property.[58] In an opinion containing little analysis, a federal district court recently held that the act did not effect a regulatory taking, and that the owner's action was barred by the statute of limitations.[59] The owner has appealed the case to the Fourth Circuit. Although there is little rent control legislation in Maryland, any novel decision from the Fourth Circuit on the takings claim could have a broader impact on litigation challenging rent control ordinances elsewhere. ■

[58]*Id.* at 7.
[59]Park Ritchie, LLC v. City of Takoma Park, No. 07-2336, slip op. at 1 (D. Md. Jan. 29, 2008).

Tenants Can Sue for Violation of Public Housing Demolition Law*

A group of public housing residents in Dublin, California, recently scored a first-round victory in their fight to save their homes from demolition. The residents survived a motion to dismiss for failure to state a claim, which had argued that Section 1437p of the United States Housing Act of 1937[1] does not confer enforceable individual rights to tenants of public housing. The interlocutory order in *Arroyo Vista Tenants Ass'n v. City of Dublin*[2] kept the tenants' suit alive, holding that specific provisions of the statute[3] do provide tenants with the rights to receive notice and relocation assistance from their public housing authority before displacement, demolition, or disposition can take place, and that these rights are enforceable under 42 U.S.C. § 1983.[4]

Background

Arroyo Vista is a 150-unit public housing apartment complex located in Dublin, California, a suburb of Oakland. It is the only public housing located within Dublin, and is managed by the Dublin Housing Authority (DHA). In July 2006, without either notifying the tenants or obtaining permission from the Department of Urban Development (HUD) to dispose of the property, DHA selected two private developers to acquire, demolish, and redevelop the property. One year later, on July 17, 2007, the City of Dublin approved a Development Agreement between DHA, Housing Authority of Alameda County (HACA), and the developers—nonprofit Eden Housing and for-profit Citation Homes Central—to demolish the apartment complex and redevelop the site as a mixed-income housing development consisting of 184 market-rate ownership units and 194 "affordable" rental units.

Approximately one month later, the DHA submitted a Disposition Application to HUD, seeking agency approval of its plan to sell and replace the public housing units. HUD did not immediately respond to the application. However, even without approval from HUD, DHA began to set in motion its plans for disposition. HACA, which administers the voucher program for the county in which Dublin is located, set aside 200 vouchers for the Arroyo Vista residents, without any plans to request replacement vouchers. The tenants assert that representatives of the agencies encouraged residents to move, urging them to take Section 8 vouchers immediately, or to risk not being granted one later. DHA and HACA representatives presented the demolition of Arroyo Vista as inevitable, telling several residents that they would need to move by November 2008.

Minority populations in Dublin are relatively small: according to the U.S. Census Bureau, in 2000 the municipality was 72.7% White, 12.1% Asian, and 10.5% African American. However, the more than 400 residents of Arroyo Vista constitute a uniquely diverse enclave in the suburb. According to a HACA report submitted to HUD in September 2007, the population at the housing complex is 52% White, 28% African American, 15% Asian, and 4% Native Hawaiian or Pacific Islander. The income levels of 65% of the residents are extremely low (less than 30% of the area median income), and an additional 24% are very low (less than 50% of the area median income). As proposed, the redeveloped "affordable" rental units are to rely on tax credit and HUD Section 202 funding. Even though the rents for these units will be below market, they will be financially out of reach for, at minimum, the 44% of Arroyo Vista families whose income is below $15,000. Because there is no other public housing in Dublin, the redevelopment plan would thus likely force many or most Arroyo Vista residents out of Dublin altogether, certainly with a disparate impact on the city's minority communities. Additionally, a majority of the "affordable" units will be reserved for seniors, precluding maintenance of the complex's family-dominated population. By the time the residents filed their action in court, more than twenty units had already been vacated.

In October 2007, four Arroyo Vista tenants and a tenants' organization filed a petition for a writ of mandate in state court against DHA, the City of Dublin, and HACA, alleging that DHA's failure to notify residents of the demolition and to provide them with relocation assistance

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[1]42 U.S.C. § 1437p (2007).
[2]No. 07-05794 (N.D. Cal. May 12, 2008) (order denying motion to dismiss) (hereinafter, "May 12 slip op.").
[3]42 U.S.C. § 1437p(a)(4) (2007).
[4]May 12 slip op. at 19-20.

was in violation of the United States Housing Act of 1937.[5] After DHA, HACA, and Dublin removed the case from state to federal district court, the residents sought a preliminary injunction and defendants moved for summary judgment. Declining to rule on either of these motions, the court instead requested, *sua sponte*, supplemental briefing on the issue of whether the specific statutory provision at issue, 42 U.S.C. § 1437p(a)(4), creates rights enforceable by 42 U.S.C. § 1983, treating the issue as a Rule 12(b)(6) motion to dismiss for failure to state a claim.[6]

Legal Standard for § 1983 Claims

In order to sustain a § 1983 claim, the residents needed to assert a violation of a federal *right*, not merely violation of a federal *law*.[7] Under the Supreme Court's decision in *Blessing v. Freestone*, a federal statute establishes an enforceable federal right where it passes a three-factor test: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the defendants.[8]

Gonzaga University v. Doe[9] further modified the first prong of the *Blessing* test, holding that only unambiguously conferred rights, not broader or vaguer benefits or interests, are enforceable. In determining whether a statute contains rights-creating language, a court must examine the text and structure of the statute for an "an unmistakable focus on the benefited class rather than on the person or entity regulated,"[10] as well as agency regulations, legislative history, and other relevant surrounding statutes. Moreover, per *Blessing*, the district court further noted that the inquiry should focus not on the "statute in its entirety,"[11] but rather on the specific statutory provision at issue.

Thus, in its ruling, the district court emphasized that the issue before it was narrow, limited *only* to the specific question of whether *subsection (a)(4)* of 42 U.S.C. § 1437p creates enforceable individual rights to receive, from a public housing authority, notice and relocation assistance before displacement, demolition, or disposition can occur.[12] The court noted that the residents were not asserting, and therefore the court did not need to decide, whether other subsections of § 1437p, among them the requirements that a PHA make certifications regarding the physical condition of the housing units[13] and develop an application for disposition in consultation with affected residents,[14] *also* created individually enforceable rights.[15]

Does § 1437p Create Enforceable Rights Under § 1983?

Several prior decisions had considered the issue of whether 42 U.S.C. § 1437p, in its various permutations that had existed over the years, created enforceable rights. However, Congress had explicitly disapproved of the result in a case that found no enforceable right, *Edwards v. District of Columbia*.[16] A group of cases that followed *Edwards* either relied on a subsection of the statute that is no longer in existence or, the court found, did not engage in sufficiently thorough analyses under *Blessing* and *Gonzaga*.[17] After a close examination of these prior holdings, the court found them not to be determinative of the narrow issue before it, and instead applied the *Blessing* and *Gonzaga* frameworks anew to the current version of the statute, as it was amended in 1998.[18]

With respect to the first prong of the *Blessing* test, whether Congress unambiguously conferred a right, as opposed to a broad or vague benefit or interest, the court held that the current text of § 1437p(a)(4) contained both "consistent and repeated" identifications of the benefited class as well as an articulation of "specific and detailed" entitlements.[19] In reaching this determination, the court specifically noted, first, that the five enumerated provisions of subsection (a)(4)[20] each contain "individually-focused terminology."[21] Secondly, the court noted that the 1998 amendment substantially expanded on the conditions

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[5]42 U.S.C. § 1437p (2007).
[6]May 12 slip op. at 4.
[7]*Id.* (citing Blessing v. Freestone, 520 U.S. 329, 340 (1997)).
[8]*Blessing*, 520 U.S. at 340-341.
[9]536 U.S. 273, 283 (2002).
[10]May 12 slip op. at 5 (citing Price v. City of Stockton, 390 F.3d 1105, 1110 (9th Cir. 2004)).
[11]*Id.* (quoting *Blessing*, 520 U.S. at 342).
[12]*Id.* at 9.
[13]42 U.S.C. §§ 1437p(a)(1)-(2) (2007).
[14]*Id.* § 1437p(b)(2)(A).
[15]May 12 slip op. at 8.
[16]821 F.2d 651 (D.C. Cir. 1987) (holding that the pre-1998 version of § 1437p did not create enforceable rights). Following this decision, in 1988 Congress amended § 1437p to include the following provision: "(d)…A public housing agency shall not take any action to demolish or dispose of a public housing project or portion of a public housing project without obtaining the approval of the Secretary and satisfying the conditions specified in subsections (a) and (b) of this section." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 121(d), 101 Stat. 1815, 1838-39 (1988). The stated Congressional purpose behind the amendment was to clarify that "no [PHA] shall take any steps towards demolition and disposition without having satisfied the statutory criteria. This provision is intended to correct an *erroneous* interpretation of the *existing* statute by…[*Edwards*] and shall be fully enforceable by tenants of and applicants for the housing that is threatened." H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469 (emphasis added). However, as part of the 1998 overhaul of the entire Housing Act, Congress both substantially rewrote § 1437p and removed subsection (d). Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 531, 112 Stat. 2461, 2570-73 (1998).
[17]*See* May 12 slip op. at 11-14.
[18]*Id.* at 14.
[19]*Id.* at 15.
[20]*See* 42 U.S.C. § 1437p(a)(4)(A) (2007) ("each family residing in a project subject to demolition"); *Id.* § 1437p(a)(4)(B) ("each resident to be displaced"); *Id.* § 1437p(a)(4)(C) ("each displaced resident"); *Id.* § 1437p(a)(4)(D) ("residents who are displaced"); *Id.* § 1437p(a)(4)(E) ("residents residing in the building").
[21]May 12 slip op. at 15.

of relocation assistance: although the pre-1998 version of the statute only stated generally that displaced residents "will be given assistance" by the PHA,[22] the current version specifies that such assistance include an offer of comparable housing, the payment of actual and reasonable relocation expenses, and any necessary counseling.[23] Finally, although the former version of § 1437p contained no requirement that a PHA notify displaced residents, the 1998 amendment added such a rule, not only providing that notification be given but also specifying the content and timing of the notice.[24]

In finding that § 1437p(a)(4) passed the first prong of the *Blessing* test, the court also disposed of two interrelated counterarguments. The first of these involved the legislative evolution of the statute: the 1998 amendment had deleted a provision (the former subsection (d)) that had specifically prohibited a PHA from taking any action to demolish or dispose of public housing without obtaining HUD approval. The court rejected, however, the contention that this deletion was dispositive of Congressional intent to create or maintain individually enforceable rights in this context.[25] Congress had, by its own stated intention, added the former subsection (d) in 1988, with the specific purpose of clarifying the "erroneous interpretation of the [then]-existing statute" handed down by *Edwards*.[26] Even without the presence of former subsection (d), then, § 1437p had *always* created individually enforceable rights for the tenants of threatened housing, and the court stated that these rights "do[] not hinge on the presence or absence of former subsection (d)."[27]

Secondly, the court addressed an interpretive issue relating to the corresponding HUD regulations. Following the 1998 amendment, HUD had revised its implementing regulations, maintaining language mirroring former subsection (d) despite its deletion from the statute.[28] However, HUD explained that these regulatory provisions were retained "to make certain that HUD can track units being phased out for funding purposes…[and were] not intended to create any private right of action."[29] The court dismissed these comments, stating that agency regulations alone "cannot nullify rights legitimately conferred by Congress any more than regulations alone can give rise to rights."[30]

Having thus found that the residents of Arroyo Vista had satisfied the first prong of the *Blessing* and *Gonzaga* tests, the court next turned to the second and third prongs—respectively, that the right conferred is "not so 'vague and amorphous' that its enforcement would strain judicial competence," and that the statute "unambiguously impose a binding and mandatory obligation" on the agency.[31] The court found that the residents satisfied both prongs. With respect to the second prong, the court held that the benefits conferred to the residents under § 1437p(a)(4)—namely, the rights to notification of demolition and to enumerated relocation benefits—are "specific and judicially enforceable."[32] With respect to the third prong, the court noted that the "repeated and consistent" use of the term "will"[33] to denote PHA obligations indicated that the tenant rights and corresponding PHA obligations were mandatory—notwithstanding the fact that the provisions in question are embedded in the section of the act detailing criteria for HUD approvals for demolitions and dispositions. [34]

Finally, the court noted that the Arroyo Vista residents' fulfillment of the three-factor *Blessing* test established their right to notification and relocation assistance only presumptively: under *Blessing*, the burden now shifted to DHA and HACA to show that Congress intended to foreclose a § 1983 remedy.[35] However, *Blessing* made clear that this is a "difficult" burden to meet, [36] and the court held that in this instance the DHA and HACA had not done so, as § 1437p neither contains any express intention to foreclose such a remedy nor creates any comprehensive enforcement scheme that might impliedly foreclose the remedy.[37]

Conclusion

As demolitions and dispositions of public housing increase in the face of financial strains on housing authorities, advocates are fighting to protect residents and ensure that affordable housing is not lost. The Arroyo Vista Tenants Association faces a much longer fight ahead, but the

[22] *Id.* at 14.
[23] *Id.*; 42 U.S.C. §§ 1437(a)(4)(iii)(I)-(III) (2007).
[24] May 12 slip op. at 15; 42 U.S.C. §§ 1437(a)(4)(A)(i)-(iii)(I) (2007).
[25] May 12 slip op. at 17.
[26] *See id.*; H.R. Conf. Rep. 100-426, 1987 U.S.C.C.A.N. 3458 at 3469.
[27] May 12 slip op. at 17.
[28] *See* 71 Fed. Reg. 62,354 (Oct. 24, 2006); 24 C.F.R. § 970.7(a) ("A PHA must obtain written approval from HUD before undertaking any transaction involving demolition or disposition of PHA-owned property"; 24 C.F.R. § 970.25(a) ("A PHA may not take action to demolish or dispose of a public housing development…without obtaining HUD approval").
[29] May 12 slip op. at 17-18; 71 Fed. Reg. 62,354 (Oct. 24, 2006).
[30] May 12 slip op. at 18 (quoting *Price*, 390 F.3d at 1112).
[31] *Id.* (citing *Blessing*, 520 U.S. at 340-41).
[32] May 12 slip op. at 18.
[33] *Id.*; 42 U.S.C. § 1437p(a)(4)(A)-(E) (2007) (providing, respectively, that HUD shall approve an application for demolition or disposition if the PHA certifies that it "will notify" displaced residents, "will provide" for the payment of relocation expenses, "will ensure" that displaced residents are offered comparable housing, "will provide" any necessary counseling, and "will not commence" demolition prior to the relocation of all residents).
[34] May 12 slip op. at 18. Here, the court relied on a recent Ninth Circuit case, *Ball v. Rodgers*, finding enforceable rights in a provision of the Medicare Act requiring a state to make specified "assurances" before the Department of Health and Human Services can grant a waiver for reimbursement of alternative care. 492 F.3d 1094, 1105-06, 1112-15 (9th Cir. 2007).
[35] May 12 slip. op. at 19.
[36] *Blessing*, 520 U.S. at 346-47.
[37] May 12 slip op. at 19.

District Court, by recognizing that tenants have a private right of action to enforce their relocation rights, provided a well-reasoned opinion for advocates to use in ensuring tenants have the resources they need and are treated fairly when a housing authority seeks to dispose of its public housing stock. Stay tuned for more updates as this case moves forward. ■

Recent Cases

The following are brief summaries of recently reported federal and state cases that should be of interest to housing advocates. Copies of the opinions can be obtained from a number of sources including the cited reporter, Westlaw,[1] Lexis,[2] or, in some instances, the court's website.[3] Copies of the cases are *not* available from NHLP.

Public Housing: Denial of Admission, Violation of Fair Housing Act

Parrott v. City of Union Point Housing Authority, 2008 WL 2302685 (M.D.Ga., May 29, 2008). An applicant for public housing, who had a thirty-four-year-old murder conviction and no other intervening criminal proceedings, brought suit under the Fair Housing Act (FHA) against the housing authority for rejecting his application for admission. The applicant claimed that the rejection was discriminatory because the housing authority admitted two other persons who had been convicted of murdering African-American persons while he had been convicted of killing a Caucasian person. The housing authority sought to dismiss the complaint for failure to state a claim, alleging that it had made a racially neutral decision based on the applicant's criminal record and that as a convicted felon he was not within a class of persons protected by the FHA. The court rejected the housing authority's argument based on the fact that the plaintiff alleged sufficient facts to show that the decision was racially motivated and, if proven, could constitute a violation of the FHA.

Public Housing: Remaining Household Member

Rodriguez v. Hernandez, 2008 WL 2095848 (N.Y.A.D., May 20, 2008). On appeal from a Supreme Court decision, the court upheld the housing authority's denial of the plaintiff's status as a remaining household member. The court found that the plaintiff was not granted permission to live in her mother-in-law's dwelling on a permanent basis and that her income was never considered in determining the rent for the public housing dwelling. Accordingly, she was not a member of the household entitled to remain in the dwelling upon the death of her mother-in-law.

Public Housing: Eviction, Drug Violation, Fair Housing Protections

Public Housing Agency of St. Paul v. Ewig, 2008 WL 2106692 (Minn.App., May 20, 2008) (Unpublished). The lower court decided that the housing authority was not entitled to evict a resident who had used crack cocaine and allowed others to use it in her dwelling on the basis that she was handicapped and therefore protected by the Fair Housing Act (FHA). The appellate court reversed, finding that the resident had violated her lease agreement and that the FHA does not protect current users of drugs.

Voucher Program: Denial of Voucher for Failure to Report Additional Household Members

Gerena v. Donovan, 2008 WL 2025009 (N.Y.A.D., May 13, 2008). The appellate court affirmed a preservation department's decision to deny the plaintiff an enhanced voucher on the ground that the plaintiff failed to notify the department that his wife and children were living with him in the apartment, thus violating the Housing Choice Voucher program regulations.

Voucher Program: Termination Hearing Decision Not Based on Substantial Evidence

Bush v. Mulligan, 2008 WL 1989794 (N.Y.A.D., May 6, 2008). An elderly Section 8 voucher resident who suffered vascular dementia was terminated from the program for failing to report receipt of Social Security benefits for eight months. Although the voucher holder submitted uncontroverted evidence at the termination hearing that she had dementia and loss of memory, the hearing officer upheld the termination on the grounds that the voucher holder committed fraud and was negligent in failing to report the receipt of the Social Security benefits. The appellate court reversed, finding that the hearing officer's decision was not based upon substantial evidence presented at the hearing.

Voucher Program: Use of Hearsay Evidence at Termination Hearing

Cintron v. Housing Authority of San Diego County, 2008 WL 1923101 (Cal.App., May 2, 2008)(Unreported). A voucher

[1]http://www.westlaw.com.
[2]http://www.lexis.com.
[3]For a list of courts that are accessible online, see http://www.uscourts.gov/links.html (federal courts) and http://www.ncsc.dni.us/COURT/SITES/courts.htm#state (for state courts). See also http://www.courts.net.