STATE OF NEBRASKA

ATTESTATION REVIEW OF THE LINCOLN HOUSING AUTHORITY

April 17, 2008 to December 31, 2008

Issued on February 12, 2009

LINCOLN HOUSING AUTHORITY

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NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

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Independent Accountant's Report

Citizens of the State of Nebraska:

We have reviewed the rental rates and selection of applicants of the Lincoln Housing Authority as of April 17, 2008, and other information through December 31, 2008. The Lincoln Housing Authority's management is responsible for the rental rates and selection of applicants.

Our review was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants and the standards applicable to attestation engagements contained in *Government Auditing Standards* issued by the Comptroller General of the United States. A review is substantially less in scope than an examination, the objective of which is the expression of an opinion on the rental rates and selection of applicants. Accordingly, we do not express such an opinion.

Based on our review, nothing came to our attention that caused us to believe that the rental rates and selection of applicants, in all material respects, are out of conformity with the criteria set forth in the Criteria section.

In accordance with *Government Auditing Standards*, we are required to report findings of deficiencies in internal control, violations of provisions of contracts or grant agreements, and abuse that is material to the Lincoln Housing Authority's rental rates and selection of applicants, and any fraud and illegal acts that are more than inconsequential that come to our attention during our review. We are also required to obtain the views of management on those matters. We did not perform our review for the purpose of expressing an opinion on the internal control over the Lincoln Housing Authority's rental rates and selection of applicants or on compliance and other matters; accordingly, we express no such opinions. Our review disclosed certain findings that are required to be reported under *Government Auditing Standards* and those findings, along with the views of management, are described below in the Summary of Results.

This report is intended solely for the information and use of the Citizens of the State of Nebraska, management of the Lincoln Housing Authority, others within the Lincoln Housing Authority, and the appropriate Federal and regulatory agencies; however, this report is a matter of public record, and its distribution is not limited.

Signed Original on File

Mike Foley
Auditor of Public Accounts
February 11, 2009

Background

The Lincoln Housing Authority (LHA) currently oversees a total of 1,449 rental housing units. LHA owns 1,179 of those units and manages the other 270 privately owned units.

LHA offers mixed-income rental units to help support low-income units in the region. Mixed-income development is defined by Neb. Rev. Stat. § 71-1575(18) (Reissue 2003) as a housing development "occupied both by persons of eligible income and by other persons." The no income level units (open market units) are available to "other persons" based on no income guidelines – except that, pursuant to the above-referenced statute, the income of "other persons" living in a public housing development "constructed or acquired and substantially occupied" after January 1, 2000, may not "exceed one hundred percent of the median income in the county in which the development is located." The numbers of units based on Lincoln's median family income levels as of April 22, 2008, were:

Table I

Median Income Levels	Number of Units	Percentage of Total
60%	234	16%
80%	443	31%
100%	101	7%
No income level (Open Market)*	671	46%
Total	1,449	100%

* See Table II below for more detail.

On May 8, 2008, the LHA Board approved a resolution to amend its "Admissions and Continued Occupancy Policy" to implement income limits for 140 units in three properties. This moved 77 units at the Northwood Terrace, 47 units at the Heritage Square, and 16 units at the Lynn Creek developments from open market to the 80% income level, reducing the overall number of LHA's open market units from 671 to 531, or from 46% to 37% of the authority's total housing. The LHA Board appears to have taken this action to comply with the statutory definition of "persons of eligible income" found at Neb. Rev. Stat. § 71-1575(21)(b) for tax purposes pursuant to Neb. Rev. Stat. § 71-1590(1)(b) (Reissue 2003) after questions regarding property taxes arose during the APA evaluation.

In 1970, the Federal General Services Administration sold approximately 1,000 single-family or duplex units to LHA in the Arnold Heights neighborhood. LHA sold almost half of these to pay off the LHA bonds issued for the original purchase. The majority of LHA's open market rentals are units in this Arnold Heights neighborhood.

The total open market units as of April 22, 2008, were:

Table II

Project Name	Number of Units	Date Acquired/Constructed
Arnold Heights	466	1970
Northwood Terrace	77	1973
Heritage Square	47	1975
Lynn Creek	16	Contract 12/03/1999 Closed 2/2000
Wood Bridge LHA	17	1997
Wood Bridge Privately Owned	48	1997
Total Open Market Units	671	

LHA pays no property taxes on any of its units; however, LHA does make payments in-lieu of taxes on some properties and provides what appears to be services in-lieu of taxes on the Arnold Heights units. As of April 22, 2008, the taxes paid were:

Table III

Type of Units	Number of Units	Percentage of Total
Services provided in-lieu of taxes	466	32.2%
In-lieu of taxes paid	320	22.1%
Limited Partnerships pay taxes	270	18.6%
Eligible income units not paying taxes	236	16.3%
Open Market rate units not paying taxes	157	10.8%
Total	1,449	100.0%

Pursuant to a 1970 agreement, LHA provides the City of Lincoln (City) with specified services. Although not expressly indicated in the agreement, it appears that those particular services are being provided in-lieu of paying taxes on the 466 Arnold Heights units. In addition to the limited services provided pursuant to the 1970 agreement, LHA performs a wider array of apparently gratuitous services for the City. Per LHA, services for the City include:

Pursuant to the 1970 agreement

- Mowing 65 acres of open space, 3.5 acres of road right-of-way, and ½ mile of creek bed.
- LHA paid the City over $300,000 for City-requested public improvements in the Arnold Heights area from 1970 through 1984.

Other Services

- Snow removal on 9.5 miles of City streets.
- Providing a rent-free duplex used as a City library.
- Providing rent-free space for a police substation.
- LHA deeded the Arnold School to the Lincoln Public Schools at no cost to the school district.

The payments in-lieu of taxes made on the 320 units is based on 10% of the units' income from tenants, less the utility costs. The amount of payments in-lieu of taxes, approximately $70,000, is completely funded by federal dollars from the U.S. Department of Housing and Urban Development (HUD).

In addition to housing that it owns and operates, LHA manages 270 units owned by various limited partnerships, which are paying taxes on those properties.

As of April 22, 2008, there were 236 low-income units and 157 open market units currently not paying taxes. The LHA Board resolution of May 8, 2008, which amended the "Admissions and Continued Occupancy Policy" to implement income limits for 140 units, reduced from 157 to 17 the number of open market units neither paying taxes nor taking advantage of some in-lieu of tax alternative.

Criteria

The criteria used in this attestation review were State statutes, Federal regulations, and LHA's policies and procedures.

Summary of Procedures

Pursuant to Neb. Rev. Stat. § 84-304(4)(a) (Reissue 2008), the Auditor of Public Accounts (APA) conducted an attestation review of LHA's rental rates and selection of applicants as of April 17, 2008, in accordance with standards applicable to attestation engagements contained in Government Auditing Standards issued by the Comptroller General of the United States. The APA's attestation review consisted of the following procedures:

1. Determination of number and location of all LHA rental units.
2. Review of applicable statutory requirements and determination of proper adherence thereto.
3. Testing of tenant eligibility.
4. Comparison of LHA rental rates to those of other similar properties.
5. Documentation of LHA's integrity program.
6. Determination of number of LHA properties being assessed property taxes.
7. Documentation of LHA's client waiting list procedures.

Summary of Results

The summary of our attestation review noted the following findings and recommendations:

1. Client Eligibility

We tested the eligibility of 38 clients, selected subjectively, and all met the income requirements for the units they occupied. The APA then examined the household incomes of the 38 clients tested, and only one exceeded 100% of the 2008 median family income for Lincoln, as determined by HUD. This one client was renting in Wood Bridge, which was built prior to January 1, 2000. Neb. Rev. Stat. § 71-15,124(1) (Reissue 2003), permits no more than 60% of the dwelling units in mixed-income developments constructed or acquired after January 1, 2000, to be occupied by persons whose incomes at initial occupancy exceed one hundred percent of the median income in the county in which the development is located. Because of the Woodridge facility's early construction date, the income restriction in Section 71-15,124(1) does not apply to it. Therefore, there are no income requirements for this mixed-income development.

We make no recommendations at this time.

2. Services Provided In-lieu of Taxes

LHA owns 466 units in the Arnold Heights addition. LHA pays no property taxes on these units. However, as noted in the "Background" section of this report, LHA appears to provide services in-lieu of taxes on those properties.

On July 13, 1970, LHA and the City executed an agreement relating to the conveyance of interest in the Arnold Heights properties from the Federal Government to LHA. This agreement requires LHA to: 1) provide $300,000 to be used by the City for the installation and replacement of capital improvements within and abutting Arnold Heights; and 2) maintain all public areas and sidewalks within Arnold Heights. For more than three decades, LHA has voluntarily performed a number of additional services for the City; however, none of those additional services are mentioned in, much less required under, the agreement. Why LHA chose initially to provide those additional services, or continues to do so, is unclear. Moreover, the agreement fails to state explicitly that the limited services required of LHA are being provided in-lieu of taxes – and, if that is indeed the purpose of the agreement, no mention is made of the specific statutory authority under which such an arrangement may be entered into.

Based upon the ostensible intent of the 1970 agreement with the City, it appears the 466 units in Arnold Heights may not be exempt from property taxes. See the following finding concerning the tax exempt status of LHA.

3. Tax Exempt Status of LHA

LHA changed its "Admissions and Continued Occupancy Policy" on May 8, 2008, reducing from 157 to 17 the number of open market units for which no property taxes are paid. However, statutory language found in the Nebraska Housing Agency Act (Neb. Rev Stat. §§ 71-1572 to 71-15,168) (Reissue 2003) raises questions about the tax exempt status of LHA property. Specifically, Neb. Rev. Stat. § 71-1590(1) limits the tax exempt status of local housing agencies to, among other things, property "used to provide housing for persons of eligible income and qualifying tenants." Neb. Rev. Stat. §§ 71-1575(21) & (23) provide definitions for "persons of eligible income" and "qualifying tenants," respectively. These definitions appear to preclude tax exemptions for housing agency properties rented to individuals whose incomes exceed the established parameters.

LHA and its legal counsel explained that the legislative intent behind LB 105 (1999), the bill responsible for the aforementioned statutory language, was to preserve the tax exempt status of housing agency properties existing prior to passage of that legislation. In support of this position, LHA pointed to language contained in Neb. Rev. Stat. § 71-1576 (Reissue 2003), which states, in relevant part:

"Any resolution by an authority and any action taken by the authority prior to January 1, 2000, with regard to any project or program which is to be completed within or to be conducted for a twelve-month period following January 1, 2000, and which resolution or action is lawful under Nebraska law as it exists prior to January 1, 2000, shall be a lawful resolution or action of the successor agency and binding upon such successor agency and enforceable by or against such agency notwithstanding that such resolution or action is inconsistent with, not authorized, or prohibited under the provisions of the act."

According to LHA's analysis, this language subjects the LHA properties in question to the definition of "persons of low income" found at Neb. Rev. Stat. § 71-1522(10) (Reissue 1996)[1], prior to the repeal of that statute pursuant to LB 105.

We sought assistance with the interpretation of the relevant statutory provisions from a number of individuals possessing expertise in this state's property tax laws, including representatives of the State Property Tax Assessor's office and the Lancaster County Assessor. Unfortunately, we were unable to obtain a conclusive response to our inquiry.

Given the apparent uncertainty surrounding the appropriate interpretation and application of the property tax exemption laws as they apply to certain LHA properties, we requested an opinion from the Nebraska Attorney General concerning the language in Neb. Rev. Stat. § 71-1590(1). The Attorney General answered informally, explaining the difficulty in determining whether the property in question is subject to taxation. **See Attachment A**.

> We recommend LHA, along with other housing agencies similarly situated, seek resolution of this issue through clarifying legislation.

4. Payment In-lieu of Taxes

LHA owns 320 low income units in Mahoney Manor and Public Housing that are not being assessed property taxes. Instead, LHA makes payments in-lieu of taxes for these properties under an agreement with the City of Lincoln. The 1973 agreement with the City requires LHA to pay 10% of the actual annual shelter rent charged for low-rent housing projects.

Neb. Rev. Stat. § 71-1590(1) limits the tax exempt status of local housing agencies to, among other things, property "used to provide housing for persons of eligible income and qualifying tenants." Neb. Rev. Stat. §§ 71-1575(21) & (23) provide definitions for "persons of eligible income" and "qualifying tenants," respectively. These sections allow tax exemptions for properties rented to individuals whose incomes meet established parameters. Neb. Rev. State § 71-1590(2) permits housing agencies "to make payments in lieu of all taxes or special assessments to the county within whose territorial jurisdiction any development of such housing agency or its controlled affiliates is located, for improvements, services, and facilities furnished by the city, county, or other public agencies, for the benefit of such development."

Under the 1973 agreement, LHA has paid between $70,000 and $80,000 in lieu of taxes each year. By doing so, LHA appears to be applying Neb. Rev. Stat. § 71-1590(2) to the Mahoney Manor and Public Housing low income units. However, such an agreement seems superfluous if, as LHA maintains, that property is tax exempt in the first place.

[1] Prior to being repealed by LB 105 (1999), Neb. Rev. Stat. § 71-1522(10) (Reissue 1996) provided the following broad definitional language: "Persons of low income shall mean persons or families who lack the amount of income which is necessary, as determined by the authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without overcrowding.

We recommend the LHA work with the City and County Assessor to determine whether the in-lieu payments are warranted under the current statutes.

5. Program Integrity

LHA has a Program Integrity program that handles approximately 100 complaints per month. During the last year alone, the program collected $30,605 in repayments, performed 700 investigations, terminated assistance for 43 clients, and held 12 hearings. The integrity program obtains information from complaints, police reports, and HUD's Electronic Income Verification program.

We make no recommendations at this time.

6. Wait List

Because of the demand for LHA housing units, there is a wait list for prospective occupants. 1,422 families were on the wait list, with 917 – or 65% – of those waiting on HUD subsidized units, as of April 22, 2008. The average wait for subsidized low-income housing is approximately one year.

We make no recommendations at this time.

Overall Conclusion

LHA owns or manages 1,449 rental housing units.

As of December 31, 2008, 531 of those units have no client income requirements. 466 of the 531 units are in Arnold Heights, for which LHA has an agreement with the City of Lincoln to provide what appear to be services in-lieu of taxes. 17 units in Wood Bridge are owned by LHA, which pays no property taxes on them. 48 units are privately owned and are subject to property taxes. We have concerns whether current State statutes exempt LHA from paying taxes on the 466 units in Arnold Heights and the 17 Wood Bridge units.

LHA owns 320 units that have client income requirements and makes payments in-lieu of taxes for these properties under a 1973 agreement with the City of Lincoln. We have concerns regarding the propriety of such an agreement, in light of LHA's claim that these 320 units are tax exempt.

LHA has satisfactory procedures in place to determine and document client eligibility and thus give the perception they are renting only to eligible tenants.

The APA staff involved in this attestation review were:

Tom Bliemeister, Auditor-In-Charge
Erin Pope, Auditor
Marty Adams, Auditor
Lance Lambdin, Legal Counsel
Mary Avery, Special Audits and Finance Manager

If you have any questions regarding the above information, please contact our office.

I#08020

Attachment A
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STATE OF NEBRASKA
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Received
SEP 30 2008
NEBRASKA
STATE AUDITOR'S
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September 26, 2008

Mike Foley
State Auditor
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RE: *Request for Attorney General's Opinion – Exemption from Taxation of Property of the Lincoln Housing Authority.*

Dear Auditor Foley:

You have requested our opinion regarding the qualification of property owned and leased by the Lincoln Housing Authority ["LHA"] for tax exemption. You state the Auditor's Office is conducting a "financial evaluation" of the LHA, and that "[a] question has arisen regarding the tax exempt status of property belonging to that entity currently being leased to individuals who do not meet the definition of 'persons of eligible income' or 'qualifying tenants' under Neb. Rev. Stat. § 71-1590(1) (Reissue 2003)." You further state you are "interested in knowing whether such property qualifies for a property tax exemption." While your staff has discussed this issue with representatives of the LHA, as well as persons with the Department of Revenue Property Assessment Division and the Lancaster County Assessor's Office, you indicate the lack of a definitive answer being provided on this question has led you to seek the Attorney General's "opinion regarding the proper interpretation of the relevant statutes.

At the outset, we note it is unclear whether your request falls within the parameters outlined in our letter to you dated February 29, 2008, in which we advised our office would not provide legal opinions regarding matters outside the scope of pending audits by the Auditor's Office. Your letter states this issue arises out of a "financial evaluation" of the LHA. We have been provided a draft report of the results of this evaluation dated August 27, 2008, as well as the LHA's response to that draft dated September 4, 2008. Your draft states "[t]his evaluation was not an audit of LHA's financial statements. . .", but "was a financial evaluation of specific LHA financial records." This "financial evaluation" thus does not involve the conduct of an audit.

Consistent with our earlier letter, it is not appropriate for us to provide a formal legal opinion regarding the issue you raise. We will, however, provide an informal analysis of the question presented.

> In 1998, Neb. Const. art. VIII, § 2, was amended to provide:
>
> (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law. . . .
>
> The Legislature has implemented this amendment by providing, in part:
>
> (1) The following property shall be exempt from property taxes:
>
> (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose. (emphasis added).

Neb. Rev. Stat. § 77-202(1) (Cum. Supp. 2006).

The Nebraska Housing Authority Act, Neb. Rev. Stat. §§ 71-1572 to 71-15,168 (2003) [the "Act"], authorizes cities or counties to create local housing agencies (such as the LHA), which are in turn granted various duties and powers. Neb. Rev. Stat. §§ 71-1577 to 1580, 71-15,112 and 71-15,113 (2003). Section 71-1590 of the Act, which relates to taxation of local housing agency property, provides, in part:

> (1) The real and personal property of a local housing agency. . .used solely (a) for the administrative offices of the housing agency. . ., (b) to provide housing for

> persons of eligible income and qualifying tenants, and (c) for appurtenances related to such housing shall be exempt from all taxes and special assessments of any city, any county, the state, or any public agency thereof, including without limitation any special taxing district or similar political subdivision. All other real and personal property of the housing agency. . .shall be deemed to not be used for a public purpose for purposes of section 77-202 and shall be taxable as provided in sections 77-201 and 77-202.11.

Neb. Rev. Stat. § 77-1590(1) (2003) (emphasis added).[1]

Generally, "statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary." *PSC Credit Services, Inc. v. Rich,* 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997). If this portion of § 75-1590(1) is read in isolation, its plain language suggests that, other than property used by a housing agency for its administrative offices, only property of a local housing agency that is leased to provide housing for "persons of eligible income" or "qualifying tenants" (as those terms are defined in § 75-1575(21) and (23)) is exempt from taxation. It further indicates that all other housing authority property is taxable because it is "deemed not to be used for a public purpose. . . ."

It is also true that, when interpreting a statute, courts will "look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *Henery v. City of Omaha,* 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). A review of your draft report indicates that the issue you raise regarding the tax exempt status of LHA property relates to certain properties which the LHA does not lease to individuals or families falling within the definitions of "persons of eligible income" or "qualifying tenants". These particular properties, which are referred to as "open market units" leased at "market rates", are part of the LHA's "mixed-income development", which is defined in the Act as "a housing development. . .occupied both by persons of eligible income and by other persons. . . ." Neb. Rev. Stat. § 75-1575(18) (2003).

While § 71-1590(1) would seem to subject leases of these "open market units" to property taxation, such a result appears to be inconsistent with the Legislature's intent to exempt governmental property used for a "public purpose" in § 77-202(1), which is defined, in part, as property used "to provide public services with or without cost to the recipient. . .", including "developments by a public housing authority. . . ." "Development" is broadly defined in the Act as "all dwellings and associated appurtenances, including real and personal property, and all other facilities and improvements of every kind and description which a local housing agency may own or

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[1] "Persons of eligible income" is defined in Neb. Rev. Stat. § 71-1575(21) (2003); "Qualifying tenants" is defined in Neb. Rev. Stat. § 71-1575(23) (2003).

operate or in which it may hold an interest. . .," and "all land upon which such dwellings, appurtenances, and facilities are situated." Neb. Rev. Stat. § 71-1575(9) (2003). Further, as noted, the Act specifically authorizes local housing agencies to engage in "mixed-income developments" in which dwelling units are occupied both by persons of eligible income and persons who do not qualify as persons of eligible income. *See* Neb. Rev. Stat. §§ 75-1575(18) and 71-15,124 (2003).

"To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Goolsby v. Anderson,* 250 Neb. 306, 309, 549 N.W.2d 153, 156 (1996). The history of the legislation which included "mixed income housing" as part of the Act reveals such developments were intended "to move away from historical concentrations of poverty." Committee Records on LB 105, 96th Leg., 1st Sess., 6 (January 26, 1999) (Statement of Sen. Brown). This purpose was again noted by Senator Brown during floor debate:

> I think that there's real value in not concentrating poverty and not having particular areas, particular locations as being designated as where poor people live. I think that there's a value in diversity in income levels of people living together just because there's more acceptance of people as individuals rather than based on whatever their bottom line is. And so I think that there are lots of social reasons that there's a value in that.

Floor Debate on LB 105, 96th Leg., 1st Sess., 6248 (May 11, 1999) (Statement of Sen. Brown).

In view of this history, the lease of property by LHA to individuals or families not meeting the definitions of "persons of eligible income" or "qualifying tenants" as part of a "mixed-income development" could be viewed as a lease of property at fair market value for a "public purpose" within the meaning of § 77-202(1)(a). That public purpose is derived from the Legislature's recognition that mixed-income developments serve the policy goal of reducing concentrations of poverty in connection with the provision of low-income housing. Thus, to the extent your concerns pertain to the tax exempt status of LHA "open market" units leased by LHA as part of its mixed-income development, recognizing an exemption for such property is not inconsistent with the Legislature's apparent intent to exempt property of "developments by a public housing authority", including mixed-income developments, as being for a "public purpose."

This conclusion is also supported by the history discussing the Legislature's intent in adopting the language in § 71-1590(1) exempting housing authority property leased to "persons of eligible income" and "qualifying tenants." The Committee Statement explaining the amendment which included this language states, in part, that this language was added to clarify that the exemption "would not extend to any portion of the property [of a housing agency] in which commercial enterprises were being

conducted." Committee Records on LB 105, 96th Leg., 1st Sess., Committee Statement at 19 (January 26, 1999). The intent to exclude from exemption housing authority property to the extent it was used for "commercial" activity or purposes was also recognized during discussion on the floor of the Legislature. Floor Debate on LB 105, 96th Leg., 1st Sess., 6175 (May 11, 1999) (Exemption not available for property used for "commercial purposes, such as a store.") (Statement of Sen. Hartnett); 6242 (Exemption applies to housing authority property but "ensure[s] that [a] business operating commercial facilities on a housing agen[cy] property would not have an unfair tax advantage over other private enterprises in the area." (Statement of Sen. Hartnett). Thus, the Legislature's apparent intent was to clarify that housing agency property used for "commercial purposes" would not qualify for exemption. The history does not establish a clear intent to tax housing agency property leased as part of a mixed-income development.[2]

As the foregoing analysis demonstrates, there is no definitive answer to the issue presented. It is certainly possible to conclude that the language of § 75-1590(1) limits the tax exemption of property leased by a housing agency only to property leased to "persons of eligible income" or "qualifying tenants". Such a construction, however, is by no means clear, and it is also reasonable to conclude that the Legislature did not, by specifically exempting property leased by a housing agency to "persons of eligible income" or "qualifying tenants", intend to tax "open market" units which are leased by a housing agency to persons other than "persons of eligible income" or "qualifying tenants" under on the agency's statutory authority to provide for "mixed-income developments". Such a result would be consistent with the Legislature's recognition of the "public purpose" served by such developments. Thus, we conclude there is no clear answer to the question you raise.

Finally, we note that county assessors have the duty to determine if property of a state or governmental subdivision is not being used for a public purpose, and have authority to issue notice that, in that case, such property will be subject to taxation. Neb. Rev. Stat. § 77-202.12(1) (Supp. 2007). The state, governmental subdivision, or lessee of the property receiving such notice may appeal the assessor's decision to the

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[2] In addition, § 77-202(1)(a)(ii) also includes with in the definition of "public purpose" the use of property by the state or a governmental subdivision "to carry out the duties and responsibilities conferred by law. . ." Neb. Rev. Stat. § 77-202(1)(a)(ii) (Cum. Supp. 2006). A housing agency's lease of property to persons other than "persons of eligible income" or "qualifying tenants" under its authority to provide for "mixed-income developments" could be construed as part of the agency's carrying out of its "duties and responsibilities as conferred by law" and thus falling within this aspect of the definition of public purpose.

county board of equalization. Neb. Rev. Stat. § 77-202.12(2) (Supp. 2007).[3] Any decision of the county board of equalization could then be reviewed by the Tax Equalization and Review Commission ["TERC"]. Neb. Rev. Stat. § 77-5007(2) (Supp. 2007). Final decisions of the TERC can be reviewed by the Nebraska Court of Appeals. Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2006). Thus, the determination of whether the LHA property in question should be taxed rests initially with the Lancaster County Assessor, and, should the Assessor issue a notice of intent to tax, that decision is subject to further appeal. Presumably, the Lancaster County Assessor would rely on the advice of his legal counsel, the Lancaster County Attorney, before making any such determination. Absent such action by the Assessor, and any subsequent appeal, it is simply not clear whether the property in question is properly subject to taxation.

Very truly yours,

JON BRUNING
Attorney General

L. Jay Bartel
Assistant Attorney General

07-110-20

[3] The lessee may appeal a notice of intent to tax because the taxes are assessed to the lessee. Neb. Rev. Stat. § 77-202.11(3) (2003).

Lincoln Housing Authority

Equal Housing Opportunity

P.O. Box 5327 • 5700 R Street • Lincoln, Nebraska 68505

February 3, 2009

Mike Foley
State Auditor
Room 2303, State Capitol
P.O. Box 98917
Lincoln, Nebraska 68509

Dear Mr. Foley:

The Lincoln Housing Authority ("LHA") is in receipt of the "Draft Attestation Review of the Lincoln Housing Authority, April 17, 2008 to December 31, 2008". This report was submitted to us for comment via e-mail on Tuesday, January 27, 2009.

The LHA submits the following comments and requests that the comments, in their entirety, be attached to your "Final Attestation Review".

Comment 1: The "Attestation Review" of LHA was not conducted in accordance with attestation standards established by the Institute of Certified Public Accountants or the standards applicable to attestation engagements contained in Government Auditing Standards. Some of the major standards not met include:

(a) The LHA did not ask or engage the Auditor of Public Accounts ("Auditor") to conduct an attestation review. Attestation reviews done unilaterally do not meet the standards stated above.

(b) The Auditor does not have sufficient knowledge of the subject matter related to setting rental rates and the selection of program participants or applicants for the various federal or local housing programs operated by the LHA to do an attestation review. This draft is the third draft completed by the Auditor in this matter. Every draft has contained significant errors.

(c) The criteria used in the "attestation review" were selected without input or approval of the LHA. This is a clear violation of the standards governing attestation reports.

(d) Most importantly, the standards require the attestation review be done by an impartial party. From the manner in which this audit has been conducted, it is clear that the State Auditor is not an impartial or unbiased party.

Telephone: (402) 434-5500 Fax: (402) 434-5502
(TDD) Telecommunication Device for Deaf: 1-800-545-1833 Ext. 875
Email: Info@L-Housing.com www.L-Housing.com

Comment 2: The following statement found on page 5 of the draft report is not supported by the tenant data collected or any information presented in the draft report:

> *"Based upon the ostensible intent of the 1970 agreement with the City, it appears the 466 units in Arnold Heights may not be exempt from property taxes."*

The above sentence in the draft report is unsubstantiated and should be removed. The LHA is a governmental body, and as such, is exempt from property taxes. The Arnold Heights units were built with federal public dollars. The units were sold by the federal government with the support and approval of the City of Lincoln to the LHA to advance our mission of providing affordable housing to Lincoln residents, and serve a valuable public purpose. Previous correspondence sent to Tom Bliemeister of your office on June 11, 2008, containing references to § 77-202, § 71-1576 and former § 71-1536(3), clearly shows Arnold Heights property to be tax exempt.

Comment 3: The following sentence on page 6 of the draft report should be deleted because it does not accurately describe the state law allowing payment in lieu of taxes:

> *"This section provides housing agencies with an alternative method of paying taxes for properties not exempt under Section (1)."*

The term "payment in lieu of taxes" is a term commonly used in municipal law to describe the voluntary payment of funds by a property tax-exempt owner to a local government for public services received by the tax-exempt property. This correction also affects your recommendation.

Comment 4 (Final Comment): The LHA is a governmental entity that does not have the power to levy any tax, nor does LHA receive Nebraska state or city tax funds for our operations. Because LHA does not receive state tax dollars, State of Nebraska tax dollars have never been at risk for loss, fraud, abuse or theft by LHA. Yet, in February 2008, your office demanded access to LHA files for the stated purpose of reviewing our tenant files. It became evident early in your review that you were questioning the tax exemption of the LHA, a governmental body. As shown in this and the two previous draft reports, the data found in the LHA tenant files and procedures confirmed that the tenants met the income requirements found in state law. Additionally, your office has not found any improper or illegal activity on the part of LHA or the LHA staff.

Rather than base your report on the relevant data collected during the on-site review, you have misused the power of your office and needlessly expended public funds to malign the LHA and question the tax exemption of properties that it owns. LHA realizes that some individuals and organizations in Lincoln do not support government ownership of housing to assist the elderly, disabled and other low-income families. We are surprised and disappointed that you, as State Auditor, still do not understand the housing agency laws, the need for housing assistance, or the public purpose served by LHA's ownership of rental units in its mixed-use developments.

Thank you for the opportunity to comment on this matter. We look forward to the conclusion of this year-long review by your office.

Sincerely,

Larry G. Potratz
Executive Director

c: Mayor Beutler
LHA Board of Commissioners
Jon Bruning, Attorney General

Auditor of Public Accounts Response

Prepared by the APA following the February 3, 2009, Lincoln Housing Authority Response

When an audited entity wishes to submit comments for inclusion in a report issued by this office, it is often unnecessary to respond thereto. Rather, it is sometimes preferable to allow such comments to speak for themselves and, by so doing, to permit them to augment, unimpeded by further input from us, the information provided in the text of the report. In this particular instance, however, that is not possible. Due to the misleading nature of the Lincoln Housing Authority's ("LHA") comments – which, rather than making any attempt to address the primary findings of the present report, consist largely of personal attacks against this office – it is imperative that we answer. Our response is required not only to counter the misrepresentations made by LHA regarding the conduct of this office, but also to provide accurate information regarding the standards and procedures that guide us in the fulfillment of our duty to serve and represent the citizens of Nebraska.

The tone of LHA's response suggests that the accusations made against this office are little more than an effort to draw attention away from the actual content of the report. This, along with LHA's attempt to paint itself as a victim of biased scrutiny, is baffling in light of the rather innocuous findings of the report. Contrary to the overwrought claim that we have sought to "malign" LHA, the report's most pointed recommendation simply encourages that governmental entity to seek "clarifying legislation" in order to put to rest any question about its tax exempt status – a question arising from the existence of arguably conflicting provisions of State statutes, brought to our attention by concerned citizens, investigated by us, and ultimately countenanced by the Attorney General. Pointing out such a question hardly qualifies as a scheme to malign; much less is it something that one would expect to provoke the resulting strong reaction by LHA.

Authority of the Auditor of Public Accounts

For the record, the Auditor of Public Accounts ("APA") has served, since territorial days, as the general accountant for the State of Nebraska. As such, this office has the duty to audit. In carrying out this mandate, the APA exercises both statutory and inherent common-law authority. The laws governing the operations of this office are found primarily at Neb. Rev. Stat. § 84-304 et seq. (Reissue 2008). Subsection (4) (a) of that opening statute directs the APA to examine, at his or her own discretion, "the books, accounts, vouchers, records, and expenditures" of a number of different public entities, including "any housing agency as defined in section 71-1575[.]" Thus, there can be no doubt that the APA has the clear authority to audit LHA.

Attestation Standards

Neb. Rev. Stat. § 84-304(9) requires the APA to "conduct all audits and examinations in a timely manner and in accordance with the standards for audits of governmental organizations,

programs, activities, and functions published by the Comptroller General of the United States [.]" These standards are referred to as the "Generally Accepted Government Auditing Standards" (GAGAS) or, more commonly, the "Yellow Book." They incorporate the attest standards of the American Institute of Certified Public Accountants (AICPA), as well as additional guidelines. We strive diligently to comply with these standards and welcome any specific, constructive criticism pertaining to our conformity with them.

Every three years, this office submits to a quality control or peer review performed by the National State Auditors Association. During such reviews, our work is examined and critiqued by professional audit examiners – with special attention paid to our compliance with GAGAS standards. The APA has undergone these peer reviews for decades. The full text of the most recent peer reviews, for 2004 and 2007, are available, on our government web page at: http://www.auditors.state.ne.us/index_html?page=content/about_us/about_us.html. Copies of prior peer reviews may be obtained by contacting our office.

The 2007 peer review concludes:

"In our opinion, the system of quality control of the State of Nebraska, Auditor of Public Accounts in effect for the period July 1, 2006 through June 30, 2007 has been suitably designed and was complied with during the period to provide reasonable assurance of conforming with government auditing standards."

The fact that a virtually identical conclusion has been offered in our previous peer reviews should dispel any doubts about our dedication to, or success at abiding by, all applicable auditing standards.

"Unilateral" Attestation

LHA complains that we undertook the present attestation review without having been asked by that public entity to do so. According to LHA, such "unilateral" action is tantamount to a violation of auditing standards.

AICPA Statements on Auditing Standards, AT § 101.13, states:

"A practitioner may accept an engagement to perform an examination, a review or an agreed-upon procedures engagement on subject matter or an assertion related thereto provided one of the following conditions is met . . . (b) The party wishing to engage the practitioner is not responsible for the subject matter but is able to provide the practitioner, or have a third party who is responsible for the subject matter provide the practitioner, with evidence of the third party's responsibility for the subject matter."

This standard clearly allows for someone other than the responsible party – LHA in this case – to engage the APA to conduct the attestation review. Contrary to the assertion made in LHA's

response, therefore, the APA did not need the permission of that entity to conduct an attestation review of its operations. The citizens of Nebraska serve as the clients for our attestation reviews, and state statutes dictate that we conduct audits. Moreover, the APA's practice of foregoing such unnecessary prior approval is customary, regardless of the entity being audited or the nature of the review.

Finally, to interpret the relevant AICPA standard as suggested by LHA would run contrary to the plain and ordinary meaning of the language contained therein. More indicative yet of the irrationality of this particular allegation is the obvious fact that such a peculiar interpretation would produce a patently absurd result; it would effectively restrict the APA's ability to carry out his or her statutory and common-law duties to those rare occasions when possible to procure the prior consent of the entity being audited – something unlikely to be either easily obtained or readily granted.

Attestation Criteria

LHA claims that we violated auditing standards by not seeking that entity's "input or approval" with regard to the criteria used for the attestation review.

AICPA Statements on Auditing Standards, AT § 101.26, provides:

"Criteria may be established or developed by the client, the responsible party, industry associations, or other groups that do not follow due process procedures or do not as clearly represent the public interest."

Similarly, AICPA Statements on Auditing Standards, AT § 101.27, states:

"Regardless of who establishes or develops the criteria, the responsible party or the client is responsible for selecting the criteria and the client is responsible for determining that such criteria are appropriate for its purposes."

AICPA Statements on Auditing Standards, AT § 101.28 explain further:

"The use of suitable criteria does not presume that all persons or groups would be expected to select the same criteria in evaluating the same subject matter. There may be more than one set of suitable criteria for a given subject matter."

The standards cited above remove any doubt regarding the prerogative of the APA to establish independently the criteria by which an attestation review is to be conducted – even if the audited entity, or anyone else, objects to it. Clearly, the APA's decision neither to confer with nor to seek the approval of LHA when developing the criteria in question was perfectly legitimate. Regardless of the entity being audited, this office routinely develops the applicable criteria without assenting to the type of deference demanded by LHA, and, no good-faith argument can be made that such a procedure constitutes a violation of auditing standards.

Also worth noting is the fact that, despite its objection to the criteria selected – which consisted of "State statutes, Federal regulations, and LHA's policies and procedures" – LHA makes no attempt to specify either the manner in which the criteria was deficient or how it could have been improved. Similarly, LHA fails to provide a single example of how any such purported shortcomings distorted or otherwise detracted from the accuracy of the report's findings.

Independence

LHA states, "From the manner in which this audit has been conducted, it is clear that the State Auditor is not an impartial or unbiased party." Conspicuously absent are any specific examples of this alleged bias or lack of partiality. As a result, we are uncertain as to the precise nature of this accusation. Regardless, we must conclude that such examples are not offered simply because they do not exist.

According to GAGAS 3.14 (2009), "Audit organizations in government entities may also be presumed to be free from organizational impairments if the head of the audit organization" is, among other things, "directly elected by voters of the jurisdiction being audited [.]" Being an elected constitutional officer of the State of Nebraska, the APA obviously falls within this category. More importantly, as explained in some detail already, our office maintains stringent procedures to ensure compliance with all applicable GAGAS requirements, including those demanding the independence of audit staff involved in a particular engagement.

We assume – though, as pointed out above, are unsure – that the accusation of bias arises from the report's finding regarding LHA's tax exempt status. That finding merely questions the clarity of the statutory provisions upon which that status is supposedly based. We take no position on the issue, which makes LHA's allegation of partiality difficult to fathom. Furthermore, the Attorney General's response to our inquiry supports our view of the apparent ambiguity of the law – thus, our recommendation that LHA seek some legislative remedy to put the matter to rest. Nevertheless, LHA insists upon its own interpretation of the relevant statutory provisions. Refusing even to acknowledge the Attorney General's letter, much less address its contents, LHA responds instead with vague accusations of impropriety on our part. Apparently, LHA believes that our reluctance to accept at face value its own, self-serving statutory interpretation is prima facie evidence of bias.

Knowledge of the Subject Matter

LHA claims that this office is unqualified to perform the present attestation review due to a presumed lack of "sufficient knowledge of the subject matter related to setting rental rates and the selection of program participants or applicants for the various federal or local housing programs operated by the LHA[.]" This claim is made despite the fact that, as pointed out already, the criteria of the attestation consisted solely of "State statutes, Federal regulations, and

LHA's policies or procedures." All findings contained in the report are based upon those criteria. What type of special knowledge is required to implement these resources is uncertain. Not surprisingly, LHA offers no indication.

The APA hires only qualified individuals to conduct audit work. Further, the Auditor-In-Charge of this attestation review has over 29 years of experience with the APA and is very well versed in accounting as well as understanding statutes, Federal regulations, and policy and procedures. Another auditor involved in this attestation review has previous experience dealing directly with LHA as part of her prior employment.

Comment Regarding 1970 Agreement and Property Taxes

As made clear from the outset, we assume that the overall negativity of LHA's response is prompted by our questioning the clarity of the statutory authority upon which that public entity's claimed tax exempt status is based. This is the only portion of LHA's response that attempts to address substantively that issue. Unfortunately, LHA's comment is more notable for the information that it intentionally excludes than for what little it contains.

LHA's argument is encapsulated in the response's concluding sentence: "Previous correspondence . . . containing references to § 77-202, § 71-1576 and former § 71-1536(3) clearly shows Arnold Heights property to be tax exempt." This contention is problematic on, at least, two levels. To start, LHA relies upon Neb. Rev. Stat. § 71-1576 (Reissue 2003) to lend credence to its position. In doing so, however, LHA neglects to mention that the portion of that statute upon which it relies has limited applicability:

"Any resolution by an authority and any action taken by the authority prior to January 1, 2000, with regard to any project or program which is to be completed within or to be conducted for a twelve-month period following January 1, 2000, and which resolution or action is lawful under Nebraska law as it exists prior to January 1, 2000, shall be a lawful resolution or action of the successor agency and binding upon such successor agency and enforceable by or against such agency notwithstanding that such resolution or action is inconsistent with, not authorized, or prohibited under the provisions of the act." (Emphasis added.)

Clearly, that statutory language applies only to projects or programs that fall within the specified year-long period.

Far more important, however, is LHA's failure even to mention Neb. Rev. Stat. § 71-1590 (1) (Reissue 2003), as well as the attendant statutory provisions found at Neb. Rev. Stat. §§71-1575 (21) and (23) (Reissue 2003), all of which were discussed specifically in the report. If none of these additional sections of statute existed – as LHA apparently wishes they did not, given its refusal to address them – LHA's claim might be well founded. The fact that they do indeed exist, however, raises concerns about the clarity of the current law regarding the tax exempt status of certain public housing projects. That was the primary finding of our report. Not until

LHA is willing to deal directly with this issue by acknowledging all of the relevant sections of statute can a candid and productive discussion of this issue take place and a satisfactory resolution to it be achieved.

Comment Regarding In-Lieu of Taxes Language

The only comment contained in LHA's response that we believe to be meritorious is that addressing language contained in our discussion of Neb. Rev. Stat. § 71-1590(2). We agree that the sentence in question was poorly drafted – and is unreflective of both the operation of the law and our understanding of it. Therefore, we concur that it should be removed from the report.

It should be noted, however, that the removal of this language does not alter the report's finding. Given the uncertainty surrounding the interpretation and application of the relevant property tax exemption laws, we believe that questions need to be addressed regarding whether LHA is paying in-lieu of taxes on some properties when not required to do so, yet failing to pay taxes on other properties when doing so might actually be warranted under the current law.

Final Comment

LHA saved its most inflammatory comments for last. In addition to asserting that we have sought to "malign" it, LHA accuses us of misuse of power and wasting public funds. Though the report does not even hint at any impropriety, LHA feels compelled to profess its innocence: "Additionally, your office has not found any improper or illegal activity on the part of LHA or the LHA staff." Moreover, LHA claims to be "surprised and disappointed" by our alleged failure to "understand the housing agency laws, the need for housing assistance, or the public purpose served by LHA's ownership of rental units in its mixed-use developments."

Quite unaccountably, LHA appears to react to the relatively tame findings contained in the report as if they pose a direct assault upon its operations, if not its very existence. This combativeness, along with a manifest unwillingness to address directly the issues raised, was displayed from the outset of the attestation review and contributed to the time needed to complete our work. Nevertheless, our final recommendation that the laws governing the tax exempt status of public housing authorities be clarified is nothing more than that. It is indicative of neither suspicions of intentional wrongdoing by LHA nor our lack of understanding of, or appreciation for, the important roles played by these valuable public entities.

Given the nature of our work, it is inevitable that the contents of our reports may occasionally prove unsettling to some. Be that as it may, we stand by the findings of our attestation review of LHA.