

Of Counsel:
LAWYERS FOR EQUAL JUSTICE

GAVIN K. THORNTON 7922
PO Box 37952
Honolulu, HI 96837
Telephone: (808) 542-5203
Facsimile: (808) 262-4727
Email: gavinthornton@verizon.net

ALSTON HUNT FLOYD & ING
Attorneys At Law
A Law Corporation

SHELBY ANNE FLOYD 1724-0
PAUL ALSTON 1126-0
THOMAS E. BUSH 4737-0
Carter Professional Center, Suite C21
65-1230 Mamalahoa Hwy,
Kamuela, Hawai'i 96743
Telephone: (808) 885-6762
Facsimile: (808) 885-8065
E-Mail: sfloyd@ahfi.com

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

RODELLE SMITH, SHEILA TOBIAS,)
BARBARA BARAWIS, and LEWIS)
GLASER individually, and on behalf of)
all persons similarly situated,)

Plaintiffs,)

v.)

HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAI'I, a duly organized and)
recognized agency of the State of)
Hawai'i.)

Defendant.)

CIVIL NO. 04-1 0069K
(Contract)
Class Action

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT; DECLARATION OF
RODELLE SMITH; EXHIBIT "A";
DECLARATION OF GAVIN
THORNTON; EXHIBITS 1-7 ;
CERTIFICATE OF SERVICE**

**Date: October 3, 2005
Time: 9:30 a.m.
Judge: Hon. Elizabeth Strance**

301 CIRCUIT COURT
STATE OF HAWAII
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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs submit this memorandum of law pursuant to Rules 7 and 56 of the Hawaii Rules of Civil Procedure. As set forth below, Plaintiffs claims are supported by the law and the undisputed facts in this case. Defendant's Motion should be denied

II. STATEMENT OF FACTS

Plaintiffs filed this suit seeking declaratory relief and damages against Defendant Housing and Community Development Corporation of Hawai'i ("HCDCH") for failing to adjust utility allowances in public housing as utility rates increased, in violation of Plaintiffs' rights under the Annual Contributions Contract ("ACC") between HCDCH and the U.S. Department of Housing and Urban Development ("HUD"), and in violation of Plaintiffs' rights under the Rental Agreement between public housing residents and HCDCH.

To fully understand issues pertaining to the utility allowance in public housing, background regarding the statutory and regulatory framework that created the requirement for an allowance is necessary. The United States Housing Act requires that shelter costs for tenants residing in federally subsidized public housing projects do not exceed 30% of tenant income. 42 U.S.C. §1437a(a), 24 C.F.R. §§ 965.501-965.508. *See also* Dorsey v. Housing Authority of Baltimore City, 984 F.2d 622, 624 (4th Cir. 1993). "Rent" under the statute includes necessary utilities paid directly by tenants. Therefore, where tenants are directly responsible for the payment of utility service, the supporting federal regulations require public housing authorities (PHAs) like HCDCH to provide the tenants with a utility allowance. 24 C.F.R. §§ 965.501-965.508.

In establishing the utility allowances, the PHA must approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment. 24 C.F.R. §965.505(a). Sometime prior to 1997,

HCDCH determined the amounts of utility consumption by public housing residents that were reasonable and in accordance with 24 C.F.R. §965.505(a). Based on its determination, HCDCH established a utility allowance schedule set in terms of consumption per kilowatt hour of electricity or cubic foot of gas (hereinafter "consumption allowances"). A copy of the consumption allowance schedule is attached as Exhibit "A" to the Declaration of Rodelle Smith (hereinafter "*Smith Dec.*").

The consumption allowance schedule is applicable to all HCDCH housing projects where utility allowances are provided. See Admission No. 11 of Defendant Housing and Community Development Corporation of Hawaii's Answers to Plaintiff's First Request for Admissions (hereinafter "*Admissions*") attached hereto as Exhibit 1 to the Declaration of Gavin Thornton (hereinafter "*Thornton Dec.*"). Because tenants at different projects pay for different utilities (e.g. some tenants pay for only lighting and refrigeration, while others pay for electric lighting and refrigeration plus gas for cooking and a hot water heater, etc.), the consumption allowances set forth the consumption amounts in different categories (e.g. the amount of gas required for one month's use of a hot water heater) according to the number of bedrooms in a unit. For example, a family residing in a three-bedroom unit at a project where tenants pay electricity bills for lighting, refrigeration, and cooking would have a consumption allowance of 480 kilowatt hours of electricity per month. See Exhibit "A" to *Smith Dec.*

To allow tenants to purchase the quantity of utilities provided for in the consumption allowances, at some point in the past HCDCH applied the utility rates at the time to the consumption allowances to convert them into terms of dollar amounts (hereinafter "dollar allowances"). Thereafter, when the rents for public housing tenants were calculated, HCDCH factored in a rent credit in the amount of the dollar allowances in an attempt to ensure that the tenant's total rent, including the cost of utilities, did not exceed 30% of tenant

