

To: Bradley Ferland, Deputy Secretary, Vermont Agency of Administration

Cc: Josh Hanford, Department of Housing and Community Development; Richard Williams, Vermont State Housing Authority; Kathleen Berk, Vermont State Housing Authority; Angela Zaikowski, Vermont Landlord's Association, Wendy Morgan, Vermont Legal Aid, Inc.

From: Jean L. Murray, Staff Attorney, Vermont Legal Aid, Inc.

Re: Legal Opinion: The Rental Housing Stabilization Program makes proper use of Coronavirus Relief Funds

Date: July 19, 2020

### Introduction

From the outset of the COVID-19 pandemic to the present time, Vermonters' homes have figured prominently in the State's campaign to keep Vermonters safe and to halt the spread of the coronavirus. See Addendum 6 to Executive Order 01-20, "Stay Home, Stay Safe and Vermont Department of Health guidance."<sup>1</sup> In enacting Title V of the CARES Act ("CARES Act"), Congress sought to ameliorate the COVID-19 pandemic's rapidly evolving corrosive effects, including those on stable housing. The issue that must be resolved is whether the language of the CARES Act allows the State of Vermont to use Coronavirus Relief Funds ("CRF") to pay landlords for rent that was unpaid before March 1, 2020 in order to ensure stable housing during the pandemic. As the analysis that follows shows, the answer is yes: rent due prior to March can be paid to landlords with CRF.

Although the CARES Act by its express terms limits the use of funds to costs incurred between March 1, 2020 and December 30, 2020, this limitation refers to "only those costs of the State that . . . were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020."<sup>2</sup> In interpreting the plain language of the federal statute, the proper focus is therefore the date the State of Vermont incurred costs to prevent eviction and homelessness by paying outstanding rent arrearage, not the date on which an individual's rent account first became overdue. Further, the Treasury Department's Guidance on use of CRF specifically allows states to incur expense to prevent eviction and assist in preventing homelessness.<sup>3</sup>

### Background

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<sup>1</sup><https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%206%20TO%20EXECUTIVE%20ORDER%2001-20.pdf> and [https://www.healthvermont.gov/sites/default/files/documents/pdf/Safely\\_Connect\\_with\\_Friends\\_and\\_Family\\_FINAL.pdf](https://www.healthvermont.gov/sites/default/files/documents/pdf/Safely_Connect_with_Friends_and_Family_FINAL.pdf).

<sup>2</sup> Section 5001(d) of the CARES ACT, found at: [https://www.govtrack.us/congress/bills/116/hr748/text/enr#link=A\\_V&nearest=H109BD2E80F6D42BD9840A634F49CC3C4](https://www.govtrack.us/congress/bills/116/hr748/text/enr#link=A_V&nearest=H109BD2E80F6D42BD9840A634F49CC3C4).

<sup>3</sup> FAQs <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

For years prior to COVID-19, Vermont has had a shortage of affordable housing.<sup>4</sup> Vermont has 76,000 rental households, half of which pay more than 30% of household income for rent.<sup>5</sup> Half of Vermont rental households are “cost burdened;” a quarter of rental households are “severely cost burdened because they pay at least 50% of their income for rent.”<sup>6</sup> In Vermont, average incomes are low, and housing costs are high. Housing costs are high in part because there is not enough housing. Vermont has a vacancy rate of around 3%.<sup>7</sup> When the cost of housing is so unaffordable, a steady percentage of renting households slip into non-payment when common life disruptions occur -- illness, loss of job, divorce, or other loss of household member. In State FY 2019, there were nearly 1800 evictions,<sup>8</sup> or about 2% of rental households. About 75% of evictions are for non-payment.<sup>9</sup> The average amount of unpaid rent leading to an eviction case is around \$2000.<sup>10</sup>

In January 2020, Vermont had a homeless population of around 1100 persons, half of whom were in congregate shelters.<sup>11</sup> COVID-19 compelled Vermont’s Agency of Human Services to place all homeless persons in motels in order to lower the risk of contagion.<sup>12</sup> By April, around 1400 persons were in motels paid for by the State. The high number of persons housed in motels was, by the end of May 1731 adults and 314 children housed in 1500 motel rooms.<sup>13</sup>

The Vermont Judiciary, in response to the Governor’s Executive Order declaring a State of Emergency, closed the courts to all except non-emergency hearings on March 16, 2020<sup>14</sup>; eviction proceedings requiring a hearing were put on hold (eviction by default continued to be granted, and some tenants continue to lose possession of their homes). By April 23<sup>rd</sup>, there were 586 active evictions pending in Vermont, 493 of which had been filed prior to March 1<sup>st</sup>.<sup>15</sup> In the second week of May, Vermont enacted S.333 (Act 101), a moratorium on eviction and foreclosure, and since then all evictions and foreclosures have been stayed. Even though landlords may not proceed with eviction, rent is still due and sometimes unpaid. The eviction process, including evictions for non-payment of rent, can

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<sup>4</sup>Housing Needs Assessment, 2020 p. 46 found at:

<https://accd.vermont.gov/sites/accdnew/files/documents/Housing/VT%20HNA%202020%20Report.pdf>

<sup>5</sup> Housing Needs Assessment, 2020 p.47.

<sup>6</sup> Housing Needs Assessment, 2020 p. 47

<sup>7</sup> Housing Needs Assessment, 2020, p. 26.

<sup>8</sup> Vermont Judiciary, Annual Statistical Report for FY19, p.43,45, found at:

<https://www.vermontjudiciary.org/sites/default/files/documents/FY19%20Statistics%20Report%20-%20FINAL.pdf>.

<sup>9</sup> “Eviction in Vermont” Report by Vermont Legal Aid, 2018, p 1. found at:

<https://www.vtlegalaid.org/sites/default/files/Eviction-Report-VLA-3.18.19-web.pdf>.

<sup>10</sup> “Eviction in Vermont” Report by Vermont Legal Aid, 2018, p 1

<sup>11</sup> Vermont Point in Time Count Report <https://helpingtohousevt.org/wp-content/uploads/2020/06/2020-PIT-Report-FINAL-1.pdf>.

<sup>12</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html>.

<sup>13</sup>GA Motel Summary, 5/29/2020, Submitted in Testimony by Sean Brown, AHS

<https://legislature.vermont.gov/Documents/2020/WorkGroups/House%20General/Housing/Homelessness/W~Sean%20Brown~GA%20Motel%20Summary%20-%20Update~5-29-2020.pdf>.

<sup>14</sup> Administrative Order 49, found at

<https://www.vermontjudiciary.org/sites/default/files/documents/AO%2049%20-%20Declaration%20of%20Judicial%20Emergency%20and%20Changes%20to%20Court%20Procedures%20with%20amendments%20through%206-19-20.pdf>.

<sup>15</sup> Case docket data supplied by Vermont Judiciary to Vermont Legal Aid, Inc. on April 23, 2020.

resume after the State of Emergency is declared at an end.<sup>16</sup> In an average year, 150 evictions are filed a month. It is predicted that because of the economic downturn caused by COVID-19, that number could swell as more households lose income and become more cost burdened.

On July 2, the Governor signed H.966 into law as Act 137, including in Section 11(a)(4), authority for “the distribution of funds to landlords on behalf of tenants in need of rental arrearage assistance.” That program is now known as the Rental Housing Stabilization Program (“RHSP”). The legislative intent of RHSP was to keep Vermonters housed by preventing non-payment evictions for as long as possible during the COVID-19 pandemic.

As a public health issue, a vital part of slowing the spread of the coronavirus is for every person to be able to go into their home and care for their household members, free from exposure to non-household members. In a public health crisis caused by a communicable disease, there can be no dispute that housing is health care. Further, because Vermont’s scarce housing stock depends on landlords to use rent revenues to meet the expense of maintaining safe housing, landlords must be paid rent, or they will take needed rental units off the market. Section 11(a)(4)(D)(ii)(III) of the Act and its implementation by the Vermont State Housing Authority provides that RHSP will makes grants of overdue rent to landlords to bring rental accounts current, provided landlords agree to drop eviction processes, and start no new non-payment evictions for up to six months into the future. Preventing eviction and stabilizing rental housing are imperative during the public health emergency due to COVID-19.

#### Argument

1. The plain meaning of CARES Act allows the State to use CRF to fund RHSP.

In relevant part, Title V of the CARES Act states:

“A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

- (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19).
- (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and
- (3) were incurred during the period that begins on March 1, 2020 and ends on December 30, 2020.”

Section 5001(d) of the CARES Act. (Emphasis added.)

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<sup>16</sup> See “Will Evictions spike when moratorium expires?” WCAX, July 17, 2020 found at: <https://www.wcax.com/2020/07/17/will-evictions-spike-when-moratorium-expires/>.

By its express terms, the CARES Act specifies costs incurred by the State, not by landlords or tenants. As a recipient of CRF, the State may use the funds in any way that the State deems necessary and reasonable to meet the needs arising from COVID-19<sup>17</sup>, subject to the limits stated in the CARES Act.

The State decided that preventing eviction and preventing further homeless was a necessary expenditure to be incurred due to the need for persons to be safely housed as long as possible due to the public health emergency with respect to the COVID-19 pandemic. Given Vermont's housing situation, particularly how it has been exacerbated as a result of the pandemic, this expenditure is reasonable, because the State's 1500 households<sup>18</sup> currently living in motels are seeking permanent rental housing, and if a tenant is evicted, it is likely that that tenant will find no other place to rent and the State will incur greater costs housing the newly homeless.

Conversely, it would not be reasonable to limit RHSP payment only to rent accrued after March 1, 2020. There were 493 eviction cases pending as of March 2020. Those tenants, and others who are behind but not yet in court, face eviction and homelessness, and the State faces the cost of further homelessness, if the rent debt cannot be eliminated and the evictions dismissed. The incentive for landlords to participate in the program is that the RHSP will allow them to meet their expenses and maintain the rental housing they provide. If landlords cannot be compensated for their losses due to non-payment of rent, there is little incentive for them to promise to refrain from evicting tenants in the future. If large parts of the rent accounts are left unpaid, landlords will undoubtedly pursue evictions, making the program useless to prevent pervasive eviction throughout Vermont.

For the foregoing reasons, the CARES Act should be interpreted to allow the RHSP to use CRF to pay rental arrearages that may have accrued prior to March 1, 2020. To interpret the language of the CARES Act in any other way could lead to the absurd result of tenants being evicted despite the State's pointed effort to avoid that very outcome through the implementation of RHSP.

## 2. Treasury Department Guidance supports the use of CRF to prevent eviction.

At several times since the enactment of the CARES Act, the United States Department of Treasury has issued guidance for States on the proper use of CRF and provided answers to Frequently Asked Questions about the use of funds. In its Guidance of June 30, 2020, the Treasury Department clarified that the cost is "incurred" "when the recipient [i.e. the State] has expended funds to cover the cost." As long as RHSP makes grants after March 1<sup>st</sup> (monies are on schedule to be paid out for the first time July 27, 2020) the cost to the State is incurred after March 1, 2020, and the terms of CARES Act are met.

"Putting this requirement together with the other provisions discussed above, section [5001(d) of the CARES ACT] may be summarized as providing that a State, local, or tribal government may use payments from the Fund only to cover previously unbudgeted costs of necessary expenditures incurred

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<sup>17</sup> Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments Updated June 30, 2020, <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>

<sup>18</sup> GA Motel Summary

due to the COVID–19 public health emergency during the covered period.” Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments Updated June 30, 2020.

The Treasury Department’s FAQ, updated July 8, 2020, directly addressed the use of CRF by a State to pay rent assistance:

**Would providing a consumer grant program to prevent eviction and assist in preventing homelessness be considered an eligible expense?**

Yes, assuming that the recipient considers the grants to be a necessary expense incurred due to the COVID-19 public health emergency and the grants meet the other requirements for the use of Fund payments under section 601(d) of the Social Security Act outlined in the Guidance. As a general matter, providing assistance to recipients to enable them to meet property tax requirements would not be an eligible use of funds, but exceptions may be made in the case of assistance designed to prevent foreclosures.<sup>19</sup>

Conclusion

The plain language of CARES Act limits the State to costs incurred during the covered period. The State of Vermont found it necessary, due to COVID-19, to pay past due rent to prevent eviction during the covered period. If Congress had wanted to cover individual citizens in its time limitation on costs, it would have expressly included individual citizens in the list of those subject to the covered period limitation. It did not. Similarly, if the Treasury Department had wanted to interpret the CARES Act in a way that prevented the State from using CRF in a reasonable and necessary way to prevent homelessness and eviction, it could have done that as well, but it did not. In fact, the Treasury Department explicitly said CRF could be used in the way the RHSP does, to accomplish the purpose of RHSP: to prevent eviction and further homelessness in Vermont.

For all the above reasons, the CARES Act should be interpreted to allow the RHSP to use CRF to pay rental arrearages that may have accrued prior to March 1, 2020.

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