parties to be notified to
20 include tenant organizations, mayors or governing bodies
21 of the municipality in which the development is located --
22 whichever is applicable -- presiding officers of the
23 governing body of the county in which the development is
24 located, and the local housing authority.

25 While not on the proposed draft, staff also

1 proposes to add a statement in the rules that the
2 development or owner has provided such notifications to
3 the best of their knowledge and ability. We also propose
4 to remove the requirement for evidence of submission or
5 receipt, so we're just looking for a copy of the notices.

6 In addition, staff has proposed adding --

7 MR. VASQUEZ: Wait.

8 MR. BANUELOS: Sorry.

9 MR. VASQUEZ: Okay. I'm sorry. Let's go ahead
10 and finish this section, or his -- continue, please.

11 MR. BANUELOS: So in that same section, staff
12 also proposed adding minimum requirements to the notice
13 letters, to include the development's name, address, city,
14 and county, the development owner's name, address,
15 individual contact name, phone number, email address,
16 information about the tenant's rights to purchase the
17 development through ROFR, the date that the ROFR notice
18 period expires, the ROFR offer price, a description of the
19 development that includes total number of units and low-
20 income units and contact information for the Department
21 staff overseeing the development's ROFR application.

22 MR. VASQUEZ: Ms. Loney -- Lauren?

23 MS. LONEY: This will be very quick, because I
24 have only very positive things to say. So just a little
25 bit of background.

1 While I am new at Texas Housers, I was a legal
2 fellow at University of Texas for the two years prior to
3 that, and a large portion of my work there was on long-
4 term affordability in the LIHTC program.

5 So the right of first refusal is a really big
6 component of protecting properties when a development
7 owner wants to sell the property or request a qualified
8 contract, for example.

9 So these types of notices provisions that have
10 been included in this draft have been really critical to
11 other state and local preservation efforts from across the
12 country.

13 I've seen right-of-first-refusal notices to
14 tenants under the current rules that don't mention the
15 consequences of a right of first refusal, which is that
16 the owner could then request a qualified contract to exit
17 the program.

18 They don't notify tenants at all -- in the
19 cases I've seen -- of their rights to organize -- tenant
20 organization and purchase the property themselves. They
21 really don't give any information except for, we satisfied
22 this right of first refusal; here's the new person to send
23 your check to.

24 To us at Housers, that's not really giving
25 people enough information to know what's happening in

1 their homes. Then also, in high-opportunity areas and
2 gentrifying neighborhoods, we've seen right-of-first-
3 refusal properties listed for sale upwards of \$32 million.

4 And local nonprofits and housing authority
5 often don't have the capacity to act independently to
6 purchase that property if they decide that's one they want
7 to preserve. So this notice that lets every interested
8 party know about this opportunity really gives every those
9 interested the chance to have the time to put together
10 financing, to work together to form partnerships if
11 needed, et cetera.

12 It essentially just gives the best possible
13 chance for a mission-driven entity to take on that
14 property so that it stays in the LIHTC program and
15 affordable. Thanks.

16 MR. VASQUEZ: Great.

17 MS. BINGHAM ESCAREÑO: Bring it home.

18 MR. BANUELOS: Under Section 10.408, relating
19 to qualified contract request, staff proposed that the
20 copy of the Physical Needs Assessment submitted with the
21 preliminary qualified contract request be no more than 12
22 months older than the date of the request.

23 This change is proposed as the result of having
24 received qualified contract requests providing old PNAs
25 that have not given an accurate picture of the critical

1 repairs needed.

2 And because critical repairs or replacements
3 must be resolved to the satisfaction of the Department
4 before the development will be considered eligible to
5 submit a qualified contract request by rule, staff must
6 have current, accurate information regarding the repairs
7 and replacements to make such a determination.

8 Finally, staff has proposed in the qualified
9 contracts section the elimination of the requirement that
10 the Department approve of any broker that will market and
11 sell the property under qualified contract, and the
12 elimination of the limit on the fee paid to the broker by
13 the seller, which is currently limited to less than
14 6 percent of the qualified contract price.

15 These changes are due to the fact that the
16 Department does not currently approve or maintain a
17 selected list of brokers, and there is not a clear state
18 or federal provision that authorizes the Department to
19 restrict brokerage fee between a seller and a broker hired
20 to market and sell a property.

21 At this time, I am available to provide further
22 details or answer any questions.

23 MR. VASQUEZ: One more comment.

24 MS. LONEY: Sorry to be person keeping everyone
25 here.

1 We really oppose the change to take away
2 TDHCA's ability to disapprove of a broker that is chosen
3 to market qualified-contract properties.

4 The reason why we oppose this and why actually
5 we would like to see this approval process be taken a step
6 further to mandate TDHCA's approval of a broker is because
7 across the country, the qualified contract is widely known
8 as the largest threat to long-term affordability in the
9 LIHTC program.

10 In Texas, we've lost 5,000 units due to
11 qualified-contract process, and other states across the
12 country are experiencing very similar problems. The only
13 state that is successfully finding preservation buyers
14 during the qualified contract process, they cite one
15 simple policy change to their success, and that is that
16 they require developers to use a broker that has
17 experience with successfully marketing and selling LIHTC
18 properties.

19 Even if there's not a list of brokers that's
20 readily available, it should be quite easy to see whether
21 or not a broker has successfully sold a LIHTC property.

22 So this is a really important provision that
23 could have a really large impact on our zero-percent
24 success rate for successfully selling properties that are
25 up for sale through the qualified-contract program.

1 So I just strongly urge TDHCA and the Board to
2 reconsider taking away any oversight by TDHCA to monitor
3 the brokers that are being used for these really, really
4 complicated and important sales.

5 MR. BRADEN: What's the one state?

6 MS. LONEY: It's Oregon. And they don't have a
7 list that you have to choose from. They don't do anything
8 except confirm that that broker has experience, because
9 they recognize that marketing and selling LIHTC property
10 through the qualified-contract process in particular is
11 not like real estate marketing in many other respects.

12 And so once the state agency in Oregon has
13 approved that broker, there's no additional requirements
14 there. And they cite that as the number-one reason why
15 they're seeing successful sales.

16 MR. VASQUEZ: However, did you say we have zero
17 percent successful sales?

18 MS. LONEY: Texas?

19 MR. VASQUEZ: Uh-huh.

20 MS. LONEY: There have been several
21 opportunities -- there have been several presentations of
22 qualified contracts that owners have turned down. And I
23 think in the Dallas area, just this past year, prior to
24 that, no property that has requested a qualified contract
25 has ended up with a preservation buyer.

1 MR. VASQUEZ: But then you're saying that we
2 should have only brokers that have experience marketing
3 these --

4 FEMALE VOICE: But there aren't any.

5 MR. VASQUEZ: But then --

6 FEMALE VOICE: There's no --

7 MR. VASQUEZ: -- they haven't had any success,
8 so shouldn't we want new brokers anyway?

9 MS. LONEY: New -- I don't know what you mean
10 by new.

11 MS. BINGHAM ESCAREÑO: What would be our pool
12 of qualified brokers?

13 MS. LONEY: That's a good question. I've never
14 looked through the pool of qualified LIHTC brokers, but I
15 know that there are brokers that are national actors that
16 I'm sure would be interested.

17 I just went to a conference in Rhode Island
18 specifically about LIHTC preservation, and there were
19 brokers there that are national actors. But there are
20 definitely others in the room, like Cynthia, who probably
21 have a lot more knowledge on the actual implementation end
22 of this.

23 MR. CABELLO: I just have --

24 MS. LONEY: Yeah.

25 MR. CABELLO: -- a couple of comments. You see

1 the prices set by the IRS regulations. The broker is
2 acting on behalf of the seller, and the broker is -- the
3 percentage is negotiated by them, too. I'm not quite sure
4 what we're trying to accomplish here when the broker is
5 marketing the property for sale and the QC price is
6 already set by the IRS regs.

7 So I don't -- I'm trying to understand what the
8 benefit will be with the broker.

9 MS. LONEY: Yeah. And I can definitely
10 reiterate what Oregon staff had told me, which is that
11 there's only certain buyers who are really interested in
12 and have the resources to pay for a property at that
13 qualified-contract price, because it usually results in
14 properties listing for sale well above fair market value.

15
16 So the idea is having a broker that's
17 knowledgeable in precisely who they need to be marketing
18 to, not just relying on a general, perhaps, real estate
19 marketing strategy, or even multifamily real estate
20 strategy -- LIHTC is just a different ballgame, and I
21 think that having brokers that understand that apparently
22 can go a really long way.

23 MR. VASQUEZ: Well, again, we appreciate the
24 comment. It will be interesting to see how Oregon
25 continues and to see if something like that can be applied

1 to the scale of Texas compared to Oregon. I think this is
2 something that we can look at how it continues working
3 out.

4 If there's statistics that show that even with
5 this change that limits our sales or -- I just don't see
6 how there's going to be a whole lot of -- or how we would
7 start crafting this to say who is eligible and who is not.
8 It starts becoming difficult.

9 This sounds to me like another one of those
10 that, as you continue joining with all the rules, making
11 committees that we have going forward, this could go
12 into the next one, if you can get more people on board.

13 MS. LONEY: Just one final comment, then, is
14 that I would say at the very least, don't strike TDHCA's
15 capacity to have oversight that's already in the rules.
16 At least keep it in the wheelhouse, and not just say we're
17 going to totally lack -- not have any oversight over this
18 because right now we don't have a list of approved
19 brokers.

20 So I think that there's still opportunity, as
21 the rules are currently written, and not the proposed
22 rule, to have some involvement in helping to locate a good
23 broker.

24 MR. BANUELOS: So a couple of comments on that.
25 So I think that the concern with having it in the rules

1 right now is that there's no criteria as to approving or
2 disapproving.

3 So it's there, but there's no guidance as far
4 as who would be acceptable as a broker, so I understand
5 that it would give us the ability to say no, but the
6 question is, under what circumstances?

7 MR. VASQUEZ: Have we ever disapproved a
8 broker?

9 MR. BANUELOS: We have not. No. And then as
10 far as the qualified contract process goes, having the
11 property listed by a broker is the first step. They
12 contact us as at TDHCA and then we post it on our website.

13 We send out a notification of the property being out
14 there for sale. So we're trying to find a buyer as well.

15 And I'll tell you recently we've had a couple
16 of properties where there was interest to purchase, but
17 the owner decided not to sell after all. So I don't know
18 if that's necessarily a function of the broker or more of
19 the attributes of the property price and all that. And
20 ultimately it's up to the seller to decide to move forward
21 or not.

22 MR. VASQUEZ: Is --

23 MR. CABELLO: I think the rule only caps the
24 amount that the broker can charge, which is 6 percent.

25 MR. VASQUEZ: Well, it's both. We're striking,

1 "The Department may, at its sole discretion, notify the
2 owner that the selected broker is not approved by the
3 Department." And then the fees paid by the seller not to
4 exceed 6 percent of the QC price.

5 MR. CABELLO: Lauren mentioned something that's
6 also important to re-emphasize. The QC price is above the
7 fair market value, so the groups that are looking for
8 these properties know to look on our website, because that
9 where we -- we also put it there to try to market the
10 property.

11 MS. BINGHAM ESCAREÑO: I have a question.
12 Since it says "may," do we have to strike it?

13 MR. VASQUEZ: That's the question. Does it
14 matter?

15 MS. BINGHAM ESCAREÑO: If it says "may," is
16 Lauren suggesting, you know, maybe we leave it in there
17 and then figure out if we need to apply it or how to apply
18 it or something, versus -- because I definitely hear what
19 you're saying about we don't have any guidelines around
20 it. But if it says "may" --

21 MR. VASQUEZ: It's at our discretion

22 MR. BRADEN: Has there ever been a problem?

23 MR. BANUELOS: No, there has not been a
24 problem.

25 MR. BRADEN: Leave it alone then.

1 MR. VASQUEZ: So we leave it as is? Don't
2 strike it?

3 MS. BINGHAM ESCAREÑO: Okay.

4 MR. VASQUEZ: What about the not to exceed 6
5 percent of the QC price? That's kind of standard anyway,
6 isn't it?

7 MR. CABELLO: That's a negotiable percentage
8 between the seller and broker.

9 MS. BINGHAM ESCAREÑO: Just not to exceed.

10 MR. VASQUEZ: But is there any harm in --

11 MR. CABELLO: No.

12 MR. VASQUEZ: -- leaving in the not to exceed?

13 MR. BRADEN: Again, we haven't had any
14 negative --

15 MR. BANUELOS: No. We have not had any
16 negative experience. We just didn't want to be in the
17 middle --

18 MS. BINGHAM ESCAREÑO: Yeah.

19 MR. BANUELOS: -- of the transaction. We just
20 said, Okay, that's between the two of you.

21 MR. BRADEN: I mean, I assume we'd only strike
22 it if there was some real reason --

23 MR. BANUELOS: There hasn't been any.

24 MR. BRADEN: -- fraud or criminal --

25 MR. VASQUEZ: So it sounds like the consensus

1 is let's just leave it in there?

2 MS. BINGHAM ESCAREÑO: Unstrike it. Yeah.

3 MR. BANUELOS: Okay.

4 MR. VASQUEZ: Lauren gets one?

5 MS. BINGHAM ESCAREÑO: Tell John. Make sure
6 you tell John.

7 MS. LONEY: Let me call my boss.

8 MR. VASQUEZ: Okay. Mr. Banuelos, is there
9 anything else on this section?

10 MR. BANUELOS: That is all under the Post Award
11 and Asset Management Rules.

12 MR. VASQUEZ: Very good.

13 MS. BINGHAM ESCAREÑO: Thank you. Thank you,
14 guys.

15 MR. VASQUEZ: Thank you for your effort. And
16 going on to the last section, which I promise is shorter
17 than the others --

18 MS. BINGHAM ESCAREÑO: All right.

19 MR. WILKINSON: Mr. Vasquez, I just to make sure
20 that we know the exact changes that you want on the
21 Asset --

22 MR. VASQUEZ: No changes. On that second -- on
23 that last --

24 MR. WILKINSON: Okay. That's back to reserve
25 accounts, it's just that the tenants must be notified.

1 We're not doing the 5 percent of --

2 MR. VASQUEZ: I'm sorry. Okay. I'm talking
3 about the other one.

4 MR. WILKINSON: I didn't -- so 10.404, the
5 reserve accounts -- are we putting in that all the tenants
6 must be notified of the existence of the account for
7 tomorrow?

8 MR. VASQUEZ: Yes. I thought we were adding
9 more --

10 MR. BANUELOS: Yes. Stepping up 5 percent.

11 MR. WILKINSON: Five percent?

12 MR. VASQUEZ: Not the --

13 MR. WILKINSON: Five percent we'll look at next
14 year, but we're adding that they must help, and that the
15 20 percent of like a refi or other cash flow --

16 FEMALE VOICE: Right. From a "will" to a "may."

17 MS. BINGHAM ESCAREÑO: Yeah.

18 MR. WILKINSON: Will, unless otherwise approved
19 by the Department, I think you said.

20 MS. BOSTON: Yes.

21 MR. WILKINSON: Those are the two --

22 MR. VASQUEZ: Correct. Yes.

23 MR. WILKINSON: And then the third change --

24 Bobby Wilkinson, Executive Director. Then the
25 third change is just keep the broker requirement.

1 MALE VOICE: No. Let's go back to the first
2 one. I don't think we're changing the "shall" to a
3 "will." We're leaving it "shall," but unless otherwise
4 agreed to by the Department.

5 MR. WILKINSON: Correct. I have it that way.
6 Okay. Just making sure.

7 MR. VASQUEZ: Thanks for doing the summary now
8 instead of at the end.

9 Okay. Again, the final item on the agenda,
10 Presentation, Discussion, and Possible Action to Make
11 Recommendation to the Governing Board on the Multifamily
12 Direct Loan Rule Entailing the Proposed Repeal and
13 Proposed New 10 TAC Chapter 13.

14 Andrew Sinnott.

15 MR. SINNOTT: Good evening. Andrew Sinnott,
16 Multifamily Loan Program Administrator. Like you just
17 said, Mr. Vasquez, this is the Proposed New 10 TAC Chapter
18 13, Multifamily Direct Loan Rule for 2020.

19 First, organizationally, our policy research
20 specialist, Alena Morgan, did a fantastic job of
21 organizing the rule within each section. So we still have
22 sections 13.1 through 13.13 as we did in 2019, but I think
23 the way the concepts are organized within each section are
24 a lot cleaner and more intuitive this year. So I just
25 wanted to acknowledge her contributions.

1 So I'll go ahead and get started, and feel free
2 to stop me or interrupt me as I'm going through each
3 section.

4 So under 13.1(c), we added a lot more
5 granularity with respect to waivers, describing the waiver
6 process for direct loan applications layered with housing
7 tax credits, applications seeking direct loan funds as the
8 only source of Department funding, and applications
9 regardless of whether or not they're layered with tax
10 credits, where the NOFA they applied under has been
11 closed.

12 Under 13.2 definitions, we deleted annual
13 income, as that as discussed in the Compliance Monitoring
14 Rules in 10 TAC 10.611, and Choice Limiting Activity,
15 since we referenced the 24 CFR Part 58 Definition in
16 13.11(b)(2).

17 Meanwhile, we added definitions for application
18 acceptance dates, deobligated funds, housing contract
19 system, and site and neighborhood standards, since we
20 discussed these things in various parts of the rule.

21 In the Rule, NOFA and application felt they
22 needed to be defined. We also clarified the surplus cash
23 definition to allow for the HUD definition of surplus cash
24 to govern when there's a HUD-insured first-lien loan.
25 When there's not a HUD-insured first-lien loan and if

1 TDHCA's loan is structured as a surplus cash flow loan,
2 the definition in 13.2 will govern.

3 Under 13.3, General Loan Requirements, we added
4 adaptive reuse developments and developments that have
5 elected income averaging with more than 15 percent of the
6 units designated market-rate units as ineligible
7 activities.

8 With regard to the adaptive reuse developments,
9 those developments that are financed by TDHCA typically
10 utilize both the housing tax credits and historic tax
11 credits, and the complex ownership structures that are
12 necessary to take advantage of both the historic and the
13 housing tax credits are often inconsistent with federal
14 HOME and NHTF rules that govern our direct loan funds.

15 With regard to applications electing income
16 averaging with 15 percent or more of the units designated
17 market rate units, staff is concerned that a big gap
18 between the income underwritten at application assuming
19 the layering of direct loan units on the tax-credit units
20 with the market-rate units able to command higher rents
21 and the income ultimately generated once the property is
22 leased when direct loan households potentially have to
23 occupy market-rate units in order to maintain income
24 averaging, thereby significantly decreasing the income of
25 the property, that a big gap could appear with respect to

1 that, so that's why we made income averaging developments
2 that have more than 15-percent market rate units
3 ineligible.

4 That's actually the result of 11.302(d)(1)(A),
5 the underwriting restrictions there, that limit the rents
6 on market-rate units to lesser of market rent or gross
7 program rent at 80-percent AMI when there's less than 15-
8 percent market rate unit.

9 I apologize if it's getting a little too in the
10 weeds, but basically when we have a deal that has 14.9-
11 percent market-rate units, those rents will be
12 underwritten at the 80-percent rent limit. When it's
13 15.1-percent, they're going to be able to say, oh, well,
14 we think we can get \$200 over the 80-percent rent limit.

15 So by limiting the difference in the market-
16 rate units and what we're underwriting the market-rate
17 units at, it's thereby limiting the potential spread
18 between what a market-rate unit could get if it's got to
19 have a HOME restriction on it and when a market-rate unit
20 doesn't have a HOME restriction on it.

21 MR. VASQUEZ: You're going to have a
22 spreadsheet on this. Right?

23 MR. SINNOTT: Megan helped.

24 MS. SYLVESTER: If you have questions, I can
25 pop up there.

1 MR. SINNOTT: It will basically -- I think it
2 will ensure long-term feasibility or make sure that --

3 MR. VASQUEZ: The developers will understand
4 this by being able to plug their numbers into the
5 spreadsheet and --

6 MR. SINNOTT: Yes.

7 MR. VASQUEZ: It'll be green or red? Right?

8 MS. SYLVESTER: No, no.

9 MR. SINNOTT: Yeah. It's kind of a challenging
10 concept, but you just --

11 MR. VASQUEZ: But we'll make sure we don't have
12 other --

13 MR. SINNOTT: Sure.

14 MR. VASQUEZ: -- developers sitting here trying
15 to say, we can't understand this.

16 MR. SINNOTT: Yeah. I mean, it's basically a
17 prohibition on developments that have greater-than-15-
18 percent market-rate units. If they're also electing
19 income averaging, they can't apply for direct loan funds.
20 That's the bottom line.

21 MR. VASQUEZ: Very good.

22 MR. SINNOTT: We also added to the list of
23 ineligible costs as we had some costs submitted for
24 reimbursement with direct loan funds lately that need to
25 be included on this list.

1 Under 13.4, Set-Asides, Regional Allocation,
2 and Priorities, we made the following changes to set-
3 asides. We renamed the Supportive Housing/Soft Repayment
4 Set-Aside to just the Soft Repayment Set-Aside in an
5 attempt to avoid confusion, since developments serving
6 general or elderly populations can also qualify under this
7 set-aside.

8 We also added a prohibition on developments
9 also receiving any project-based subsidy from having the
10 project-based subsidy be used on the direct loan units.
11 We made some clarifications to the CHDO in general set-
12 asides as well.

13 We changed the title of Regional Allocation to
14 Regional Allocation and Collapse, as both concepts are
15 discussed in the section. Some other minor clarifying
16 changes in this section as well.

17 In the Priorities section, (c) and (d) of 13.4,
18 we made some minor clarifying changes and further describe
19 Priority 3 applications, specifically applications layered
20 with 9-percent tax credits that are on the wait list after
21 the July Board meeting.

22 Under 13.5, Award Process, we made lots of
23 minor clarifying changes throughout. Substantial changes
24 include in (f), we further clarified the changes that may
25 be made to 9-percent layered applications when direct loan

1 funds are oversubscribed in the set-aside, or for a fund
2 source that has geographic limitations in a set-aside,
3 like HOME; and discussed how direct loan funds that become
4 available between the time a 9-percent layered application
5 is submitted and the late July Board meeting will not be
6 reserved for 9-percent layered applications, unless
7 specifically described in the NOFA.

8 In (g), we further clarified how the Department
9 will determine the direct loan fund source for an
10 application recommended for a direct loan award.

11 Under (h), the finding of eligibility, similar
12 to the findings of eligibility in the proposed 2020
13 version of Chapter 11, for applications that have received
14 an award of funds from the Department within the past 15
15 years and/or have started or completed construction will
16 now come from -- the funding eligibility will now come
17 from the Executive Director or authorized designee, rather
18 than the Board.

19 We have also proposed excluding weather events
20 not classified as force majeure as a reason why such
21 applications could be found eligible.

22 Under 13.6, Scoring Criteria, we deleted the
23 scoring criteria regarding tenant populations with special
24 housing needs, scoring for participating in the
25 Department's Section 811 PRA program, as that scoring

1 criteria was similarly deleted in Chapter 11 for 2020.

2 Under 13.7, the Max Funding Request and Minimum
3 Number of Direct Loan Units, lots of minor clarifying
4 changes, with the only substantive change being in (c), in
5 which we added maximum rehabilitation per unit subsidy
6 limits in response to Board direction for staff to get a
7 better handle on per-unit rehab costs.

8 Right now, the base amount per unit to
9 determine substantial rehab for FHA-insured loan programs
10 is \$15,933, but then you apply the 243-percent high-cost
11 adjustment that TDHCA-funded developments are subject to,
12 since we're in the Fort Worth region -- that whole region
13 gets that 243-percent high-cost adjustment -- or grantees
14 in that Fort Worth region get a 243-percent high-cost
15 adjustment, that brings the cap to 38,717.

16 So we've got a minimum of 25- to 30,000
17 depending on the circumstances, and then a max of 38,000.

18 But that's only on the direct loan eligible costs, which
19 typically make up approximately 90 percent of total
20 housing development costs.

21 So there are more -- you know, in a \$10 million
22 deal, \$1 million will be direct loan ineligible costs,
23 typically --

24 MR. VASQUEZ: And we're basing this off the HUD
25 federal limit?

1 MR. SINNOTT: Right. So the actual maximum
2 rehab per unit subsidy limit, like I said, assuming that
3 kind of 90 percent of total housing development costs are
4 direct loan eligible costs, the actual total housing
5 development costs or per-unit costs would be \$43,000 when
6 you account for those direct loan ineligible costs.

7 But we're open to any committee suggestions
8 regarding this, as well as any items today.

9 Under 13.8 -- do you have any recommendations?

10 MR. VASQUEZ: I recommend you continue.

11 MR. SINNOTT: Okay. Under 13.8, Loan Structure
12 and Underwriting Requirements, we more clearly describe
13 the closing memo to the underwriting report process that
14 all direct loans are subject to and establish the
15 threshold to the decrease and the DCR between the time of
16 the initial underwriting report and closing memo to the
17 underwriting report that can be approved without Board
18 approval.

19 So it's now .05, so DCR can drop from a 125 to
20 a 120 and we can approve that administratively.
21 Anything -- you know, if it goes from 125 to a 115,
22 that'll come to you all. So decreases greater than .05 as
23 a result of the principal amount or scheduled payment
24 amounts on that superior lien increase will come to the
25 Board.

1 Currently, 13.8 does not have a threshold, and
2 requires all increases in the principal or payment amount
3 of any superior loans after the initial underwriting
4 report to be approved by the Board.

5 Under (c), we more clearly describe the
6 criteria for construction of perm loans, which has been
7 the standard structure for direct loans establishing the
8 construction term as being coterminous with any superior
9 construction loan as long as it's not created in 36
10 months, clarifying that no interest accrues during the
11 construction period, allowing the Department to require
12 payment from other sources when repayment on our loan is
13 limited by HUD's definition of surplus cash flow,
14 clarifying that priority lien position on the Department's
15 loan will only be considered with the USDA loan, reducing
16 the owner equity requirement for direct-loan-only deals to
17 10 percent of total development cost, and deleting the
18 requirement that direct-loan-only applicants provide
19 appraisal reflecting a maximum 80-percent loan-to-value,
20 instead relying on the direct loan to not be more than 80
21 percent of total housing development costs, since the cost
22 of obtaining an appraisal can be prohibitive for smaller
23 developers and because at least for new construction, an
24 as-completed appraisal is speculative, and given that the
25 development would not be complete until two to three years

1 after the appraisal is published.

2 Minor clarifications in (d) and (e). (f): We
3 added criteria for when a direct loan will be used to
4 refinance existing debt. (g): We clarified that the
5 direct loan funds may not be used as passthrough
6 financing, which is popular with partnerships that have
7 nonprofits as the general partner. Most federal HOME and
8 NHTF requirements are inconsistent with the passthrough
9 financing structure.

10 Under 13.9, we updated construction standards
11 from 2012 to 2015. IEBC or IBC is applicable. We added a
12 statement in (e) regarding the possibility that rehab
13 developments funded with federal sources may be required
14 to meet minimum rehab standards as required by HUD, as we
15 are looking into the possibility of allowing
16 rehabilitation to be an eligible activity within HTF.

17 Under 13.10, we -- under (c), we expounded on
18 the HOME-match eligible unit concept from the definition
19 section 13.2, explaining how these types of units can
20 exist both within and/or in addition to the direct loan
21 restricted units, depending on the fund source.

22 In (e), we further developed the concept of all
23 units being income-and rent-restricted, when housing tax
24 credit equity and direct loan funds are the only sources
25 of permanent financing.

1 Under 13.11, in (b), we changed some of the
2 time lines for when certain benchmarks must be met post
3 award, including corresponding changes to the construction
4 completion deadlines, since we allowed longer construction
5 periods, or the possibility of longer construction periods
6 in 13.8(c).

7 In (b)(11)(D)(ii), we added specific
8 documentation that REA needs in order to produce the
9 closing memo to the underwriting report.

10 In 12(a), we deleted the personal guarantee
11 requirement, as the Department's LURA, which is recorded
12 and runs with the property, accomplishes similar goals and
13 because the personal guarantee adds to the administrative
14 burden of the loan closing process.

15 In 14, as Rosalio alluded to in his
16 presentation of the Asset Management Rule earlier, we
17 noticed a unique aspect of the federal NHTF rule, 24 CFR
18 93.406, that required a cost certification upon
19 construction completion and annual audits throughout the
20 30-year federal affordability period that we felt was
21 worth incorporating into Chapter 13 as a result of its
22 uniqueness.

23 So 13.11(b)(14) only applies to developments
24 funded with NHTF. Under 13.12, the changes were mostly
25 minor clarifying changes, though we did indicate in (a)(5)

1 that decreases in the direct loan amount prior to closing
2 may be administratively approved, but may be subject to
3 penalties in 13.11.

4 And under 13.13, we carried through the
5 threshold .05 to the decrease in the DCR that can be
6 approved without Board approval as it relates to increase
7 superior debt post closing, and in (d), we further
8 developed requirements regarding the assignment and
9 assumption of direct loans following the approval of the
10 ownership transfer.

11 With that, that concludes my presentation. Do
12 you have any questions or comments?

13 MR. VASQUEZ: Okay. Anyone in the audience
14 have any comments? Thoughts?

15 (No response.)

16 MR. SINNOTT: I put everyone to sleep?

17 MS. BINGHAM ESCAREÑO: No.

18 MR. VASQUEZ: Obviously there was lots of input
19 from the development community during this process.

20 MR. SINNOTT: For sure. Yeah. Throughout
21 the --

22 MR. VASQUEZ: Throughout this --

23 MR. SINNOTT: -- roundtables and emails. Yeah.

24 MR. VASQUEZ: Okay. Well, it looks like you're
25 off the hook.

1 MR. SINNOTT: All right. Thank you.

2 MS. BINGHAM ESCAREÑO: Good job, Andrew.

3 MR. VASQUEZ: Okay. All the agenda items have
4 been addressed.

5 Is there any public comment on items not on the
6 agenda that anyone needs to address?

7 (No response.)

8 MR. VASQUEZ: Okay. Do we have a -- are you
9 confident that you have the summary, Brooke, of the edits
10 that we are suggesting to be made?

11 MS. BOSTON: Yes.

12 MR. VASQUEZ: Okay. So at tomorrow's Board
13 meeting we'll have a similar, although much abbreviated,
14 presentation and make recommendations to the Board given
15 the edits that we've put together.

16 Mr. Wilkinson?

17 MR. WILKINSON: Bobby Wilkinson, Executive
18 Director.

19 Mr. Vasquez, I think the way we'd planned to
20 organize it next time after talking to Beau was when this
21 particular rule comes up during staff presentations,
22 they'll discuss the changes that you all suggested, and
23 the chairman will probably move it to you to make a motion
24 on your changes being accepted by the rest of the Board
25 along with the proposed rule.

1 MR. VASQUEZ: Correct. Great.

2 Other comments?

3 (No response.)

4 MR. VASQUEZ: Okay. Well, seeing that we've
5 completed the agenda, this concludes the meeting of the
6 Rules Committee of the Governing Board of the Texas
7 Department of Housing and Community Affairs.

8 It is now 8:21, and we stand adjourned. Thank
9 you.

10 (Whereupon, at 8:21 p.m., the meeting was
11 adjourned.)

C E R T I F I C A T E

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3 MEETING OF: Rules Committee of TDHCA Board

4 LOCATION: Austin, Texas

5 DATE: October 9, 2019

6 I do hereby certify that the foregoing pages,
7 numbers 1 through 8687, inclusive, are the true, accurate,
8 and complete transcript prepared from the verbal recording
9 made by electronic recording by Nancy H. King before the
10 Texas Department of Housing and Community Affairs.

11 DATE: October 17, 2019
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18 _____
(Transcriber)

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