

ACTION STRATEGIES
TO IMPLEMENT THE 215 ALLIANCE COURT DECISION AND THE
FY 2000 HUD APPROPRIATIONS ACT
[rev. 2-15-00]

Two recent developments provide new support for actions to benefit tenants with enhanced vouchers and tenants in buildings where the termination of a Section 8 contract has occurred or is pending.

First, in the Minnesota case *215 Alliance v. Cuomo*, 61 F.Supp. 2d 879 (D. Minn. 1999), Federal District Judge Donovan Frank made two important rulings:

- That HUD had violated federal law which required it to cover subsequent rent increases for tenants with enhanced vouchers.
- That HUD violated federal law by allowing an owner to terminate a Section 8 contract with a notice that did not specify the reasons for the termination *and* that did not clearly notify the tenants that the owner was not going to renew the contract.

HUD has not appealed this decision, which means that, at least in Minnesota, it is the law.

Second, on October 20, 1999, the President signed the FY 2000 HUD Appropriations Act (Pub. L. No. 106-74, Sec. 538, establishing new Sec. 8(t) of United States Housing Act, covering subsequent rent increases) which contains enhanced voucher language that incorporates the substance of the *215 Alliance* decision. Because this provision is a clarification of prior law (see House Rep. 106-286), our position is that it is retroactive in effect, and affected tenants are owed reimbursements. The new law also eliminated the requirement that an owner's notice of nonrenewal of a Section 8 contract state the *Reasons* for the nonrenewal, which was one feature of the court's decision. However, the new law *does not* affect the court's ruling that owners must give clear notice of their intent to not renew a Section 8 contract, or the validity of opt-out notices served prior to October 20, 1999.

Strategies for enhanced vouchers.

The new law and the *215 Alliance* court decision both require that HUD pay enhanced voucher rent increases if the PHA determines that the new rents are reasonable. This concept applies retroactively to tenants who received enhanced vouchers. Enhanced vouchers were provided to eligible tenants because: (a) the owner prepaid the project's subsidized mortgage, (b) the owner initially raised the rent above the FMR or voucher payment standard to a market level determined reasonable by the PHA; (c) the new rent exceeded 30% of the tenant's adjusted income, and (d) the owner instituted subsequent rent increase(s) that were not paid by HUD or the PHA. The following steps can be used to seek relief for those tenants that were harmed.

- Determine which projects meet the above criteria. While we are trying to obtain this information nationally, you can request it from the local HUD office or from the local PHA. A list of properties prepaid prior to 12/31/98 can be obtained for your state at www.nhtinc.org. (Use the link to "Opt-Out Data and Prepayment Statistics", click on the "additional link" to Prepayment Statistics by State and fill in your state.) Since this problem involves HUD's failure to cover subsequent rent increases, a list through 12/31/98 is probably sufficient, since usually the second rent increase could not kick in before 12/31/99.
- From this raw list of prepayments, you'll need to determine:
 - (1) whether enhanced vouchers were provided, and
 - (2) whether there has been a *subsequent* rent increase ABOVE the local voucher payment standard that HUD did not cover (illegally). In some cases, you can tell this from the NHT data about subsequent rent increases, but often it's likely to be an estimate or even incorrect, and in any case, you won't necessarily know (from this info) the local voucher payment standard.
- Contact the PHA in the jurisdiction of the affected property with the more specific questions about enhanced vouchers and rent levels.
- Send a written demand to the local HUD office (usually the HUD Hub Director of Housing or the Regional Secretary's Representative), with copies to Secretary Cuomo and HUD General Counsel Gail Laster, that HUD immediately implement the new law and the court decision by identifying all affected tenants, including those who may have moved from the project, authorizing the PHA to increase subsidies to cover the increased rents and reimburse tenants for all prior rent increases which HUD had previously refused to pay, and providing other appropriate relief to correct the harm suffered by tenants who moved (moving costs, increased rent costs, the right to move back into the project, etc.).
- Enlist the support of the local PHA in this effort, since they are also bound by the new act and will not want to pay the implementation costs out of their existing budgets or be sued.
- Enlist your Senators and federal Representatives to put pressure on HUD to implement the new law and court decision immediately and retroactively. [Attached is a sample draft letter.]
- If HUD fails to respond promptly, sue HUD and the PHA to enforce compliance and for relief for the affected tenants. You can use the *215 Alliance* complaint (available at < www.mhponline.org > , click link to AAffordable Housing Info@, then Apreservation@, and then Apreservation litigation@), revised to account for the impact of the new legislation. You may also have to take action to defend tenants facing eviction for nonpayment of the currently unaffordable rents. If you need help, Ann Norton and Jack Cann at the Housing Preservation Project (MN) or Jim Grow at NHLP are willing to assist where possible.

Strategies for terminations of Section 8 contracts.

The *215 Alliance* judge determined that owners who want to terminate (nonrenew) a Section 8 contract must give a notice (now one year in length) that clearly informs the tenant that they are not going to renew B even if Congress approved funding for the next year - and that states the reasons for the termination or nonrenewal. Although the new law eliminated the requirement that the termination notice state Areasons®, it did not change the requirement that the termination notice must clearly inform the tenants of the owner=s intentions.

There are two categories of projects affected. The first are those where the terminations are *pending*, that is, the owners gave a one-year notice before the effective date of the new law, October 20, 1999, but the termination date has not passed. Under *215 Alliance*, it is clear that such notices must clearly state both the owner=s intention not to renew *and* the reasons for the nonrenewal. A notice failing on either account is illegal. The second category includes projects with defective notices where the Section 8 contract termination *has already occurred*, i.e., the one year has passed. These terminations are also subject to challenge, but the remedy is less clear.

For either type of property, the notice claim may provide important relief to affected tenants. First, it may create additional time and pressure to permit other preservation solutions (e.g., a Amark-up to market under HUD=s new policy or a nonprofit acquisition). Second, it may provide beneficial results for tenants in delaying the date of their termination until FY 2000, when they become eligible for enhanced voucher protections that may not have existed previously (e.g., straight opt-outs without a subsidized mortgage prepayment).

The following steps can be used to seek relief for those tenants that were negatively affected by either of these situations.

- Determine which projects meet either of the above criteria by getting the list of opt-outs as of 12/31/98 from the NHT website listed above re prepayments and enhanced vouchers. Get copies of the termination/nonrenewal notices and review them carefully. This information can be requested from the local HUD office (avoid FOIA if you can because it may slow down the response). Copies of the notices themselves can also be obtained from the tenants.
- For pending terminations with notices filed prior to October 20, 1999, send a written demand to the local HUD office (usually the HUD Hub Director of Housing or the Regional Secretary=s Representative), with copies to Secretary Cuomo and HUD General Counsel Gail Laster, that HUD immediately notify the owners that the notices are defective and void and that a new notice that complies with the court decision and the law must be provided in order for HUD to consider approving a termination. (Of course, all other notice requirements apply, which means that the year time period will only begin to run with a complete and proper notice. This is essentially the position that HUD has taken in Notice H 99-36 with respect to termination notices filed in FY 2000.)

- For terminations that have already occurred, the letter to HUD should demand appropriate remedies, which can include reinstatement of the contract and other financial relief to compensate the affected tenants, etc.
- For new notices filed after October 20, 1999, ensure that the notice clearly states the owner's intent and that the owner does not move to terminate after filing a one-year notice of intent to renew. If either of these defects occurs, send a similar written demand to HUD.
- Enlist your state and local congressional delegation to put pressure on HUD to implement the new law and court decision immediately and retroactively.
- Sue HUD to enforce compliance and obtain relief for the affected tenants. You can use the *215 Alliance* complaint, revised to account for the impact of the new legislation. Again, if you need help, Ann Norton and Jack Cann at the Housing Preservation Project (MN) or Jim Grow at NHLP are willing to assist where possible.

Here's some text that you can edit and cut and paste as you please, for a draft letter that the tenants can provide to their legislators to get HUD to act quickly to provide retroactive enhanced voucher benefits. You may want to use parts for any initial letter from the tenants to the legislator.

[DRAFT LETTER FROM LEGISLATOR TO CUOMO RE RETRO ENHANCED
VOUCHER BENEFITS]

Dear Mr. Secretary:

I am writing you with a matter of urgent importance to many very low-income HUD-assisted tenants in [your state] and elsewhere around the country, specifically the Department's failure to follow the law in adjusting "enhanced voucher" subsidies provided over the past few years to certain HUD tenants in prepayment buildings. Tenants who were supposed to be protected against displacement by this assistance have been driven from their homes by HUD's inaction. I do not believe that you intend this result, so I look forward to your expeditious action.

One such situation involves a property in [town], [give name of property]. [Provide problem statement, with key facts re number of units, tenant characteristics, etc.]

The subsidized mortgage of the property was prepaid in [date], and [if applicable] the Section 8 contract covering ___ units expired on [date]. At that time, HUD provided the tenants with "enhanced vouchers" administered through the local housing authority, with special payment standards set at the new post-prepayment market rent levels for the property. When the owner subsequently increased rents by about \$___ per unit per month [starting date of subsequent rent increases], and again by \$___ per unit per month in [next date, if any], HUD and the local PHA incorrectly took the position (per HUD Notices PIH 98-19 and 99-16) that the enhanced voucher payment standards were not adjustable to cover these later rent increases.

HUD's position has been ruled illegal by a federal court. *215 Alliance v. Cuomo*, 61 F.Supp. 2d 879 (D. Minn. 1999). Congress has also recently clarified that HUD's position was contrary to law. See Pub.L. No. 106-74, Sec. 538, establishing new Sec. 8(t) of United States Housing Act, covering subsequent rent increases ("as such rent may be increased from time to time", subject to PHA rent reasonableness test). The legislative history of this provision indicates that it was a clarification of Congress' position that HUD's interpretation was illegal. House Rep. 106-286 stated: "The Fiscal Year 1997 VA, HUD and Independent Agencies Appropriations Act created a special section 8 enhanced voucher to provide a higher subsidy for residents in properties where an owner prepays the mortgage and then charges a higher rent. When this language was included, the Committee intended that it cover initial rent increases, as well as subsequent rent increases, where the rent is reasonable according to the public housing authority. The Administration, however, has chosen to interpret the law to cover only one rent increase rather than subsequent increases. To clarify any ambiguity, language is included in the Administrative provisions to ensure that subsequent rent increases, if reasonable, are covered by the enhanced voucher."

It is inexcusable for HUD not to provide prompt relief to tenants who have been, and continue to be, harmed every day by the economic impact of HUD's illegal policy. Every day of delay means that needy tenants, many of whom are elderly or people with disabilities, cannot afford to stay in their homes or must divert precious funds to rent at the expense of other life necessities.

Mr. Secretary, you must act promptly to provide the funds required by law to avoid continued extreme hardship to these tenants and all other tenants that have received enhanced vouchers, as well as unnecessary litigation. Please advise me quickly with your plan to do so.

[YS, Concerned Legislator]