1. Submit to the Community Development Department within 30 days of notification a certificate of occupancy of all affordable housing facilities intended to qualify as a credit; or

2. Provide the City an irrevocable letter of credit equal to the amount of fees imposed *and* provide the City, within 12 months of the initial issuance of the credit or 12 months from the date of any certificate of occupancy, with a certificate of occupancy for the affordableaffordable housing facilities designated to qualify as a credit.

Calculating the Credit. The credit amount varies for newly constructed or rehabilitated projects, for projects that receive public financing, and for other factors.

Where no public financing sources were used for developing the housing for which the credit is sought, the following credits for newly constructed units will be available to offset fees proposed under the linkage ordinance:

	Very Low-Income Households	Low-Income Households
Single-room occupancy hotel guestrooms (SROs)	$40,000	$32,000
Single-room units	$71,000	$55,000
One-bedroom units	$76,500	$60,000
Two-bedroom units	$86,500	$70,000
Three-bedroom units	$96,500	$80,000

Credits for rehabilitated units in appropriate housing facilities will be somewhat less:

	Very Low-Income Households	Low-Income Households
Single-room units and SROs	$25,000	$19,600
One-bedroom units	$25,000	$19,600
Two-bedroom units	$30,000	$23,400
Three-bedroom units	$35,000	$27,300

When the units are developed with certain public financing, 50 percent of the above-mentioned credits is available if a community-based nonprofit is involved with the development of the affordable housing units, or 33 percent when a community-based nonprofit is not involved. Public financing includes such sources as the federal low-income housing tax credit, the state low-income housing tax credit, Community Development Block Grant money, and various housing programs created by the State of California, and tax increment funds.

For copies of the items discussed in this article or for further information about these initiatives, contact Dan Pearlman in the Project's Berkeley office. ◙

HUD MEMORANDA LIMIT RULES ON LUMP-SUM ADDITIONS TO FAMILY INCOME

Of late there have been many problems concerning HUD's rules that require certain lump-sum payments to be treated as income for rent calculation purposes. *See* 24 C.F.R. §§215.21b(4); 236.3(b); 813.106(b)(4) and 913.106(b)(4) (lump-sum payments for delayed start of periodic payment). Efforts to nullify those requirements across the board have thus far not succeeded. *See, e.g., Head v. Jellico Housing Authority*, No. 88-5353 (E.D. Tenn. opinion and order Feb. 2, 1988), 21 CLEARINGHOUSE REV. 1347 (April 1988) (Clearinghouse No. 42,444), *aff'd*, 870 F.2d 1117 (6th Cir. 1989) (including lump-sum payments in income is permissible where tenant had knowledge of obligation to report because of lease provision); *Flowers v. Smith*, 726 F. Supp. 141 (S.D. Miss. 1988), *aff'd*, 891 F.2d 903 (5th Cir. 1989) (lump-sum retroactive award of SSI was income for purpose of calculating rent for public housing, even though 24 C.F.R. §913.106(b)(4) only refers to payments received from Social Security; PHA had not denied tenant due process or violated 24 C.F.R. §966.5 when the only notice it gave tenant of the rule classifying such payments as income was contained in policies posted on the office bulletin board).

There has been success, however, in chipping away the amounts of the lump-sum that may be treated as income. In a series of memoranda, HUD has ruled that various parts of the lump-sum cannot be included in the income used to calculate rent.

First, there are certain times when the lump-sum payment is to cover income that should have been paid during a period of time when the tenant was not living in public or subsidized housing. In those situations it does not make sense to include in income the part of the lump-sum that covers the earlier period, because if it had been paid on time it would not have been considered in calculating rent. HUD has agreed. *See* Letter from HUD, Seattle Office, to Kitsap County Consolidated Housing Authority (Dec. 21, 1989) (an SSI lump-sum payment for the period the tenant was not living in subsidized housing should not be included) (on file at the National Housing Law Project).

Second, if the tenant has had to pay attorney's fees in order to secure the lump-sum payment, the tenant should be allowed to deduct those fees from the lump-sum before the rent is calculated. Those fees are not available to pay the rent. More importantly, if the tenant had not paid the lawyer to collect the lump sum, the landlord would not have any of the lump sum to include in income. Again, HUD has agreed with that proposition. *See* HUD Memorandum from Thomas Sherman to Gertrude W. Jordan, Regional Administrator re

Lump-sum Payments Involving Attorney Fees (Feb. 27, 1989) (attorney fees should be deducted from the lump-sum when computing annual income if the attorney's efforts have recovered the lump-sum and the recovery does not include an additional amount in full satisfaction of the attorney's fees) (memo on file at the Project).

Third, with the project-based subsidy programs (as opposed to Public Housing and Section 8 Existing Housing), HUD has apparently adopted a policy of not including a lump-sum payment as income unless, prior to receiving the lump sum, the tenant had suffered a drop in income and had secured an interim recertification of income and rent reduction. *See Martin v. Eastside Housing Development Corporation*, No. 0300B (D.R.I. stipulation for judgment Aug. 18, 1989) (Clearinghouse No. 45,014) (HUD stipulated that lump-sum payment to project-based Section 8 tenant was not income but an asset); correspondence between Roger Bertling, Legal Services of Eastern Missouri, and George Demetre, HUD, St. Louis Office (Nov. 6 and 27, 1989) (HUD rules that SSI lump sum is not income for Section 8 project-based tenant, when tenant had been on general relief during entire period and had never asked for an interim rent reduction because of loss of income). HUD's position in these situations seems to be based upon a handbook provision requiring that result.[1]

Fourth, sometimes it can be valuable to have the PHA or the landlord calculate the rent retroactively instead of including the lump sum in the current year's income and thus increasing the rent during the coming 12 months. If the lump-sum payment is the result of a determination that the person was disabled for SSI or Social Security purposes, that determination should be made retroactive as well. Thus, for example, if the lump sum covers a past period during which the tenant was not treated as a household headed by an elderly or disabled person, the tenant would not have been allowed to deduct his or her medical expenses and to take the $400 deduction per year. If the calculations are made retroactively and the disability determination is made retroactive as well, the tenant would be allowed to deduct $400 from the lump sum for each year that the lump-sum payment covers, in addition to any nonreimbursed medical expenses in excess of 3 percent of the tenant's income during that period. HUD at least has ruled that PHAs are allowed to make the calculations retroactively, although it has not yet required that method. *See* Letter from HUD, Seattle Office, to Kitsap County Consolidated Housing Authority (Dec. 21, 1989) (the impact of an SSI lump-sum payment could be calculated either retroactively for the period it covered or prospectively for the coming year (on file at the Project). ■

[1] *See* HUD HANDBOOK 4350.3 CHG-1, OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, Ch. 3, ¶¶3-1b(7) and 3-4 and Exhibits 3-1 and 3-5; App. 19a, ¶16. (Section 236, Rent Supplement and project-based Section 8 tenants are not required to report lump-sum additions to family income, including those that are for a delayed start of a periodic payment, if no interim rent reduction has been requested. The payment, when reported at the annual recertification period, is either considered an asset or not counted because it has been spent.)

CENSUS EARNINGS AND AGENT ORANGE PAYMENTS NOT CONSIDERED INCOME FOR HUD HOUSING PROGRAM TENANTS

HUD has issued a notice that monies earned by residents of Public Housing, Section 8, Section 236 and Rent Supplement housing as official census takers will be excluded from income for determination of eligibility, benefits, and rent. 55 Fed. Reg. 12,622 (April 4, 1990). HUD is interpreting the income to be temporary, non-recurring or sporadic and thus excluded from income. *See* 24 C.F.R. §§913.106(c)(9), 813.106(c)(9), 215.21 (c)(9), and 236.3(c)(9). The exclusion will remain in effect for income earned so long as the census takers are discharging their official duties. It is anticipated that the exclusion will remain in effect between April 1 through August 31, 1990. If a tenant's income as a census taker has caused an increase in rent, refunds must be made by July 3, 1990.

To implement Pub. L. No. 101-201, 103 Stat. 1795 (Dec. 6, 1989), HUD has also published a notice excluding from income payments received after January 1, 1989, from the Agent Orange Settlement Fund or any other fund established pursuant to the *In Re Agent Orange* (E.D.N.Y.) litigation. HUD, Notice, Federally Mandated Exclusions from Income, 55 Fed. Reg. 13,328 (April 10, 1990). That statute prohibits the treatment of payments from the Agent Orange Settlement Fund as income or resources under federal means-tested programs, including both the HUD and FmHA housing programs. The prohibition is retroactive to January 1, 1989, so that any HUD-subsidized tenants, including public housing tenants, who have had such payments treated as income during the past 16 months are entitled to reimbursement. In addition, any applicants who were denied admission because their incomes were to high are entitled the reconsideration of their rejection and to be notified of that right. *Id.* at 13,329. Section 8 tenants whose benefits were terminated would also be entitled to reconsideration and reimbursement. ■