

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ALPHONSE MOURAD,)
)
 Petitioner)
)
 v.) Docket No. 18038-05L.
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent)

ORDER

This case was heard at the Session of the Court in Boston, Massachusetts, commencing on May 21, 2007. The record in this case was held open until June 12, 2007, for the purpose of receiving into evidence a complete copy of the transcript of the proceeding in the United States Bankruptcy Court for the District of Massachusetts held on September 26, 1997, involving petitioner.

On June 11, 2007, the Court received from petitioner a complete copy of the foregoing Bankruptcy Court proceeding transcript.

Upon due consideration, it is

ORDERED that the Clerk of the Court shall hereby mark into evidence as Exhibit 12-P, the copy of the transcript of the proceeding held in the United States Bankruptcy Court for the District of Massachusetts, on September 26, 1997, involving petitioner. It is further

ORDERED that the record in this case is closed.

~~(Signed)~~ Joseph H. Gale

Joseph H. Gale
Judge

Dated: Washington, D.C.
June 14, 2007

1 UNITED STATES BANKRUPTCY COURT
2 DISTRICT OF MASSACHUSETTS - BOSTON

3
4 IN THE MATTER OF: . Case No. 96-10123-CJK
5 V & M MANAGEMENT, INC. . Boston, Massachusetts
6 Debtor. . September 26, 1997
7 . 9:33 O'Clock A.M.

8 TRANSCRIPT OF CONFIRMATION HEARING ON JOINT PLAN OF
9 REORGANIZATION OF STEPHEN S. GRAY, CHAPTER 11 TRUSTEE, MANDELA
10 RESIDENTS COOPERATIVE ASSOCIATION, BEACON RESIDENTIAL PROP-
11 erties, AND WINTER HILL FEDERAL SAVINGS BANK; OBJECTION BY
12 GARY LEROY AND MOURAD AND OWENS ASSOCIATES; JOINT RESPONSE BY
13 STEPHEN S. GRAY, CHAPTER 11 TRUSTEE, MANDELA RESIDENTS
14 COOPERATIVE ASSOCIATION, BEACON RESIDENTIAL PROPERTIES, AND
15 WINTER HILL FEDERAL SAVINGS BANK; OBJECTION BY USA/IRS;
16 CONFIRMATION HEARING ON FIRST AMENDED PLAN OF GARY LEROY AND
17 MOURAD AND OWENS ASSOCIATES; OBJECTION BY USA/IRS; JOINT
18 OBJECTION BY STEPHEN S. GRAY, CHAPTER 11 TRUSTEE, MANDELA
19 RESIDENTS COOPERATIVE ASSOCIATION, BEACON RESIDENTIAL
20 PROPERTIES, AND WINTER HILL FEDERAL SAVINGS BANK
21 BEFORE THE HONORABLE CAROL J. KENNER, J.U.S.B.C.

22 APPEARANCES:

23 For Chapter 11 Trustee,: PAUL MOORE, ESQ.
24 Stephen S. Gray, Choate, Hall & Stewart
25 53 State Street
Boston, MA 02109

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Electronic Sound Recording Operator: Mary L. Artesani

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11 Electronic Sound Recording Operator: Mary L. Artesani

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1 APPEARANCES - Continued

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10 Cooperative Association:

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		<u>I N D E X</u>			
	<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
1					
2	<u>Witnesses</u>				
3	JANE GUMBLE				
	By Mr. Quinn		14/30/33		
4	By Mr. Ricotta		30		
	By Mr. Moore		32		
5					
6	HOWARD EARL COHEN				
	By Mr. Quinn		36		
	By Mr. Moore		42		
7					
8	STEPHEN S. GRAY, TRUSTEE				
	By Mr. Baum		43		
9					
10	JOHN E. KLINE				
	By Mr. Baum		53		
11					
12	JOHN W. KEITH				
	By Mr. Baum		57		
	By Mr. Moore			68	
	By Mr. Ricotta		69		
13	<u>Rebuttal</u>				
14	STEPHEN S. GRAY, TRUSTEE				
	By Mr. Quinn	75			
15	By Mr. Moore	75			
16	<u>Exhibits</u>			<u>Ident.</u>	<u>Evid.</u>
17	1 Current DCHD Tax Credit Allocation Plan			17	17
18	2 Letter, 8-1-97, From Quinn			19	19
19	A Application for Tax Credits, Mandela LP			40	
20					
21	FINDINGS/RULINGS - The Court		81-119		
22					
23					
24					
25					

1 (At Tape #1, Index #28, 9:33 a.m.)

2 THE COURT: This is V&M Management, Inc., and this
3 is a hearing on confirmation. I have a joint plan of
4 reorganization of Stephen Gray, Chapter 11 Trustee, Mandela
5 Residents Cooperative Association, Beacon Residential
6 Properties, and Winter Hill Federal Savings Bank. I have two
7 objections to that -- to the confirmation of that plan. One
8 is by the United States of America, and the other is by Gary
9 Leroy and Mourad and Owens Associates. I also have the joint
10 response by the Trustee to the Gary Leroy objection.

11 I have the First Amended Plan by Gary Leroy and
12 Mourad and Owens & Associates, together with two objections,
13 one by the United States of America and the second by Stephen
14 Gray, et al. Would you please identify yourselves for the
15 record?

16 MR. QUINN: Robert A. Quinn for Gary Leroy, Mourad,
17 and Owen Associates, Your Honor.

18 MR. BAUM: Robert J. Baum for Gary Leroy and Mourad
19 Owens.

20 MR. KRULEWICH: Leonard Krulewich for Leroy and
21 Mourad Owens. And might I say, Your Honor, that we do not
22 have -- we never were served with either objection by the
23 United States either -- to either plan.

24 THE COURT: Okay

25 MR. RICOTTA: Paul Ricotta for Beacon Residential

1 Properties Limited Partnership.

2 MR. SCHAPIRO: Saul Schapiro for the Boston
3 Redevelopment Authority.

4 MR. JACKSON: Kirk Jackson for the Mandela
5 Residents Cooperative Association.

6 MS. KNOSPE: Marvis Knospe for the Internal Revenue
7 Service.

8 MR. BRADFORD: Eric Bradford for the United States
9 Trustee. Good morning.

10 THE COURT: Good morning.

11 MR. HUTCHINS: John Hutchins for the Winter Hill
12 Federal Savings Bank.

13 MS. DEIN: Judith Dein for Winter Hill Federal
14 Savings Bank.

15 MR. MOORE: Paul Moore for Stephen Gray, Chapter 11
16 Trustee.

17 THE COURT: Okay. Where should we begin?

18 MR. RICOTTA: We would suggest, Your Honor, we
19 could right to balloting because we have a stipulation and I
20 believe an agreed-up order on that score.

21 THE COURT: Good.

22 MR. RICOTTA: I mean, I -- Mr. Moore was the one
23 who was involved in that, Your Honor, but I can, I think,
24 briefly indicate that a stipulation has been entered by both
25 the proponents of the joint plan and also by the proponent of

1 the Mourad plan that indicate that -- and if I can just
2 summarize it at some point, Your Honor, the numbers, that all
3 impaired classes with respect to the joint plan have voted in
4 accordance with the Bankruptcy Code -- that is, more than one
5 half in number and more than two-thirds in amount, and that
6 none of the impaired classes under the Mourad plan have voted
7 pursuant to the Bankruptcy Code and have not accepted the
8 Mourad plan. And that's what the stipulation in the agreed-
9 upon order essentially says.

10 And, Your Honor, on that basis, although we have
11 obviously a very lengthy objection, it would appear to us
12 that there would be no possibility -- no legal ground upon
13 which the Mourad plan can be confirmed, and that we would
14 suggest that we proceed right with confirmation of the --
15 attempting to show confirmation of the joint plan.

16 THE COURT: Do you agree?

17 MR. QUINN: Almost, Your Honor. They voted
18 pursuant to the Code in the Leroy and Mourad, Owens. They
19 simply didn't vote in favorable degree pursuant to the Code;
20 but I agree with Mr. --

21 THE COURT: I'm don't understand the distinction.

22 MR. QUINN: Well, they voted. As the Code
23 provides, they may vote.

24 THE COURT: They voted. Right.

25 MR. QUINN: But the majority of more than 50 per

1 cent did not vote in favor of the Leroy/Mourad/Owens plan.

2 THE COURT: So are -- do you agree then that the
3 Gary Leroy and Mourad and Owens plan cannot be confirmed?

4 MR. QUINN: Not at this stage, Your Honor. We
5 agree that they did not satisfy the vote as required by the
6 law.

7 THE COURT: Well, today is the day.

8 MR. KRULEWICH: May I --

9 MR. QUINN: I know that, Judge.

10 THE COURT: Excuse me, Mr. Krulewich. Please sit
11 down. Do you want to draw straws to see which of the three
12 of you speaks this morning?

13 MR. QUINN: We usually flip coins, Judge -- a
14 three-sided coin.

15 THE COURT: All right, but I thought -- a three-
16 headed coin, fine. It's up to you which of the three of you
17 speaks, but --

18 MR. QUINN: I'll yield to my brother, Your Honor.

19 THE COURT: All right.

20 MR. KRULEWICH: If Your Honor please, we believe
21 that the joint plan will not be confirmed, and --

22 THE COURT: No, on that as -- Mr. Krulewich, let's
23 focus --

24 MR. KRULEWICH: I under --

25 THE COURT: -- on the issue. The first issue is,

1 | does your plan -- the Gary Leroy and Mourad and Owens plan --
2 | have the votes, are you going to somehow argue that you do?

3 | MR. KRULEWICH: Presently, no. We believe at the
4 | conclusion of the joint -- hearing on the joint plan that the
5 | Winter Hill Savings -- Federal Savings Bank will agree to
6 | accept the --

7 | THE COURT: Mr. Krulewich --

8 | MR. KRULEWICH: -- plan and therefore --

9 | THE COURT: I'm not -- Mr. Krulewich, please. I
10 | don't want posturing this morning. We've got a long day
11 | ahead of us. Let's focus on the issues.

12 | MR. KRULEWICH: I am trying, Your Honor.

13 | THE COURT: The issue is this: You don't have the
14 | votes, so there's not --

15 | MR. KRULEWICH: At the present time, no.

16 | THE COURT: Today's the day. This --

17 | MR. KRULEWICH: I understand, Your Honor. But --

18 | THE COURT: Thank you, Mr. Krulewich, I have your
19 | answer. Thank you. All right.

20 | MR. KRULEWICH: If Your Honor please, may argue --
21 | may I make an offer of proof?

22 | THE COURT: Mr. Krulewich, would you -- no, you may
23 | sit down, Mr. Krulewich; and if you're not going to answer
24 | questions that we're not -- we're going to be here all night,
25 | so let's move forward, but let's focus on the issues and not

1 make speeches.

2 I have the agreed order which is signed by the
3 parties in connection with the voting on the plan, and I've
4 entered that order. The next issue then is -- that means
5 that the First Amended Plan of Gary Leroy and Mourad, Owens &
6 Associates did not obtain sufficient votes pursuant to
7 Section 1126 and 1129 of the Bankruptcy Court, therefore,
8 that plan is not confirmed.

9 MR. KRULEWICH: I do take exception, Your Honor.

10 THE COURT: Fine. Ten days to file a notice of
11 appeal, Mr. Krulewich.

12 MR. KRULEWICH: Yes, I understand. Thank you.

13 THE COURT: Confirmation of the joint plan. Who
14 wants to proceed? Mr. Ricotta?

15 MR. RICOTTA: Yes, Your Honor. Pursuant to the
16 deadline set by the Court, we have filed with the Court
17 actually four affidavits which were filed as of last Monday.
18 The Court set Monday at four p.m. as the deadline. The first
19 affidavit is the affidavit of Stephen Gray, which is
20 generally showing compliance with 1129. There is an
21 affidavit of Mr. Howard E. Cohen. There is an affidavit of
22 Mr. John Kline, and there is also an affidavit of Mr. John
23 Keith. Those affidavits speak to compliance with 1129 and
24 feasibility, and without going through all those affidavits
25 because the point of submitting those affidavits was to do it

1 ahead of time and to dispense with having to do live
2 testimony, we would ask that the Court accept those
3 affidavits in lieu of the direct testimony. The affiants are
4 here in the courtroom today and available, and that the Court
5 accept those affidavits as our proof of our compliance with
6 1129.

7 THE COURT: Okay. Do you -- let me make sure. I
8 have the affidavit of Howard Cohen, which has been filed a
9 couple of days ago -- September 22 -- and then I have his
10 supplemental submission as well which was filed just
11 yesterday. Fine. I'll take the affidavits in lieu of direct
12 testimony, with reserving, of course, the opponent's right to
13 cross-examine.

14 MR. KRULEWICH: If Your Honor please, I would move
15 to strike the affidavits of Mr. Cohen and Mr. Keith. The
16 affidavits are replete with hearsay conclusions and otherwise
17 unadmissible testimony. I have no objection to Mr. Kline's
18 affidavit. I do reserve the right to cross-examine Mr.
19 Kline, but with respect to Mr. Cohen's affidavit and Mr.
20 Keith's affidavit, we would respectfully object to their
21 affidavits.

22 THE COURT: Overruled. You may -- do you want to
23 cross-examine Mr. Keith and Mr. Cohen as well?

24 MR. QUINN: Yes.

25 MR. KRULEWICH: Yes, Your Honor.

1 MR. RICOTTA: May I examine Mr. Cohen, Your Honor?

2 THE COURT: Sure. What order would you like to go
3 in?

4 MR. RICOTTA: I'd like to begin with Mr. Cohen.

5 MR. QUINN: Well, that's perf -- any order that
6 they wish, Your Honor, is fine with us.

7 THE COURT: Okay. Fine. Howard Cohen.

8 MR. RICOTTA: Your Honor, if I may. A request was
9 just made of me of Mr. Jim Liston, who is the attorney for
10 the Department of Housing and Community Development. There
11 was a subpoena apparently obtained by the Mourad proponents
12 that subpoenaed someone from -- Ms. Jane Gumble, I believe --
13 from the DHCD. Mr. Liston has filed a motion to quash, and
14 given the schedule of Ms. Gumble, he would like to know if he
15 could address the Court with respect to his motion to quash,
16 and I -- he just asked me to ask you that, and I would -- I
17 think that might be appropriate since, depending upon your
18 ruling, Ms. Gumble may or may not need to be here throughout
19 the rest of the day.

20 THE COURT: Okay.

21 MR. QUINN: And if I may speak at this juncture,
22 Your Honor --

23 THE COURT: Sure.

24 MR. QUINN: -- I'd be happy -- if we had the
25 opportunity to inquire of Ms. Gumble -- I'd be happy to begin

1 with her instead of Mr. Cohen.

2 THE COURT: Okay. Thank you, Mr. Cohen. Why don't
3 you step down and we'll call you later. Don't go too far.

4 MR. LISTON: Your Honor, I'm sorry for this
5 interruption in the usual course of events. Yesterday at one
6 p.m. in the afternoon the Department of Housing and Community
7 Development was served with a subpoena requiring the presence
8 today of Ms. Jane Gumble as well -- who is the Director of
9 the Department -- as well as the production of what are
10 literally thousands of pages of documents for this hearing
11 today. We received this at one p.m.

12 I called Mr. Krulewich. One of the problems is
13 that Ms. Gumble has -- because she did not know she was going
14 to be called upon to testify here today -- has a speaking
15 engagement at which she was scheduled to appear at 10:30 this
16 morning; and I did call Mr. Krulewich yesterday afternoon and
17 requested if he could simply substitute another person who
18 would be more knowledgeable who had worked on this particular
19 matter as a representative of the Department to testify on
20 matters that he might be interested in asking questions on.
21 He refused to allow that.

22 So I, this morning, filed an emergency motion
23 seeking to quash the subpoena, primarily on the issue of
24 notice. These gentlemen, Judge, have had at least five
25 weeks' notice of this hearing and have had months of notice

1 that the DHCD was involved in this matter, and they should
2 not have waited until one o'clock yesterday afternoon to
3 serve this subpoena. It's just -- it's totally burdensome
4 and unreasonable, and under Rule 45 warrants the order of a -
5 - the entry of an order to quash the subpoena.

6 THE COURT: Tell me again what HDC stands for.

7 MR. LISTON: The Department of Housing and
8 Community Development, Your Honor. This is the State agency
9 which would be -- which is responsible for the award of tax
10 credits.

11 THE COURT: Okay. Thank you.

12 MR. LISTON: I have a copy of the motion here, Your
13 Honor, if you would like --

14 THE COURT: Does it say anything in addition to
15 what you just told me?

16 MR. LISTON: Very little, Your Honor. That's --
17 that is the essence of it.

18 THE COURT: Okay. Good. I'll take your
19 representation then. Is there opposition?

20 MR. QUINN: Yes, Your Honor. May it please the
21 Court, Exhibit E to the affidavit of Howard Cohen of which
22 we've made motion to strike is an August 1 letter, two-page
23 letter of Jane Wallace Gumble to Mr. Cohen and Mr. Hall, I
24 believe, of the joint plan group in which Ms. Gumble makes
25 certain statements about their prospect of approval of their

1 application for a tax credit.

2 That tax credit issue is an essential element of
3 the feasibility of the joint plan proposal. We had spoken in
4 this court before about the chicken and the egg problem and
5 the elusive answer to that question. I submit that this is
6 another part, and a very essential part, of that matter; and
7 in ten minutes I can find out from Ms. Gumble -- enough, I
8 hope, to elucidate all of us, as to which comes first in this
9 case.

10 THE COURT: Okay. Let me ask Mr. Liston, is Ms.
11 Gumble here?

12 MR. LISTON: Yes, she is, Your Honor, and --

13 THE COURT: Does she have ten minutes?

14 MR. LISTON: I don't know where she -- she is here,
15 Your Honor, and apparently if it would take ten minutes,
16 perhaps --

17 THE COURT: Okay.

18 MR. LISTON: -- it would -- might be appropriate.

19 THE COURT: Then I'm going to deny the motion. I
20 agree that given the fact that this confirmation hearing was
21 scheduled over five weeks ago, it might have been anticipated
22 earlier that Ms. Gumble was going to be a necessary party
23 here this morning, but given the fact that she's here and
24 given the fact that counsel says it will be ten minutes, I
25 don't see that there is any harm, but --

1 MR. LISTON: One point, Your Honor. We did not
2 bring the thousands and thousands of documents which were
3 requested yesterday. It was physically impossible to bring
4 those.

5 THE COURT: Okay. Very good. Okay. Let's begin
6 then with the testimony. Ms. Gumble.

7 **JANE GUMBLE, WITNESS, DULY SWORN.**

8 THE COURT: Before we begin, should we perhaps
9 clarify the issue outstanding and the objection to the joint
10 plan? Who has standing to object to the joint plan? I
11 assume Mr. Leroy does as a creditor.

12 MR. RICOTTA: Yes, but, Your Honor, I do not
13 believe that a Mourad, Owens & Associates, LLC, which is the
14 developer, who's not a creditor in this case and I do not
15 believe has any other interest in this case, would therefore
16 have any standing to participate, given the fact that their
17 plan has been already ruled to be unconfirmable, and that
18 only perhaps a creditor like Mr. Leroy would have standing.

19 THE COURT: Well, the fact that the Mourad/Owens
20 plan has not -- has been not -- has not been confirmed isn't
21 relevant to the standing issue. It's -- the standing -- in
22 other words, Mourad & Owens' lack of financial stake. Do you
23 agree with that, Mr. Quinn?

24 MR. QUINN: Yes, Your Honor.

25 THE COURT: Okay.

1 MR. QUINN: And I would stand on Mr. Leroy's
2 authority to --

3 THE COURT: Very good. Okay. So -- let it --
4 Mary, have the record reflect then that the objection is on
5 behalf of Gary Leroy and not Mourad, Owens & Associates,
6 because Mourad and Owens Associates lack standing. With that
7 preface.

8 MR. QUINN: Thank you, Your Honor.

9 **DIRECT EXAMINATION**

10 **BY MR. QUINN:**

11 Q. Will you identify yourself, please, by name and
12 occupation?

13 A. My name is Jane Wallace Gumble. I am the Director of
14 the Department of Housing and Community Development.

15 Q. And what is your education, Ms. Gumble?

16 A. I have an undergraduate degree from Lehigh University
17 and a law degree from Boston University.

18 Q. Are you a practicing attorney otherwise?

19 A. I continue to maintain my license, but no, I do not
20 practice law.

21 Q. Thank you. And in your position with DHCD, if I may
22 call it that, are you the head of the agency for tax credits
23 in the Commonwealth of Massachusetts pursuant to Section 22
24 of the Internal Revenue Code for Real Estate?

25 A. Without knowing the provision of Section 22 verbatim, I

1 am the desig -- the Department of Housing and Community
2 Development is the designated tax credit agency for the
3 Commonwealth.

4 Q. And under that authority at some time did you promulgate
5 an allocation plan relative to granting tax credits?

6 A. We did.

7 Q. Are you able to identify that document, Ms. Gumble?

8 A. Again, I would assume this is our allocation plan. This
9 is our cover page, but I am not familiar with every page of
10 the document, and to the extent it appears to be our plan, I
11 assume it is our plan.

12 MR. QUINN: I'll offer that as an exhibit, Your
13 Honor.

14 THE COURT: Okay. Did you show it to counsel?
15 Have you seen it?

16 MR. RICOTTA: Yes.

17 MR. QUINN: He has a copy, Your Honor.

18 MR. RICOTTA: I've seen it, Your Honor; however, I
19 think I need to object, and if Mr. -- if the witness is going
20 to be asked to testify with respect to this plan, since I do
21 not believe that she has just testified that this is, in
22 fact, a plan that was promulgated by the agency, she's making
23 an assumption, and I don't believe that --

24 THE COURT: Okay. Then, Ms. Gumble, would you take
25 a look at the plan, go through it, and tell me -- tell the

1 Court whether you believe that is the plan, to make sure
2 we're talking about the right document here.

3 MR. QUINN: It was among the documents subpoenaed,
4 Your Honor.

5 (Pause)

6 **BY THE WITNESS:**

7 A. To the best of my knowledge, this is our current
8 allocation plan.

9 MR. QUINN: I'd offer it again, Your Honor.

10 THE COURT: Okay. Fine. Mark it Exhibit 1.

11 **WHEREUPON EXHIBIT 1 WAS MARKED AND ADMITTED INTO EVIDENCE**

12 THE COURT: Do you want it?

13 MR. QUINN: I would like it, Your Honor, because
14 I'd like to give it to the witness.

15 THE COURT: Okay.

16 **BY MR. QUINN:**

17 Q. In that allocation plan, Ms. Gumble, for applicants of
18 tax title credits -- or tax credits, excuse me -- for real
19 estate, what does that allocation plan constitute?

20 A. The qualified allocation plan is the document that
21 notifies future applicants for how they would apply for an
22 allocation to the Commonwealth.

23 Q. Is it the rules of the game for applying for the
24 allocation?

25 A. Yes.

1 Q. And let me call your particular attention to page 15.
2 This allocation plan in this Section 7 establishes certain
3 threshold criteria, does it not?

4 A. It does.

5 Q. And on page 15 you recite Threshold 5, Evidence of Site
6 Control, is that correct?

7 A. Correct.

8 Q. And your Evidence of Site Control requires a
9 demonstration of full control of all land and buildings
10 included in a project, isn't that correct?

11 A. That's what it says.

12 Q. And that's what you promulgated.

13 A. Correct.

14 Q. Now sometime on August 1, Ms. Gumble, did you address a
15 letter to Mr. Glenn Hall and Mr. Howard Cohen regarding V&M
16 Management, Inc., this case?

17 A. I did. I did.

18 Q. Let me show you that and ask if you'll identify it,
19 please.

20 MR. QUINN: And I will represent to the Court that
21 it is Exhibit E of the Howard Cohen affidavit.

22 **BY THE WITNESS:**

23 A. This appears to be a copy of the letter signed by me
24 dated August 1st, 1997.

25 MR. QUINN: Thank you. I'll offer that as an

1 Exhibit, Your Honor.

2 THE COURT: Well, I don't need it, actually,
3 because it's attached to the Howard Cohen affidavit, so it's
4 already in evidence.

5 MR. QUINN: Well, we object to the affidavit, Your
6 Honor, so to the extent that we object, I'd like to offer it.

7 THE COURT: Well, okay. That objection has been
8 overruled; but okay, fine.

9 MR. QUINN: Thank you, Your Honor.

10 THE COURT: The more paper the better.

11 (Laughter)

12 MR. QUINN: We do our best to make Xerox happy
13 anyway, Judge.

14 **WHEREUPON EXHIBIT 2 WAS MARKED AND ADMITTED INTO EVIDENCE**

15 **BY MR. QUINN:**

16 Q. Do you remember the burden of that August 1 letter that
17 you wrote? What did you say?

18 MR. LISTON: Objection.

19 UNIDENTIFIED: Objection, Your Honor.

20 MR. LISTON: The letter speaks for itself, Your
21 Honor.

22 THE COURT: Well, I'll permit Ms. Gumble to
23 summarize it if she chooses -- if she can. Overruled.

24 **BY THE WITNESS:**

25 A. May I have a copy of the letter?

1 Q. Yes.

2 A. (Pause) The first paragraph talks about providing a
3 letter in the context of a bankruptcy proceeding. The second
4 paragraph talks about the State allocation plan. The third
5 paragraph talks about how we award tax credits. And the
6 fourth paragraph appears to talk about the specifics of the
7 Beacon propo -- the MRCA Beacon proposal, and talks about
8 State resources. I think that's a summary of the letter.

9 Q. The second to the last paragraph speaks of site control,
10 does it not? That Threshold requirement of site control?

11 A. Yes.

12 Q. And you expressed an opinion in the letter regarding a
13 so-called Beacon proposal, did you not?

14 A. The last sentence says that,

15 "We would construe the Court's authorization to
16 distribute the plan for creditor approval as
17 satisfactory evidence of site control."

18 And sometime in August 26th, did you have a meeting with
19 Elizabeth Mourad and Bill Cohen (sic) -- Bill Owens?

20 A. I did.

21 Q. And where was that?

22 A. In my office.

23 Q. Who was present?

24 A. Elizabeth Mourad; her brother, whose first name I do not
25 recall; Bill Owens; I want to say Alfonse Mulhone -- I'm not

1 positive; and I believe --

2 Q. Othello Mulhoney?

3 A. Othello, I'm sorry. And Elizabeth Morse from my office,
4 and Mark Slotnick from my office. I believe that's everyone
5 that was there.

6 Q. And was there discussion regarding site control at that
7 meeting?

8 A. They raised the issue and I said, we -- yes, I mean, the
9 answer is yes, we discussed it.

10 Q. Was there discussion regarding the court authorization
11 to distribute the plan for creditor approval?

12 A. At the time the letter was -- yes.

13 Q. At the meeting, isn't that correct?

14 A. Yes.

15 Q. And were you made aware then that there was a second
16 plan authorized by the Court?

17 A. I was.

18 Q. For creditor approval?

19 A. Yes.

20 Q. Did you express an opinion or a statement after you were
21 made aware that there was a second plan regarding site
22 control?

23 A. I believe I said that the circumstances or the facts had
24 changed since the August 1st letter, and to the extent the
25 facts had changed, the determination of site control would

1 need to be revisited, and asked them to put a request in
2 writing because it required both counsel and programmatic
3 review, neither of who were present at the meeting.

4 Q. What was your knowledge about the -- about the creditor
5 -- the plan for creditor approval when you wrote the August 1
6 letter?

7 A. I'm sorry, I'm not -- I don't understand your question.

8 Q. What did you understand to be the issuance of plans for
9 creditor approval in this bankruptcy case when you wrote the
10 August 1st letter, Exhibit 2?

11 A. I go back to --

12 MR. LISTON: Objection, Your Honor, the question is
13 too vague.

14 THE COURT: Would you repeat the question?

15 MR. QUINN: Yes, Your Honor. May I rephrase it?

16 THE COURT: Sure.

17 **BY MR. QUINN:**

18 Q. How did you become aware of the Beacon proposal, which I
19 think is what you call it here, in your August 1 letter? Had
20 it been filed by August 1?

21 A. With the Bankruptcy Court?

22 Q. No. With DHCD.

23 A. The Beacon bankruptcy claim would never be filed with
24 us.

25 Q. No. The application for tax credits.

- 1 A. No, applications were not due until August 26th --
- 2 Q. So how did you be --
- 3 A. -- however, we had information from Beacon about a
- 4 proposed application. We often get information in advance of
- 5 an actual deadline.
- 6 Q. And do you remember how specifically you got this
- 7 information?
- 8 A. It came -- it was submitted to our tax credit staff for
- 9 preliminary review.
- 10 Q. Did anyone visit you personally to discuss it?
- 11 A. Yes.
- 12 Q. Who?
- 13 A. I met with Howard Cohen.
- 14 Q. Did you meet with Mr. Hall?
- 15 A. Yes.
- 16 Q. And you wrote this letter after that meeting.
- 17 A. I don't recall the date of the meeting.
- 18 Q. Would you say it was before August 1?
- 19 A. I believe it was.
- 20 Q. When you wrote this letter, had you any awareness that
- 21 there was a second plan proposed before the Bankruptcy Court
- 22 for approval of the creditors?
- 23 A. I did not.
- 24 Q. Then on August 21st you learned -- on August 25th you
- 25 learned there was a second plan.

1 A. I'm assuming that's the date of the meeting with the
2 Mourad/Owens group.

3 Q. That's what I identify it as.

4 A. Okay.

5 Q. Is that your memory?

6 A. I believe it was around then. I don't recall
7 specifically, and that is when I learned of a second plan, I
8 believe.

9 Q. And did you form a judgment then whether, indeed,
10 Threshold 5 was met or would be met under those circumstances
11 by the time of filing for tax credits --

12 A. I did not.

13 Q. -- on the part of Mr. Hall and Mr. Cohen?

14 A. I did not.

15 Q. If, at the time of filing they did not have full control
16 of all land and buildings included in the project, could
17 their application be considered by DHCD?

18 A. Nothing in the allocation plan says when threshold
19 determinations need to be made.

20 Q. Is that so?

21 MR. RICOTTA: Your Honor, can the record reflect
22 that that last answer was a Yes? The witness just nodded her
23 head.

24 THE COURT: Oh, okay.

25 THE WITNESS: Oh, sorry.

1 THE COURT: Yes, the witness -- yes.

2 THE WITNESS: I'm sorry.

3 **BY MR. QUINN:**

4 Q. Is it your statement that site control is not necessary
5 to be established at the time of the application?

6 A. The review of the application is performed after it is
7 submitted.

8 Q. I call your attention to page 13. Do you have Exhibit 1
9 there? (Pause) At the top.

10 MR. QUINN: Thank you, Mr. Baum.

11 **BY MR. QUINN:**

12 Q. The second sentence after the heading of Section 7
13 says, as I read it:

14 "Unless an application meets all threshold criteria
15 set forth in this Section, the Department will not
16 review the application in the competitive scoring
17 categories."

18 Is that your rule?

19 A. That's what it says.

20 Q. And that's your rule. This is -- this is your --

21 A. Right.

22 Q. -- allocation plan, your rules of the game, is it not?

23 A. Correct.

24 MR. MOORE: Your Honor, if I may, this is all very
25 interesting, but since you now have found that their plan

1 | can't be confirmed, there is only one plan; therefore, we are
2 | where Ms. Gumble thought we were at the time. She has a
3 | commitment. Why are we asking these questions?

4 | THE COURT: Mhmm. Why are we asking these
5 | questions?

6 | MR. QUINN: We submit, Your Honor, that there is no
7 | plan that can be approved -- that can be confirmed as
8 | feasible if Ms. Gumble adheres to the rules of her game.

9 | THE COURT: But why -- why -- explain to me what --
10 | then why don't you make me an offer of proof as to where
11 | you're going on that.

12 | MR. QUINN: Yes, Your Honor. I offer to prove on
13 | the testimony already given by this witness and on the
14 | testimony that would be given by three other witnesses
15 | regarding the August 25 conversation that the testimony will
16 | be that for the first time on August 25th Ms. Gumble learned
17 | of a second plan submitted for approval by creditors. At
18 | that time, in her words, she revisited or said the issue of
19 | site control must be revisited. If we apply the rules under
20 | the allocation plan, then we must disqualify the application
21 | of the joint plan group for tax credits, and that means that
22 | their program would -- their plan would fail. Three
23 | witnesses will testify to the August 25th conversation, if
24 | Your Honor will hear them. They will be those three people
25 | mentioned in the conference by Ms. Gumble. They will be Ms.

1 Mourad, they will be Mr. Owens, and they will be Mr. Mulhane.

2 THE COURT: Well, what difference does it make.
3 The Gary Leroy and Mourad and Owens plan has been rejected by
4 creditors. Therefore, it is not confirmed. What -- how
5 does that affect the feasibility of the joint plan today,
6 September 25th?

7 MR. QUINN: That does not affect the joint plan,
8 but the decision of Ms. Gumble -- the decision -- the only
9 decision she's authorized to make *will* affect the joint plan.

10 THE COURT: Mmhmm.

11 MR. QUINN: And we submit the only decision she is
12 authorized to make under her rules will be to deny the
13 application for tax credits, and that renders the plan of the
14 joint group not feasible.

15 THE COURT: I don't understand. Why don't you then
16 ask her whether the joint plan is not feasible because she
17 will not issue the tax credits? Ask her that question, if
18 that's the issue.

19 MR. QUINN: If I may, Your Honor?

20 THE COURT: Go ahead.

21 **BY MR. QUINN:**

22 Q. If there is no site control --

23 MR. RICOTTA: Objection, Your Honor.

24 **BY MR. QUINN:**

25 Q. -- by the --

1 MR. LISTON: That's not the question.

2 MR. RICOTTA: Objection, Your Honor, that was not
3 the question.

4 THE COURT: Right. Mr. Quinn, that -- the
5 objection is sustained. That is not the issue.

6 MR. QUINN: May I inquire in three questions, Your
7 Honor?

8 THE COURT: You can ask another question, and I'll
9 rule on any objection; otherwise, you may inquire.

10 MR. QUINN: Thank you.

11 **BY MR. QUINN:**

12 Q. If there is no site control by an applicant,
13 specifically Beacon --

14 MR. RICOTTA: Objection.

15 **BY MR. QUINN:**

16 Q. -- or the joint plan group, at the time of filing their
17 application, can you approve their application for credit?

18 MR. RICOTTA: Objection, Your Honor.

19 THE COURT: I'll allow it. I take it as a
20 hypothetical question, but --

21 **BY THE WITNESS:**

22 A. We review the application for threshold determination.
23 We can accept the application.

24 Q. And is that in conformance with the allocation plan, the
25 rules of the game, as you describe them?

1 A. Yes.

2 Q. You do say on page 26 of your rules, right under
3 Application Completeness, in the third sentence,

4 "For purposes of threshold review and competitive
5 evaluation, the Department will not accept the
6 submission of additional documentation after the
7 application deadline."

8 Is that correct?

9 A. I don't see where you're reading from. I have to --

10 Q. It's on page 26, and it's under the heading,
11 "Application Completeness."

12 A. Yes.

13 Q. And it's the third sentence.

14 A. That's what the plan says.

15 Q. You do say that, is that correct?

16 A. That's what the plan says.

17 Q. And that's your plan.

18 A. Yes.

19 Q. That's your rules of the game.

20 A. Correct.

21 MR. QUINN: Thank you. I have no more questions,
22 Your Honor.

23 THE COURT: Okay.

24 MR. QUINN: Thank you.

25 THE COURT: Thank you. Do you have any cross-

1 examination, Mr. Ricotta? How are doing for time? Are you
2 okay?

3 THE WITNESS: Yeah, I'm fine. Thank you.

4 MR. RICOTTA: Yes, Your Honor.

5 **CROSS-EXAMINATION**

6 **BY MR. RICOTTA:**

7 Q. Ms. Gumble, if the joint plan is confirmed by the
8 Bankruptcy Court, is it the position of the DHCD that the
9 proponents of the joint plan will have site control within
10 the meaning of your allocation plan?

11 A. Yes.

12 MR. RICOTTA: Thank you, Your Honor. No further
13 questions.

14 THE COURT: Anything further?

15 MR. QUINN: Yes, Your Honor.

16 THE COURT: Okay.

17 **CONTINUED CROSS-EXAMINATION**

18 **BY MR. QUINN:**

19 Q. Is it a fact or not that the proponents of which my
20 brother made reference had site control on the day they filed
21 their application?

22 A. The determination of site control is made after a review
23 of what we received. That determination has not yet been
24 made.

25 Q. And you're saying you will accept subsequent documents

1 and filings after the date for filing application for tax
2 credits, is that correct?

3 A. No, I answered his question, would confirmation of the
4 plan be evidence of site control, but it would be.

5 Q. Will you -- is it your position that you do accept
6 documents subsequent to the date for filing on the issue of
7 site control?

8 A. The determination of site control has not yet been made.
9 We would weigh all of the information that we had and make
10 that determination.

11 Q. All the information you had at the time that application
12 was made under Threshold 5?

13 A. That's right.

14 MR. LISTON: Objection, Your Honor.

15 BY MR. QUINN:

16 Q. Is that correct?

17 MR. LISTON: Objection, Your Honor. It's just --
18 it's --

19 THE COURT: I'll allow it.

20 MR. LISTON: It's irrelevant, and it's going on and
21 on.

22 BY MR. QUINN:

23 Q. Is that correct?

24 A. (Pause) I'm not sure I understand what your question
25 is.

1 Q. My question is, would you form a judgment whether site
2 control existed on the part of the proponents of the joint
3 plan at the time they filed their application for tax
4 credits, according to your allocation plan?

5 A. Yes.

6 MR. QUINN: Thank you.

7 MR. MOORE: Your Honor, just a couple questions?

8 THE COURT: Yes.

9 **CROSS-EXAMINATION**

10 **BY MR. MOORE:**

11 Q. Ms. Gumble, under your rules, does an owner have site
12 control?

13 A. Yes.

14 Q. Does someone who is under a binding agreement to
15 purchase from the owner have site control?

16 A. Yes.

17 Q. All right. Did Mr. Gray join in the application of
18 Beacon and the tenants?

19 A. He did.

20 Q. And that was from the outset, from Day One?

21 A. Correct.

22 Q. And therefore, is it your understanding that there is
23 site control?

24 A. There is my understanding that there is site control.

25 MR. MOORE: Thank you.

1 THE COURT: Any further questions?

2 MR. QUINN: I have to ask one more.

3 THE COURT: Okay.

4 **CONTINUE CROSS-EXAMINATION**

5 **BY MR. QUINN:**

6 Q. You mean site control is no longer under review, Ms.
7 Gumble?

8 A. At the ti -- my understanding from staff --

9 UNIDENTIFIED: We just did it.

10 MR. LISTON: She just answered the -- objection.
11 Just answered the question, Your Honor.

12 THE COURT: I'll allow it.

13 THE WITNESS: Yes.

14 MR. LISTON: She just answered the question.

15 THE COURT: I'll allow it.

16 **BY THE WITNESS:**

17 A. Yes, we have a determination of site control, as I
18 understand it from staff.

19 Q. So it's no longer under review. Pardon me?

20 A. As I understand it, staff has -- in finishing the
21 review, but that question would be that it would lead me to
22 that conclusion. I have not received my final recommendation
23 from staff.

24 Q. So you're changing your earlier statement? It's no
25 longer under review.

1 A. It was just as much a hypothetical question as yours.
2 Staff if completing it, but if that fact pattern is the case,
3 then I can make a determination of site control.

4 MR. QUINN: I don't want to be argumentative, but
5 you've made a conditional statement. Thank you very much.

6 THE COURT: Any further questions? Thank you, Ms.
7 Gumble. You're excused.

8 MR. MOORE: Your Honor, if I may, for the
9 convenience of the United States, there is another objection
10 that I think we resolved and perhaps --

11 THE COURT: Okay.

12 MR. MOORE: -- the United States could --

13 MS. KNOSPE: Thank you, Your Honor. Marvis Knospe
14 for the Internal Revenue Service.

15 MR. QUINN: Excuse me.

16 MS. KNOSPE: We had made -- oh -- yes.

17 MR. QUINN: If I may, Your Honor, I have no
18 objection if Ms. Gumble leaves at this time. I'm sure my
19 brothers would not either.

20 THE COURT: Good.

21 MS. KNOSPE: We had made a limited objection, Your
22 Honor, to the extent it appeared that our administrative
23 claim may not have been intended to have been paid in full
24 with interest and penalties; however, I'm advised that it is
25 a fact that it will be paid in full. It's been made a part

1 A. It was just as much a hypothetical question as yours.
2 Staff if completing it, but if that fact pattern is the case,
3 then I can make a determination of site control.

4 MR. QUINN: I don't want to be argumentative, but
5 you've made a conditional statement. Thank you very much.

6 THE COURT: Any further questions? Thank you, Ms.
7 Gumble. You're excused.

8 MR. MOORE: Your Honor, if I may, for the
9 convenience of the United States, there is another objection
10 that I think we resolved and perhaps --

11 THE COURT: Okay.

12 MR. MOORE: -- the United States could --

13 MS. KNOSPE: Thank you, Your Honor. ~~Marvis Knospe~~
14 for the Internal Revenue Service.

15 MR. QUINN: Excuse me.

16 MS. KNOSPE: We had made -- oh -- yes.

17 MR. QUINN: If I may, Your Honor, I have no
18 objection if Ms. Gumble leaves at this time. I'm sure my
19 brothers would not either.

20 THE COURT: Good.

21 MS. KNOSPE: We had made a limited objection, Your
22 Honor, to the extent it appeared that our administrative
23 claim may not have been intended to have been paid in full
24 with interest and penalties; however, I'm advised that it is
25 a fact that it will be paid in full. It's been made a part

1 of the proposed order, and with that confirmation by debtor's
2 counsel, I have no further objection and would withdraw my
3 objection.

4 THE COURT: Very good. Okay. Mary, would you have
5 the record reflect the United States has withdrawn its
6 objection to confirmation of the joint plan. Mr. Ricotta,
7 how would you like to proceed?

8 MR. RICOTTA: Well, I understand, Your Honor, that
9 the -- my brother has had some questions from Mr. Cohen, and
10 he certainly, I believe, is still in the courtroom, and if
11 they want to proceed on that basis, I think we ought to just
12 go right back to where we were.

13 MR. QUINN: I'd like to do that, Your Honor.

14 THE COURT: Very good. Mr. Cohen.

15 **HOWARD EARL COHEN, WITNESS, DULY SWORN**

16 MR. QUINN: I submit this motion to strike
17 affidavits of John Keith and Howard Cohen, and I believe Your
18 Honor has already ruled, but may I present it, and --

19 THE COURT: Well, just make an oral motion at this
20 point.

21 MR. QUINN: All right, Your Honor.

22 THE COURT: And what is the basis for striking Mr.
23 Cohen's affidavit?

24 MR. QUINN: That the bulk of what he testifies to,
25 apart from his excellent Curriculum Vitae -- which I thought

1 | was incomplete, but which is certainly a handsome one -- is
2 | hearsay, and should not be so admitted to his testimony.

3 | THE COURT: Okay. The objection is overruled, but
4 | you may cross-examine Mr. Cohen on the statements contained
5 | both in his affidavit filed in September 22 and his
6 | supplemental affidavit filed September 25.

7 | MR. QUINN: Thank you very much.

8 | **CROSS-EXAMINATION**

9 | **BY MR. QUINN:**

10 | Q. Would you identify yourself, please?

11 | A. Yeah, my name is Harold Earl Cohen. I'm president of
12 | Beacon Residential Properties, Limited Partnership.

13 | Q. And Beacon Residential Properties Limited Partnership is
14 | a participant in the joint plan and proposal, is it?

15 | A. Correct.

16 | Q. When I ask you I will ask you, identifying the limited
17 | partnership, Mr. Cohen, do you have ownership in the so-
18 | called Mandela properties?

19 | A. Currently?

20 | Q. Yes.

21 | A. No. No.

22 | Q. Have you ever had ownership in those properties?

23 | A. No.

24 | Q. Do you know who the owners are?

25 | A. I'm not sure -- V&M Management, Inc., as I understand

1 | it.

2 | Q. And do you describe owners on page 5 at #12 of your
3 | affidavit?

4 | A. You're talking about paragraph 12 of that affidavit?

5 | Q. Yes. You speak of who the new owners will be, is that
6 | correct?

7 | A. That's what our anticipation is if our plan is
8 | confirmed.

9 | Q. Do you have knowledge of who applied for tax credits
10 | before Ms. Gumble's division?

11 | A. I do.

12 | Q. And who did?

13 | A. Mandela Homes Limited Partnership.

14 | Q. Let me show you this document and see if you can
15 | identify it.

16 | A. It's not my document.

17 | Q. I understand that. Do you know it?

18 | A. I have seen it.

19 | Q. And would you describe it for the Court?

20 | A. It purports to be LIHTC applications, August 26th, 1997,
21 | funding round #2, 1997; production applicants and
22 | preservation applications and the two lists.

23 | Q. What do you understand it to be?

24 | A. I think it's a document prepared by DHCD listing the
25 | people to contact for -- with respect to tax credit

1 applications.

2 Q. The subject of which I discussed with Ms. Gumble in
3 your presence here today, is that correct?

4 A. Correct.

5 Q. Do you see a checkmark beside one of those individuals
6 or groups that filed, is that correct?

7 MR. RICOTTA: Your Honor, I need to object because
8 this is not in evidence, it's not his document; he didn't
9 prepare it, he's only seen it. I don't know why we can have
10 questions about the contents of it.

11 THE COURT: Well, do you have a copy of the
12 document?

13 MR. RICOTTA: No, I don't, Your Honor.

14 THE COURT: Neither do I, Mr. Quinn, so I don't --

15 MR. QUINN: All right, Your Honor.

16 THE COURT: -- I'm not following the testimony at
17 all.

18 MR. QUINN: Thank you. May I offer it as an
19 exhibit, Your Honor?

20 THE COURT: Do you have a copy for counsel?

21 MR. QUINN: I do, Your Honor.

22 THE COURT: And who prepared the document?

23 **BY MR. QUINN:**

24 Q. Do you know who prepared the document, Mr. Cohen?

25 A. No. I thought you did.

1 MR. QUINN: We submit it was prepared by DHCD, Your
2 Honor, and it is a list of those who have applied for tax
3 credits under the August 26th, 1997 deadline, funding round
4 #2, 1997.

5 MR. RICOTTA: Your Honor, I mean, we have no proof
6 of who prepared this. We really have no idea how Mr. Cohen
7 can testify as to a document that has no founda -- that has
8 no foundation been laid for it.

9 MR. QUINN: I'm trying to find that out, Your
10 Honor.

11 THE COURT: Well, you can ask him questions to lay
12 a foundation --

13 MR. QUINN: Thank you, Your Honor.

14 THE COURT: -- for introducing the document.

15 **BY MR. QUINN:**

16 Q. Do you know the name of the entity that filed for tax
17 credits before the DHCD, Mr. Cohen?

18 A. The name of the applicant, Mandela Homes Limited
19 Partnership.

20 Q. You say you've seen this document before that I've
21 placed before you, is that correct?

22 A. Correct.

23 Q. And do you know the name under which it is listed on
24 this document I place before you?

25 A. I don't think it has the name of the applicants.

1 Q. Let me call your attention to the line with the
2 checkmarks on it.

3 MR. RICOTTA: Your Honor, I mean, once again, I
4 mean, we're getting into the contents of this document, I
5 guess for substantive purposes.

6 THE COURT: Well, Mr. Quinn can lay a foundation,
7 if he can, for introduction of the document. Let's do this,
8 so that the record is clear, Mary, would you please mark it
9 Exhibit A so it's not introduced into evidence, but it's
10 marked so that the record will be clear.

11 MR. QUINN: Thank you, Your Honor.

12 **WHEREUPON EXHIBIT A WAS MARKED FOR IDENTIFICATION**

13 **BY MR. QUINN:**

14 Q. With particular reference to the lines to which I've
15 called your attention, what is the identity of the applicant
16 on that line?

17 A. There is no applicant identity.

18 Q. Is there a reference to Mandela there?

19 A. Under a dif -- under the first column there is.

20 Q. Yes. And under the second column, what is the identity?

21 A. It says, "Location of Project."

22 Q. Pardon?

23 A. I'm confused. The first column says, "Project Name."

24 Q. Yes.

25 A. And it says Mandela.

- 1 Q. And what's the next column?
- 2 A. "Location of Project."
- 3 Q. And what does it say?
- 4 A. Roxbury.
- 5 Q. And what is the next column?
- 6 A. "Name of Developer."
- 7 Q. And what does that say?
- 8 A. That says, "Beacon Residential Properties, Limited
- 9 Partnership."
- 10 Q. And is it your testimony here that Beacon Residential
- 11 Properties did not file an application for tax credits?
- 12 A. Correct. The applicant is different from the developer.
- 13 There's no list here of the applicants.
- 14 Q. Thank you. Was Hammond Street Limited Partnership among
- 15 the applicants that filed for tax credits?
- 16 A. No.
- 17 Q. And it was only Mandela Housing Limited Partnership that
- 18 filed for tax credits.
- 19 A. Mandela Homes Limited Partnership.
- 20 Q. Is Mandela Homes Limited Partnership one of the
- 21 individuals identified or one of the entities identified in
- 22 the joint plan before the Court today?
- 23 A. Yes.
- 24 Q. Under that title?
- 25 A. I believe so.

1 MR. QUINN: The record will speak for itself.

2 Thank you, Mr. Cohen.

3 THE COURT: Do you have any further questions?

4 MR. RICOTTA: No, Your Honor.

5 THE COURT: Thank you, Mr. Cohen.

6 MR. MOORE: Your Honor, just briefly?

7 THE COURT: Oh, sure.

8 **CROSS-EXAMINATION**

9 **BY MR. MOORE:**

10 Q. Mr. Cohen, did Mr. Gray, in fact, join in the
11 application?

12 A. He did.

13 Q. From Day One?

14 A. He did.

15 Q. And he advised that to the DHCD in writing with the
16 application?

17 A. He did.

18 MR. MOORE: Thank you.

19 THE COURT: Thank you, Mr. Cohen.

20 (Pause)

21 THE COURT: Do you want to cross-examine either
22 John Kline or John Keith?

23 MR. BAUM: Your Honor, I would like the opportunity
24 to cross-examine Mr. Kline, Mr. Keith, and the Trustee, who
25 has also submitted an affidavit.

1 THE COURT: Okay. Which order?

2 MR. BAUM: How about the Trustee first, Your Honor?

3 THE COURT: Okay. Mr. Gray.

4 **STEPHEN S. GRAY, TRUSTEE, WITNESS, DULY SWORN**

5 **CROSS-EXAMINATION**

6 **BY MR. BAUM:**

7 Q. For the record, would you please state your name?

8 A. Stephen S. Gray.

9 Q. And, Mr. Gray, you have been the Chapter 11 Trustee in
10 this proceeding?

11 A. I have.

12 Q. In that role you've been the caretaker of the estate of
13 the debtor?

14 A. I've been responsible to administrate the affairs of the
15 debtor, subject to the supervision of this Court.

16 Q. And you've also been a proponent of more than one plan
17 of reorganization, is that correct?

18 A. I have.

19 Q. You are the proponent, in part, of what we've been
20 calling the joint plan, is that correct?

21 A. I am.

22 Q. And you had proposed an earlier plan with an outfit
23 called UDCPCV, is that correct?

24 A. I did.

25 Q. And you have also filed or had filed on your behalf

1 | several adversary proceedings throughout the course of this
2 | Chapter 11, is that correct?

3 | A. I have.

4 | Q. Now a centerpiece of your plan of reorganization, the
5 | joint plan, is the ability to obtain tax credits in a timely
6 | fashion and at a certain amount, is that correct?

7 | A. It is.

8 | Q. If you don't get the tax credits on time your plan
9 | cannot work, is that correct?

10 | A. The plan, I believe, talks about the -- what happens if
11 | tax credits are not allowed in the amounts or -- I shouldn't
12 | say that. The funding is not available in the amounts
13 | sufficient to meet the payments under the plan. There is a
14 | certain dilution of those payments.

15 | Q. Are you referring to the sex -- withdraw that. Are you
16 | referring to the second allocation of tax credits?

17 | A. I believe so, yes.

18 | Q. That's the allocation that seeks \$350,000 in tax credits
19 | in 1998, is that correct?

20 | A. The -- yes.

21 | Q. And what you're looking for first is a million dollars,
22 | is that correct?

23 | A. Yes.

24 | Q. And you're looking for the million dollars in the second
25 | round of the 1997 tax allocation plan, is that correct?

1 A. Yes.

2 Q. And that's scheduled to happen sometime in October?

3 A. As I understand it.

4 Q. And if you don't get the million dollars, then you can't
5 do your plan, is that right?

6 A. The payments would not be made as scheduled under the
7 plan.

8 Q. Well, on the effective date, what are the total payments
9 you're supposed to make?

10 A. I don't have that in front of me. It's scheduled in the
11 plan.

12 Q. Well, what sources of funds are you going to look to for
13 those payments?

14 A. Funds that would be made available from the syndication
15 of the tax credits or any bridge loans that would be funded
16 subject to the syn -- ultimate syndication of those tax
17 credits.

18 Q. And you would not disagree with me that if you're not
19 able to get the million dollars' first round of tax credits
20 for syndication, you will not be able to go through with the
21 plan as proposed, is that correct?

22 MR. MOORE: Your Honor, objection. It calls for a
23 legal conclusion. The plan has a definition of "Effective
24 Date" which is tied to the funding of tax credits.

25 MR. BAUM: He's the author of --

1 MR. MOORE: We don't have an effective date until
2 we have tax credits. It doesn't talk about October 1997.

3 MR. BAUM: I refer to October as being the
4 allocation -- projected date for allocation to the State
5 agency. His effective date is the plan -- whatever he said
6 in his plan, and if he doesn't have the money at the time of
7 the effective date through these tax credits, I want to know
8 if he can do his plan.

9 MR. MOORE: It's the old chicken and egg, Your
10 Honor. The effective date is tied to when we get the
11 funding, so there won't be an effective date until we get the
12 funding.

13 THE COURT: Okay. All right. The objection is
14 sustained because of the definition of the effective date in
15 the plan.

16 **BY MR. BAUM:**

17 Q. Without the tax credits, you can't do your plan, can
18 you?

19 A. The plan is predicated on funding from the syndication
20 of low income housing tax credits or bridge loans that would
21 be made available in anticipation of that funding, and that's
22 where the money comes from to make the payments under the
23 plan.

24 Q. Thank you for your answer. That answered the question,
25 "Where do you expect to get your funds?" The question I

1 asked you is if you don't have the tax credits, can you do
2 your plan?

3 A. I -- as I said, the tax credits are syndicated. They're
4 sold. Funds come in from that. There's also arrangements of
5 which part of this predicated, for which bridge loans can be
6 made available to fund those in anticipation of future tax
7 credit allocations.

8 Q. I'll try one more time. If you don't get the tax
9 credits, can you do your plan?

10 MR. MOORE: Your Honor, Mr. Gray's now answered the
11 question twice. He may not like the answer --

12 THE COURT: No. Overruled. In fairness, Mr. Gray
13 did not answer it that last time. He had, I believe,
14 answered it previously, but you may ask the question.

15 **BY MR. BAUM:**

16 Q. Yes or no? If you don't get the tax credits --

17 A. There -- there will be no effective date if there is no
18 funding for the payments under the plan, if that's the answer
19 to your question.

20 Q. Now you know that in order to get tax credits, the
21 applicant has to demonstrate site control, is that correct?

22 A. That is my understanding.

23 Q. And during the period in which you've been the Trustee
24 for the -- one of the participants in the joint plan, can you
25 tell us if there has ever been an executed option agreement

1 by the joint proponents for this particular property?

2 A. An executed option agreement?

3 Q. Yes.

4 A. No.

5 Q. Has there ever been an executed purchase and sale
6 agreement?

7 A. No.

8 Q. Has any of the joint proponents ever been a mortgagee
9 for this particular property?

10 A. Yes.

11 THE COURT: I would hope so, counsel.

12 (Laughter)

13 THE COURT: Otherwise we've wasted a lot of time
14 here.

15 (Laughter)

16 **BY MR. BAUM:**

17 Q. Is there any agreement that you can point to existing
18 now or that existed on August 26th giving a price and an
19 expiration date for the control of this parcel?

20 MR. RICOTTA: Objection, Your Honor. I believe
21 that the plan, which has been signed by the proponents,
22 including Beacon and MRCA and everyone else speaks for
23 itself.

24 THE COURT: Yes, the plan speaks for itself, Mr.
25 Baum.

1 MR. BAUM: Well, for the record, Your Honor, what I
2 am doing is tracking the rules of the game as authenticated
3 by the witness Gumble, and the requirements within those
4 rules for the determination of site control, and they're very
5 specific.

6 THE COURT: Counsel, the plan -- the plan defines
7 these issues, but you can ask it if you want, but it's just
8 time-consuming.

9 **BY MR. BAUM:**

10 Q. Briefly, to your knowledge, either now or no August
11 26th, has there been any signed agreement to put a control of
12 this parcel by any of the joint plan proponents?

13 MR. MOORE: Your Honor, if I may, that is calling
14 for a legal conclusion. The point Mr. Ricotta was trying to
15 make is that the law, as I understand it, provides that when
16 a Trustee enters into an agreement or a plan and signs it
17 subject to Bankruptcy Court approval, he is bound by it
18 subject to his good faith obligation to go forward and get it
19 approved. The plan is in agreement. We know that. It's a
20 legal question.

21 THE COURT: Absolutely. Okay. But, Mr. Gray may
22 answer the question if he can.

23 THE WITNESS: Could you ask the question again,
24 please?

25 THE COURT: Do you want to hear it again? Yes.

1 **BY MR. BAUM:**

2 Q. To your knowledge has there ever been a signed agreement
3 for the control of this property by any of the joint
4 proponents for the joint plan?

5 A. I believe that the order appointing me gives me the
6 authority to control this property, subject to the approval
7 of this Court, and the supervision of this Court. I also
8 believe that the plan in which I entered into, so-called
9 joint plan, binds me and the other parties under that joint
10 plan for the ultimate control of this property.

11 Q. And does that -- any of those documents run with the two
12 V&M Management, Inc., the current owner?

13 A. They run -- they run to the debtor through me.

14 Q. And therefore you're saying that if the Court exercises
15 its discretion and orders favorable to you that at that point
16 you will achieve site control.

17 MR. RICOTTA: Objection.

18 **BY THE WITNESS:**

19 A. No.

20 THE COURT: Sustained. It's a *non sequitur*,
21 counsel.

22 MR. BAUM: I'm sorry?

23 THE COURT: It is a *non sequitur*, the question.

24 MR. BAUM: Mmhmm.

25 **BY MR. BAUM:**

1 Q. Now you have, at various times during these proceedings,
2 taken a position regarding the value of the property, is that
3 correct?

4 A. Yes.

5 Q. Indeed, you have taken the position that the fair market
6 value of the property does not exceed \$100,000, is that
7 correct?

8 A. It was an appraisal that was prepared by an appraiser
9 appointed by this Court that stated that, yes.

10 Q. That was the bonds appraisal.

11 A. Yes.

12 Q. That's an appraisal that you commissioned.

13 A. Yes.

14 Q. With the authority of the Court.

15 A. Yes.

16 Q. And paid for through the State funds for the debtor.

17 A. Yes.

18 Q. And that is the appraisal that you used to represent to
19 the Court in the first plan that you filed that the fair
20 market value of the property did not exceed \$100,000, is that
21 correct?

22 A. The disclosure statement so stated, yes.

23 Q. And that is the position you took with respect to
24 Adversary Proceedings that you had filed against several
25 creditors, is that correct? That the property was not worth

1 more than \$100,000.

2 A. Yes.

3 Q. And that \$100,000 fair market value was based upon the
4 property as a going concern, is that correct?

5 A. It's based on the property as described in that
6 appraisal, which I think was very specific.

7 Q. It wasn't a liquidation value, was it?

8 A. Based -- the value of the property as described in that
9 appraisal as it sat without ongoing subsidies, without
10 certainty of ongoing subsidies or any money available for its
11 rehabilitation.

12 Q. Now during the period in which you have been the Chapter
13 11 Trustee, have you collected certain funds from HUD for the
14 repair or renovation of the property?

15 A. We have collected funds from HUD for the operation of
16 the property, some of which has been used for the repair of
17 the property. We've also been granted special adjustments
18 beyond the normal funding of the -- under the HAP contract
19 from HUD for specific improvements to the property.

20 Q. Now you were appointed Trustee on April 1, 1996, is that
21 correct?

22 A. I believe so.

23 Q. And since that time can you estimate for us how much, in
24 terms of total dollar value, repair has been done to the
25 property?

1 A. I believe there is roughly about six or \$700,000 that
2 have been funded out of the general funds in the property,
3 and another seven or \$800,000 from special adjustment funds,
4 some of which was repair to the property and some of which
5 was providing additional facilities and programs to the
6 property.

7 Q. Six to 700,000 from one source and seven to 800,000 from
8 another source?

9 A. Roughly.

10 Q. That would be for a total of 1.3 to 1.5 million dollars?

11 A. Yes, some of which was used for programs as opposed to
12 specific physical improvements.

13 MR. BAUM: All right. No further questions, Your
14 HOnor.

15 THE COURT: Any cross-examination? No? Thank you,
16 Mr. Gray.

17 MR. BAUM: Your Honor, if we could examine Mr.
18 Kline at this time?

19 THE COURT: Okay. John Kline.

20 **JOHN E. KLINE, WITNESS, DULY SWORN**

21 **CROSS-EXAMINATION**

22 **BY MR. BAUM:**

23 Q. Good morning, sir.

24 A. Good morning.

25 Q. Would you please state your full name for the record?

1 A. Yes. My name is John, middle initial E, last name
2 Kline.

3 Q. And, Mr. Kline, did you submit an affidavit in this
4 matter as your pre-filed direct testimony?

5 A. Yes, I did.

6 Q. And that affidavit was upon your oath?

7 A. Yes.

8 Q. Now I must observe that your Curriculum Vitae is quite
9 impression. I do have a couple of questions on the
10 valuation, though, if you could help me this morning. I
11 think you've testified through your affidavit that you did
12 two valuations for the premises, is that correct?

13 A. That's correct.

14 Q. One while you were engaged by an earlier plan proponent,
15 is that right?

16 A. That's correct.

17 Q. And more recently after you were contacted by the
18 proponents of the current joint plan sometime in late August
19 or early September, is that correct?

20 A. That's correct.

21 Q. Now on page -- paragraph 10 of your affidavit you offer
22 the opinion that as of year-end 1986, the fair market value
23 of the property was \$3,950,000, is that correct?

24 A. Yes.

25 Q. And that was valued as an ongoing concern, wasn't it?

1 A. That was valued as an ongoing concern with certain
2 assumptions.

3 Q. Assumptions that would be normal in this particular
4 course of review an appraisal, is that correct?

5 A. Yes.

6 Q. And then in paragraph 14 of your affidavit, you say that
7 on September -- as of September 12, 1997 the property had a
8 fair market value of \$3,850,000, is that correct?

9 A. That's correct.

10 Q. That's approximately nine months later, going from --

11 A. Approximately.

12 Q. -- 12-31 to 9-12.

13 A. Yes.

14 Q. And in that nine-month period the property devalued,
15 fair market value dropped in your opinion by \$100,000, is
16 that correct?

17 A. That's not really correct.

18 Q. Well, have I misstated the numbers?

19 A. It's correct in that on those two dates I rendered two
20 value estimates that were \$100,000 different.

21 Q. Okay, and the second estimate was \$100,000 lower than
22 the one that was done nine months earlier.

23 A. That's correct.

24 Q. And you say in page 24 of your affidavit that you spent
25 two days doing your appraisal. Is that consistent with your

1 | memory?

2 | A. I don't have the affidavit in front of me, but that's
3 | probably consistent with how long it took me to do the
4 | valuation update and --

5 | Q. I don't want to make you uncomfortable. I'm happy to
6 | show you my copy of --

7 | A. I'd like to read it.

8 | MR. BAUM: May I, Your Honor?

9 | THE COURT: Sure.

10 | **BY MR. BAUM:**

11 | Q. The highlighted area.

12 | A. Okay.

13 | Q. Having shown to you part of your affidavit, is it
14 | consistent with your memory that you spent two days on site
15 | in valuing the property?

16 | A. Yes.

17 | Q. You never did a liquidation analysis for determining the
18 | value of the property, did you?

19 | A. No, I did not.

20 | Q. Two appraisals, two days, second one \$100,000 less than
21 | the first one after a nine-month period, is that correct?

22 | A. That's correct.

23 | Q. And still you found, quote,

24 | "In general, the subject buildings are in fair to
25 | average condition as of the date of the appraisal."

1 Is that correct?

2 A. That's correct.

3 Q. You will agree, won't you, that when you do value on
4 real estate, the auction value is usually much less than the
5 fair market value, is that correct?

6 A. Usually.

7 Q. And auction value is synonymous with liquidation value,
8 is that correct?

9 A. In a legal term, yes.

10 MR. BAUM: No further questions.

11 THE COURT: Do you -- does anyone have any redirect
12 for Mr. Kline?

13 MR. RICOTTA: One second, Your Honor. (Pause) No,
14 Your Honor.

15 THE COURT: Thank you, Mr. Kline. You may step
16 down.

17 MR. BAUM: Your Honor, I'd like to have the
18 opportunity to inquire of Mr. Keith.

19 THE COURT: Fine. John Keith.

20 **JOHN W. KEITH, WITNESS, DULY SWORN**

21 **CROSS-EXAMINATION**

22 **BY MR. BAUM:**

23 Q. Good morning, Mr. Keith.

24 A. Good morning, Mr. Baum.

25 Q. It's good to see you again.

1 A. Nice to see you and Mr. Quinn.

2 Q. Mr. Keith, for the record would you please state your
3 name and business address?

4 A. My name is John W. Keith. My business address is 532
5 Paige Street, Stoughton.

6 Q. And your business currently is construction and rehab?

7 A. General contracting.

8 Q. General contractor? Licensed by the Commonwealth?

9 A. Yes.

10 Q. And you say in your affidavit -- oh, by the way, do you
11 have a copy of your affidavit?

12 A. No.

13 Q. With you?

14 MR. BAUM: Can counsel provide him with a copy of
15 his affidavit? Me, too.

16 **BY MR. BAUM:**

17 Q. You say in your affidavit that you've done a great deal
18 of government-assisted rehabs, is that correct?

19 A. That's correct.

20 Q. And my memory is approximately 1,000 a year?

21 A. We rehab approximately 1,000 apartments a year, that's
22 correct.

23 Q. And that's rehab versus new construction?

24 A. That's correct.

25 Q. And you have experience in new construction, don't you?

1 A. Yes, we do.

2 Q. Over the years can you tell me how many units of new
3 construction you've done for government-assisted programs?

4 A. A combination of government and conventional,
5 approximately 5,000 new.

6 Q. And talking now specifically of those new construction
7 subsidized units, is that through Chapter 40(b)?

8 A. Not necessarily.

9 Q. Federal and State programs?

10 A. Federal and State.

11 Q. For the subsidized, the assisted housing units, the new
12 construction, can you in a general way say what the
13 construction cost per unit is?

14 A. Today the new construction costs with prevailing wages
15 would probably be approximately \$80,000 a unit.

16 Q. Now of the projects you list in your affidavit, could
17 you tell us which one are government-assisted rehabs?

18 UNIDENTIFIED: Page 3.

19 **BY MR. BAUM:**

20 Q. Page 3.

21 A. Top to bottom?

22 Q. Yes, please.

23 A. Okay, the Briscoe House, HUD financed. Hartland Hills,
24 HUD financed. Lydon Woods, tax credits from HUD. Chicopee
25 Village, tax credits. Mansfield Meadows, tax credits. North

- 1 Village, tax credits. Rolling Greens, Mass. Housing Finance.
- 2 Q. I'm sorry, I didn't catch that.
- 3 A. Rolling Green, Mass. Housing Finance.
- 4 Q. MHFA?
- 5 A. MHFA, right. Westminster Village, MHFA. Catituate
- 6 Homes, tax credits. Village Park, HUD and tax credits.
- 7 Countryside Village, New Hampshire Housing Finance Agency.
- 8 Pine Grove, Mass. Housing Financing, tax credits, and HUD.
- 9 The Fairways, New Hampshire Housing Finance Agency. The
- 10 Elliott Hotel, conventional.
- 11 Q. The Elliott is different from the others on the list
- 12 because it's not low-income housing?
- 13 A. That's correct.
- 14 Q. So that really shouldn't be on the list at all, right?
- 15 MR. RICOTTA: Objection.
- 16 THE COURT: Overruled.
- 17 **BY MR. BAUM:**
- 18 Q. Now is -- in your experience, is there anything
- 19 different from a developer's point of view for the tax credit
- 20 versus the MHA versus the HUD programs?
- 21 A. The only difference is a general contractor -- some
- 22 would have so-called prevailing wages and some would not.
- 23 Q. And we would not --
- 24 A. From the contractor's point of view.
- 25 Q. Which would not?

1 A. Tax credits do not have prevailing wages.

2 Q. Which is what is proposed in this project.

3 A. That's correct.

4 Q. Now each of these projects that you described, except
5 for the Elliott Hotel, these were rehabs?

6 A. That's correct.

7 Q. And can you give us a range on a per-unit basis for the
8 cost of rehab?

9 A. Okay. Some would be as low as \$10,000 per dwelling
10 unit, and some would be as much as \$83,000 per unit.

11 Q. Didn't you say a few moments ago that at 80,000 you
12 could build a new unit?

13 A. That's correct.

14 Q. So some of the rehabs are more costly than building new?

15 A. That's correct.

16 Q. What would you say would be the average cost of the
17 rehabs that you've describe on this page?

18 MS. DEIN: Objection, Your Honor, just to relevance
19 unless we're going to spend the whole rest of the day finding
20 out about the condition of each of these properties, the
21 scope of the rehab, and anything else that would be relevant
22 to a number.

23 THE COURT: Where are we going on this?

24 MR. BAUM: I'm sorry?

25 THE COURT: Where are we going on this?

1 MR. BAUM: I'm trying to understand the
2 justification for the costs projected for the rehabilitation
3 of this property. This witness is -- and if I'm permitted to
4 go a little bit further -- I won't be long on it -- but if
5 I'm permitted to go a little bit further, I think the
6 relevance will be clear.

7 **BY MR. BAUM:**

8 Q. Now on the average, what is the per-unit rehab cost for
9 the properties described here?

10 A. Properties similar to this would be approximately
11 \$30,000 a unit.

12 Q. Now the Countryside Village was a luxury clubhouse, is
13 that right?

14 A. That's correct.

15 Q. That was on the high end on a per-unit basis.

16 A. Not necessarily.

17 Q. Now you heard Mr. Kline testify a few moments ago that
18 the condition of the units as he inspected them were average
19 -- fair to average condition, do you recall that?

20 A. I was at the men's room.

21 Q. Oh, okay. Now in your affidavit you describe the work
22 undertaken for you or your firm. How many times did you
23 visit the subject property? You personally?

24 A. I believe six.

25 Q. And how long were these visits?

- 1 A. Anywhere from an hour and a half to five hours.
- 2 Q. And how many units did you examine?
- 3 A. Approximately -- my guess would -- best guess would be
4 twenty.
- 5 Q. Twenty out of the 276.
- 6 A. That's correct.
- 7 Q. Now you're not an engineer, are you?
- 8 A. No, I'm a contractor.
- 9 Q. And you make a lot of reference to the -- what is
10 referred to as the "I/O Report," the In-site/On-site Report?
- 11 A. Yes.
- 12 Q. Now the activity that was undertaken by In-site/On-site
13 was taken independently of whatever activity you were
14 involved in, right?
- 15 A. They're independent.
- 16 Q. And do you recall when the I/O report was prepared?
- 17 A. No.
- 18 Q. At what time did you receive a copy of it?
- 19 A. I don't recall.
- 20 Q. Do you recall if you read the report completely?
- 21 A. Yes.
- 22 Q. Did you?
- 23 A. Yes.
- 24 Q. And that is the report that you referenced to determine
25 the per-unit cost for rehabilitation?

- 1 A. I used my own experience and figures.
- 2 Q. Would you look at page 12 of your affidavit -- I mean
3 paragraph 12.
- 4 A. Mhmm.
- 5 Q. Is it true -- I'm sorry. I'll let you get there.
- 6 A. I don't see a page --
- 7 Q. Paragraph 12. It's on page 7.
- 8 A. (Pause). Yes, Bob.
- 9 Q. Is it fair to say that the information in paragraph 12
10 is derived from the On-site/In-site report?
- 11 A. I believe that's -- was put together by our office, the
12 cost if the nine million 118.
- 13 Q. Well, the language is,
14 "The On-site/In-site report are feasible and can be
15 completed for approximately \$9,118,000."
16 Is that your figure or is that the On-site/In-site report?
- 17 A. That's our figure.
- 18 Q. Okay. And you did a division to get the 33,000?
19 Division of so many units?
- 20 A. Well, you divide -- we always talked per unit, so that's
21 the --
- 22 Q. Did you do the calculations yourself?
- 23 A. Yes. I reviewed my office's.
- 24 Q. So you -- what you're saying is you didn't rely upon the
25 On-site/In-site report.

1 A. I didn't say that.

2 Q. Did you rely on it?

3 A. I rely upon my office's. Naturally, I reviewed it.

4 Q. Did you rely upon it?

5 A. I relied upon my office's report.

6 MR. BAUM: Your Honor, I would like to renew the
7 motion to strike the affidavit to the extent it refers to In-
8 site/On-site and to the extent it attaches the In-site/On-
9 site report, which is hearsay, inadmissible under 802, nor
10 that this witness's knowledge is admissible under 602. It is
11 not something that he can rely upon, and it's certainly --
12 contains hearsay within a hearsay -- inadmissible under 805.

13 MR. RICOTTA: Your Honor, that misconstrues what
14 the language is in this affidavit. If you read the
15 affidavit, what Mr. Keith is saying is that the construction
16 tasks generally outlined in the On-site/In-site report are
17 the tasks that Keith Construction is generally going to be
18 completing at this project. He's not -- he did not attach
19 the On-site/In-site Report to his affidavit, and I don't
20 think there is anywhere in here where he is testifying as to
21 any of the substance of the On-site/In-site Report other than
22 to say that he reviewed it, and the tasks are the same tasks
23 that Keith Construction is going to be doing at this project.

24 THE COURT: Let me ask Mr. Keith, what tasks are
25 Keith Construction going to perform in connection with the

1 | Mandela property?

2 | THE WITNESS: Okay. Bringing the project up to HUD
3 | standards, bringing up to Building Code standards, and making
4 | improvements that would make it marketable with the so-called
5 | "Roving Section 8 Certificates,"

6 | THE COURT: And in order to complete those -- that
7 | -- in order to get to that goal, what do you have to do?

8 | THE WITNESS: Repair the elevators, put new roofs
9 | on, repair the parking lots, relandscape, remove asbestos,
10 | kitchen cabinets and appliances; repair bathroom, et cetera.

11 | THE COURT: How much do you think that's going to
12 | cost?

13 | THE WITNESS: Approximately nine million dollars.

14 | THE COURT: Okay. Thank you. You may cross-
15 | examine Mr. Keith on the testimony he's just given.

16 | MR. BAUM: Thank you. Again, Your Honor, with the
17 | -- if counsel's position is accurate, there is prejudice in
18 | striking the On-site/In-site Report, and I --

19 | THE COURT: Well, we get to the same place counsel.
20 | No.

21 | MR. BAUM: No, we get -- we don't, Your Honor,
22 | respectfully. There is a totem pole issue here. The Howard
23 | Cohen affidavit also refers to the On-site/In-site Report,
24 | which purportedly is authenticated through the Keith
25 | affidavit.

1 THE COURT: Do you have any questions for this
2 witness on what the construction at the property is going to
3 be? And if you do you should ask him now.

4 MR. BAUM: I request that my objection is noted.

5 **BY MR. BAUM:**

6 Q. Mr. Keith, what are you using as your base line for
7 determining what has to be done?

8 A. I don't understand the question, Bob.

9 Q. What set of facts and information are you using as the
10 start phase for the work that you would propose to get to the
11 complete phase?

12 A. I still don't understand the question, Bob.

13 Q. Are you relying upon a HUD report?

14 A. I'm relying upon my experience.

15 Q. So then when you make reference to HUD report on
16 paragraph 7 of your affidavit, that's not what you used?

17 A. I'm using my experience, Bob.

18 Q. Excuse me, sir?

19 A. I'm using my experience, Bob.

20 Q. Mr. Keith, I will address you as Mr. Keith, and I would
21 expect that you would address me with the same respect. Now
22 you didn't use the On-site/In-site Report and you didn't use
23 the HUD report, is that what you're saying?

24 MS. DEIN: Objection. Misconstrues the testimony.

25 THE WITNESS: Mr. Baum --

1 THE COURT: Excuse me. That's my job.

2 (Laughter)

3 THE COURT: The witness has already answered the
4 question. The objection is sustained.

5 MR. BAUM: I have no further questions.

6 THE COURT: Is there any redirect for the witness?

7 MR. MOORE: I would -- Mr. Keith, wait.

8 **REDIRECT EXAMINATION**

9 **BY MR. MOORE:**

10 Q. Just briefly, Mr. Keith. When you review a project to
11 project costs, is it common to review whatever engineering
12 studies have been done?

13 A. Yes.

14 Q. Is it common practice in your business --

15 MR. BAUM: Objection, leading the witness. It's
16 direct testimony.

17 THE COURT: I'll allow it.

18 MR. MOORE: It's direct testimony --

19 MR. BAUM: Leading, as to foundation, Your Honor,
20 that he attacked.

21 THE COURT: I'll allow it.

22 **BY MR. MOORE:**

23 Q. Is it common in your business?

24 A. Yes.

25 Q. Do you regularly do that?

1 A. Yes.

2 Q. In doing these kinds of projects do you regularly review
3 whatever HUD capital needs reports there are?

4 A. Yes.

5 MR. MOORE: Okay, thank you.

6 THE COURT: Anything further?

7 MR. RICOTTA: Yes.

8 **CROSS-EXAMINATION**

9 **BY MR. RICOTTA:**

10 Q. Mr. Keith, when your affidavits states that your
11 employees under your supervision inspected the units in the
12 premises at Mandela, did your employees inspect other units
13 that you did not inspect?

14 A. Yes.

15 Q. And from their statements to you, is that how you came
16 to the conclusions that were --

17 MR. BAUM: Objection.

18 **BY MR. RICOTTA:**

19 Q. -- objected to Mr. Baum?

20 THE COURT: The question is leading, counsel.
21 Would you rephrase it, please?

22 **BY MR. RICOTTA:**

23 Q. How did you come to your -- how did you come to your
24 conclusion with respect to the condition of the units at
25 Mandela?

1 A. The visual by our staff and also their reports.

2 Q. And not just relying upon --

3 MR. BAUM: Objection.

4 **BY MR. RICOTTA:**

5 Q. -- your personal observation.

6 THE COURT: I'll allow it.

7 **BY THE WITNESS:**

8 A. That's correct.

9 MR. RICOTTA: Thank you.

10 THE COURT: Anything further? Thank you, Mr.
11 Keith. You may step down. Does that complete the cross-
12 examination of the affiants?

13 MR. BAUM: That does complete cross-examination,
14 Your Honor.

15 THE COURT: Okay. What would you like to do at
16 this point?

17 MR. QUINN: Your Honor, may I offer an impeachment
18 witness as the testimony of Ms. Gumble regarding her
19 testimony in the August 25 meeting?

20 THE COURT: What does the August 25 meeting have to
21 do with the question of feasibility at this point?

22 MR. QUINN: I submit that if the impeachment
23 testimony regarding the August 25 meeting were brought into
24 focus that it would demonstrate that the golden egg of tax
25 credits must first come from approval based on site control

1 that had to exist on August 26th, the date of application for
2 tax credits.

3 MR. RICOTTA: Your Honor, I mean, I would -- we
4 would have to object to that type of testimony. You heard
5 from the witness this morning that, number one, there was a
6 determination made that either the tax credit application has
7 site control within their discretion and if the joint plan is
8 confirmed, that confirms that the tax credit proponents had
9 site control; and so to take testimony with respect to what
10 happened as an August 25 meeting, when the witness has
11 already testified that it is -- will essentially be
12 irrelevant is just going to waste a lot of time.

13 And in addition, Your Honor, I would point out that
14 if the DHCD is willing to say that we will be able to get tax
15 credits if the joint plan is confirmed I don't see the
16 relevance of whatever happened at an August 25 meeting.
17 We'll either get the tax credits or we won't. She's
18 testified that we will.

19 THE COURT: Okay. Would you make me an offer of
20 proof then as to why the August 25th meeting is relevant to
21 the question of whether the tax credits will be issued?

22 MR. QUINN: We offer to prove that the testimony of
23 the witnesses regarding the August 25th meeting would be to
24 the effect that Ms. Gumble was not aware at the time she
25 wrote her August 1 letter that there was more than one plan

1 proposed before the Bankruptcy Court for approval; that if
2 she had been aware, she would not have been able to say that
3 sufficient evidence exists for site control at the time of
4 the August 1 letter or at the time of the filing of the
5 application for tax credits. And that being the case, she
6 could not legally grant the tax credits. We submit that on
7 that basis the Court could not condone an illegality which
8 would be the granting of the tax credits in violation of the
9 allocation plan, her rules of the game, and this Court would
10 have to find that the tax credits being absent legally that
11 there could not be a feasible plan proposed.

12 THE COURT: But again, we're -- this is becoming
13 circular. What I understood Ms. Gumble testified earlier
14 this morning was that when and if the joint plan is
15 confirmed, the tax credits would be -- let me see if I can
16 find her words. She said that her agency needs to know that
17 the proponents of the joint plan had site control. She said
18 that site control would be established once the plan was
19 confirmed. So I don't understand why -- well, I don't
20 understand why the August meeting is relevant; but if you
21 want to put on testimony -- and it won't be -- take too long,
22 I'll hear it.

23 MR. QUINN: Thank you, Your Honor. I'd like to,
24 and I will be as brief as I can.

25 THE COURT: Okay.

1 MR. QUINN: Respectfully, Ms. Gumble also said that
2 under Threshold 5, if site control doesn't exist when the
3 application is made, then it can't be cured afterwards, and
4 that's the point that I'd like to make.

5 THE COURT: Well, no, I don't agree.

6 MR. RICOTTA: Objection.

7 MR. LISTON: Objection. That was never stated.

8 THE COURT: I don't agree with that
9 characterization at all, Mr. Quinn.

10 MR. MOORE: Your Honor, just for the record?

11 THE COURT: Mhmm.

12 MR. MOORE: Ms. Gumble also testified that an owner
13 has site control. Mr. Gray is a joint applicant. He joined
14 in the application. Under Section 541 he has legal title to
15 the property.

16 THE COURT: Mhmm.

17 MR. MOORE: She also testified if there is an
18 agreement then there is site control. You have a plan in
19 front of you. Everybody signed it --

20 THE COURT: Mhmm.

21 MR. MOORE: -- but let it go if you want to.

22 THE COURT: Well, is there a question about Mr.
23 Gray's site control?

24 MR. KRULEWICH: Yes, Your Honor.

25 THE COURT: Please sit down, Mr. Krulewich. Sit

1 down, please. What's the -- what's the --

2 MR. QUINN: The objection is that without the
3 approval and without the application and approvals of this
4 Court, Mr. Gray does not have site control of this property.

5 THE COURT: Mr. Gray is V&M Management. He is the
6 Chapter 11 Trustee, duly authorized. No one but Mr. Gray can
7 speak for the debtor at this point, and the debtor owns the
8 real estate. So where are we on that argument?

9 MR. QUINN: Well, respectfully, Your Honor, there
10 is no testimony that Mr. Gray was an applicant for the
11 taxpayer.

12 MR. RICOTTA: But that's not true, Your Honor. It
13 was just -- there as testimony by Mr. Cohen that Mr. Gray was
14 a co-applicant on the tax credit application.

15 THE COURT: Well, is Mr. Gray still here?

16 MR. GRAY: Yes, Your Honor.

17 THE COURT: Why don't we put you back on the stand
18 and you can answer that question.

19 **STEPHEN S. GRAY, RECALLED TO THE WITNESS STAND, REMINDED HE**
20 **IS STILL UNDER OATH**

21 THE COURT: Mr. Gray, you're (end of Tape #1. Tape
22 #2 continues without interruption as follows:) still under
23 oath. Consider yourself under oath until you sleep tonight.
24 (Laughter)

25 THE WITNESS: I always consider myself under oath,

1 Your Honor.

2 **REBUTTAL EXAMINATION**

3 **BY MR. QUINN:**

4 Q. Mr. Gray, did you sign an application for a tax credit
5 for the Department of Community and Housing Development that
6 was filed before August 26th?

7 A. Yes.

8 Q. With your signature.

9 A. Yes.

10 Q. Any other signatures?

11 A. I believe Mr. Cohen's and Mr. Hall's.

12 MR. QUINN: Okay. Thank you.

13 THE COURT: Any further questions?

14 MR. QUINN: No further questions, Your Honor.

15 THE COURT: All right, thank you.

16 MR. MOORE: Your Honor --

17 **REBUTTAL EXAMINATION**

18 **BY MR. MOORE:**

19 Q. Mr. Gray, isn't it the case that you sent a letter to
20 the DHCD joining in the application?

21 A. Yes.

22 Q. That was a written letter signed by you?

23 A. Yes.

24 Q. And it was submitted simultaneously with the submission
25 of the application?

1 A. Yes.

2 Q. And does that refresh your recollection as to how the
3 process proceeded?

4 A. Yes.

5 Q. And that was from Day One of submission of the
6 application, is that correct?

7 A. Yes.

8 Q. And at that time the plan had already been submitted, is
9 that correct?

10 A. Yes.

11 MR. QUINN: I'm most appreciate of Mr. Moore's
12 testimony, Your Honor.

13 THE COURT: Fair enough. Thank you, Mr. Gray. You
14 may step down. It's five past eleven. I think it might be a
15 good time to take a recess. What -- how should we proceed
16 after the recess? What do you want to do?

17 MR. QUINN: I'd like to -- I'd like to revisit
18 whether I will ask my impeachment witnesses to take the
19 stand, Your Honor. You've allowed me the opportunity.

20 THE COURT: But are -- isn't it now moot in light
21 of Mr. Gray's testimony that as the owner of the property he
22 joins in the application?

23 MR. QUINN: I'd like to think no, Your Honor.

24 THE COURT: Well, when --

25 (Laughter)

1 THE COURT: I find that that is dispositive of the
2 issue of site control. Mr. Gray has site control as an
3 owner. He is the owner in his capacity as Trustee of the
4 debtor.

5 MR. QUINN: You've solved the egg and the chicken
6 problem, Your Honor.

7 THE COURT: Okay, thank you. What shall we do then
8 after the recess? Where do you want to go?

9 MR. QUINN: Respectfully, I don't think we have any
10 more evidence or any more testimony regarding their plan.

11 THE COURT: Okay. Mr. Ricotta, which --

12 MR. QUINN: Do you want to read in the motions?

13 THE COURT: Pardon?

14 MR. BAUM: Your Honor, before we go on a recess or
15 break, I do want to renew and file the motion to strike the
16 affidavit testimony, and I'd like to give that to the Court.

17 THE COURT: File it in the Clerk's Office. You've
18 made your motion and I've denied it, counsel.

19 MR. BAUM: Okay, fine. This is a record, Your
20 Honor. I'd like to also file and have the Court act on a
21 motion to stay an order on confirmation until the final award
22 of tax credits is issued.

23 THE COURT: Do you want to be heard on that?

24 MR. RICOTTA: Yes, Your Honor. I mean, we're now
25 attempting to reintroduce the chicken and the egg here. And

1 the point is is that --

2 THE COURT: Mhmm.

3 MR. RICOTTA: -- there is no -- there are no
4 grounds for stay. I --

5 THE COURT: Let's do this. I'm sorry to interrupt
6 you. Let's do this. Let's take a recess now. You're going
7 to want me to make findings under Section 1129, and there are
8 a whole bunch of findings that need to be made. I have a
9 couple of questions about just some issues. We'll go through
10 the 1129 elements one by one. We'll go through the votes,
11 and I imagine you have a proposed order on confirmation?

12 MR. RICOTTA: Yes, Your Honor.

13 MS. DEIN: We will have.

14 MR. RICOTTA: We will have. It's just been
15 circulated last evening, so --

16 THE COURT: I need it now.

17 MR. RICOTTA: Okay. We will mark it up and give it
18 to you.

19 THE COURT: Good. Give a copy to Mr. Quinn and
20 counsel. With respect to -- well, why don't we do that? Why
21 don't we -- I'd like to see the proposed confirmation order
22 before we recess or at the time we recess. How long will it
23 take you to get that in shape?

24 MR. MOORE: Your Honor, why don't I just submit
25 what I have. If Mr. Ricotta has some questions -- I did give

1 | it to him yesterday -- we can deal with those later, but at
2 | least he'll have the opportunity to look at it in the
3 | meantime.

4 | THE COURT: What does that mean? It's a draft?

5 | MR. MOORE: No, it's -- I don't know what issues he
6 | has. I didn't hear until just now that he did. He's had
7 | this since yesterday.

8 | THE COURT: Okay, well --

9 | MR. RICOTTA: My comments, Your Honor, are minor,
10 | so if that will speed the process, that's fine. Otherwise,
11 | we could take a fifteen-minute recess, and I could
12 | communicate them and give them back to you in handwritten
13 | form, and then we could have it retyped after the recess.

14 | MR. MOORE: And then might have an opportunity
15 | during the recess to look at what was there, and we can add
16 | to this if we have to, but at least he'll have a chance to
17 | look at it in the meantime. Mr. Bradford's comments are
18 | here, and the IRS's changes are here.

19 | THE COURT: Okay. Okay. We'll take a recess.
20 | Look at it, and as quickly as possible get it to me; and in
21 | the meantime I will read Gary Leroy's motion to stay order of
22 | confirmation and let me just ask a couple of just sort of
23 | clean-up questions. Well, no. I'll reserve them for later.
24 | Thank you.

25 | ATTORNEY: Thank you, Your Honor.

1 (Off the record at Tape #2, Index #480. 11:11 a.m.)

2 * * * * *

3 (On the record at Tape #2, Index #490. 11:39 a.m.)

4 THE COURT: Okay. This is V&M Management, Inc. I
5 have the proposed order of confirmation. Have you had a
6 chance to look at it?

7 MR. KRULEWICH: We have, Your Honor.

8 THE COURT: Anything you want to add?

9 MR. KRULEWICH: With respect to paragraph 5, Your
10 Honor, the executory HAP contract, in their objection to the--

11 THE COURT: Paragraph 5 --

12 MR. KRULEWICH: -- Leroy --

13 THE COURT: -- of what?

14 MR. KRULEWICH: Paragraph 5, page 7 of the proposed
15 order.

16 THE COURT: Mhmm. Yes.

17 MR. KRULEWICH: In their objection to the Leroy
18 plan the proponents, the joint proponents state that the HAP
19 contract is not assignable, and yet here they are attempting
20 to have this Court assign that contract. I think they have
21 to either determine whether it is or it is not assignable.

22 MR. RICOTTA: Your Honor, that misstates what the
23 objection said. The objection said that without the consent
24 of HUD that the HAP contract is not assignable and one of the
25 exhibits attached to Mr. Cohen's affidavit --

1 THE COURT: Mhmm.

2 MR. RICOTTA: -- indicates that HUD will assign
3 that contract.

4 THE COURT: Anything further?

5 MR. KRULEWICH: That may be correct, Your Honor,
6 except that it can't take place until after the Court
7 confirms a plan, and that's why I'm suggesting it's not
8 assignable. Yes, Your Honor, with respect to paragraph 18,
9 the attempt is to prevent an automatic stay, and that's
10 contrary to my motion that requests the automatic stay for--

11 THE COURT: Okay.

12 MR. KRULEWICH: -- purposes of appeal, and I think
13 that motion addresses that issue, although I believe we have
14 ten days from the entry of the order approving the plan to
15 take an appeal in any event.

16 THE COURT: Okay. The motion of Gary Leroy for
17 stay of confirmation until final award of tax credits is
18 issued is denied. The Bankruptcy Code Section 1129(a)(11)
19 requires only that the Court make a finding that confirmation
20 of the plan will not be -- is not likely to require the need
21 for further reorganization, and I will make findings on the
22 record with respect to feasibility. The testimony though of
23 Ms. Gumble this morning causes me to conclude that the
24 allocation of the tax credits is highly likely, and
25 therefore, I'm going to deny the motion to stay order on

1 confirmation.

2 MR. KRULEWICH: If Your Honor please, I appreciate
3 the Court's ruling on the motion and the reasons therefor. I
4 have knowledge that one prior application by the Trustee was
5 filed with the -- the information just came to me, so I
6 apologize to the Court.

7 THE COURT: It's not a matter of apology, counsel.
8 It's a matter of --

9 MR. KRULEWICH: But I have -- I have knowledge
10 that--

11 THE COURT: -- evidence.

12 MR. KRULEWICH: -- just came to me today that the
13 Trustee previously filed his application with the DHCD on his
14 original plan.

15 THE COURT: Do you want to put a witness on -- do
16 you want to put a witness on?

17 MR. KRULEWICH: I would ask the Trustee to retake
18 the stand. He's already sworn.

19 THE COURT: And what -- make me an offer of proof.

20 MR. KRULEWICH: The offer is, Your Honor, that the
21 DHCD denied the application on the grounds of site control,
22 that they had no site control at that time, and there's no
23 reason why they would have site control now if it was
24 previously denied that the Trustee did not have site control
25 once before.

1 THE COURT: Ms. Gumble already addressed those
2 issues, Mr. Krulewich. No.

3 MR. KRULEWICH: Thank you.

4 THE COURT: Okay. I have also pending a couple of
5 motions that were filed within the last month or so. I have
6 a motion to estimate the claim of Mario Nicosia, Trustee, for
7 voting purposes, and I'm going to rule on that motion right
8 now. That motion is moot as Mr. Nicosia -- as neither Mr.
9 Nicosia nor L&N First Mortgage Realty Trust filed a ballot,
10 so that motion is denied.

11 I also have a motion by Gary Leroy and Mourad,
12 Owens to estop the claimants from asserting contradictory
13 positions. I have an objection and opposition by Winter Hill
14 et al. I suppose at this point, Mr. Krulewich, do you want
15 to address the -- do you want to ask Winter Hill if it wants
16 to change its vote?

17 MR. KRULEWICH: Well, I would ask that, Your Honor,
18 if Winter Hill would like to change its vote to favor the
19 debtor's -- the Leroy plan. I assume I know what the answer
20 is.

21 MS. DEIN: Winter Hill does not intend to change
22 its vote.

23 THE COURT: Very good. Okay. I'm going to deny
24 the motion of Gary Leroy to estop claimants from asserting
25 contradictory positions, and I will issue a memorandum this

1 morning.

2 (Pause)

3 The Trustee has an objection to the Gary Leroy
4 plan. What do you want me to do with that objection? I've
5 already ruled that the Gary Leroy plan was rejected by
6 creditors and therefore cannot be confirmed under 1126 and
7 1129. Do you want me to make findings in connection with
8 that objection, or is it -- do you want me to mark it moot?

9 MR. RICOTTA: Well, Your Honor, I think that in
10 order to protect the record, I would like at least findings
11 with respect to the grounds that have been discussed this
12 morning, certainly the balloting. That's one of our
13 objections. And I would like to have those findings on the
14 record in order to protect the record.

15 THE COURT: Just with respect to the balloting,
16 or -- ?

17 MR. RICOTTA: Actually --

18 THE COURT: -- because --

19 MR. RICOTTA: If the Court would be predisposed,
20 Your Honor, I would like to have findings with respect to all
21 of our objections, if possible.

22 THE COURT: Okay.

23 MR. RICOTTA: And to the extent that the Court is
24 so disposed, I would like to have as many of the grounds
25 allowed as we can.

1 THE COURT: Okay. Let's deal with them one by one
2 then. Let me get my papers. The first objection is with
3 respect to payment of administrative claims under
4 1129(a)(9)(A). Do you want to address that?

5 MR. KRULEWICH: If Your Honor please, I'd like to
6 avoid the need of addressing these. The Court would not
7 allow any evidence to be presented with regard to the Mourad
8 plan, but I think --

9 THE COURT: Excuse me, Mr. Krulewich. I think that
10 inaccurately characterizes what's going on here. You walked
11 in and said, "I don't have the votes." Therefore the plan
12 cannot be confirmed. It wasn't a matter of denying you an
13 opportunity to put -- to make a record as to why your plan
14 should be confirmed, so please stick to the record, Mr.
15 Krulewich.

16 MR. KRULEWICH: If Your Honor please, I never had
17 said that. My brother --

18 THE COURT: Do you have anything to say --

19 MR. KRULEWICH: -- suggested that to the Court.

20 THE COURT: -- in connection with the
21 administrative claims? Because --

22 MR. KRULEWICH: Yes, Your Honor, with respect to
23 the administrative claims, the estimate in the plan was
24 \$600,000. The Court entered a judgment on fees that were
25 \$700,000, and the plan would have had sufficient funds

1 available to pay the \$700,000 that the Court had approved.

2 THE COURT: Okay. Thank you.

3 MR. KRULEWICH: So that the plan --

4 THE COURT: So you're --

5 MR. KRULEWICH: -- would have been able to satisfy
6 the requirements to pay all the administration expenses.

7 THE COURT: How are you going to pay \$700,000 worth
8 of claims with only 600,000?

9 MR. KRULEWICH: There was money left over from the
10 available 4.4 million that the debt -- that the proponent was
11 willing to pay to the Trustee to purchase the property.

12 THE COURT: Has your loan --

13 MR. KRULEWICH: The --

14 THE COURT: Okay.

15 MR. KRULEWICH: The plan provided that the amount
16 of the unsecured dividend could be anywhere between zero and
17 53 per cent. As a suggestion, Your Honor, they say from the
18 Court, and that took into consideration the amount of the
19 administration expenses and the disputed claims as well.

20 THE COURT: Mr. Ricotta?

21 MR. RICOTTA: Your Honor, the amount of the
22 administrative claims in this case -- the allowed
23 administrative claims in this case exceed a million dollars,
24 first of all. Second of all, the Mourad plan --

25 THE COURT: Because of the tax claim? Because of

1 | the DOR claim?

2 | MR. MOORE: Partly, Your Honor, but the allowed
3 | amount of even the professional fees I believe exceeds the
4 | amount -- exceeds the \$700,000.

5 | THE COURT: I didn't run the numbers.

6 | MS. DEIN: It's around --

7 | MR. MOORE: I have them, Your Honor, if you want
8 | them.

9 | THE COURT: What are the -- what did the fee orders
10 | allow?

11 | MR. MOORE: Choate, Hall & Stewart 300 and --
12 | approximately \$393,000. The expenses of 33 or so haven't
13 | been ruled on yet.

14 | THE COURT: Right, and I'll explain that. You need
15 | to remind me to come back to that.

16 | MR. MOORE: Mr. Gray was allowed \$246,000 in fees
17 | and approximately \$4,000 in expenses. Hanify & King was
18 | allowed approximately 147,000 in fees and 7,600 in expenses.
19 | Mr. Braunstein was allowed 48,700 in fees approximately and
20 | just about \$1,000 in expenses. Frank Kirby was awarded
21 | 32,065 and another 1,400 in expenses. Vertolino & Lowey was
22 | awarded 44,700 in fees and I think it's 1,611 in expenses,
23 | and the DOR has a claim for \$90,000. Our addition -- and
24 | it's offered --

25 | THE COURT: Is that post-petition?

1 MR. MOORE: Yes.

2 THE COURT: Because I have 112.

3 MS. DEIN: Yeah, it's 112. It was reduced further
4 in the joint plan to 90, but it's 112 in general.

5 THE COURT: I see. So if the Mourad/Owens plan
6 were confirmed, we would have to use the 112 figure.
7 112,000. Okay. So what do you -- did you add up all of
8 those?

9 MR. MOORE: We had \$1,019,000, Your Honor.

10 THE COURT: 1,019,000?

11 MR. MOORE: Yes.

12 MR. HUTCHINS: Is that net of retainer?

13 MR. MOORE: No, that's net a retainer.

14 MR. HUTCHINS: Net of retainer? There were --

15 MR. SCHAPIRO: No, it's not. It's not net of
16 retainer. There's about 40,000 in retainers to be reduced --

17 MR. MOORE: 25,000 for Hanify & King and \$14,000
18 for Mr. Kirby, so --

19 MS. DEIN: And that's only counting 90 --

20 THE COURT: So subtract out 39,000 from that?

21 MR. MOORE: Right.

22 THE COURT: So we're just a shade under a million.
23 Okay. And the Mourad plan proposes to pay administrative
24 claimants in an amount no greater than \$600,000.

25 MR. KRULEWICH: If Your Honor please, the available

1 for unsecured and undersecured creditors was 1,348,000. That
2 was after taking into consideration the 600,000 that we
3 thought the Court would approve on the administrative fees.
4 There is also a provision for payment of the taxes in the
5 plan, so that would not have been part --

6 THE COURT: Okay.

7 MR. KRULEWICH: -- of that.

8 THE COURT: But they didn't agree to that.

9 MR. KRULEWICH: Your Honor --

10 THE COURT: So you can't compel the DOR to agree to
11 that.

12 MR. KRULEWICH: No, we have -- the DOR is separate
13 -- a separate assessment for the DOR for which were going to
14 pay under the plan.

15 THE COURT: All right, so you'd have a million
16 dollars in cash.

17 MR. KRULEWICH: A million 348.

18 THE COURT: Where do you get a million 348?

19 MR. KRULEWICH: From our Schedule C attached to the
20 plan, Your Honor.

21 THE COURT: Okay.

22 MR. KRULEWICH: There's 1,348,700 plus the 600,000
23 that we had already scheduled for the -- for the
24 administrative claim, so the total amount that we have would
25 be 1,900,000 -- a bit better than 1,900,000, so there would

1 have been sufficient funds to pay the administrative claims,
2 and that does not take into consideration that the cash that
3 the Trustee has, that would have been available as well.

4 THE COURT: Subject to Winter Hill's perfected
5 security interest.

6 MR. KRULEWICH: Subject to whatever the Court finds
7 as a security interest. We're arguing that Winter Hill's
8 security interest is based upon the value that they would
9 receive at the time of Chapter 7 liquidation of the assets as
10 set forth in 1129.

11 THE COURT: Well, that's on paragraph 4 --

12 MR. KRULEWICH: Yes, Your Honor.

13 THE COURT: -- of the joint objection. Why --
14 Winter Hill has rejected your plan. Why does it meet the --
15 how does your plan satisfy Winter Hill's interests?

16 MR. KRULEWICH: If we had an accepting class, which
17 we do not have, then we would argue that the only evidence
18 before the Court today was the Trustee's evidence on
19 valuation and the liquidation that is a Chapter 7 amount that
20 Winter Hill would receive at confirm -- if this were a
21 Chapter 7 what Winter Hill would receive. The Trustee's
22 representation testimony was that the value of the property
23 at forced sale would be \$100,000. The -- Mr. Kline's
24 testimony was that the \$3,850,000 was a fair market value,
25 and yes, the amount received at forced sale would have been

1 less than that amount. So it's someplace between 100,000 and
2 3,850,000.

3 The Trustee's -- I'm sorry, the joint plan provides
4 for a payment of \$1,650,000 to Winter Hill. The Mourad plan
5 provides for a payment of two million dollars to Winter Hill.

6 THE COURT: Mhmm.

7 MR. KRULEWICH: And we submit that the liquidation
8 value -- if this property went to auction as a Chapter 7 --
9 would be no greater than two million dollars. We're offering
10 Winter Hill the two million dollars, which they would receive
11 as a distribution from a Chapter 7. And that's why we come
12 up with the two million dollar figure.

13 THE COURT: Okay, so you're --

14 MR. KRULEWICH: But that's assuming that we have an
15 accepting class, and we don't.

16 THE COURT: Right. So -- but what Mr. Ricotta is
17 saying is he wants to nail every single nail in this coffin,
18 and he's entitled to do that.

19 MR. KRULEWICH: I --

20 THE COURT: So --

21 MR. KRULEWICH: -- I agree, Your Honor.

22 THE COURT: -- nail away.

23 MR. KRULEWICH: But under 11 -- under 1129, we
24 satisfy the requirement.

25 THE COURT: Under 1129(a)(7), since Winter Hill has

1 not accepted the plan, you must show that Winter Hill will
2 receive or retain under the plan on account of its claim
3 property as of a value as of the effective date of the plan
4 that is not less than the amount that such holder would
5 receive in a Chapter 7 case.

6 MR. KRULEWICH: And that's --

7 THE COURT: So under the plan, Winter Hill gets two
8 million doll -- under the Mourad plan, you get two million
9 dollars on a secured claim of four million dollars, to use
10 rough numbers.

11 MS. DEIN: According to the Mourad disclosure
12 statement, which I think is what controls here, they gave us
13 a liquidation value of \$3,670,000, according to Exhibit C to
14 their disclosure statement. I also suggest that Mr. Gray did
15 not testify that the \$100,000 figure was a forced sale
16 figure, and Mr. Kline did not address any figure other than
17 it would be less than the 3.8 million.

18 THE COURT: Okay. I find that the Mourad plan, in
19 any event, could not be confirmed even if it had accepted --
20 even if it had been accepted by creditors because it violates
21 Section 1129(a)(7) of the Bankruptcy Code with respect to the
22 treatment of Winter Hill's secured claim. Winter Hill holds
23 a perfected first lien on the property in an amount of
24 approximately four million dollars, and the valuation of the
25 property by Mourad Owen -- by Gary Leroy, Mourad/Owens -- is

1 3.6 million and upwards of 3.8 million. Therefore, Winter
2 Hill would be entitled to receive 3.6 million at the very
3 least on its claim, but it certainly would be nowhere near
4 the two million dollars that the Mourad/Owens plan and the
5 Gary Leroy plan provides.

6 With respect to -- I guess we skipped one, which
7 was the tax -- the DOR priority tax claim under 507(a)(8),
8 for one million dollars and change. Do you want to address
9 that or do you -- where would you like to go on this?

10 MR. RICOTTA: Your Honor, considering my role as
11 the carpenter with the hammer, I would like to state that the
12 DOR's administrative claim -- excuse me -- priority tax claim
13 here is over a million dollars; and simple mathematics under
14 the Mourad plan indicates that they cannot pay the \$580,000
15 which the Mourad plan allocates to the DOR, and the DOR has
16 not agreed to that treatment, and there is simply not enough
17 money under the Mourad plan to pay Winter Hill's claim, which
18 the Court has just discussed, and the administrative claims,
19 which we have also just discussed and I won't revisit. And
20 then in addition to that paid, over a million dollars,
21 \$1,010,000 to the priority tax claims as required under the
22 Code.

23 And I ask for a finding to be made that the Mourad
24 plan violates Section 1129(a)(9)(C) of the Code on that
25 basis.

1 THE COURT: Okay.

2 MR. KRULEWICH: First of all, we establish that the
3 priority claim is 580,000 not a million dollars. There has
4 been never a finding by any court of competent jurisdiction
5 as to the amount of the indebtedness that is owed to the DOR,
6 and accordingly, it is our opinion that the claim of the DOR
7 does not exceed the \$580,000 which has been proposed. There
8 have been numerous hearings in many courts, as the Court is
9 well aware -- not only in this court but there have -- I
10 counted, I think, thirteen actions in the Superior Court at
11 which no one established the amount of the tax claim.

12 Indeed, the proponents acknowledge that there is a
13 claim. The proponents feel that the tax claim is in an
14 extraordinarily large amount that cannot be established under
15 any set of circumstances, and thus I believe that the plan
16 treats the DOR properly, and unless and until the DOR has
17 established the correct amount of the claim, that the amount
18 set forth in the Schedule 3, we have \$596,300 for the DOR and
19 the Internal Revenue Service I believe would be an accurate
20 number. Now that is also an amount that is set aside in
21 Exhibit C and would not have any effect on any of the other
22 distributions.

23 THE COURT: Have you looked at the DOR -- the DOR
24 has filed a proof of claim?

25 MR. KRULEWICH: They have filed several proofs of

1 claim.

2 THE COURT: Okay.

3 MR. KRULEWICH: None of which make sense.

4 THE COURT: And then --

5 MR. KRULEWICH: And there was an objection filed by
6 the Trustee to all of the proofs of claim and there has never
7 been a hearing with respect to the proofs of claim because I
8 believe all of that was going to be stayed due to the
9 negotiations of the plan proponents.

10 THE COURT: Okay.

11 MR. MOORE: Your Honor, I keep hearing about that
12 objection, but I didn't file it, and I don't know who did.
13 There isn't any.

14 THE COURT: I'm not aware of any objection.

15 MR. OGILVIE: Your Honor, on behalf of the
16 Department --

17 THE COURT: Not in this case.

18 MR. OGILVIE: -- there was no objection filed.

19 THE COURT: Yes.

20 UNIDENTIFIED: A proof of claim, I think --

21 THE COURT: Can you show me that, Mr. Krulewich?
22 This is news to me.

23 MR. KRULEWICH: I'm sorry, Your Honor. I thought I
24 saw -- I thought when I saw the objections to the proofs of
25 claim that there was one.

1 THE COURT: Why don't you take a look at the docket
2 and see if you can find it. Mr. Krulewich, I don't see an
3 objection. I looked for it the last time you mentioned it.

4 MR. KRULEWICH: In that case, Your Honor, I would
5 file or I would ask the Trustee to file an objection to the
6 proof of claim and let the DOR establish that proof of claim.
7 The Trustee has not done so, and that is part of the
8 Trustee's obligations to do so.

9 MR. MOORE: Your Honor, under the Code --

10 THE COURT: No, Mr. Moore --

11 MR. MOORE: Thank you.

12 THE COURT: -- I don't think that warranted -- that
13 argument doesn't warrant rebuttal. Any party can file an
14 objection to any claim at any time, and neither the Trustee,
15 as best I can determine, nor Gary Leroy and Mourad and Owens
16 has ever filed an objection to the Department of Revenue
17 claim. As such, it enjoys *prima facie* validity and under
18 507(a)(8) must be paid. Your plan doesn't do that;
19 therefore, it is not confirmable. Mr. Ricotta?

20 MR. RICOTTA: Your Honor, actually I believe that
21 the next objection is the last one that is not in dispute,
22 and that is an objection with respect to 1129(a)(3) of the
23 Code based upon the fact that the BRA, the Boston
24 Redevelopment Authority, would need to approve any transfer
25 under the Mourad plan, and the BRA has not approved that

1 transfer. In fact, the BRA on September 11th approved the
2 transfer to the proponents of the joint plan, and I would
3 add, Your Honor, that I guess surprisingly, the proponents of
4 the Mourad plan never even applied to the BRA for approval of
5 a transfer.

6 THE COURT: Okay. Then I'm -- so you're saying
7 that the plan could not be confirmed because it wouldn't be
8 feasible because there's neither BRA approval nor HUD
9 approval of the assignment of the HAP contract?

10 MR. RICOTTA: Correct, Your Honor.

11 THE COURT: Okay. Do you want to respond to that?

12 MR. KRULEWICH: Yes, Your Honor, with respect to
13 the BRA approval, Chapter 121(a)(16) provides that upon a
14 foreclosure by HUD there would be no need for BRA approval
15 for the transfer of the property to the buyer at the
16 foreclosure sale. This was an action -- this was a
17 proceeding that V&M Management purchased the property at a
18 foreclosure sale from HUD, and therefore, any requirements
19 under 121(a) would be waived.

20 I believe, Your Honor, that the proponents -- the
21 joint proponents, the joint plan proponents, did not have
22 standing to request 121(a) approval in any event, and nor did
23 the Leroy proponents because until this Court approves a
24 plan, it was my feeling that we could not go in and ask for a
25 transfer of the 121(a) rights. I believe that's again the

1 chicken before the egg. I was unfortunately not correct
2 because the BRA *did* enter an order approving the joint plan
3 proponents' transfer, but it was subject to the further order
4 of this Court. With respect to the HAP contract, Your Honor,
5 the plan never discussed the HAP contract. The purchaser --
6 the Leroy proponent does not want the HAP contract. The
7 intent was to go to market rates and to have the voucher
8 system so that there was no need to have the HAP contract.
9 There is nothing in the plan that provides for the HAP
10 contract, and it's just assumed by the objector that the HAP
11 contract was a requirement. It is not -- we do not discuss
12 that issue in the plan.

13 THE COURT: Okay. I find, and again, that the Gary
14 Leroy, Mourad/Owens plan could not be confirmed under Section
15 1129(a)(11) because it's not feasible, and it's not feasible
16 because the BRA approval is necessary for the transfer of the
17 property, and the BRA has given its approval, but not to Gary
18 Leroy and Mourad/Owens. Instead, that approval has been
19 granted to the joint plan proponents. So for all of those
20 reasons, including the fact that there were not sufficient --
21 there were not any votes in favor -- any -- no class voted in
22 favor of the Gary Leroy, Mourad/Owens plan, I would deny
23 confirmation to that plan. So I will sustain the Trustee's
24 objections as stated on the record today.

25 MR. RICOTTA: And, Your Honor, for the record, are

1 | you also overruling the objections of the -- of Gary Leroy
2 | and so forth to the --

3 | THE COURT: I'm going to do that separately.

4 | MR. RICOTTA: Okay. Thank you, Your Honor.

5 | THE COURT: And I'm going to walk through that
6 | right now. First, with respect to the votes, I find that all
7 | three classes of creditors have voted in favor of the joint
8 | plan, and therefore that prong of the confirmation
9 | requirements have been met.

10 | I also find that based on the detailed and well-
11 | supported affidavits and the live testimony of John Keith,
12 | president of Keith Construction; by Stephen Gray, the
13 | Trustee; by John Kline, the vice-president of Honeyman
14 | Appraisal; and by Howard Cohen, the president of Beacon
15 | Residential Management and Beacon Residential Properties, I
16 | find that the joint plan proponents have sustained their
17 | burden of proof under Section 1129 of the Bankruptcy Code.

18 | With respect to feasibility, I specifically find as
19 | follows: I find that the joint plan proponents have
20 | satisfied their burden of proof under Section 1129(a)(11) and
21 | that this plan will not be -- is not likely to be followed by
22 | a further need for reorganization under Section 1129(a)(11).
23 | The four witnesses were impressive. Their credentials were
24 | impressive. Their testimony was credible, and their
25 | conclusions were well supported.

1 The decision of DHCD regarding allocation of the
2 one million dollars of tax credits to this reorganized entity
3 appears highly likely, based on Ms. Gumble's testimony today;
4 and in that regard I should point out that any plan for this
5 debtor would require various approvals of governmental
6 agencies, Federal, State -- well, State and City anyway, and
7 that this debtor has satis -- has basically jumped through
8 all of those hoops. The joint plan has already been approved
9 by the BRA, has likely approval by HUD, has the support of
10 the Department of Revenue and has support of the City of
11 Boston.

12 The feasibility requirement under Section
13 1129(a)(11) does not require a finding that there is a 100
14 per cent assurance that the plan is feasible, and I'm going
15 to read into the record a couple of decisions by both the
16 Second Circuit and the Tenth Circuit.

17 "Section 1129(a)(11) requires Courts to scrutinize
18 carefully the plan to determine whether it offers a
19 reasonable prospect of success and is workable.
20 Courts have expressed this standard in two ways.
21 The Second Circuit has stated that, quote: 'the
22 feasibility standard is whether the plan offers a
23 reasonable assurance of success. Success need not
24 be guaranteed.'"

25 And that's the Johns-Manville court case, 1988, out of the

1 Second Circuit. The Tenth Circuit is in accord. Quote:

2 "The purpose of Section 1129(a)(11) is to prevent
3 confirmation of visionary schemes which promise
4 creditors and equity security holders more under a
5 proposed plan than the debtor can possibly obtain.
6 In determining whether a plan meets the
7 requirements of 1129(a)(11), the Bankruptcy Court
8 has an obligation to scrutinize the plan carefully
9 to determine whether it offers a reasonable
10 prospect of success and is workable."

11 Closed quote.

12 The possibility of failure is not fatal. It's just
13 -- it is clear that there is a relatively low threshold of
14 proof necessary to satisfy the feasibility requirement, and
15 in this case the joint plan proponents have greatly exceeded
16 that low threshold.

17 I find that there is a reasonable assurance of
18 commercial viability here, and there is a reasonable prospect
19 of success.

20 With respect to the other findings under Section
21 1129, none have been -- the other remaining issues as set
22 forth in Mr. Gray's two affidavits -- well, I guess Mr.
23 Gray's -- Mr. Gray submitted two affidavits, so his affidavit
24 with respect to all of the criteria under 1129 I adopt.
25 There's been compliance with the applicable provisions of the

1 Bankruptcy Code, all payments that have been made have been
2 approved and are reasonable. There is no -- the debtor is
3 not going to engage in activity subject to the jurisdiction
4 of governmental regulatory agencies with respect to rates or
5 rate changes.

6 The balloting we've already addressed. The
7 liquidation analysis we've already addressed. Retiree
8 benefits are not an issue, and I find that all the
9 requirements of 1129 have been satisfied. I have the
10 proposed order. The only change I made is *de minimis*, which
11 is that on page 6, Disposition of Objections, the Gary Leroy
12 and Mourad/Owens objection is overruled in all respects
13 because I -- it was somewhat ambiguous to say just the Mourad
14 objection. The only objection I had was by Gary Leroy and
15 Mourad/Owens, and since I've made a finding that Gary Leroy
16 has standing, I think it's important to clarify that.

17 Other than, I have -- I guess I have nothing else
18 to add at this point.

19 MR. MOORE: Your Honor, if I could add just one
20 thing for the record -- you may recall that fees were capped
21 in our -- fees and expenses were capped -- administrative
22 expenses were capped in our plan at 960, and this -- as
23 indicated, we've exceeded that.

24 THE COURT: At 960?

25 MR. MOORE: 960 I believe it was.

1 THE COURT: Okay, 960,000.

2 MR. MOORE: The applicants other than Mr. Kirby --
3 and Mr. Kirby we just haven't been able to reach -- have all
4 agreed that we will consent to an allocation of what's
5 available under the plan so that that is not an issue, and
6 Mr. Kirby may well join us later.

7 THE COURT: Okay. Good. The plan is confirmed.

8 MR. KRULEWICH: If Your Honor please, does the plan
9 provide for paragraph 18?

10 THE COURT: Right. Do you want to make a motion
11 for stay pending appeal?

12 MR. KRULEWICH: I -- I thought I had. I --

13 THE COURT: No, your motion was that a confirmation
14 order not enter. I denied that motion.

15 MR. KRULEWICH: I will make --

16 THE COURT: If you want to make a motion for stay
17 pending appeal, you can't make it until after the
18 confirmation order is entered. If you want to do it now,
19 you're welcome to.

20 MR. KRULEWICH: I shall make a motion to stay the
21 confirmation until appeal -- for purposes of an appeal, yes,
22 Your Honor.

23 THE COURT: Okay. Why -- tell me why the criteria.

24 MR. KRULEWICH: I believe the Court is in error
25 with respect to its findings that the affidavits satisfy the

1 requirements. The Court overruled the objections. I believe
2 the objections to the affidavits are appropriate, that they
3 will be approved and allowed by the appellate court. The
4 affidavits that the Court relied upon in its findings were
5 based upon knowledge outside of the affiants' possession.
6 They relied upon documents that were not properly presented
7 before the Court. There was hearsay testimony within the
8 documents. There -- the testimony of the affiants for the
9 most part were conclusory based upon those documents
10 attached, those exhibits attached to the affidavits. And if
11 the Court relies -- and I have no other evidence with respect
12 to feasibility other than those affidavits because the Court
13 relied upon those affidavits. If I am correct, the District
14 Court will allow my objections and overrule the confirmation
15 of this plan, and based upon that alone should be sufficient
16 to stay the plan.

17 The other reason why I'm asking to stay the plan is
18 because I believe the testimony by Ms. Gumble from the DHCD
19 was not sufficient to state that the funding, the tax credit
20 allowances would be sufficient in order -- and that the
21 application would be approved. Our understanding of the
22 application process is that if you don't have all of your
23 facts together at the time of the application, it cannot be
24 supported by additional documents. The rules of the DHCD say
25 that, and this Court's approval of a plan is another document

1 | which the DHCD would need to review in order to approve the
2 | funding of the tax credits that are sought.

3 | Since there is no site control, since there was a
4 | refusal by DHCD prior to today -- today's hearing, and the
5 | determination that there was no site control, the fact that
6 | the plan was sent out and the disclosure statement approved,
7 | and the fact that there were other people present when Ms.
8 | Gumble stated to them that there is no site control is other
9 | grounds for the appeal. So that there is not sufficient
10 | information, in my opinion, before the Court to satisfy the
11 | requirements of 1129, and under those circumstances I would
12 | ask that the matter be stayed pending an appeal to the
13 | District Court.

14 | THE COURT: Do you want to address any of the other
15 | criteria for granting a stay pending appeal?

16 | MR. KRULEWICH: I believe that should be
17 | sufficient, Your Honor.

18 | THE COURT: Well, there are -- this is a four-prong
19 | test, and so you're not going to offer anything on the other
20 | three aspects?

21 | MR. KRULEWICH: If Your Honor please, there would
22 | be irreparable harm to the creditors in the event the Court
23 | does not allow this stay. If there is an immediate transfer
24 | of the property as the Court has approved and Section 18 of
25 | the order determines that --

1 THE COURT: What's the harm?

2 MR. KRULEWICH: The harm is that we would have to
3 -- we would have to seek a retransfer of the property because
4 the plan would not be confirmable. It would no longer be
5 feasible and the -- and would be subject to perhaps another
6 reorganization or a liquidation of the assets, and if there
7 were a --

8 THE COURT: What happens -- what happens if the
9 joint plan were not confirmed. What follows from that?

10 MR. KRULEWICH: We believe the Court would -- based
11 upon the Court's earlier statements, would convert the case
12 or dismiss the case probably, that the bank would move to
13 foreclose, and that a foreclosure proceeding would take
14 place, and there would be a purchase at foreclosure.

15 THE COURT: And where would that leave -- where
16 would foreclosure by Winter Hill, which holds a four million
17 dollar claim, leave the unsecured creditors?

18 MR. KRULEWICH: The unsecured creditors would get
19 just as much as they're going to get under the Trustee's
20 plan. We believe that the Trustee -- I'm sorry, the joint
21 plan would provide unsecured creditors with nothing. The
22 other alternative would be that we could win over Winter Hill
23 and have them come into our plan.

24 THE COURT: I think it's fair to say Winter Hill
25 has voted and it's not going to change its vote. Is that

1 | accurate, Ms. Dein?

2 | MS. DEIN: Yes, Your Honor.

3 | THE COURT: So where -- so foreclosure by Winter
4 | Hill leaves Mr. Leroy where?

5 | MR. KRULEWICH: We believe that Winter Hill,
6 | despite Ms. Dein's statement, will accept the two million
7 | dollars.

8 | THE COURT: Okay. Anything else you want to say?

9 | MR. KRULEWICH: No, Your Honor.

10 | THE COURT: Okay. Mr. Ricotta, do you want to
11 | respond, or does anyone want to respond?

12 | MR. MOORE: Your Honor, based on what you've said,
13 | the likelihood of success is nil, much less, there is not
14 | reasonable likelihood of success. You've cited the
15 | feasibility standards. You heard the evidence. The
16 | challenges to the affidavits are ludicrous in the first
17 | instance, and secondly, meaningless. We had live testimony
18 | here from witnesses, based on their personal knowledge. To
19 | the extent they relied on expert opinions, they're entitled
20 | to rely on expert opinions under the *Federal Rules of*
21 | *Evidence*, and the foundation is an issue that they could have
22 | attacked, and they didn't seem to want to.

23 | As to irreparable harm, the creditors clearly would
24 | get nothing if this plan isn't confirmed. Hopefully all of
25 | these get paid. I'm a creditor, so the balance of harms is

1 in favor of creditors. I don't know what harm there is to
2 Mr. Leroy. Mr. Krulewich has just conceded he'll probably
3 get nothing if you don't stay this -- or if you do stay this.

4 In the public interest -- he skipped that one, I
5 think.

6 THE COURT: Mmhhh.

7 MR. MOORE: There are 1,500 people who live at
8 Mandela. The City and State have made a determination that
9 this is an important project, and they're just trying to
10 block the tax credits.

11 THE COURT: Okay. I'm going to make findings on
12 the record.

13 I'm going to deny the motion for stay pending
14 appeal for the following reasons: There are four standards
15 for granting a stay, and they're really similar to the
16 standards for preliminary injunction, and I'm going to cite
17 IN RE: Public Service Company of New Hampshire, 1990. In
18 addition, the First Circuit's decision in Power Recovery
19 Systems in 1991, and the standards are also set forth in the
20 Great Barrington Fair and Amusement Company case out of this
21 District and the IN RE: Miraj & Sons, Inc. case, also out of
22 this District.

23 There are four criteria. The movant -- in this
24 case it's Gary Leroy and Mourad/Owens -- must show that,
25 first, he will likely succeed on the merits. I find that

1 | there is no likelihood that Gary Leroy and Mourad/Owens will
2 | succeed on the merits. I base my findings in confirming the
3 | joint plan on the affidavits and the live testimony of five
4 | witnesses: Mr. Kline, Mr. Cohen, Mr. Keith, Mr. (sic)
5 | Gumble, and Stephen Gray, the Trustee.

6 | I found that all of the criteria under Section 1129
7 | had been satisfied, and that the sole objection being that
8 | some of the affidavits contained hearsay evidence would not
9 | lead me to conclude that Gary Leroy would succeed on the
10 | merits.

11 | There is no suffering -- there -- in addition,
12 | Leroy has not suffered -- would not suffer any irreparable
13 | harm on a denial. As counsel pointed out, Mr. Leroy expects
14 | to get nothing under the Chapter 11 plan of the Trustee at
15 | all. In fact, he will likely receive a significant dividend;
16 | but in the event that the Court were to deny confirmation of
17 | the joint plan today, unsecured creditors are certain to get
18 | nothing because whether -- if I were to deny confirmation
19 | today, either I would dismiss or convert the case or,
20 | probably before I even had a chance to do that, Winter Hill
21 | would move for relief from stay, and it would be granted
22 | immediately because Winter Hill has a perfected -- has a
23 | first mortgage, actually just after the Boston Water & Sewer
24 | in amount in excess of the value of the property; because the
25 | administrative claims are enormous, unsecured creditors would

1 get nothing -- absolutely nothing.

2 The harm to -- again, moving to the third factor --
3 the harm that Mr. Leroy would suffer does not outweigh the
4 harm of the opposing party; and lastly, the public interest
5 was not addressed, and in this case there are 276 units of
6 housing here, and the City of Boston and the Department of
7 Revenue and the State have clearly a public interest in
8 making sure that those people have a safe place to live.

9 So for all those reason I am going to deny -- I am
10 denying the stay sought by Gary Leroy and Mourad/Owens.

11 What else do we need to do? You need your
12 expenses, right?

13 MR. MOORE: Yes, Your Honor.

14 THE COURT: I was -- the reason I didn't enter the
15 order on expenses is I couldn't -- I wasn't real clear on
16 what the numbers were in light of the fact that you were due
17 a credit.

18 MR. MOORE: For the reimbursement for -- we did
19 receive that yesterday.

20 THE COURT: Okay. So what's the net amount that
21 you're due for expenses?

22 MR. MOORE: I don't know the amount of that credit
23 off the top of my head, unless Mr. Quinn does.

24 MR. QUINN: Talking about me -- it's \$1,137 and
25 small change, Your Honor.

1 THE COURT: All right. Thank you. What amount
2 should your expenses be allowed for?

3 MR. MOORE: The numbers I have here, Your Honor,
4 are -- I didn't total it -- but \$18,456.92, I think it is --
5 or 97. I can't read my writing very well. Make it 92. And
6 \$14,410.79 less the reimbursement that Mr. Quinn mentioned.

7 THE COURT: Okay. So you're entitled to -- and
8 forgetting the cents -- \$32,866, correct?

9 MR. MOORE: Correct.

10 THE COURT: Minus 1,100. This is rough justice at
11 this point. So you're due a total of 31,766?

12 MR. MOORE: Yes, Your Honor.

13 THE COURT: Is that right?

14 MR. MOORE: That's fine.

15 THE COURT: Okay. Mary, would you let the record
16 reflect that I'm allowing Choate, Hall & Stewart's request
17 for reimbursement of expenses in the amount of \$31,766. When
18 do you expect the effective date to be?

19 MR. RICOTTA: In part, Your Honor, that's going to
20 obviously depend upon the DHCD awards the tax credits.

21 THE COURT: Mhmm.

22 MR. RICOTTA: My latest information is that that
23 will probably occur sometime between the middle of October to
24 the end of October. I think at that juncture to give people
25 time to do what will turn out to be voluminous documents and

1 | so forth, I think, you know, we will probably need until
2 | around the end of November, the first of December. That will
3 | only give people actually about thirty -- forty-five days
4 | after that allocation to do all the closings. So I think
5 | that that's probably reasonable to expect at that point. And
6 | in any event, Your Honor, the commitment letters that we have
7 | generally expire in the middle of December, so it has to be
8 | by that time, and the plan itself provides that everything
9 | has to be done by the end of December. I think that that --
10 | subject to my client telling me that I'm totally wrong about
11 | how much work they can do, I think that that's a reasonable
12 | schedule to expect here.

13 | THE COURT: What I'm looking for is a final
14 | accounting. So I want to know a date by which I can expect a
15 | final accounting.

16 | MR. RICOTTA: If -- perhaps if you give me one
17 | minute, perhaps I could --

18 | THE COURT: Do you want to take a recess and then
19 | tell me?

20 | MR. RICOTTA: That may be helpful because I --

21 | THE COURT: Sure.

22 | MR. RICOTTA: -- think I need to coordinate also
23 | with the Trustee in doing that.

24 | THE COURT: Okay. And then when we return I'm also
25 | going to ask you when do objections to claims have to be

1 | filed, and can they be done simultaneous to this whole
2 | process so that we reach a point where you can actually cut
3 | checks at the beginning of 1998? So those are the questions
4 | I'm going to ask you when you come back. Let me know when
5 | you're ready.

6 | MR. RICOTTA: Fair enough, Your Honor.

7 | THE COURT: Thank you.

8 | MR. RICOTTA: Thank you.

9 | (Off the record at Tape #2, Index #3761. 12:27 p.m.)

10 | * * * * *

11 | (On the record at Tape #2, Index #3780. 12:35 a.m.)

12 | THE COURT: Mr. Ricotta?

13 | MR. RICOTTA: Yes, Your Honor, I think, from our
14 | standpoint we can say that we will have this matter closed
15 | and funds given to the Trustee by December 15th, and I think
16 | that the Trustee is requesting -- well, you know what, Your
17 | Honor? I think I should have the Trustee speak for himself.

18 | THE COURT: Okay.

19 | MR. MOORE: Your Honor, the plan says that
20 | objections will be filed within ninety days after the
21 | effective date, which is way out there.

22 | THE COURT: Mhmm.

23 | MR. MOORE: We desire to close the case and start
24 | paying U.S. Trustee fees as soon as possible. I would think,
25 | depending on the Court's schedule, we probably can resolve

1 | claims by year end or at least on January 31.

2 | THE COURT: Good. So can you commit to filing all
3 | of the objections today by a date certain?

4 | MR. MOORE: Certainly. October 15th or at the end
5 | of Sep --

6 | THE COURT: Oh, yeah. Yeah.

7 | MR. MOORE: Maybe that's too tight. I'm sorry.

8 | THE COURT: Yeah. I was thinking November.

9 | MR. MOORE: The end -- November -- I was going to
10 | say November 15th or the end of October, whichever one --

11 | THE COURT: Yeah, November 15th makes good sense to
12 | me. Actually, that's a Saturday. November 14th. Mary,
13 | would you have the record reflect that -- well, who's going
14 | to file the objections? Are you just going to file them,
15 | or -- ?

16 | MS. DEIN: There may be objections from other --

17 | THE COURT: Okay.

18 | MS. DEIN: They indicated to me -- I'm sorry. They
19 | indicated to me that they may be filing objections.

20 | THE COURT: Okay. Let's do this: Anyone who wants
21 | to file an objection must do so by November 14th at four p.m.
22 | Please don't file a motion to extend that time. If you're
23 | going to do discovery prior to filing an objection, you'd
24 | better start now. We'll go from there. Good. Okay.

25 | MR. MOORE: Your Honor, one other matter. You may

1 recall that as to Vertolino and Lowey, their work in
2 connection with the plan was deferred to see if we would be
3 confirmed, and the Court indicated it would entertain the
4 9,000 or so in fees after confirmation. Now that we've been
5 confirmed, I would ask that you allow those fees. I think
6 Mr. Quinn indicated on the record he had no objection if the
7 plan was confirmed, and it has been.

8 THE COURT: Okay. Very good. Mary, would you pull
9 out that order for me on Vertolino and Lowey's fee
10 application? What about your 80,000 in estimated expenses?

11 MR. MOORE: I'm sorry?

12 THE COURT: What about your 80,000 in estimated
13 future fees? How do you want to deal with that?

14 MR. MOORE: I anticipated I would probably file
15 another fee application after the effective date -- one final
16 one -- rather than ask the Court to estimate fees. It's up
17 to you.

18 THE COURT: What do you think makes the best sense?
19 It's --

20 MR. MOORE: I guess I'd like to save the time and
21 money of doing another fee application.

22 THE COURT: Mmhmm.

23 MR. MOORE: Particularly since the fees are capped
24 in this case.

25 THE COURT: Mmhmm.

1 MR. MOORE: We are already -- I checked yesterday
2 -- we are already in excess of \$30,000, not including fees
3 that we've spent today and the like.

4 THE COURT: Run that by me again, how the numbers
5 work. What's the cap on Choate/Hall's fees?

6 MS. DEIN: The cap only has to do actually with the
7 proceeds from the tax credit syndication, so it will vary.
8 There's cash on hand, there's a cap from the amounts that
9 come from tax credit syndications. If there is recovery of
10 other assets from other sources --

11 THE COURT: Oh.

12 MS. DEIN: -- that can be applied to
13 administrative --

14 THE COURT: Okay.

15 MS. DEIN: -- which is why we've never been able
16 to come out and say --

17 THE COURT: I see.

18 MS. DEIN: -- "this is the bottom line number."

19 THE COURT: So if there are avoidance actions then
20 brought, then the Trustee's counsel would be --

21 MS. DEIN: That can go into the administrative fee
22 pot.

23 THE COURT: Okay. So where does that leave us? So
24 it seems to me you're going to have to come back, right?
25 Because you're going to have to file claims objections, and

1 | you're going to have to -- you may, in fact, file avoidance
2 | actions, right?

3 | MR. MOORE: We may. I doubt there are going to be
4 | many, based upon collectibility issues and the like, but I'm
5 | happy to come back and do it later.

6 | THE COURT: Well --

7 | MR. RICOTTA: That makes sense because the other
8 | money is there, too.

9 | THE COURT: So how do you want to -- how do you
10 | want to leave that?

11 | MR. MOORE: I will apply for any additional fees
12 | with another --

13 | THE COURT: Okay.

14 | MR. MOORE: -- final fee application.

15 | THE COURT: Okay. So it will be sometime after
16 | January 1, right?

17 | MR. MOORE: Yes, Your Honor.

18 | THE COURT: So, Mary, would you have the record
19 | reflect that Choate, Hall & Stewart may file a further fee
20 | application after January 1, 1998.

21 | MS. DEIN: I would just like -- I don't think it's
22 | really an issue, but any objections, those -- which are to be
23 | filed by November 14th, that excludes Winter Hill. I mean,
24 | there was a deadline of July 1st of last year to file
25 | objections to Winter Hill's proof of claim, which is how we--

1 THE COURT: I remember that that's the case. I
2 suppose if somebody files an objection to your claim, then
3 we'll -- but I -- who would do that?

4 MS. DEIN: I don't know.

5 (Laughter)

6 THE COURT: I guess that's a reasonable position.

7 MS. DEIN: I mean, that deadline really was set
8 awhile ago for the Court.

9 THE COURT: Was it? Okay. Okay.

10 MS. DEIN: And --

11 THE COURT: If that comes -- if that's a problem
12 then we'll deal with it at that point, but it may not, in
13 fact, be a problem. I vaguely recall the issue that -- I
14 remember setting a deadline for basically -- to flush out
15 arguments about this -- the amount and the validity of your
16 mortgage, but I didn't -- I don't recall that right away.
17 Okay. Anything else we need to do?

18 MR. SCHAPIRO: Yes, Your Honor, it's -- today is a
19 very unusual day in that I have not said anything the entire
20 morning, and it was very difficult, but I do want to say on
21 behalf of the governmental entities that we had an objective
22 of trying to preserve affordable housing in this area and to
23 rehab the property, and I appreciate all the time and effort.
24 I know this has not been easy or a standard bankruptcy case;
25 and just on behalf of all the government entities and myself

1 | personally, I appreciate Your Honor's both persistence and
2 | patience in this matter.

3 | THE COURT: Thank you.

4 | MR. SCHAPIRO: Thank you.

5 | MR. MOORE: Your Honor, just one final
6 | clarification. Mr. Gray has applied for some projected fees,
7 | and indicated he was at cap. To the extent additional sums
8 | do come in, it would allow him to increase the cap. I take
9 | it he could apply further?

10 | THE COURT: Absolutely.

11 | MR. MOORE: Thank you.

12 | THE COURT: Absolutely. And, Mary, would you -- I
13 | just want to make the record so that I recall it later.
14 | Mary, would you have the record reflect that in the event
15 | that further assets come into the case, Mr. Gray can seek
16 | further compensation. Good. Thank you.

17 | ATTORNEYS: Thank you, Your Honor. Thank you very
18 | much, Your Honor.

19 | THE COURT: Mary will give you a copy of the
20 | confirmation.

21 | ATTORNEY: Thank you.

22 | THE COURT: Thank you.

23 | * * * * *

24 |

25 |

1 I certify that the foregoing is a true and accurate tran-
2 script from the electronic sound recorded record of the
3 above proceedings.

4 
5 _____

10-12-97
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