reluctant to participate. More than half of the properties with project-based Section 8 contracts have HUD mortgage insurance; any funding interruptions could result in mortgage defaults and more costly claims on the mortgage insurance fund. Tenants, who have no clear protection against the consequences of a HUD breach of contract, face growing uncertainty.

Inadequate HUD estimates about total subsidy costs[8] could also trigger nonpayment problems, similar to those in the summer of 2007, if the program lacks the financial cushion provided by one-year funding.

Advocates have been seeking various legislative reforms to require HUD to provide advance notice of imminent nonpayments to Congress, owners and tenants.

Advocates have also been seeking various legislative reforms to require HUD to provide advance notice of imminent nonpayments to Congress, owners and tenants. Advocates support requiring HUD to use available funds for tenant protections or even the mortgage insurance fund to provide stopgap funding to properties with expiring funding increments. Affected owners should be authorized to draw on reserves to make mortgage payments or pay operating expenses. Tenants should also receive temporary protection from any threatened rent increases. The House Mark to Market Reform bill, H.R. 3965, as reported by the House Financial Services Committee, contains a provision requiring notice to owners, authorization for use of reserves, and interest for late payments,[9] although this legislation requires reintroduction in the 111th Congress.

As Congress takes up appropriations issues after the election, likely in January, NHLP and its allies will continue to seek adequate funding to restore a solid foundation for these invaluable 1.4 million units. ■

[8]This could happen if HUD underestimates the number of units involved that require renewal funding, or underestimates per-unit subsidy renewal costs due to inflation in operating costs, to rising market rents for certain properties, or decreases in tenant incomes.

[9]H.R. 3965, § 13, as reported April 10, 2008, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3965rh.txt.pdf.

HUD Issues Regulations Implementing the Neighborhood Stabilization Program

The Housing and Economic Recovery Act (HERA) was signed into law on July 30, 2008. The act is an effort to address the country's foreclosure crisis and thus contains numerous foreclosure assistance provisions, including the restructuring of Government Sponsored Enterprises such as Fannie Mae and Freddie Mac, providing refinancing schemes for homeowners, establishing a National Housing Trust Fund, and creating the Neighborhood Stabilization Program (NSP).[1] NHLP has previously published articles on other provisions of HERA.[2] This article focuses on Title III of the act, which creates the NSP and grants $3.92 billion for emergency assistance to states and localities to redevelop abandoned and foreclosed homes and residential properties.[3]

These NSP funds are not for foreclosure-prevention activities or for redevelopment of non-blighted areas.[4] Instead, they are meant to stabilize neighborhoods that have deteriorated as a result of high foreclosure rates. Congress identified five uses for which grantees may use NSP funds:

- establish financing mechanisms for purchase and redevelopment of foreclosed-upon homes and residential properties;
- purchase and rehabilitate homes and residential properties that have been abandoned or foreclosed upon, in order to sell, rent, or redevelop such homes and properties;
- establish land banks for homes that have been foreclosed upon;
- demolish blighted structures; and
- redevelop demolished or vacant properties.[5]

[1]Housing and Economic Recovery Act, Pub. L. No. 110-289, 122 Stat. 2654, 2850-4 (2008); HUD Notice Implementing Neighborhood Stabilization Program Under the Housing and Economic Recovery Act, 73 Fed. Reg. 58,330 (October 6, 2008)(hereinafter HUD NSP Notice).

[2]*See* Katherine Lehe, *Foreclosure Relief Legislation Includes GSE Regulation and National Housing Trust Fund*, 38 Hous. L. Bull 161, 161-7 (Aug. 2008).

[3]Housing and Economic Recovery Act (hereinafter HERA), Pub. L. No. 110-289, § 2301-5, 122 Stat. 2654, 2850-4 (2008).

[4]HUD NSP Notice at 58,338.

[5]HERA § 2301(c)(3); HUD NSP Notice at 58,337-8.

Allocations/Funds

The Department of Housing and Urban Development (HUD) previously announced the allocations for NSP grants.[6] As required by HERA, it more recently released rules implementing the NSP.[7]

HERA established three criteria for determining where to allocate the funds:

- the number and percentage of home foreclosures in each state or unit of general local government;
- the number and percentage of homes financed by subprime mortgage related loans in each state or unit of general local government; and
- the number and percentage of homes in default or delinquent in each state or unit of general local government."[8]

Following these guidelines, HUD created an allocation formula to determine need: 70% based on the number and percent of foreclosures, 15% on the number of subprime loans, 10% on the number and percent of loans in default, and 5% for the number and percent of loans delinquent for sixty to ninety days.[9]

The appropriation is treated as a special allocation of Fiscal Year 2008 funding[10] of Community Development Block Grant (CDBG) money except as otherwise noted in HERA.[11] Ten percent of the funds can be used for grant administration.[12]

The NSP funds must be obligated or expended in an amount equal to the grant allocation within eighteen months of the allocation.[13] Grantees must expend all or more than their initial grant allocation within four years or HUD will recapture those funds and redistribute them.[14][15]

A significant portion of the allocations go to states rather than localities.[16] This is significant because, unlike the regular CDBG program, states may choose to directly use these funds rather than simply distribute them to local entities and nonprofits.[17]

During the course of NSP implementation, grantees are expected to receive "program income." Profit made through NSP program activities will be treated differently depending on the activity and the year. Before July 30, 2013, grantees receiving income from "purchas[ing] and rehabilitat[ing] homes and residential properties that have been abandoned or foreclosed upon, in order to sell, rent, or redevelop such homes and properties,"[18] or from "redevelop[ing] vacant or demolished properties,"[19] may keep the income to use in accordance with NSP rules and regulations.[20] After July 30, 2013, such program income will return to the U.S. Treasury, unless HUD approves a request to use the income for NSP purposes.[21] For the other NSP approved activities, grantees may retain program income for related activities both before and after 2013.[22]

Affordability

HERA dictates that all NSP funds must be used to benefit low- to middle-income families.[23] For the purposes of the NSP, HUD will use the CDBG income definitions, but will adjust the middle-income category. A low-income family is defined as having an income of no more than 50% of Area Median Income (AMI) as determined by HUD; a moderate-income family is defined as having an income of no more than 80% of AMI.[24] For the NSP, middle-income families include those that make 80-120% of AMI. If a foreclosed property is sold, rented or redeveloped, grantees must ensure that it remains affordable to low- to middle-income families. However, this requirement is only "to the extent practicable" which may provide a loophole for some NSP grantees.[25] Because NSP grantees must develop an action plan for the expenditure of NSP funds, this issue could be addressed by advocates locally. For example, advocates could call for an action plan to define "extent practicable" and state that the grantee will make maximum efforts to ensure affordability. Further, the plan could include regular public reporting requirements on the extent to which such requirements are being met.

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[6] HUD NSP Notice at 58,345.
[7] *Id. at* 58,343 (Attachment listing all allocations), *available at* http://www.hud.gov/offices/cpd/communitydevelopment/programs/neighborhoodspg/.
[8] HERA § 2301 (b)(3).
[9] HUD NSP Notice at 58,344.
[10] *Id.* at 58,332.
[11] *Id.* at 58,330. (NSP funds, with exceptions stated in HERA, will be subject to 24 C.F.R. part 570 subparts I, A, C, D, J, K, O (2008)).
[12] *Id.* at 58,337-8.
[13] *Id.* at 58,340.
[14] *Id.* at 58,340-1.
[15] While an NSP-assisted property may be held in a land bank, it may not be held in one for more than ten years "without obligating the property for a specific, eligible redevelopment of that property in accordance with NSP requirements." *Id.* at 58,335-6.
[16] HUD NSP Notice, *supra* note 5.
[17] HUD NSP Notice at 58,336; see also 24 C.F.R. § 91.320(d)(requiring state CDBG action plan to include method of distributing funds to local governments and nonprofits in accordance with Consolidated Plan). Additionally, states will have to review and audit any subrecipients, designated public agencies, and units of general local government as necessary to meet legal requirements. The state is responsible for enforcement of these requirements among its subrecipients, designated public agencies, and units of general local government. Records must be kept of all of the state's activities.
[18] HERA § 2301(c)(3)(B); HUD NSP Notice at 58,340-1.
[19] HERA § 2301(c)(3)(E); HUD NSP Notice at 58,340-1.
[20] HERA § 2301(d)(4); HUD NSP Notice at 58,340-1.
[21] HERA § 2301(d)(4); HUD NSP Notice at 58,340-1.
[22] HERA § 2301(d)(4).
[23] *Id.* § 2301(f)(3).
[24] 24 C.F.R. § 91.5 (2008).
[25] HUD NSP Notice at 58,334.

While the CDBG program allows grantees to use up to 30% of their grants for activities other than the low- and moderate-income objective, the NSP does not. Unlike the regular CDBG program, NSP grantees cannot use NSP funds to prevent or eliminate slums and blight or address urgent community development needs.[26] Instead, grantees have four options for activities that may meet the low- and moderate-income requirements:

- The grantee may provide or improve residential structures to be occupied by a household whose income is at or below 120% of AMI.
- The grantee's activity may serve an area in which at least 51% of the residents have incomes at or below 120% of AMI.
- The activity may create or retain jobs for families of qualifying income.
- The activity may serve only those families whose incomes are at or below 120% of AMI.[27]

In addition to generally serving families at 120% of AMI or below, HERA requires that grantees use at least 25% of their allocated funds to house families whose income does not exceed 50% of AMI.[28] Grantees will have to document how they intend to comply with this requirement. Given the limited amount of funds available under the act, it will be difficult to achieve this requirement without other sources of funding, such as project-based vouchers and Low-Income Housing Tax Credits. HUD will review compliance at the beginning and end of the grant period.[29]

While outright affordability requirements are useful tools, they do not do as much as is necessary to aid low-income families. Other NSP program requirements may help advocates push for greater affordability. For example, grantees will be required to continue to certify that they are complying with their duty to affirmatively further fair housing. HUD's rules encourage grantees to reassess their Analysis of Impediments to determine if the current realities of the housing market necessitate any changes.[30] In neighborhoods where the resident composition includes members of protected groups, fair housing requirements intersect with affordability goals and can serve as an additional tool to obtain greater housing affordability. Other required certifications include consistency with the Consolidated Plan, compliance with Section 3 requirements,[31] and compliance with relocation requirements.[32] Although it is not mentioned in the regulations, advocates should urge grantees to coordinate the action plan with the local public housing agency plan in order to coordinate the use of NSP funds with other programs such as project-based vouchers and Section 8 Homeownership. Advocates have the potential to dramatically affect the use of the money, as well as the quality and affordability of the resulting housing and communities, by critically evaluating these certifications, incorporating local nonprofit oversight or management into the Section 3 program, and helping create and implement realistic supportive services and assistance for relocation plans.

Substantial Amendment: Action Plan

All CDBG grantees that have received an NSP allocation must submit a substantial amendment to their Consolidated Plan action plans by December 1, 2008.[33] HUD will use the Disaster Recovery Grant Reporting System to accept and track NSP program action plans. Because the regulations went into effect September 29, 2008, grantees should already be in the process of drafting the amendments.

Submission Process

Grantees may either act alone or pool their resources in one of three ways. They may submit a joint request with contiguous entitlement communities in a metropolitan area or with their state agency.[34] Each grantee may also apply for the entire grant and enter into a subrecipient agreement with either another jurisdiction or a nonprofit that will administer all or part of the grant.[35] Existing cooperation agreements will apply for the purposes of NSP funding.[36] Local nonprofits with the capacity to perform such administration, or with expertise or missions in one or more aspects of the performance areas, should carefully consider the possible benefits of such an arrangement.

Grantees are also responsible for ensuring that all members of the public have equal access to the action plans, including, in a state-wide plan, people from the entire geographic area affected. Local advocates can play critical roles in convening and facilitating such involvement through structures such as state-wide resident associations and community empowerment networks. The proposed action plan must be accessible on the Internet and in more traditional ways, such as on paper. Grantees

[26] *Id*. at 58,335.
[27] *Id*.; Documentation requirements are the same as those as required by 24 C.F.R. §§ 570.208 and 570.483.
[28] HERA § 2301(f)(3)(A); HUD NSP Notice at 58,335-6.
[29] HUD NSP Notice at 58,335-6.
[30] *Id*. at 58,342.
[31] *See* NHLP, *Increasing Employment and Job Training for Low-Income Residents Through Section 3*, 35 Hous. L. Bull. 152, 152-7 (July 2008).
[32] HUD NSP Notice at 58,342-3.
[33] Note that grantees may apply for less than the allocated amount, and "HUD encourages each local jurisdiction receiving an allocation to carefully consider its administrative capacity to use the funds within the statutory deadline versus the capacity of the state administrator." HUD NSP Notice at 58,332.
[34] *Id*.
[35] *Id*.
[36] *Id*.

are responsible for ensuring that the proposed NSP program information is available in languages necessary for limited English proficiency individuals in the area to understand.[37]

The public will only have fifteen days to comment on the plans—shortened from the usual thirty days for Consolidated Plans.[38] The final action plan must include a summary of public comments.

The public comment period provides a short but critical opportunity for advocates to push for NSP activities that will address the needs of low-income families. Advocates in each grantee jurisdiction should make it their responsibility to track the publication of the action plan and then alert others within the affected community. The loss of even a few days will be costly if mobilizing a grassroots response, mass media attention and/or political action is required

If a grantee submits an incomplete or inconsistent action plan, it will have the opportunity to resubmit an updated plan within forty-five days of the first disapproval or February 13, 2009, whichever is earlier.[39] The regulations are silent on whether the grantee must again submit the plan for public comment, but advocates should attempt to insert this understanding into the initial action plan in case the need arises.

Contents

The action plan substantial amendments should include four general parts:

- information about needs, distribution, use of funds, and definitions;
- information by activity describing how the grantee will use the funds;
- the general terms under which assistance will be provided; and
- contact information for grantee program administrators.

The first section should include data on the needs of the jurisdiction, a narrative regarding how the grantee's use of funds will meet HERA's requirements on helping areas with the most need, and definitions of certain terms such as "blighted structure" and "affordable rents."[40] Moreover, the first section must include a description of how the grantee will ensure continued affordability for NSP-assisted housing.[41] It is especially important for advocates to participate in crafting this section, as the definitions and descriptions will control the income targeting, location, subsidy depth and affordable lifespan of the sold, rented or rehabilitated residences. These definitions will also help predict whether the agency is focused upon meeting the goal that 25% of funds must assist families at or below 50% of AMI.

The second section of the substantial amendment should describe how the grantee will use its funds. This section is also vital for advocate participation. The grantee will identify which NSP and CDBG eligible uses of funds and activities it will engage in.[42] The plan must identify which areas with the highest need are addressed by the intended activities and the expected benefit for low- to middle-income families.[43] Additionally, the grantee must include details about performance measures, budget, start and end dates, and who will carry out each activity.[44] The grantee may identify other areas of need.

Third, the substantial amendment must include the terms of assistance.[45] These terms include, if applicable, the discount required to buy foreclosed properties and the range of interest rates.[46] This section must state whether the beneficiaries will be homeowners or renters and how long the assistance will last.[47] If housing is built, the grantee must explain how it will ensure continued affordability.[48] Finally, this section must identify which proposed activities benefit low-income people.[49]

The fourth and final section of the plan must include contact information for the program administrators.[50] Once these sections are filled out, the plan is submitted to HUD and must be posted prominently on the grantee's website.

Acquisition, Rehabilitation Standards, Relocation, and Sale

A key component of the NSP is the grantee's authorization to acquire foreclosed properties. This component includes a number of restrictions. An NSP grantee can only buy a foreclosed-upon home or residential property at a discount from the current market value of the property.[51] The Uniform Relocation Act (URA) requires fair market value, but HERA trumps.[52]

Grantees must be careful to ensure that such property acquisitions are voluntary, because taking the property by eminent domain would require paying market value under the Fifth Amendment Takings Clause. Grantees must comply with the provisions of the URA whenever there are residents in an acquired property.[53]

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37 HUD NSP Notice at 58,333.
38 *Id.*
39 *Id.*
40 *Id.* at 58,333.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 58,334.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 HERA § 2301(d)(1); HUD NSP Notice at 58,330.
52 49 C.F.R. § 24.102(d)(2008); HUD NSP Notice at 58,334.
53 42 U.S.C. § 5304(d); HUD NSP Notice at 58,343.

When a grantee acquires foreclosed properties, it is not required to engage in one-for-one replacement of low- and moderate-income housing. Instead it will have to follow the tepid requirements of the action plan which must state the number of low- and moderate-income units that are expected to be demolished or converted, the number of affordable housing units that will be made available (defined as up to 120% of AMI), and how many units will be available to families with an income less than 50% of AMI.[54] Clearly, this has the potential for eliminating housing currently affordable to low-income families. Here again, local advocacy in the creation of the action plan could prove critical in minimizing unit loss.

Advocates should encourage action plans that allow current low-income residents to remain in place, to return to their former homes after redevelopment or, at the very least, return to other homes in the redeveloped community.

HERA charges NSP grantees with rehabilitating foreclosed-upon homes and residential properties. In doing so, grantees must comply with all laws, codes, and regulations "relating to housing safety, quality, and habitability."[55] HERA also defines rehabilitation as requiring the grantee to increase energy efficiency or provide renewable energy resources for foreclosed-upon homes and residential properties.[56] HUD encourages grantees to incorporate in their plans green building for increased sustainability.[57] Grantees must describe their rehabilitation plans in their action plan.[58]

The rules and regulations of the NSP aim to ensure that if residential property is resold as a homeownership unit, the cost will be less than the cost of buying and rehabilitating the property.[59] Therefore, a grantee can purchase a foreclosed property only at a discount of at least 5% from the current market-appraised value.[60] When a grantee aggregates its purchases, the overall discounted price should be at least 15% for the initial eighteen-month grant period.[61]

Local advocates may wish to encourage action plans that allow current low-income residents to remain in place, to return to their former homes after redevelopment or, at the very least, return to other homes in the redeveloped community. Advocates should also consider pursuing plans that require grantees to contract with capable local nonprofit developers or encourage competition for contracts among trusted local nonprofit developers or owners. Such developers and owners will likely be experienced in merging combinations of subsidies to increase the depth and length of the affordability.

Reporting

Reporting requirements are vital for transparency and provide advocates an opportunity to maintain pressure on grantees to create affordable housing as part of their NSP activities. HUD will require that NSP grantees submit quarterly reports for fifteen months and that they post them prominently on their websites.[62] The quarterly reports must contain information on the use of the funds, such as stating the benefits to low- and moderate-income families, and the sources of non-NSP funds.[63] Housing advocates should ensure that these reports include information on whether the grantee is meeting its goals for serving families at or below 50% of AMI. Additionally, grantees will have to submit monthly reports on their expenditures and obligated funds until at least the entire amount of the grant has been obligated.[64] Again, advocates should urge that these reports be made publicly available.

Conclusion

While the Neighborhood Stabilization Program is primarily focused on returning foreclosed-upon or abandoned residential property to active use—as opposed to preventing foreclosure or eviction—it nevertheless provides fertile ground for immediate and active engagement of organized local residents and advocates. ■

[54] HERA § 2301(d)(2); HUD NSP Notice at 58,339.
[55] HUD NSP Notice at 58,338.
[56] HERA § 2301(d)(2).
[57] HUD NSP Notice at 58,338.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 58,482.
[61] *Id.*
[62] *Id.* at 58,341.
[63] *Id.*
[64] *Id.*