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Cover: Park Village Apartments, Oakland CA, an 84-unit elderly development where the owner is seeking to opt-out of the project-based Section 8 program. The owner failed to provide proper notice and the residents have challenged threatened rent increases and evictions. For full story, see page 84.

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New HUD Relocation and Replacement Voucher Policy for Public Housing Demolition and Disposition

By Joe Akman*

Introduction

Since 1995, the Department of Housing and Urban Development (HUD) has actively removed public housing units which are at least nominally identified as "severely distressed" from the federally subsidized low-income housing stock. Prior to 1995, the U.S. Housing Act required that units that are demolished or disposed of be replaced on a one-for-one basis.¹ In 1995, this requirement was suspended² and, in 1998, repealed by the Quality Housing and Work Responsibility Act.³ The National Housing Law Project estimates that at least 130,000 public housing rental units designated for demolition have been lost without replacement between 1995 and 2001.⁴ Indeed, HUD recently acknowledged that the HOPE VI program, in conjunction with the Public Housing Capital Fund, has reached its goal of contributing to the demolition of 100,000 public housing units.⁵

In 2001, HUD adopted a policy for replacing demolished and disposed units⁶ by providing public housing authorities (PHAs) replacement vouchers for each unit that the PHA did not receive replacement funding to rebuild. This policy, which was reaffirmed in 2002, 2004, and 2005,⁷ sought to ensure that demolition and disposition

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¹See 42 U.S.C.A. § 1437p(b)(3) (West 1994).

²See Pub. L. No. 104-19, § 1002(a), 109 Stat. 194, 235 (July 27, 1995).

³42 U.S.C.A. § 1437p (West 2003).

⁴This figure is based on a report from the HUD Special Application Center, Field Office Demo/Dispo Units Total Recap (Nov. 5, 2001), and the HOPE VI revitalization site profiles and summaries for fiscal years 1999-2001, which are available at <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/>.

⁵Office of Management and Budget, Budget of the United States Government, FY 2008, Department of Housing and Urban Development, at <http://www.whitehouse.gov/omb/budget/fy2008/pdf/budget/hud.pdf>.

⁶Submission and Processing of Public Housing Agency (PHA) Applications in Fiscal Year (FY) 2001 for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, as Amended, PIH 2001-20 (Jun. 21, 2001).

⁷Submission and Processing of Public Housing Agency (PHA) Applications in Fiscal Year (FY) 2001 for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Mandatory Conversion) of Public Housing Units Under Section 33 of the U.S. Housing Act of 1937, As

did not result in the overall loss of assisted housing (whether in the form of public housing or vouchers) administered by a PHA.

HUD Policy Change: PIH Notice 2006-05 and PIH Notice 2007-10

In 2006, HUD issued PIH Notice 2006-05, which contained a deeply buried provision announcing that Housing Assistance Payment and administrative fees for replacement vouchers would only be provided for units *occupied* at the time of a PHA's application for replacement vouchers.⁸ On April 30, 2007, HUD issued PIH Notice 2007-10, more clearly illuminating the 2006 policy with respect to demolition and disposition, completing the dramatic departure from the pre-2006 policy. Under this current policy, vouchers will no longer replace all the housing that is disposed or demolished and not replaced. The current policy states that,

The maximum number of demolition/disposition vouchers for which a PHA may be eligible is based upon the number of *occupied* units that will be demolished, sold or otherwise disposed of minus the number of families that will move to other public housing units.... In addition, demolition/disposition voucher funding will only be provided for public housing units if the PHA has not already received relocation or replacement funding for these same units.⁹

For PHAs and communities that are demolishing or disposing of public housing, this policy effectively reduces the total number of assisted units in the community, since HUD will not provide replacement vouchers either for vacant public housing units or for occupied units whose residents are relocated to other public housing, or where the PHA has already received replacement funding for the units that will be disposed or demolished.

Amended, PIH 2002-21 (Oct. 2, 2002); Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2004-4 (Mar. 29, 2004); Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2005-15 (Apr. 26, 2005). See note 9, *infra*.

⁸Implementation of the 2006 HUD Appropriations Act (Public Law 109-15) Funding Provisions for the Housing Choice Voucher Program, PIH 2006-5 (Jan. 13, 2006).

⁹PIH Notice 2007-10 (Apr. 30, 2007) (Voucher Funding in Connection with the Demolition or Disposition of Occupied Housing Units) (*emphasis added*).

Aside from its obvious adverse impact, the new policy is ambiguous. It does not explicitly state what happens if there is an inadequate number of public housing relocation units. In other words, it is unclear if a PHA would be eligible for vouchers if the need for relocation vouchers exceeds the lost units minus the replacement units. It appears that PHAs will have to use already authorized vouchers to relocate current tenants whenever the sum of the number of replacement units and the number of tenants who want to relocate with vouchers exceeds the number of units being demolished. A more favorable interpretation, not likely to be followed by HUD, is that if no relocation units are available, HUD will provide replacement/relocation vouchers irrespective of whether the number of units replaced and the number of occupied units exceeds the number of units slated for demolition.

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The current policy places an additional limitation on the maximum number of vouchers that may be awarded. That number is limited by the number of families that request a voucher or for whom the public housing that they desire is not available. Thus, a locality may lose assisted units for a variety of reasons. One reason may be the desire or willingness of the public housing residents living in a threatened development to move to other public housing, not the need of the community for replacement housing. Another reason may be that HUD may place pressure on a PHA to encourage tenants to move to other public housing, as opposed to requesting vouchers, in order to reduce the size of the low-income housing programs.

The current policy also departs from the earlier HUD policy that made a critical distinction between replacement and relocation vouchers. Under the old policy, if there were more tenants who needed vouchers than there was available public housing for relocation, PHAs could request vouchers, which together with the federally funded replacement units, exceeded the total number of units to be disposed of or demolished.¹⁰ The current policy eliminates this possibility.

¹⁰Submission and Processing of Public Housing Agency (PHA) Applications for Housing Choice Vouchers for Relocation or Replacement Housing Related to Demolition or Disposition (Including HOPE VI), and Plans for Removal (Required/Voluntary Conversion Under Section 33 of the U.S. Housing Act of 1937, As Amended, and Mandatory Conversion Under Section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) of Public Housing Units, PIH 2004-4, ¶ 4 (March 29, 2004).

The recently issued PIH notice continues the policy that the critical date for determining occupancy appears to be “at the time of the PHA’s application for vouchers.” This date may be “as soon as the demolition/disposition application or conversion application is approved,” which is the earliest date that an application for vouchers may be submitted. Because PHAs are not obligated to apply for vouchers immediately upon approval of the demolition/disposition application, it may also be weeks or months after the approval is received. Setting the voucher eligibility date late in the demolition disposition process, combined with the fact that HUD does not enforce a policy of full occupancy in the public housing program, assures that there will be a loss of affordable housing units in jurisdictions that are demolishing or disposing of public housing.

Legal Vulnerability

The Bush Administration sought to obtain legislative authorization for this policy change in its HUD Fiscal Year 2007 and 2008 budgets by getting Congress to provide replacement funding only for units *under lease*.¹¹ However, Congress never provided that authorization.¹² Because the appropriation still provides funds for “relocation and replacement of housing units that are demolished or disposed of...,”¹³ HUD’s recent policy changes have arguably jumped the gun. Furthermore, the current policy may violate the Administrative Procedure Act and HUD’s own rulemaking requirements, which require public notice and comment for issuing new regulations and significant policy changes, which were not followed here.¹⁴

How PIH 2007-10 May Work in Practice

Example 1

Assume that a PHA plans to demolish 500 public housing units, of which only 200 are occupied at the time of demolition approval. If the PHA plans to replace 300 of the 500 units and the 200 remaining residents request vouchers, the jurisdiction suffers no loss of affordable housing units. On the other hand, if 100 of the 200 remaining

occupants choose to, and successfully, relocate to other public housing units, the maximum number of vouchers requested will be 100. Combining the 100 vouchers with the 300 replacement units means that the jurisdiction will lose 100 units as a result of the demolition.

Example 2

Assume that a PHA plans to demolish 500 public housing units, of which 200 are occupied. If that PHA plans to replace 400 of the demolished units and no residents relocate to other public housing, the PHA would only be allowed to apply for 100 vouchers because of the large proportion of replacement units, and as a result would have to use other local resources to house the other 100 residents.¹⁵ If the 200 public housing occupants choose to, and successfully, relocate to other public housing, the PHA will not be able to request any vouchers and will lose 100 affordable units.

Example 3

Assume that a PHA plans to demolish 500 public housing units, of which 200 are occupied. If the PHA plans to replace 200 of the units and 200 of the current occupants request vouchers, it could apply for 200 vouchers. But since only 200 units are being replaced, the jurisdiction will lose 100 units of affordable housing. On the other hand, if 100 of the 200 current occupants choose and successfully relocate to other public housing, the loss in affordable housing units will increase to 200 units because the PHA can only apply for 100 vouchers under the current policy.

Impact on Local Communities

As a practical matter, the current policy means that jurisdictions that demolish or dispose of public housing units are likely to experience a reduction in the overall number of affordable units administered (combined number of public housing units and vouchers). This loss will occur because of what typically happens when a PHA makes a determination to demolish or dispose of property. In most cases, PHAs pursue a natural if not forced process of relocating tenants. Frequently, tenants begin to make moving decisions because of the pending demolition application.¹⁶ In some cases, PHAs induce the relocation of tenants through reduced services, persuasion or other methods. In each of these cases, if the PHA does not

¹¹Office of Management and Budget, Budget of the United States Government, FY 2007, Appendix Department of Housing and Urban Development, at <http://www.gpoaccess.gov/usbudget/fy07/pdf/appendix/hud.pdf>; Office of Management and Budget, Budget of the United States Government, FY 2008, Appendix Department of Housing and Urban Development, at <http://www.gpoaccess.gov/usbudget/fy08/pdf/appendix/hud.pdf>.

¹²The House bill would have adopted the Administration’s proposal, but the Senate Committee version did not include the “under lease” limitation. Compare H.R. 5576 (109th Cong., 2d Sess.), pp. 341-42 (as reported from Senate Appropriations Committee, July 26, 2006), with H.R. 5576 (109th Cong., 2d Sess., House version, set forth as stricken text in Senate version, pp. 73-74, *supra*).

¹³Pub. L. No. 109-115, tit. III, 119 Stat. 2396, 2441 (2005) (for FY 2006); H.J.Res. 20, Pub. L. No. 110-5, §§ 101, 104 (Feb. 15, 2007) (for FY 2007, incorporating FY 2006 conditions).

¹⁴5 U.S.C.S. §§ 551-559 (Lexis 2007); 24 C.F.R. Part 10 (2006).

¹⁵Presumably, the PHA would use some of its already allocated existing vouchers, which turn over on a regular basis, to meet the need for relocating the residents.

¹⁶When a PHA plans to demolish or dispose of public housing, the PHA must submit an application to the Special Applications Center, a division of the HUD Office of Public and Indian Housing based in Chicago, for review and approval before proceeding. See Demolition/Disposition Processing Requirements Under the New Law, PIH 1999-19, ¶ 10 (Apr. 20, 1999), updated by Demolition/Disposition Requirements Under the 1998 Act, PIH 2003-9 (HA) (Mar. 27, 2003).

rent the vacated units—something which it is not likely to do—the current policy reduces the maximum number of replacement vouchers that it is eligible to receive if all the units are not rebuilt.

*Regardless of how the unit loss occurs,
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housing units administered through
a PHA has permanent implications.*

PHAs and communities can further lose affordable units through HUD's policy of encouraging PHAs with significant accumulation of voucher reserves (undesignated fund balance) not to request additional replacement or relocation vouchers.¹⁷ Alternatively, HUD may require PHAs to use their voucher reserves to address the need for voucher funding in connection with demolition and disposition.¹⁸ If either occurs, the number of available affordable units will decline in the local jurisdiction. Indeed, jurisdictions with reserve funds will be doubly penalized because the public housing units lost will not be replaced with vouchers and the voucher reserves cannot be used to the advantage of serving additional needy families.¹⁹

Regardless of how the unit loss occurs, the reduction in total number of housing units administered through a PHA has permanent implications for a local jurisdiction because the jurisdiction cannot again increase the overall number of its authorized vouchers to replace the lost units. Thus, the overall number of affordable housing units for the jurisdiction will decline.

The following are examples of what is happening in several jurisdictions. They demonstrate the potential impact of the current policy.

Baltimore

The Housing Authority of Baltimore City (HABC) forcibly moved tenants from Somerset Homes before HUD approved a demolition/disposition plan. Although these relocations violated federal regulations,²⁰ when the local

¹⁷Prior to PIH 2007-10, HUD reduced the amount of replacement voucher funding if the PHA's voucher utilization rate for the previous year fell below 95%. The number of replacement vouchers was reduced according to the dollar amount of underutilization below the threshold. In 2002, the reduction in replacement funding for voucher underutilization was increased slightly to 97%. This change remained in effect in PIH 2004-4 (Mar. 29, 2004) and PIH 2005-15 (April 26, 2005).

¹⁸PIH 2004-4, ¶ 7 (Mar. 29, 2004).

¹⁹PHAs have increased the reserve levels for a number of reasons, including concerns about the changing funding formula (which prompted PHAs to react conservatively and not to expend their full allocations) and administrative problems (which prevented full utilization and market conditions that make vouchers less desirable to local landlords).

²⁰24 C.F.R. § 970.25 (2007), Annual Contributions Contract as required by HUD.

tenants and a Congressman challenged the PHA's actions, HUD only cautioned HABC against continuing the process.²¹ HUD did not seek compliance with its regulation, which requires a PHA to honor its HUD contractual obligation to maintain and operate the development as housing for low-income individuals.²² At present, fewer than 100 of the 308 units in the development are occupied and HABC has no intention to replace any of the demolished units. If approved for demolition—and assuming the occupancy rate does not increase—HABC will lose at least 208 units as a result of the current policy.

The Somerset Homes development in Baltimore is just one example of the policy's effect on Baltimore's affordable housing stock. HABC is also seeking approval to demolish a number of other developments with no plans to replace any of them.²³ If HUD continues its policy of not enforcing the prohibition against the relocation of tenants prior to the approval of demolition/disposition plans, vacancies at these developments will increase prior to the approval of the demolition/disposition application, which, in turn, means that applications for replacement vouchers will potentially result in even greater losses of affordable housing for the jurisdiction.

New Orleans

In New Orleans, the current policy will lead to significant losses in affordable housing. Prior to Hurricanes Katrina and Rita, New Orleans had approximately 7,200 units of public housing, of which 2,100 were vacant. After the hurricanes, only 1,400 units were occupied and the Housing Authority of New Orleans (HANO) recently submitted an application to demolish 5,000 public housing units and to replace them with only 1,474 units. Assuming that the 1,400 units occupied are among the 5,000 slated for demolition, New Orleans stands to lose no less than 2,126 affordable housing units. At a time when New Orleans has already lost approximately 80% of its affordable housing stock due to the hurricanes, such a loss of public housing will only exacerbate the unique challenges found in New Orleans and the surrounding hurricane

²¹HUD sent a letter to HABC in response to an inquiry from Congressman Elijah Cummings (D-MD), responding to a complaint by the Somerset Homes Tenant Council that HABC is relocating families without HUD approval of a relocation plan or demolition application (May 3, 2007). HUD should have demanded that HABC cease and desist further relocation activities. Instead, HUD cautioned HABC that they cannot start formal relocation activities until HABC gets HUD approval, and that HABC may not coerce any family to relocate prior to approval of the demolition application. The letter then gave HABC fifteen days to explain what they are doing and gave HABC the option of claiming that it is relocating residents for purposes of vacancy consolidation. HUD provided HABC that option even though HABC had made it quite clear that it is demolishing the entire development. Source, Barbara Samuels, ACLU-MD. See Letter from Bill Tamburrino, HUD Hub Director, to Paul Graziano, Executive Director, HABC (May 3, 2007) (on file at NHLP).

²²24 C.F.R. § 970.25 (2007).

²³Source: Barbara Samuels, ACLU-MD.

impacted region.²⁴ Unfortunately, the HUD notice appears to be written in anticipation of its applicability to the hurricane affected jurisdictions as a reference is made in the notice to the Disaster Voucher Program, which only operates for residents from the hurricane affected areas.²⁵ Contrary to HUD's apparent intentions, the unique situation in the hurricane affected areas demands a distinct policy to ensure that the area does not lose exorbitant amounts of publicly assisted affordable housing.

Cleveland

The Cuyahoga Metropolitan Housing Authority (CMHA) is in the process of developing a demolition/renovation plan for the Garden Valley development that has 628 units, of which only about 350 are currently occupied. CMHA is planning to replace the development with between 486 and 586 new units. In this instance, the current HUD policy will probably not reduce the number of affordable units in Cleveland as long as at least 142 of the 350 current occupants request a voucher. But, even though no loss of affordable housing appears evident, the current policy may create great difficulties for CMHA. Since 486 or 586 units will be replaced, the maximum number of vouchers that may be obtained for relocation/replacement purposes under the current policy is, respectively, 42 or 142. In the event public housing units are not available to meet the needs of the 208 or 308 current occupants that will not be entitled to replacement/relocation vouchers, CMHA will either have to use already authorized vouchers to rectify the shortfall, or perhaps, delay demolition plans until vouchers become available to meet the unmet need.²⁶

Conclusion

The current demolition/disposition replacement vouchers policy is likely to lead to the erosion of the number of affordable housing units available through the federal low-income housing programs.²⁷ As demonstrated by the small snapshots of Baltimore, New Orleans, and Cleveland, the new policy will significantly hinder communities' capacity to serve the housing needs of their lowest-income populations. It will also make it more difficult for local communities and housing advocates to determine the number of units lost as the number is one that can change as tenants relocate to other public housing, move out, or the number of replacement units increases or decreases. ■

²⁴Source: Laura Tuggle, New Orleans Legal Assistance Corporation.

²⁵See note 7, *supra*.

²⁶Source: Peter Iskin, The Legal Aid Society of Cleveland.

²⁷Although the most recent notice by its terms applies only to replacement vouchers for public housing units, HUD has reportedly taken the position that the statement in its 2006 Notice, PIH 2006-5 (Jan. 13, 2006), applies to limit replacement of privately owned, federally assisted units lost from the inventory as well, despite the fact that its last published notice on the subject, Notice PIH 2001-41, states precisely the opposite.

Under the Radar Revisions to RD Voucher Program

In March of 2006, the Rural Housing Service and the Department of Housing and Urban Development (HUD) published a notice in the Federal Register implementing the Rural Development Demonstration Voucher Program (Rural Voucher Program).¹ The program, which was enacted in the Agricultural Appropriations Act of 2006² and reauthorized and refunded in the omnibus supplemental appropriations act of 2007,³ was designed to protect residents of Section 515 rental housing from displacement when owners of the housing prepay their loans. The Federal Register notice simply announced the program and the manner in which Rural Development (RD)⁴ and HUD intended to operate it. It did not request public comments or state if and when formal program regulations would be proposed or adopted. In other words, RD implemented the program without complying with the Administrative Procedure Act (APA)⁵ or other agency law.⁶

In October of 2006, RD published a Voucher Guide to direct its staff on how to operate the Rural Voucher Program. RD has never made the Voucher Guide public and it is not available from its website. Presumably, the Voucher Guide can only be secured by filing a Freedom of Information Act Request with the agency.

In April of 2007, a year after it published the original program notice in the Federal Register, RD published an internal agency memorandum that announces significant changes to the program.⁷ Curiously, the memorandum claims to merely clarify current program policies. In fact, it goes beyond mere clarification and announces certain changes to the program that became effective upon its publication and others that will become effective July 1, 2007. The memorandum also discloses that RD plans to publish a new Voucher Guide this summer. Because the

¹71 Fed. Reg. 14084 (March 20, 2007).

²Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. 109-97, Title III (Nov. 10, 2005).

³Revised Continuing Appropriations Resolution, 2007, Pub. L. 110-5, § 101 (Feb. 15, 2007).

⁴The United States Department of Agriculture A(USDA) has stopped using the name Rural Housing Service with respect to the agency that is administering its rural housing programs. Since the programs are administered in the field by the Rural Development division of the department, it now refers to the housing programs as the Rural Development programs. However, the department has not legally changed the agency's name, consequently, it continues to name RHS as the administering agency in formal publications, such as the Federal Register.

⁵5 U.S.C. § 701 et. seq.

⁶42 U.S.C. § 1490n.

⁷Clarification of Issues for the Rural Development Voucher Demonstration Program, RD Unnumbered Letter (April 27, 2007) available at <http://www.rurdev.usda.gov/regs/ul/ulapril07.pdf> (hereinafter "memorandum").