

Rural Housing Service Calls for Repeal of ELIHPA

Proposal Would Effectively Extinguish the Section 515 Program

Described as a bill “to establish a program to revitalize rural multifamily housing,” the Rural Housing Service (RHS) recently released a legislative proposal that could have detrimental effects on rural residents and the entire Section 515 Rural Rental Housing (RRH) program if it receives congressional support.¹ Although the proposal has not yet been introduced, it has already drawn criticism from tenant representatives, nonprofit developers and the for-profit community.

The proposal’s major components include an attempt to implement a voucher program for displaced residents; create loan restructuring and revitalization options for owners “in good standing”;² institute \$25 minimum rents;³ and repeal prepayment restrictions and procedures⁴ found in the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).⁵ Selected comments about the agency’s proposal follow.

Backdrop

There are approximately 435,000 units of Section 515 RRH housing in rural areas throughout the country.⁶ Approximately 58% of the households occupying these units are headed by a person who is elderly or disabled.⁷ The remaining units are occupied by low-, very low- and extremely low-income families. The average income of households living in Section 515 housing is \$9,075.⁸

¹The Rural Housing Service (RHS) is an agency within the Department of Agriculture (USDA). RHS administers USDA’s housing programs, including the Section 515 Rural Rental Housing Program. 42 U.S.C.A. § 1485 (West 2003) (providing loan authority for the Section 515 Rural Rental Housing Program). RHS, RURAL HOUSING SERVICE LEGISLATIVE PROPOSAL (2005) [hereinafter PROPOSAL], at <http://www.rurdev.usda.gov/rd/cong/MFHRevitalization.pdf>.

²PROPOSAL, *supra* note 1, at 5.

³*Id.* at 7.

⁴*Id.* at 10.

⁵42 U.S.C.A. § 1472(c) (West 2003).

⁶ICF CONSULTING, RURAL RENTAL HOUSING—COMPREHENSIVE PROPERTY ASSESSMENT AND PORTFOLIO ANALYSIS FINAL STUDY REPORT, Memo 2 (2004) [hereinafter CPA STUDY], at <http://www.rurdev.usda.gov/rhs/mfh/Property%20Assessment/Property%20Assessment.htm>.

When compared to the Government Accountability Office’s (GAO) figure, this number shows a decline since January 2003, when the stock included 464,604 units. GAO, GAO 04-424, STANDARDIZATION OF BUDGET ESTIMATION PROCESSES NEEDED FOR RENTAL ASSISTANCE PROGRAM 4 (2004), at <http://www.gao.gov/new.items/d04424.pdf>.

⁷*Id.*

⁸*Id.*

RHS’ proposal seeks to extinguish Section 515 preservation at the same time other low-income housing resources are diminishing. The National Low Income Housing Coalition (NLIHC) recently released information that shows that there is a 1.6 million-unit national housing shortage for people who are extremely low-income.⁹ This under-housed population includes precisely those households who qualify for the Section 515 program. The housing shortage is even worse in rural areas, where decent and affordable housing continues to be scarce. In many communities, Section 515 housing is the only available decent and affordable housing. More often than not, there is no other comparably affordable housing to which people can move unless they are willing and able to relocate to distant communities, away from their jobs, families and services.

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RHS contracted with ICF Consulting in 2003 to conduct a study of the agency’s Section 515 Rural Rental Housing Stock.¹⁰ The study, *Rural Rental Housing – Comprehensive Property Assessment and Portfolio Analysis, Final Study Report* (CPA), was published in November 2004.¹¹ It concludes by identifying problems and offering a number of recommendations.¹² Among its recommendations is the institution of a revitalization and restructuring program for the aging stock.¹³ A great deal of the agency’s legislative proposal adopts recommendations of the CPA study.

⁹*Point of View*, 10 MEMO TO MEMBERS 23 (NLIHC, Washington, D.C.), June 10, 2005, at http://www.nlihc.org/mtm/mtm10_23.html#1; see also NLIHC, LOSING GROUND IN THE BEST OF TIMES: LOW INCOME RENTERS IN THE 1990s, at 8 (March 2004), at http://www.nlihc.org/research/losing_ground.pdf (discussing a previous shortage of 1.27 million units for extremely low-income renters).

¹⁰NHLP, *Long-Awaited Rural Rental Housing Report Released*, 35 Hous. L. Bull. 1, 11-16 (2005).

¹¹*Id.*

¹²*Id.*

¹³*Id.*

Wholesale Repeal of ELIHPA Prepayment Restrictions

Without recognizing resident needs or the value of the already diminishing stock to communities, RHS buries the proposal's farthest-reaching provision at the end of the draft bill. The agency entitles the section that repeals ELIHPA "Conforming Amendments to Title V of the Housing Act of 1949."¹⁴ It states: "Section 502 of the Housing Act of 1949 (42 U.S.C. 1472) is amended by striking subsection (c)."¹⁵ Subsection (c) consists of the ELIHPA prepayment procedures and restrictions.¹⁶ In the agency's section-by-section analysis of its proposal, RHS blandly states that the provision removes the current prepayment restrictions.¹⁷ But, make no mistake—the "conforming" provision decimates all prepayment protections and exposes residents to displacement.

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Prepayment of Post-1989 Loans

The analysis accompanying the agency's proposal fails to explain the nexus between the need to repeal all prepayment restrictions in their entirety and the objective of revitalizing the current housing stock, the supposed purpose of the proposal. By entirely repealing the prepayment provisions, the proposal's effect would even reach post-1989 loans that have, contractually, never been permitted to prepay. Although there have been no indications that post-1989 loan contracts would be amended to allow prepayment, it is clearly conceivable that owners of any newly constructed projects or parties to newly serviced loans would be permitted to receive lucrative RHS loan benefits as well as the ability to exit the program at-will by way of prepayment.

No Resident Notice

Although the proposal would provide owners with the unfettered right to prepay and withdraw from the Section 515 program at any time, the RHS proposal includes

no resident notice provisions. With approximately 58% of Section 515 projects designated for the elderly and disabled, notice is essential and should be at least twelve months before an owner should be allowed to prepay.

Resident notice must be early enough to allow residents to confront relocation issues (i.e., commuting to work and school, accessing services, etc.). Not only is it fitting to provide residents with adequate notice, but other community stakeholders should be alerted to the upcoming prepayment as well. Local agencies and other service providers require adequate time to develop mechanisms through which they may assist households in finding housing and relocating.

No Resident Relocation Assistance

The proposal's unrestricted prepayment provision would provide no relocation assistance for residents. Whenever residents are forced to relocate from their homes by reason of an owner's prepayment and premature withdrawal from the program, they should be provided relocation benefits to enable them to relocate to other decent and affordable housing.

Unconditioned Prepayment Can Lead to Unprotected Residents

The agency adopts the CPA's estimate that owners of 10% of the Section 515 stock would prepay if the prepayment restrictions were repealed. This figure is probably too conservative. ICF Consulting, the company that conducted the sample study, arrived at a 10% estimate based on analyses of markets where prepayment would be *economically* viable.¹⁸ It noted that it did not consider other motivating circumstances that might cause an owner to seek prepayment.¹⁹ Taking into account additional circumstances, such as aging owners or those who simply want out of the program, it is not unreasonable to expect more widespread prepayment.²⁰

Little Protection for Tenants

RHS justifies unfettered prepayment in large part on the tenant protection provisions included in the proposal, consisting primarily of tenant-based vouchers.²¹ However,

¹⁸CPA STUDY, *supra* note 6, at 35-37.

¹⁹*Id.*

²⁰See GAO, GAO 2-392, MULTIFAMILY RURAL HOUSING: PREPAYMENT POTENTIAL AND LONG-TERM REHABILITATION NEEDS OF SECTION 515 PROPERTIES, at 2 (2002) (estimating that approximately 24% of the projects would prepay within eight years if restrictions were repealed), at <http://www.gao.gov/new.items/d02397.pdf>.

²¹Presentation by Russ Davis, RHS Administrator, Knowledgeplex Expert Chat, Aug. 9, 2005 [hereinafter KnowledgePlex Expert Chat], available at <http://www.content.knowledgeplex.org/kp/audio-video/multimedia/refiles/ruralhousing.wmv> (last visited Aug. 22, 2005).

¹⁴PROPOSAL, *supra* note 1, at 10.

¹⁵*Id.*

¹⁶42 U.S.C.A. § 1472(c) (West 2003).

¹⁷RHS, SECTION-BY-SECTION ANALYSIS OF LEGISLATION TO REVITALIZE RURAL MULTIFAMILY HOUSING (2005) [hereinafter RHS ANALYSIS], at www.rurdev.usda.gov/rd/cong/MFHRevitalizationAnalysis.pdf.

the agency fails to condition the prepayment of Section 515 loans upon the adequate supply of and funding for these vouchers.

Tenant representatives, nonprofit organizations and others have advocated for funding of such vouchers, which are already authorized under current law.²² However, coupled with a repeal of prepayment restrictions, the proposal's voucher provisions fail to provide the fix that many advocates seek. While the proposed voucher program may provide some residents with a certain level of support as currently drafted, it will not meet the needs of displaced elderly, disabled and family households.²³

No Right to Remain

RHS has unequivocally stated that the voucher program described in its proposal does not seek to be an enhanced voucher program such as is in place in the Department of Housing and Urban Development's (HUD) assisted multifamily housing programs.²⁴ A reading of the RHS provisions makes this distinction clear.

Unlike in the case of HUD enhanced vouchers, RHS does not seek to provide residents with the right to remain in their current housing after prepayment. Without the right to remain, residents who receive vouchers may still face immediate displacement if the owner decides not to accept vouchers or increases rents beyond levels affordable for the projects' extremely low-, very low- and low-income residents.

Other Needed Protections

Even if an owner accepts vouchers from its current residents and sets post prepayment rents at affordable levels, nothing in the voucher proposal precludes the owner from assigning new or increased incidental costs, such as security deposits. Similarly, nothing in the voucher proposal requires good cause for eviction. Although vouchers may be used for rental housing expenses, no housing quality standards accompany RHS' voucher proposal.

These shortcomings should be addressed. In addition, all residents of prepaid projects should be deemed automatically eligible for vouchers. The local administering agency should be precluded from imposing any further screening or eligibility requirements upon residents.

To the extent the proposal purports to permit voucher portability, voucher use should be extended beyond "eligible living spaces anywhere in the United States" to include territories as well (where Section 515 properties also exist).²⁵ If true portability is to be realized, the proposal's voucher-level formula cannot create static levels through factors such as "the comparable rent for a living unit similar to the tenant's unit in the prepaid property based on the *fair market* rental rates for the area *at the time of prepayment* adjusted for inflation"²⁶

Voucher users who cannot afford additional housing expenses should not be forced to pay the minimum rent fee imposed by the agency. The agency has provided no nexus between tenant protection vouchers and the need to institute minimum rents. Based upon other reasons set forth later in this article, this provision should be struck. Residents who are displaced because of owner prepayment actions should not be further penalized.

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Voucher Use for Single Family Home Purchases

While the prospect of a resident's ability to use a voucher toward the purchase of a home is promising, actual utilization may be particularly challenging given Section 515 residents' rural locales. These voucher holders should be given priority for securing RHS Section 502 loans.²⁷ Without this priority, timely loan qualification will be unlikely. Additionally, in order to ensure that extremely low-income households can afford to purchase a home, the payment subsidy mechanism for the loan should be based on the household income while disregarding the voucher subsidy. Once purchases close, these voucher holders should be allowed to retain their vouchers even if they default on their home loans so that they are able to return to affordable rental housing.

Distribution of Vouchers for Loan Accelerations and Foreclosures

Residents of projects that have had loans accelerated and paid off because of defaults should qualify for vouchers as well. Like residents of otherwise prepaid

²²HAC & NHLP, FINAL REPORT OF THE TASK FORCE ON RURAL RENTAL HOUSING PRESERVATION 23 (2005), available at <http://www.nhlp.org/html/rhs/PreservationTaskForceReport%20Final.pdf>; NATIONAL RURAL HOUSING COALITION, RURAL RENTAL HOUSING ISSUES 3 (2004) (on file with author); 42 U.S.C.A. § 1490r (West 2003) (limiting the number of annual contracts to cover 5,000 units per year.)

²³PROPOSAL, *supra* note 1, at 8-10.

²⁴42 U.S.C.A. § 1437f(t) (West 2003).

²⁵PROPOSAL, *supra* note 1, at 9.

²⁶*Id.* at 10 (emphasis added).

²⁷42 U.S.C.A. § 1472 (West 2003).

projects, these residents lie equally exposed to displacement because their projects are withdrawn from the program at the time of the pay-off or foreclosure sale.²⁸ After withdrawal, the agency does virtually nothing to ensure that rents remain affordable for the project's residents.

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Vague Revitalization and Restructuring Provisions

Although revitalization of the Section 515 stock should receive serious consideration and funding, RHS' vague provisions regarding revitalization and restructuring make it difficult to understand how the program would be implemented or to what extent owners would be encouraged to participate. In this regard, more extensive analysis of this portion of the proposal cannot truly be complete until RHS' plans are clarified. However, there are certain aspects to the current proposal that warrant some critical attention and further thought.

Lacks Long-Term Use Restrictions

If the revitalization program is to serve the dual goal of rehabilitation and preservation, as informally mentioned various times by the agency, the program should commit to setting minimum terms for its new restrictive use provisions (RUPs). When an owner volunteers for the revitalization program and takes advantage of its financial offerings (i.e., reduction or elimination of interest, partial or full debt deferral, debt forgiveness, subordination, reamortization of payments, grants),²⁹ the owner simultaneously agrees to commit to new RUPs. These RUPs require the owner to continue operation of the project for its original affordable-housing use over a certain term of years.

The agency's analysis states that RUPs will be set at twenty years.³⁰ However, the proposal states that "an agreement by the project owner to continue the property use restrictions with respect to the project in accordance

with the section 515 housing program for a period not to exceed the greater of 20 years or the remaining term of the 515 loan"³¹ The proposal is silent on the minimum term for these new long-term use agreements.

Without a statutorily set minimum term for RUPs, the agency will be free to determine how short of a period participating owners will be required to continue operation of the newly funded projects before they are allowed to prepay. These terms may quite well vary across different RHS administrations. Without a minimum term, it becomes difficult to predict the utility of the revitalization program for preservation purposes.

Project Qualification Should Be Based on Need

According to the proposal, for a project to qualify for the revitalization program, an owner must be deemed an owner "in good standing."³² While one would not wish to see a noncompliant owner reap the financial rewards of the revitalization and restructuring program, it is conceivable that a noncompliant owner project may very well be one in need of revitalization for the sake of the residents. Factors such as whether the management is adequate or the cost of revitalization exceeds the agency's modest ceiling (50% of the cost of replacement housing) are not the best criteria for deciding whether to revitalize a project.³³ The primary aim of the revitalization program should be reconsidered, and more focus should be directed toward the Section 515 program's ultimate users: the residents. With careful thought, this can be achieved while remaining responsible to financial and budgetary considerations.³⁴

The proposal limits participation to RHS loans that were made prior to January 1, 1992.³⁵ The agency's analysis provides no further information about this eligibility standard, but RHS' Administrator has stated that the date coincides with the effective date of the Federal Credit Reform Act. According to the Administrator, this date selection would make matters easier from a budgetary standpoint.³⁶ He also mentioned that the agency found no

³¹PROPOSAL, *supra* note 1, at 3.

³²*Id.* at 2.

³³*Id.* at 6.

³⁴The project eligibility requirements have also raised concerns in the for-profit community. Inferred in the criticism is that some owners may not be determined to be in good standing due to financial reasons, not created by his or her own actions, but because of program administration. John B. Meyers, Memorandum "In re: August 205 RD Legislative Proposal," Aug. 15, 2005, 3 (on file with author).

³⁵PROPOSAL, *supra* note 1, at 2.

³⁶KnowledgePlex Expert Chat, *supra* note 21. The Federal Credit Reform Act provides accounting rules with which federal agencies must comply. Pub. L. No. 101-508, tit. XIII, § 13201(a), 104 Stat. 1388-610 (1990) (effective fiscal year 1992) (codified at 2 U.S.C. §§ 661 *et seq.*).

²⁸7 C.F.R. § 3560.456; USDA, HB-3-3560, MULTI-FAMILY HOUSING SERVICING HANDBOOK, § 2 (2005) (Liquidation Procedures), at <http://www.rurdev.usda.gov/regs/hblist.html>.

²⁹PROPOSAL, *supra* note 1, at 2.

³⁰RHS ANALYSIS, *supra* note 17, at 2 ("The agreement will include the owner's agreement to new restrictions for a period of 20 years").

need for long-term rehabilitation on ten- to thirteen-year-old projects (post-1992 projects).³⁷

It is unclear what the effect of this selected date may be, particularly considering post-1989 projects, whose owners have always been precluded from prepaying. A deeper understanding of the effect of the Federal Credit Reform Act upon the agency's proposal remains unclear.

Resident Participation

For a plan that seeks to remedy and improve physical housing conditions under which residents live, the proposal fails to provide for participation by those very same residents in any fashion. Resident participation is particularly important in light of the program's process of determining whether an owner should be labeled in good standing. If this owner-eligibility requirement remains, residents should be notified when an owner applies to participate in the revitalization program. They should be invited to meet with the agency and provide their views about the project's revitalization needs. Residents should also be made aware of how revitalization will affect their occupancy and be permitted to provide input on this matter as well.

Displacement and Relocation

Ideally, revitalization should take place without any resident displacement. However, if revitalization forces resident displacement, the provisions should make it clear that displaced tenants are entitled to relocation benefits. To the extent that relocated residents are forced to pay higher rents, some form of rental assistance should be provided. It also should be stated that any resident who is displaced due to revitalization has an absolute right to return to the project once revitalization is complete.

Rent Increases

While residents should be allowed the opportunity to live in projects that are decent and safe, revitalization and restructuring efforts should not cause rents to increase to levels that make them unaffordable or cause displacement. The rent structure set out in the restructuring provisions is arbitrary, too high and will likely have a severe adverse impact on Section 515 residents whose incomes are very low and essentially fixed. For residents who do not receive the agency's Rental Assistance (RA) deep subsidy,³⁸ the proposal permits annual rent increases up to 40% of the area median income (AMI).³⁹

This standard, which fails to take into consideration the income of a project's residents as well as the availabil-

ity and depth of other project subsidies, can eventually displace residents from their homes. The proposal entirely discounts the fact that approximately 57% of the residents in RHS housing live on fixed incomes. These households' incomes do not rise proportionately with other incomes, and they cannot afford to absorb annual rent increases that are based upon income increases of the broader population. The proposal also discounts the fact that many projects that are not receiving RA receive Interest Credit subsidies (which effectively reduce the owners' interest rates on the RHS loans to 1%)⁴⁰ or other subsidies such as HUD Section 8 assistance.⁴¹

Significantly, the proposal fails to take into consideration the fact that, through the restructuring process, RHS can modify a project's rent structure to serve households of various incomes. By reducing debt, increasing other subsidies, or making grants, the agency can set project rents to serve households that can afford rents set at 20, 30 or 40% of AMI.

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It is also arguable that the use of the AMI standard in rural areas inaccurately reflects rural income instead of that of the jurisdiction's larger geographic area, which often includes urban areas with higher incomes. If that is the case, AMI figures for many rural areas may actually be inflated and allow landlords to set rents at levels that are not truly affordable by residents whose incomes are at 40% of AMI.

Minimum Rents

Without explaining in any level of detail in its section-by-section analysis, RHS summarily states that "[a]ll tenants receiving rental assistance will be subject to a minimum \$25 per month rental payment."⁴² The minimum rent provision imposes an unjustified and unnecessary hardship on extremely low-income residents and should be eliminated.

Given the extremely low average income of residents in Section 515 housing, a minimum rent of \$300 per year is overly burdensome and unnecessary. The agency has

³⁷*Id.*

³⁸42 U.S.C.A. §1490a(1)(c) (West 2003).

³⁹PROPOSAL, *supra* note 1, at 7.

⁴⁰42 U.S.C.A. §§ 1490a(1)(B) (West 2003).

⁴¹42 U.S.C.A. §1437f (West 2003).

⁴²PROPOSAL, *supra* note 1, at 10.

cited no report that documents any widespread fraud in the forty-year operation of the Section 515 program. While there may be individual cases where residents have under-reported income, there is no data showing that such under-reporting is isolated to persons whose income is so low that they are entitled to pay no rent.

Although resident under-reporting exists in certain instances, examination of HUD reports has failed to confirm that such under-reporting is the primary reason for overpayment of subsidies.⁴³ Overpayment of subsidies has also been attributed to administrator and landlord billing errors.⁴⁴ Some believe that these errors too often result in residents paying excessive rents (i.e., instances in which qualifying resident deductions are not taken into account). Income reporting issues, if they exist, should be resolved by better income verification processes and not by the imposition of a minimum rent on the lowest-income residents in the Section 515 program.

Next Steps

These are only a few areas of concern regarding RHS' legislative proposal. It is unknown when RHS' proposal will take effect, if at all. At the time of this writing, the next steps include the introduction of the proposal in bill form. Until the proposal is acted upon by Congress or the President, the RHS Administrator has indicated that the agency will continue to administer the program under its current authorizations and appropriations, including the agency's current revitalization demonstration program.⁴⁵ Advocates have begun discussion on various modes of providing legislative education and advocacy on issues contained in the proposal. NHLP will continue to report on the status of the RHS proposal. ■

⁴³See GAO, GAO 05-224, HUD RENTAL ASSISTANCE: PROGRESS AND CHALLENGES IN MEASURING AND REDUCING IMPROPER RENT SUBSIDIES 4-5 (2005).

⁴⁴*Id.*

⁴⁵KnowledgePlex Expert Chat, *supra* note 21. Email from Brenda Morton (on behalf of RHS Administrator in response to KnowledgePlex Expert Chat questions), USDA Rural Development, to Jennifer Kerslake, Expert Chat Coordinator, KnowledgePlex (Aug. 18, 2005, 04:38 PM EST) (on file with author).

The current demonstration program was announced through RHS' Administrative Notice 4036. USDA, Revitalizing the Multi-Family Housing (MFH) Portfolio Demonstration of New Revitalization Concepts, AN 4036 (Dec. 28, 2004) (expiring Feb. 28, 2004) (on file with author).