

HUD to Revise Policy for Protecting Tenants Facing Mortgage Maturity or Expiring Restrictions

For several years, housing advocates have been working to highlight the need for protections for unassisted tenants residing in federally supported properties when the federal mortgage matures and the accompanying rent and use restrictions expire.¹ Over the next decade, mortgages on thousands of properties subsidized by the Department of Housing and Urban Development (HUD) and Rural Development will approach the end of their 40-year terms.² This article discusses recent efforts by Congress and HUD to assist tenants in properties facing mortgage maturity or expiring restrictions.

Background

At maturity of the mortgage or restriction, both the properties and tenants, especially those without project-based rental assistance, face an uncertain future. If the federally restricted rents are below market levels, unassisted tenants face possible rent increases, the significance of which will depend upon the size of the gap between the assisted and market rents. Unlike the situation posed by mortgage prepayments or Section 8 opt-outs, federal law does not guarantee any prior notice or subsidies for unassisted tenants when the associated restrictions expire. Some unassisted tenants may have limited protections under state or local notice or rent control laws. Until recently, there were no special tools to preserve the affordability of these properties.

In the fiscal year (FY) 2012 appropriations bill, Congress provided a \$10 million set-aside of the voucher renewal account's tenant protection funds for tenants in buildings with expiring mortgages, contracts or use restrictions who are not otherwise eligible for assistance.³

¹For general background, see NHLP, *Mortgage Maturity Problem Still Awaits Congressional Action*, 41 HOUS. L. BULL. 151, 160 (July 2011), <http://nhlp.org/files/Mortgage%20Maturity%20Problem.pdf>.

²HUD estimates that expiring restrictions could affect about 190,000 units in 1,900 properties during the period of 2012 through 2020. HUD, *Impact of Provision of Enhanced Vouchers at Mortgage Maturity* (undated document prepared by HUD in late 2010) (on file with NHLP). About 72,000 are unassisted by other federal housing subsidies, thus posing a special risk to residents. *Id.* at 2. In fiscal year 2012 alone, the National Housing Trust has estimated that almost 13,000 units financed through various HUD-subsidized mortgage programs but without renewable project-based rental assistance face expiring restrictions. National Housing Trust, *Unassisted Units in Subsidized Properties Maturing In [Year]* (Oct. 2010) (on file with NHLP).

³Pub. L. No. 112-55, 125 Stat. 677-78 (Nov. 18, 2011) (language governing tenant protection vouchers in the Tenant-Based Rental Assistance account).

Advocates across the nation, particularly in Illinois and Massachusetts, worked closely with Senators Richard Durbin (D-IL) and Scott Brown (R-MA), who advocated for these protections.

The final FY 2012 provision authorizes HUD to provide tenant protection assistance, through tenant protection vouchers or enhanced vouchers, to tenants residing in expiring properties located in low-vacancy areas who face rents greater than 30% of household income. Tenants in three types of HUD-assisted housing are eligible for these protections, including those residing in properties with: (1) maturing HUD-insured, HUD-held, or Section 202 mortgages that require HUD permission to prepay; (2) expiring rental assistance contracts for which tenants are not eligible for tenant protection assistance under existing law; or (3) expiring affordability restrictions accompanying a HUD mortgage or preservation program. This tenant protection assistance also could be utilized as project-based vouchers (PBVs),⁴ which would preserve the affordability of the development, while providing tenant mobility. The statute directed HUD to issue implementation guidelines by mid-March, including defining eligible at-risk households.

HUD Guidance

On March 16, 2012, HUD provided guidance in the form of HUD Notice PIH 2012-19.⁵ The notice contained several problematic features:

- providing only \$6 million of the \$10 million authorized;
- limiting tenant protection to properties with mortgages maturing or affordability restrictions expiring only during FY 2012, not in prior years, placing many households at risk;
- presumptively restricting eligibility to those on a list of properties in low-vacancy areas;⁶
- requiring that owners apply by May 4, 2012, and that PHAs be willing to participate in order for tenants to receive protections;⁷
- using a lottery to select among otherwise eligible applications if funding is oversubscribed; and

- if an owner seeks to project-base the tenant protection assistance, and the ordinary 25% of units limitation under the PBV program applies, the owner would decide which tenants receive enhanced vouchers and which would receive PBVs, despite the possible significant impact of this choice on the rent paid by tenants.

Responding to concerns expressed by the National Housing Law Project (NHLP) and allied tenant organizations, as well as legislative proponents of the protections, HUD recently has published another notice⁸ withdrawing the prior notice and announcing the Department's intent to issue a revised notice in the near future. In separate conversations, HUD has indicated that it will revise at least provisions on two issues raised by advocates: (1) the lack of protections for tenants in properties with mortgages or affordability restrictions that expired prior to October 1, 2011 (particularly those in Chicago and Massachusetts who worked tirelessly to obtain tenant protection funds); and (2) determining the relative need of applications, rather than using a lottery. Hopefully, HUD also will revisit other issues, such as the lack of any procedure to entertain applications where tenants are in need, but owners fail to apply. HUD has stated that the new guidance will be issued for public comment, with final guidance issued shortly after the close of the comment period.

At the same time, although election-year prospects for appropriations remain decidedly uncertain, the Senate appropriations bill for FY 2013 contains a similar provision for next year that would set aside up to an additional \$5 million for this purpose.⁹ NHLP will continue to follow the expiring use issue and report on future developments. ■

⁴Under the authority of 42 U.S.C. § 1437f(o)(13) (2012).

⁵HUD, *Implementation of Funding for Tenant-Protection Vouchers for Certain At-Risk Households in Low-Vacancy Areas*, Notice PIH 2012-19 (Mar. 16, 2012), http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/publications/notices.

⁶The notice provided that HUD would consider unlisted properties if owners verified their qualifications and low-vacancy location.

⁷Owners would make initial determinations of rent overburden and low-income eligibility for unassisted tenants, and PHAs would make final determinations.

⁸HUD Notice PIH 2012-20 (May 2, 2012).

⁹S. REP. NO. 112-157, at 93-94 (Apr. 19, 2012).