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Tenants' Rights**

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Originally published in 1981, NHLP's Green Book has proven indispensable to housing law practitioners across the country.

Dubbed the Green Book by users across the country, *HUD Housing Programs: Tenants' Rights* is a comprehensive, issue-oriented guide to the federal housing programs. Last published in 1994, the 3rd Edition has been reworked, updated and expanded to cover recent sweeping changes from Congress, HUD and the courts.

It is the only book that explains and analyzes all applicable laws central to effectively representing tenants assisted under the HUD programs. In a single volume, it provides a practical road map through the complexity of the federal housing programs, including public housing, subsidized rental housing, vouchers, section 8 homeownership, and others. Evictions, resident participation, loss of units and other key issues are covered in depth as well.

Meticulously researched and clearly written by expert NHLP staff attorneys and outside contributors, the Green Book is a unique and invaluable resource for anyone working within the scope of the federal housing programs:

- attorneys and paralegals
- fair housing and other public interest advocates
- HUD offices
- public housing authorities
- nonprofit housing and community organizations
- private owners and managers
- local and state housing agencies
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The 3rd Edition contains the most recent applicable authorities for virtually all common problems encountered in a federal housing landlord-tenant relationship, including state and federal cases, federal statutes and regulations, and HUD Handbooks, Notices and opinion letters.

HUD Housing Programs: Tenants' Rights is available now. See the Publication Order Form for prices.

CD ROM

The 3rd Edition of the Green Book features a complimentary CD-ROM that contains a searchable table of more than 2,000 cases. It also contains full PDF texts of selected hard-to-find documents referenced in the manual, including HUD circulars, notices, forms, memoranda and unreported court opinions.

**SPECIAL
FEATURE**

AN ESSENTIAL RESOURCE FROM THE NATIONAL HOUSING LAW PROJECT

**NATIONAL
HOUSING LAW
PROJECT**



advancing housing justice

March 2006

Dear *Housing Law Bulletin* Readers:

In March 1971, the National Housing and Economic Development Law Project of the Earl Warren Legal Institute at Boalt Hall, University of California at Berkeley, published the first issue of the *Law Project Bulletin*. As that first issue explained, the *Bulletin* was created to assist an emerging cadre of housing attorneys among legal services programs across the country. Its purpose was to “call attention to new developments offering opportunities for effective legal or community action” to advance the housing rights of low-income families.

The *Law Project Bulletin* eventually became the *Housing Law Bulletin*, now published by the National Housing Law Project, an independent housing law and policy center.

In this issue, we mark the thirty-fifth anniversary of the *Bulletin* with a brief retrospective. We believe that, in some sense, the *Bulletin* has been a running account of the history of housing for low-income families and housing advocacy in the United States. In preparing this sampling of prior issues, we have been struck by the ebb and flow of victories and setbacks and victories again over the years. While these may currently be unpromising times for housing justice, there have been unpromising times in the past, as well as times of success and progress.

In a guest commentary reprinted in the *Bulletin* in 2003, Wayne Sherwood wrote:

Political and social conditions can change. I hope that in the not-too-distant future our nation will realize that in order to survive as a society, we need to acknowledge that we are all in the same boat, rich and poor, and need to pay attention to the needs of all Americans, not just the top 10 percent. There once was a day when Americans were glad to help each other build their houses. Maybe that day will come again.

When that day does come, it will be in no small part because of the hard work of the many housing advocates across the country that the *Bulletin* was created to serve.

Gideon Anders
Executive Director

Housing Law Bulletin Retrospective

March 1971

ANNOUNCING THE BULLETIN

Over the past several months Legal Services Programs in all parts of the country have designated staff attorneys who will be working all or much of their time in the areas of housing law and/or community-based economic development. This Bulletin will be sent monthly to each of them, and to other individuals and organizations who request it, to call attention to new developments offering opportunities for effective legal or community action. It will generally key into programs and strategies discussed in detail in this Project's Handbook on Housing Law, copies of which have been broadly distributed to Legal Services lawyers.* In all cases the Project will provide, on request, further detail on the matters discussed and in appropriate cases support for related legal services actions.

February 1979

West Virginia Supreme Court Adopts Implied Warranty of Habitability

West Virginia has become the most recent state to judicially recognize an implied warranty of habitability in residential rental agreements. In an opinion filed on December 12, 1978, the West Virginia Supreme Court officially joined the approximately 40 other American jurisdictions which have rejected the outmoded doctrine of *caveat lessee* by case or statute. *Teller v. McCoy*, ___ W. Va. ___, ___ S.E.2d ___ (No. CC900, W. Va. Sup. Ct., Dec. 12, 1978). The *Teller* opinion is of interest primarily because of its expansive language concerning the proper measurement of damages for a landlord's breach of the implied warranty, though the case also supplies other essential remedies for an aggrieved tenant that were omitted by the state legislature when passing a statutory warranty some nine months ago (W. Va. Code §37-6-30, March 11, 1978).

March 1974

WARRANTY OF HABITABILITY ESTABLISHED IN CALIFORNIA

In the case of *Green v. Superior Court*, the California Supreme Court held that an implied warranty of habitability in residential leases exists in California as part of the common law, and that breach of such warranty may be raised as a defense in an unlawful action. In reaching its decision, the Court also found that the repair and deduct provisions of Civil Code Sections 1941 and 1942 are not exclusive remedies for tenants, and do not preclude the development of the common law doctrine of implied warranty of habitability.

In reaching its holding that the common law implies a warranty of habitability in residential leases, the Court compared the tenant's position to that of a consumer.

May 1974

HOUSING LAW SECTION

CONSTITUTIONAL RIGHT TO JURY TRIAL IN EVICTION PROCEEDINGS GRANTED BY U.S. SUPREME COURT

On April 24, 1974, the United States Supreme Court decided *Pernell v. Southall Realty* which is the high Court's first decision in private tenant-landlord law since *Lindsey v. Normet*² decided in 1972.

Justice Marshall's opinion³ held that the Seventh Amendment to the United States Constitution guarantees both parties to an action to recover possession of rental property the right to trial by jury.

September 1983

JUSTICE PREVAILS: WRIGHT v. ROANOKE

For those of you who have followed the saga of private rights of action, January 14, 1987, should mark a most important turning point in the long struggle to ensure access to federal courts for the intended beneficiaries of the federal housing programs. On that day, the United States Supreme Court reversed the Fourth Circuit's decision in *Wright v. Roanoke Redevelopment and Housing Authority*, 771 F.2d 883 (1985), *rev'd*, 55 U.S.L.W. 4119 (Jan. 14, 1987). *Wright* was the third in that court's trilogy of decisions closing the federal courthouse doors to public housing tenants. See *Perry v. Housing Authority of Charleston*, 664 F.2d 1210 (4th Cir. 1981); *Phelps v. Housing Authority of Woodruff*, 742 F.2d 816 (4th Cir. 1984). By reversing the Fourth Circuit, the Supreme Court has reinstated, at least in the Section 1983 context, the common sense principle which formerly prevailed, *i.e.*, that if federal law has created substantive rights for private individuals, those individuals should be able to sue in federal court when their rights have been violated.

May 1986

NEW REGULATIONS AFFECTING HUD AND FmHA PROGRAMS DENY ELIGIBILITY TO UNDOCUMENTED PERSONS

On April 1, 1986, HUD issued final regulations implementing a 1981 statute (42 U.S.C. § 1436a) which makes certain people who are not citizens of the United States ineligible for some of HUD's housing programs. 51 Fed. Reg. 11,198-11,231 (April 1, 1986). The new regulations are a product of a long, tortuous and controversial rulemaking process. They will introduce new levels of complexity in the administration of the programs, particularly relating to the admissions process and the recertification process. The complexity will arise not merely for undocumented aliens but also for immigrants who are lawfully present and for citizens as well. As a result, it is important for everyone to clearly understand how the new rules are supposed to work in order to lessen the confusion they will inevitably create. Thus, part of this article will be a rather laborious explanation of the content of the regulations and their application to particular situations. There are also significant questions about the validity of the new rules which will be discussed at the end of this article.

January 1987

ON THE STREETS: A LOOK AT HOMELESSNESS AND WHAT IS BEING DONE ABOUT IT

The homeless living and dying on the streets of our cities are a standing challenge to the moral legitimacy of this Nation. Right now the homeless are the shame of America.

These words were spoken by Bob Hayes, counsel to the National Coalition for the Homeless, at a hearing before the House Subcommittee on Housing and Community Development, 97th Cong., 2d Sess. (Dec. 15, 1982), p. 60, on "Homelessness in America" (hereinafter, "Hearing"). During a day in which Congress heard countless eloquent witnesses tell of the enormity of the problem of homelessness and the small but often heroic steps being taken to alleviate it, Mr. Hayes' summation of the moral claim of the homeless drew applause. In truth, though, every person who spoke that day, from soup kitchen workers to members of the Salvation Army, government agencies, and church groups, impliedly or openly raised the question of the worth of a society that tolerates allowing its members to sleep on the streets for want of a home.

March 1984

VERMONT ADOPTS WARRANTY OF HABITABILITY

The Supreme Court of Vermont has recognized the doctrine of implied warranty of habitability in residential leases whether oral or written. *Hilder v. St. Peter*, No. 82-440 (Vt. Sup. Ct. Feb. 3, 1984), Clearinghouse No. 34,280.

The court's opinion is modeled after Judge Skelly Wright's seminal opinion in *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970), and specifically holds that the warranty of habitability is implied into every residential lease in the state of Vermont, whether oral or written, and that the landlord warrants that the premises are in habitable condition at the inception of the tenancy and will remain so throughout the duration of the tenancy. The warranty specifically covers latent and patent defects and applies to both term and at will tenancies. Common areas of multifamily housing are also included within the landlord's responsibility for maintaining decent, safe, and sanitary premises. It is specifically stated that the warranty of habitability cannot be waived by a tenant by oral or written agreements. Moreover, tenants will not be held to have waived the warranty of habitability even if they enter the tenancy with knowledge of the defect, so long as the defect involves an essential facility within the rental premises.

June 1995

DRASTIC CUTS IN LEGAL SERVICES FORCE DEEP CUTS IN HOUSING LAW PROJECT STAFF AND SERVICES

Dear Friends:

In response to the devastating slashing of our 1995 Legal Services Corporation ("LSC") grant, and in anticipation of zero LSC funding for national support in 1996, the Project has been forced to take immediate steps to reduce staff and services.

The last day of service for many Project staff will be July 31, 1995. The legal services community is losing the talent, dedication and decades of experience that these departing Project staff have unselfishly rendered on behalf of the cli-

ent community we all serve. We will never forget them or the contributions they have made.

Effective August 1, 1995, the Oakland office will be reduced to the following staff: Manuel Romero, Director; David Bryson, Deputy Director; Jim Grow, Staff Attorney; Eleyette Worth, Finance and Administration; and Amy Siemens, Support Staff. Nancy Bernstine, Director of Governmental Relations, and a half-time Legislative/Office Assistant will remain in our Washington, D.C. office. We will also be hiring a full-time Director of Development in the near future.

January 1995

TO BE OR NOT TO BE: A TIME OF RECKONING FOR NATIONAL HOUSING POLICY

Changes in Washington that began more than a year before the recent congressional elections portend extremely hard times for the people with the lowest incomes in this country. The following is a brief summary and analysis of those proposed changes as they relate to poor people's housing needs.

April 2002

U.S. Supreme Court Finds No "Innocent Tenants" in Application of One-Strike Law

On March 26, 2002, the U.S. Supreme Court reversed the judgment of the Ninth Circuit Court of Appeals which, sitting *en banc*, had upheld a federal district court's decision to issue a preliminary injunction preventing the termination of the separate tenancies of four elderly residents by the Oakland Housing Authority (OHA) under the HUD "one-strike" law.¹ Whereas the Ninth Circuit had concluded that the one-strike law could not be interpreted to permit eviction of "innocent tenants,"² the Supreme Court found that the law properly and unambiguously vested local public housing agencies (PHAs) with the authority to do just that.³

September 1999

MINNESOTA SECTION 8 TENANTS WIN MAJOR PRESERVATION VICTORY

The tenants of Oak Grove Towers in Minneapolis recently won a major victory against HUD when they obtained a federal court declaratory judgment at the end of August. *215 Alliance v. Cuomo*, 1999 WL675106, ___ F.Supp. 2d ___, Civ. No. 98-64 (DWF/AJB) (D. Minn., memorandum opinion and order filed Aug. 30, 1999).¹ In a ruling of first impression, the federal judge found that the owners' Section 8 opt-out notice violated federal law, and that HUD's refusal to adjust subsidy levels on the enhanced vouchers issued to the tenants upon the owners' prepayment of the mortgage also violated federal law. This decision could have major implications for tenants and communities facing the market-rate conversions that are sweeping the country, by providing a viable legal claim to challenge some opt-outs and to obtain stronger tenant protections after prepayment.²

July 2003

Community Service and Self-Sufficiency Requirements Reinstated

On June 20, 2003, the United States Department of Housing and Urban Development (HUD) Office of Public and Indian Housing issued a notice to all Public Housing Authorities (PHAs) advising them of the reinstatement of the mandatory community service requirements originally enacted under Section 512 of the *Quality Housing and Work Responsibility Act of 1998* (QHWRA).¹

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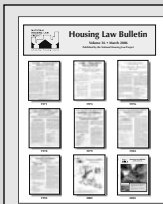
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Cover: A selection of *Housing Law Bulletin* covers over the years celebrates the publication's thirty-fifth anniversary. See the letter by National Housing Law Project Executive Director Gideon Anders and *Housing Law Bulletin* retrospective, discussing the changes that have occurred during the publication's history.

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Reauthorized Violence Against Women Act Protects Housing Rights of Domestic Violence Survivors

By Anthony Ha*

The federal Violence Against Women Act (VAWA) of 2005 was signed into law on January 5, 2006.¹ In addition to reauthorizing VAWA, which expired in September 2005, the law now requires specific protections for victims of domestic violence, dating violence and stalking who reside in three of the major federal housing programs. The law also authorizes several as-yet unfunded programs to combat these problems.

At the outset, it is important to recognize that the new VAWA applies to the Public Housing, Housing Choice Voucher, and Project-Based Section 8 programs,² but does not cover the other housing subsidy programs of the Department of Housing and Urban Development (HUD), the Low-Income Housing Tax Credit program administered through the Internal Revenue Service, or programs administered by the Department of Agriculture's Rural Housing Service, not to mention tenants in unsubsidized private housing. While politics may have required such restricted coverage, these other tenants may nevertheless have protections available under specific program provisions or under sex discrimination provisions of the Fair Housing Act.³

VAWA protects individuals who have been victims of at least one incident of domestic violence, dating violence or stalking if the incident forms the basis of a public housing agency (PHA) or landlord's eviction, termination, or denial of admission to the unit or program. It does not

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¹The final legislation, denoted H.R. 3402, reflected the agreement between House and Senate negotiators reconciling the earlier Senate and House versions of the bill (S. 1197 and H.R. 3402, 109th Cong., 1st Sess. (2005), respectively). The housing provisions are located in Title VI of the law, Pub. L. No. 109-162, 119 Stat. 2960 (2006). (Hereinafter, we will use section references in Title VI of the law, and the forthcoming U.S. Code citations). An enrolled version of the legislation, but not yet the final GPO Public Law, is available online at <http://thomas.loc.gov>.

²Changes to project-based Section 8 and the Housing Choice Voucher program are described in § 606, amending the project-based Section 8 and Housing Choice Voucher programs at 42 U.S.C. §§ 1437f(c),(d) and (o), respectively. Changes to the public housing program are made by § 607, amending 42 U.S.C. 1437d.

³See NHLP, *Court Recognizes Domestic Violence Survivor's Fair Housing Challenge to Eviction*, 35 Hous. L. BULL. 171, 181 (2005) (reviewing *Bouley v. Young-Sabourin*, No. Civ. 1:03 CV 320, 2005 WL 950632 (D.Vt. Mar. 10, 2005)).

prevent a PHA or landlord from evicting, denying admission, or terminating the assistance of a victim if the landlord or PHA's actions are not based on the fact that the individual is or has been a victim.

VAWA establishes new protections for victims of domestic violence, dating violence and stalking, as well as the immediate family members of the victim.

Defining Who Is Protected

For tenants and applicants in the covered programs, VAWA establishes new protections for victims of domestic violence, dating violence and stalking, as defined in the new law, as well as the immediate family members of the victim. Domestic violence generally includes violence committed by current or former spouses, partners or cohabitants,⁴ whereas dating violence reaches violence committed by those in romantic or intimate relationships.⁵ Victims of stalking are also covered.⁶

Denial of Admission or Eligibility

Under the new protections, neither PHAs nor subsidized owners may use an individual's status as a victim of domestic violence, dating violence or stalking as a basis for denying admission to a property or denying voucher eligibility.⁷ Practically speaking, this means that owners and PHAs cannot, for example, use unfavorable landlord-tenant histories based on incidents of violence committed against the applicant now seeking housing assistance. However, PHAs and owners may still reject applicants on other grounds unrelated to the domestic violence.

⁴See 42 U.S.C. § 1437d(u)(3)(A); 42 U.S.C. § 1437f(f)(8). Domestic violence includes "felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabited with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies."

⁵See 42 U.S.C. § 1437d(u)(B); 42 U.S.C. § 1437f(f)(9): "violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim," as determined by the length and type of the relationship and the frequency of interaction).

⁶See 42 U.S.C. § 1437d(u)(3)(C); 42 U.S.C. § 1437f(f)(10) for the detailed definition of stalking.

⁷For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(A) and 42 U.S.C. § 1437f(d)(1)(A); for PHAs administering vouchers, see 42 U.S.C. § 1437f(o)(6)(B); and for public housing, see 42 U.S.C. § 1437d(c)(3).

Evictions or Terminations of Tenancy

The new protections also create an exception to the federal "one-strike" criminal activity eviction rule for tenants who are victims. Previously, under HUD's rules for many of the federal housing programs, PHAs and owners could terminate tenancies of domestic violence victims if the acts were committed by a household member or guest. Under the new VAWA protections, an incident of actual or threatened domestic violence, dating violence or stalking is not good cause for terminating the victim's tenancy.⁸ Nor does criminal activity directly relating to domestic violence, dating violence or stalking constitute adequate grounds for eviction of the victim.⁹

In a significant change intended to guide owners where state law does not address the problem of ousting only perpetrators, the new VAWA establishes a federal right for a PHA or landlord to bifurcate a lease in order to evict the offender while allowing the victim to remain in occupancy.¹⁰ Evictions may still proceed in those rare situations where the PHA or landlord demonstrates that an individual's tenancy, despite their status as a covered victim, presents an actual or imminent threat to other tenants or property employees.¹¹

Termination of Voucher Assistance

The new one-strike exceptions also apply to a PHA's termination of voucher assistance. Under the new VAWA, an incident of actual or threatened domestic violence, dating violence or stalking is not good cause for terminating a victim's housing assistance.¹² Neither does criminal activity directly related to domestic violence, dating violence or stalking constitute sufficient grounds.¹³ However, to respect these protections while addressing any need

⁸For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(B), and 42 U.S.C. § 1437f(d)(1)(B)(ii); for vouchers, see 42 U.S.C. § 1437f(o)(7)(C); for public housing, see 42 U.S.C. § 1437d(1)(5).

⁹For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(C)(i) and 42 U.S.C. § 1437f(d)(1)(B)(iii)(I); for vouchers, see 42 U.S.C. § 1437f(o)(7)(D)(i); for public housing, see 42 U.S.C. § 1437d(1)(6)(A).

¹⁰For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(C)(ii) and 42 U.S.C. § 1437f(d)(1)(B)(iii)(II); for vouchers, see 42 U.S.C. § 1437f(o)(7)(D)(ii); for public housing, see 42 U.S.C. § 1437d(1)(6)(A).

¹¹For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(C)(v) and 42 U.S.C. § 1437f(d)(1)(B)(iii)(V); for vouchers, see 42 U.S.C. § 1437f(o)(7)(D)(v); for public housing, see 42 U.S.C. § 1437d(1)(6)(E).

¹²For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(B) and 42 U.S.C. § 1437f(d)(1)(B)(ii) (even though eviction, not termination of assistance, should have been the exclusive remedy for such purported lease violations); for vouchers, see 42 U.S.C. § 1437f(o)(7)(C) and 42 U.S.C. § 1437f(o)(20)(A).

¹³For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(C)(i) and 42 U.S.C. § 1437f(d)(1)(B)(iii)(I) (although eviction should be the only threat to tenants); for vouchers, see 1437f(o)(7)(D)(i) and 42 U.S.C. § 1437f(o)(20)(C).

for the PHA to bifurcate voucher assistance if a bifurcated lease proves insufficient, a PHA may terminate the assistance to any perpetrator who is a voucher recipient.¹⁴

Voucher Portability

Families who want to leave their existing unit to protect a victim threatened by further violence may receive a voucher from the PHA to move to another jurisdiction if the family has complied with all other Section 8 obligations.¹⁵ Although unclear from the statute, families of victims should be able to seek this relief during the term of any lease, not just at expiration, although it appears that making a safety move within a jurisdiction falls outside of the statutory directive.

State or Local Laws Apply if More Protective

For all of these admission, eviction and termination protections, if any other state, local or federal law provides greater protection to victims than VAWA, that more protective law governs.¹⁶

Certification of Victim Status

As a prerequisite to invoking these protections, a PHA or owner may (but is not required to) request an individual to certify their victim status via an as-yet undeveloped HUD-approved certification form,¹⁷ which must be signed by the claimant and include the name of the perpetrator.¹⁸ Alternatively, this requirement may be satisfied by a document signed by a victim service provider, an attorney, or a medical professional assisting the victim, attesting to “bona fide incidents of abuse,”¹⁹ or by producing a police or court record.²⁰ The victim must provide the certification within fourteen business days, or within any discretionary extension provided.²¹

The PHA or other landlord must keep this information confidential; it must not be entered into a shared database.

The PHA or landlord may disclose the information if the victim requests or consents in writing, if the information is required for use in related eviction proceedings, or if required by applicable law.²²

Implementation of the New VAWA Requirements

VAWA’s new provisions became effective when the bill was signed into law, although many PHAs, landlords, tenants, applicants and judges remain unaware of them. HUD has not yet indicated whether it plans to issue any implementing regulations, notices or other guidance. As written, the law requires PHAs to notify Public Housing, Voucher and project-based Section 8 tenants of these new VAWA rights, including confidentiality, as well as owners and managers of Section 8 housing.²³ Until some kind of administrative implementation and education of all affected participants occurs, the task of enforcing these new rules will often fall to applicants, tenants and their advocates. The new protections may be asserted in any administrative hearing available to the tenant or applicant to challenge the threatened harm, or by an appropriate affirmative or defensive judicial claim.

Related Planning Requirements

The new VAWA also requires PHAs to address domestic violence issues in their five-year PHA plans.²⁴ In addition, localities must include the housing needs of domestic violence victims in developing their Consolidated Plans every five years,²⁵ which should hopefully trigger identification of strategies to address those needs. ■

¹⁴See 42 U.S.C. § 1437f(o)(20)(D)(i).

¹⁵See 42 U.S.C. § 1437f(r)(5).

¹⁶For project-based Section 8, see 42 U.S.C. § 1437f(c)(9)(C)(vi) and 42 U.S.C. § 1437f(d)(1)(B)(iii)(VI); for vouchers, see 42 U.S.C. § 1437f(o)(7)(D)(vi) and 42 U.S.C. 1437f(o)(20)(D)(v); for public housing, see 42 U.S.C. § 1437d(l)(6)(F) and (u)(1)(E).

¹⁷For project-based Section 8 and vouchers, see 42 U.S.C. § 1437f(ee)(1); for public housing, see 42 U.S.C. § 1437d(u)(1).

¹⁸For project-based Section 8 and vouchers, see 42 U.S.C. § 1437 f(ee)(1)(A); for public housing, see 42 U.S.C. § 1437d(u)(1)(A).

¹⁹For project-based Section 8 and vouchers, see 42 U.S.C. § 1437 f(ee)(1)(C)(i); for public housing, see 42 U.S.C. § 1437d(u)(1)(C)(i).

²⁰For project-based Section 8 and vouchers, see 42 U.S.C. § 1437 f(ee)(1)(C)(ii); for public housing, see 42 U.S.C. § 1437d(u)(1)(C)(ii).

²¹For project-based Section 8 and vouchers, see 42 U.S.C. § 1437 f(ee)(1)(B); for public housing, see 42 U.S.C. § 1437d(u)(1)(B).

²²For project-based Section 8 and vouchers, see 42 U.S.C. § 1437 f(ee)(2)(A); for public housing, see 42 U.S.C. § 1437d(u)(2)(A).

²³42 U.S.C. § 1437d(u)(2)(B) (public housing) and § 1437f(ee)(2)(B) (voucher and project-based Section 8 programs).

²⁴42 U.S.C. § 1437c-1 (goals, objectives, policies and programs).

²⁵42 U.S.C. § 12705(b)(1).

Administration's Fiscal Year 2007 Budget Seeks Cuts in Key Housing Programs

President Bush's Fiscal Year (FY) 2007 Department of Housing and Urban Development (HUD) budget request submitted to Congress on February 6 requests \$33.6 billion for HUD, 1.8% below the FY 2006 HUD funding level of \$34.3 billion, even before any inflation adjustment.¹ Primary targets for these reductions are Community Development Block Grants, Public Housing, and housing for the elderly and people with disabilities. Faring comparatively well under the Administration's plan are the Section 8 and HOME programs, with homeless assistance programs slated for more funding that would be targeted to several new initiatives. About two-thirds of the budget—almost \$21.6 billion—would fund the various Section 8 programs.

Of course, the budget is just one important component kicking off the annual federal funding process. Congress now proceeds to make its key decisions—in the budget resolution setting overall spending limits and appropriations bills providing final agency and program funding levels later in the year.

Section 8 Rental Assistance

The budget seeks \$15.9 billion for tenant-based rental vouchers, approximately \$500 million more than FY 2006's final level. Funds for project-based assistance would be \$5.68 billion, approximately \$600 million more than FY 2006.

Tenant-Based Vouchers

Of the \$15.9 billion request for vouchers, \$14.44 billion would cover renewals of expiring one-year voucher annual contribution contracts between HUD and public housing agencies (PHAs), of which \$100 million would be earmarked for adjusting PHA funding levels for "unforeseen exigencies" and portability costs. An additional \$149 million would provide tenant protection vouchers for various public and assisted housing conversion actions, \$1.28 billion would support PHA administrative fees, and \$47.5 million would cover Family Self-Sufficiency coordinators.

The request for tenant protection vouchers, if adopted, would reduce the level of assistance provided to communities experiencing housing conversion actions. Although tenant protection vouchers have historically been provided

to replace all units leaving the affordable housing inventory,² the budget seeks to fund only those units currently under lease, not vacant units, which would reduce the net number of locally subsidized units.

The Center on Budget and Policy Priorities estimated that the Administration's proposed funding level would be sufficient to assist approximately 2.07 million families with vouchers in FY 2007, about the same number of families estimated to be assisted in FY 2006, but only about 96% of the vouchers actually authorized in FY 2007.³

Because the proposed funding formula relies on that enacted last year, the distribution of funds among local PHAs would prove uneven, requiring either cuts in some PHAs' level of assistance or modest increases in others.

However, because the proposed funding formula relies on that enacted last year, the distribution of these funds among local PHAs would prove uneven, requiring either cuts in some PHAs' level of assistance or modest increases in others. HUD proposes to continue using an outdated and inefficient dollar-based renewal funding formula to determine what each PHA would receive in FY 2007. Very old data (data on per-unit costs from the May-July 2004 period, plus inflation adjustments) would be used to determine each PHA's voucher renewal needs for FY 2007. Thus, those PHAs whose costs have increased since 2004 more than the general cost adjustment factor (whether because of market rent increases or decreases in tenant incomes) will receive inadequate funding, even before any across-the board reductions necessitated by any inadequacy of the overall appropriation for the program nationwide. These PHAs will thus be forced to take steps to reduce voucher assistance in their communities, either by reducing the number of vouchers or by reducing their costs per voucher, by reducing payment standards and increasing effective tenant rent burdens. One noteworthy good element of the budget request is that those PHAs that receive more voucher funds than they are currently authorized to use could support additional vouchers beyond their authorized level, so that the waste of funding for these entities caused by this year's restrictions would be eliminated.

¹This article draws upon the President's FY 2006 Budget, as well as *Overview of the President's FY07 Request for the Department of Housing and Urban Development*, by the National Low-Income Housing Coalition, included as a Special Supplement to the February 10 edition of *Memo to Members*.

²See, e.g., Section 8 Tenant-Based Assistance (Enhanced and Regular Housing Choice Vouchers) For Housing Conversion Actions—Policy and Processing Guidance, PIH 2001-41 (Nov. 14, 2001).

³Barbara Sard, Douglas Rice & Will Fischer, *Initial Assessment of President's 2007 Budget: Impacts on Housing Voucher Program and Hurricane Recovery* (rev. Feb. 17, 2006), available at <http://www.cbpp.org/2-17-06hous.htm>.

Of course, these results are all avoidable by revising the funding formula to rely more on current voucher leasing and cost data to allocate proposed FY 2007 program funding levels.

Two other positive elements of the budget are: (1) the earmark of \$100 million of the voucher funds to cover PHAs' expenses for unforeseen exigencies and additional portability costs—items for which the current formula does not provide sufficient flexibility; and (2) funding for adjustments to renewal allocations to cover the increased costs of PHAs operating a Family Self-Sufficiency program, where increased tenant rent contributions are escrowed for their benefit.

The budget also provides a platform for HUD to press for its "State and Local Housing Flexibility Act," introduced in 2005 as H.R. 1999 and S. 771, to give PHAs greater flexibility to manage the voucher program within whatever funding levels are ultimately provided. Last year Congress resisted this invitation to deregulation, and hopefully will maintain that resolve this year as well.

Project-Based Rental Assistance

The HUD budget requests \$5.68 billion for project-based rental assistance for FY 2007, which includes \$145 million for contract administration. This amount, assisting about 1.3 million families in over 19,000 properties nationwide, is a 12.7% increase from the FY 2006 level of \$5.04 billion. HUD officials believe that this amount will be sufficient to renew all project-based contracts in FY 2007 under existing laws and procedures.

Unlike many prior years, the budget requests no new funds to cover amendments to long-term Section 8 contracts that are running short on available funds to cover needs over the remainder of their unexpired term. Instead, HUD proposes to use unexpended excess balances remaining on contracts that have already expired to fund amendment needs.

Public Housing Capital Fund

The Administration's request would continue to starve the public housing capital fund, notwithstanding the long-standing more than \$20 billion backlog of public housing rehabilitation needs. The FY 2007 request is for only \$2.2 billion for the public housing capital fund, more than a 10% reduction from this year's inadequate level. Capital funding has dropped a long way from FY 2001's level of \$3 billion. Beyond requesting \$20 million for emergency capital needs, which covers little, the budget ignores the needs to repair or rebuild the public housing stock in the Gulf states that was damaged or destroyed by the 2006 hurricanes.

Within this overall \$2.2 billion, only \$24 million is requested for the Residential Opportunity and Self Sufficiency program, a cut of more than 30% (\$14 million) from this year. Nothing is requested for the Neighborhood

Networks initiative (\$7 million in FY 2006). Included is approximately \$15 million for HUD's Real Estate Assessment Center, which evaluates the public housing stock.

Public Housing Operating Fund

To cover the difference between tenant contributions and operating costs, the budget request seeks approximately \$3.6 billion for public housing operating funds, the same as this year. According to the National Association of Housing and Redevelopment Officials, this amount would provide only 81% of actual needs as PHAs shift to the required asset-based management system from the former system based on the allowable expense formula. The request includes approximately \$6 million for technical assistance related to conversion to this new system. Since operating costs (especially utilities) are increasing and any nationwide trend of significantly increasing tenant incomes has yet to be detected, this request is apparently based in fantasy.

HOPE VI

As in prior years, the Administration seeks no funding for the controversial HOPE VI program to revitalize public housing, while also seeking rescission of the \$99 million provided by Congress this year. The budget reports the following cumulative results of the HOPE VI program, as of June 30, 2005: 60,923 households have been relocated, 76,766 units have been demolished, 43,397 units (new and rehabilitated) have been completed and 39,931 completed units have been occupied. No information is provided on the fate of the former residents of these revitalized properties.

Native American and Hawaiian Housing Block Grants

The budget seeks \$626 million for the Native American Housing Block Grant program, including approximately \$2 million to guarantee up to \$14.9 million in loans to encourage private lenders to provide affordable housing financing. The budget seeks \$5.9 million for the comparable Native Hawaiian Block Grant.

Housing Opportunities for Persons with AIDS

The President's Housing Opportunities for Persons with AIDS (HOPWA) request seeks an increase of 4.9% to \$300 million from this year's level, supporting approximately 75,000 units. The Administration will also submit a proposed legislative amendment to the authorization legislation to allow HUD to change the funding allocation formula to account for the current number of people living with AIDS as well as the need for housing in the jurisdiction.

Community Development Block Grants

The budget again seeks substantial changes in the Community Development Block Grant program, as well as a huge whack in funding from \$4.18 billion to \$3.03 billion. If the Administration has its way, CDBG formula grants would be cut by \$3.71 billion to \$2.98 billion, although CDBG would remain at HUD (contrary to last year's proposed transfer to the Commerce Department). The Administration will submit legislation to revise the allocation formula ostensibly to improve targeting of funds to communities based on need and to provide performance-based bonuses.

Last year's request for a Strengthening America's Communities Initiative survives—the Administration will seek to develop a common set of performance goals and measures for all federal community and economic development programs.

Youthbuild would receive \$50 million, but be transferred to the Department of Labor for better coordination with Job Corps and other employment and training programs.

HOME and Other Homeownership Funding

HOME funding would increase from \$1.73 billion to \$1.92 billion, including \$1.8 billion for formula grants and \$100 million for the American Dream Downpayment Initiative (a large increase over this year's \$25 million). These HOME funds are slated to assist development, acquisition or rehabilitation of almost 84,000 units, and more than 12,000 units of tenant-based rental assistance. Related to homeownership but not within the HOME account, the Self-Help and Assisted Homeownership Opportunity program would receive \$39.7 million, reduced from this year's \$61 million. Also related to homeownership but outside of HOME, the budget requests \$44.5 million for a new separate Housing Counseling Assistance account, often used primarily for current and prospective homeowners.

Homeless Assistance Grants

Homeless assistance grants would receive a 15.7% increase in funding (up \$209 million) to a level of approximately \$1.54 billion. The Administration has proposed legislation to consolidate its three competitive homeless assistance programs (Shelter Plus Care, Supportive Housing and Section 8 Moderate Rehab Single Room Occupancy, but not Emergency Shelter Grants) into a single program. This new consolidated program would use up to \$200 million for the as-yet unauthorized Samaritan Housing Initiative, specifically addressing supportive housing needs of the chronically homeless. The request also seeks \$24.8 million for a four-year Prisoner Re-Entry Initiative (with the Departments of Justice and Labor) to help ex-offenders successfully transition to community life and long-term employment, with funding transferred to the Department

of Labor upon enactment. These two new proposals alone would swallow more than the requested increase for the Homeless Assistance account.

Rural Housing and Economic Development

The budget again seeks to eliminate HUD's Office of Rural Housing and Economic Development, for which Congress provided \$17 million this year.⁴

Housing for the Elderly and People with Disabilities

The request again seeks to reduce funds for Section 202 elderly housing by 26%, from \$735 million to \$545 million. Curiously, the budget states that it expands this program (probably because any cut less than 100% would technically add a unit or two, thus expanding). These funds cover capital advances for project construction, rental assistance contracts for the units and renewal of such contracts that face expiration, and related supportive services. The set-aside for service coordinators would increase modestly from \$51 million to \$59 million.

Similarly, the budget request would cut in half funding for the Section 811 program providing housing for people with disabilities, from \$237 million to \$119 million. These funds cover the same capital, assistance and service components as the Section 202 funding, as well as tenant-based rental assistance. The request would allow up to \$15.8 million for new project rental assistance contracts (attached to properties developed with capital advances) and up to \$14.8 million for new tenant-based rental assistance.

Fair Housing and Equal Opportunity

The budget seeks a marginal reduction in funding for fair housing programs from \$46 million to \$45 million. Of this amount, the Fair Housing Assistance Program would receive \$25 million and the Fair Housing Initiatives Program would receive approximately \$20 million.

Lead-Based Paint Hazard Reduction

The budget seeks only \$115 million for the lead-based paint reduction program, a huge 35% cut from this year's \$150 million level.

GSE Reform

The budget request would provide \$6 million for the expenses of GSE regulation. The Administration's budget also reiterates its support for broad reform of the government sponsored enterprises (GSE) system, including

⁴For more on rural housing in the FY 2007 budget, see *RHS FY 2007 Budget Would Cut Rental Program and Threaten Tenants' Right to Remain* on page 60 of this issue.

Fiscal Year 2007 Budget for Selected HUD Programs

<i>HUD Program (set asides indented)</i>	FY06 Enacted* (in millions)	FY07 Request (in millions)
Tenant Based Rental Assistance	15,417	15,920
Tenant Protection Vouchers	178	149
Administrative Fees	1,238	1,281
Family Self Sufficiency Coordinators	47	47.5
Contract Renewals	13,949	14,436
Project Based Rental Assistance	5,037	5,676
Contract Renewals	4,890	5,526
Public Housing Capital Fund	2,439	2,178
Emergency/Disaster Grants	17	20
Resident Opportunities and Supportive Services (ROSS)	38	24
Public Housing Operating Fund	3,564	3,564
HOPE VI	99	-99
Native American Housing Block Grants	624	626
Native Hawaiian Housing Block Grants	8.7	6
Housing Opportunities for Persons with AIDS	286	300
Community Development Fund	4,178	3,032
Community Dev. Formula Grants	3,711	2,975
Self Help Homeownership Opportunity	20	0
Economic Development Initiative Grants	307	-307
Youthbuild	49	--
Brownfields Redevelopment	10	0
HOME Investment Partnership Program	1,733	1,917
HOME Formula Grants	1,690	1,816
American Dream Downpayment Assistance	25	100
Housing Assistance Counseling	42	--
Homeless Assistance Grants	1,327	1,536
Shelter Plus Care (renewals)	255	285
Samaritan Initiative	--	200
Rural Housing and Economic Development	17	0
Housing for the Elderly (Section 202)	735	545
Housing for Persons with Disabilities (Section 811)	237	119
Housing Counseling Assistance	--	45
Fair Housing and Equal Opportunity	46	45
Fair Housing Assistance	26	25
Fair Housing Initiatives	20	20
Lead-Based Paint Hazard Reduction Program	150	115
Salaries and Expenses	1,141	1,162
Homeland Security – Emergency Food and	151	151

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a strengthened independent regulator to oversee Fannie Mae, Freddie Mac and the Federal Home Loan Bank System. Currently, the House's GSE legislation, H. R. 1461, has passed the House of Representatives, while the Senate bill, S. 190, was reported out of the Senate Banking, Housing and Urban Affairs Committee on a party-line vote and awaits Senate floor action.

The budget contends that the need to mitigate the systemic risk of economic failure posed by GSE market shares argues in favor of broad regulatory powers for any new regulator. In particular, the Administration recommends regulatory authority to limit the GSE's portfolio holdings, which currently stand at \$17 trillion. Further, the budget suggests that GSE assets be limited to those providing a specific public benefit, such as a pipeline for mortgage securitization and affordable housing mortgages unsuitable for securitization. ■

RHS FY 2007 Budget Would Cut Rental Program and Threaten Tenants' Right to Remain

The Administration's Rural Housing Service (RHS) Fiscal Year (FY) 2007 budget¹ proposes to eliminate totally funding for the Section 515 rural rental housing program,² would dramatically reduce Rental Assistance (RA) subsidy funding³ for existing rural rental and farm labor housing by reducing the term of RA contracts from four to two years, reaffirms the Administration's intention to eliminate rental housing prepayment restrictions, and would dramatically reduce the funding necessary to protect residents from displacement. In other respects, the FY 2007 budget mirrors budget proposals of the past several years, which have generally proposed to hold steady direct loan funding, which serves low-income households, while increasing funding for guaranteed loans, which serve more moderate-income households.

¹OMB, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007 (2006) [hereinafter Budget], available at <http://www.whitehouse.gov/omb/budget/fy2007/>.

²42 U.S.C.A. § 1485 (West 2003).

³42 U.S.C.A. § 1490a(a)(2)(A) (West 2003).

Section 515 Rural Rental Housing Program

By far the most dramatic proposal in the FY 2007 budget is the total elimination of funding for the Section 515 Rural Rental Housing program.⁴ While the Administration proposed only to fund the program at \$27 million in FY 2006 and to use those funds for rehabilitation and preservation of the existing stock,⁵ it has not previously proposed to eliminate the program totally. Congress rejected the Administration's efforts to cut the program below \$100 million in both FY 2005 and 2006, thereby forcing RHS to maintain at least a nominal new construction program. The FY 2007 budget provides no explanation as to why the Administration is proposing to eliminate the program altogether. It does state that the Administration expects to revitalize the existing Section 515 stock through its Section 542 rural voucher program.⁶ If that is true, the budget proposal is not truly different from last year's proposal. However, as is discussed below, the budget fails to make clear how the administration proposes to revitalize the existing stock and protect residents from prepayment displacement with a request for voucher funding that is substantially below what the Administration stated last year would be required to protect residents against displacement. Thus, the Section 515 funding cut may indeed be very significant.

Rental Assistance Funding

The Rental Assistance Program subsidizes the rents of low- and very low-income residents of Section 515 rental and Section 514/516 farm labor housing⁷ much as the project-based Section 8 program subsidizes the rents of residents of HUD assisted housing. The Administration FY 2007 budget proposes to cut funding for the Rental Assistance Program from the current appropriations of \$653 million to \$486.3 million.⁸ However, it appears that the Administration is proposing to achieve the reduction by simply cutting the term of Rental Assistance (RA) contracts from four years to two. Unfortunately, the budget does not make it clear whether the reduction also eliminates rental assistance for any new construction that may take place in FY 2007 in either the Farm Labor or Rental Housing programs. When the Administration announced funding availability for the Section 515 program in 2005 it made it clear that the housing would not receive RA. While RA was also not available in the current budget for

⁴BUDGET, *supra* note 1, at 140-1.

⁵See NHLP, *Proposed 2006 Budget Would Slash Federal Housing Programs and Freeze Spending*, 35 HOUS. L. BULL. 79, 83 (2005).

⁶BUDGET, *supra* note 1, at 141.

⁷42 U.S.C.A. §§ 1474 (farm labor housing loans) and 1476 (farm labor housing grants) (West 2003).

⁸BUDGET, *supra* note 1, at 136.

the Farm Labor Housing program, the Administration retrieved funding from existing contracts to make some RA available for new projects committed in FY 2006. It is doubtful that it will be able to do the same for FY 2007, which means that Congress will have to appropriate additional funds for the RA program if any newly constructed farm labor housing is to serve truly low-income farm laborers and if any new units will be constructed under the Section 515 program.

It is not clear why the Administration chose to reduce the funding term of RA contracts from four to two years, instead of the one-year funding commitments that it makes for the project-based Section 8 program. The only explanation that the budget includes is the statement that “[t]wo years is the minimal contract term that provides savings but still allows the multi-family housing direct loan program to operate efficiently.”⁹

Prepayment of Rental Housing Loans

The Administration uses the FY 2007 budget to reaffirm its intent to introduce legislation that would allow owners of Section 515 housing, whose loans are not subject to use restrictions, to prepay their loans at any time¹⁰ and to allow the Administration to undertake a revitalization program that would preserve projects that owners do not want to prepay. While drafts of such legislation have been in circulation for about a year, the legislation has not been formally introduced in either the House or the Senate as of this writing. It is, however, expected that the legislation will be introduced sometime this year. An Administration-sponsored study estimated that 46,000 units of the nearly 500,000-unit inventory would be prepaid if the prepayment restrictions were lifted.¹¹ People outside the Administration fear that the numbers will be substantially higher.

⁹*Id.*

¹⁰*Id.* at 137. Ironically, the budget suggests that such legislation is not necessary. It states that “[r]ecent Federal court rulings allow projects that received their financing prior to 1989 to prepay and leave the program.” *Id.* In fact, the statement is not true in a variety of respects. Starting in 1978, all subsidized Section 515 projects were subjected to twenty-year use restrictions. Thus, any project that was financed after 1986 is still subject to some use restrictions and not likely to be prepaid. More significantly, three federal district courts, all within the jurisdiction of the Ninth Circuit, have held that owners may prepay their Section 515 loans without complying with the prepayment restrictions that were adopted in the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA). See, e.g., *Kimberly Assocs. v. United States*, 98-0083-S-LMB (D. Id. 2003). One of those cases is currently on appeal to the Ninth Circuit. *DBSI/TRI Ltd. P’ship v. United States*, No. 04-36066 (9th Cir. 2006). Moreover, the Eighth Circuit has recently held that Section 515 owners may not prepay their loans in derogation of ELIHPA. *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005). Not surprisingly, the budget makes no reference to that case.

¹¹See NHLP, *Long-Awaited Rural Rental Housing Report Released*, 35 HOUS. L. BULL. 1, 11 (2005).

Voucher Funding

What is truly perplexing about the FY 2007 budget is that it only requests \$74.25 million for the Section 542 voucher program and states that the funds can also be used for multi-family revitalization efforts that were first proposed in the FY 2006 budget.¹² In that budget, the Administration estimated that it would need \$214 million for each of three years to underwrite vouchers for residents who will face rent increases or likely be displaced by prepayments that occur if the Section 515 prepayment restrictions are lifted.¹³ In presentations made to various advocacy groups, Russ Davis, the RHS administrator, explained that after the vouchers are funded equal sums of money would be necessary to fund the revitalization of the remaining Section 515 stock. In light of those statements, it is not at all clear how the budget proposes to protect residents and take care of revitalization efforts with only \$74.25 million.

The Administration uses the FY 2007 budget to reaffirm its intent to introduce legislation that would allow owners of Section 515 housing to prepay their loans at any time.

Other Direct Loan and Grant Programs

In other respects, the FY 2007 budget proposal is very similar to prior budgets and current funding levels. It proposes to increase funding for the Section 502 direct home loan program by nearly \$98 million, from \$1,140.8 million to \$1,238 million.¹⁴ The very low-income home repair loan program is increased from \$35 million to \$36.3 million,¹⁵ while the grant program is maintained at \$30 million.¹⁶ The farm labor housing loan program is also increased from \$38.5 million to \$41.6 million,¹⁷ while the farm labor

¹²BUDGET, *supra* note 1, at 137.

¹³Because the Administration did not formulate legislation that would have allowed prepayments of Section 515 loans and did not explain its need for \$214 million in Voucher funding, Congress did not authorize funding for the voucher program in FY 2006 except on a demonstration basis. While \$16 million was made available for the program in FY 2006, the program has not been made operational as of this writing.

¹⁴BUDGET, *supra* note 1, at 140.

¹⁵*Id.*

¹⁶*Id.* at 134.

¹⁷*Id.* at 140.

grant program, which makes the housing more affordable to very low-income households, is decreased slightly from \$14 million to \$13.9 million.¹⁸ Several rural rental housing preservation demonstration programs that were initiated in recent appropriations bills are slated for elimination in the FY 2007 budget.

Guaranteed Loan Programs

The Section 502 guaranteed loan program, which predominantly serves moderate-income households, is reduced slightly in the FY 2007 budget from \$3,681 million to \$3,564 million.¹⁹ At the same time, the Section 538 guaranteed rural rental housing loan program, which serves moderate-income households, will receive almost twice the funding that it received this year if Congress approves the Administration's budget proposal. The program is currently funded at \$100 million and the FY 2007 budget proposes to fund it at \$198 million.²⁰

A complete table comparing the Administration's FY 2007 budget request to the FY 2006 appropriations is set out below.

¹⁸*Id.* at 134-5.

¹⁹*Id.* at 143.

²⁰*Id.*

Congressional Action

Given that 2006 is an election year, it is doubtful that Congress will go along with the Administration's budget proposals, particularly its effort to terminate the Section 515 program. It has resisted severe cuts to the program in non-election years and it is doubtful that it will eliminate the program in an election year. Evidence of Congressional opposition to the Administration's proposal came several days after the President released the FY 2007 budget when House Minority Leader Nancy Pelosi (D-CA), together with Financial Services Ranking Member Barney Frank (D-MA) and Agriculture Committee Ranking Member Collin Peterson (D-MN), released a strong statement criticizing the Administration's proposed cuts to the rural housing programs and vowing to fight them.²¹ This is the first time in many years that House Democrats have openly and critically opposed the Administration's proposed cuts to the rural housing programs.

The FY 2007 budget now goes to the House and Senate appropriations committees which will review them and make modifications. The Appropriations committees are not expected to take final action on the FY 2007 budget until September or October of this year. ■

²¹Press Release, Rep. Nancy Pelosi (D-CA), House Democrats Blast Cuts to Rural Housing Programs (Feb. 9, 2006), available at <http://www.democraticleader.house.gov/press/releases.cfm?pressReleaseID=1410>.

Administration's FY 2007 Proposed Budget

Program	FY 2006 Appropriations	FY 2007 Budget Proposal
Section 502 direct home loans	\$1,140.8	\$1,238
Section 502 guaranteed home loans	3,681	3,564
Section 504 home repair loans	35	36.3
Section 504 elderly home repair grants	30	30
Section 514 farm labor housing loans	38.5	41.6
Section 516 farm labor housing grants	14	13.9
Section 515 direct rural rental housing loans	100	0
Section 521 Rental Assistance	653	486.3
Section 523 self-help technical assistance grants	34	37.6
Section 533 housing preservation grants	10	9.9
Section 538 guaranteed rental housing loans	100	198
Section 542 Rural Housing Vouchers	16	74.25
Rental Preservation Revolving Loans	3	0
Rental Preservation Demonstration	9	0
Rural Community Development Initiative	6.35	0

(All figures in millions of dollars)

RHS Proposes Return to “Interest Credit” Single Family Homeownership Subsidy

The Rural Housing Service (RHS) has proposed regulations that will revise the formula for determining the amount of subsidy that direct Section 502¹ home loan borrowers will receive when they enter into new loans with the agency.² The proposed regulations would eliminate the current complicated subsidy formula, which is based in part on the relationship between a borrower’s income and the local area median income, and substitutes a formula that is based on the borrower’s income and his or her principal, interest, taxes, and insurance (PITI) payments.

Even though it will be called “Payment Assistance 2,” the new formula is really the same as the “Interest Credit” formula that the agency has used, and continues to use, for borrowers whose loans were approved prior to October of 1995. The sole difference is that the old formula based the subsidy determination on the borrower paying at least 20% of income for PITI, while the new formula requires the borrower to pay at least 25% of income for PITI.

If adopted, the new subsidy formula would only be used to determine the subsidy for new borrowers. Existing direct Section 502 borrowers’ subsidy would be determined in accordance with the current formula unless their present subsidy is discontinued because their income increases to the point that they are no longer eligible for assistance and, thereafter, their income declines and makes them eligible for assistance again. Comments to the proposed regulations are due on or before April 18, 2006.³

Background

RHS single family home loan borrowers have been eligible for an interest subsidy since passage of the Housing and Urban Development Act of 1968.⁴ Between 1968 and 1995, the subsidy was called Interest Credit and it effectively reduced the borrower’s monthly mortgage payment to the higher of (1) the cost of amortizing the RHS loan at a 1% interest rate, or (2) 20% of the household’s adjusted income less the cost of taxes and insurance, provided that the mortgage payment did not exceed the cost of amortizing the loan at its market rate of interest.⁵

Due to the high cost of the subsidy and perceived opportunities for borrowers to abuse the program by maximizing the subsidy for which they were eligible by purchasing more expensive homes, RHS changed the subsidy in 1995 for all prospective borrowers.⁶ Under the new subsidy program, called Payment Assistance, the effective interest rate charged borrowers was the higher of (1) a minimum prescribed percentage of income that the borrower had to pay for PITI, which varied as borrower income increased; or (2) a prescribed loan amortization rate that is based on the ratio of the borrower’s adjusted income to local area median income.⁷ Borrowers who were receiving Interest Credit when the amended regulations went into effect continued to be eligible for that subsidy.

Even though it will be called “Payment Assistance 2,” the new formula is really the same as the “Interest Credit” formula that the agency uses for borrowers whose loans were approved prior to October of 1995.

In response to complaints about the effects of the payment subsidy formula, RHS began a review of the Payment Assistance subsidy in 2004 and concluded that the formula caused anomalies in the distribution of subsidy, continued to encourage borrowers to maximize their subsidy by purchasing more expensive homes, and that it was generally complicated and difficult to explain.⁸ As a result, RHS hired a consultant to assess the extent to which the formula distributed funds inequitably, examine formulas used by other mortgage programs, and develop a simple and more equitable alternative for extending subsidies to borrowers that would not increase the costs to the government but would continue to serve the same target market that is currently served by the program.

Proposed Regulations

After extensive analysis, much of which is summarized in the preamble to the newly proposed regulations,⁹ RHS has proposed a new subsidy formula, which it will call “Payment Assistance 2,” for determining the subsidy that borrowers will receive. While the wording for how the

¹42 U.S.C.A. § 1472(a) (West 2003).

²Single Family Housing Loans, Payment Assistance, Proposed Rule, 71 Fed. Reg. 8523 (Feb. 17, 2006).

³Comments can be submitted in a variety of ways. The e-mail address for submitting comments is comments@wdc.usda.gov (include RIN number 0575-AC59). The Web address is <http://www.rurdev.usda.gov/regs/>.

⁴Pub. L. No. 90-448 (1968).

⁵7 C.F.R. § 3550.68(d) (2005).

⁶See Single Family Housing Loans, Payment Assistance, Proposed Rule, 71 Fed. Reg. 8523, 8524 (Feb. 17, 2006).

⁷*Id.* at 8524-8525.

⁸*Id.* at 8525.

⁹*Id.* at 8526-8542.

subsidy level is to be determined is presented somewhat differently from the wording for the old Interest Credit formula, the ultimate calculations made to determine the subsidy that the borrower receives are identical—except that borrowers would be expected to pay at least 25% of income for PITI as opposed to 20% under the old Interest Credit formula.

Specifically, under Payment Assistance 2, the amount of assistance granted would be the lesser of the difference between (1) the annualized promissory note installment plus the cost of taxes and insurance less 25% of the borrower's adjusted income; or (2) the annualized promissory note installment less the amount the borrower would pay if the loan were amortized at an interest rate of 1%.¹⁰

Under the proposed regulations, borrowers who are currently receiving Payment Assistance 1 would not be authorized to switch to Payment Assistance 2 even if it would be more advantageous for them to do so. This is because the proposed regulations would limit eligibility to new borrowers and current borrowers who are not receiving subsidy payments. Thus, a current borrower could not change to the new formulation unless the old subsidy was terminated and the borrower reapplied for assistance because household income was again reduced.

Analysis

The “new” subsidy formula proposed by RHS would be a welcome return to a more rational way of determining the subsidy that borrowers under the single family homeownership program should be receiving. It would eliminate significant disparities that were introduced into the subsidy calculations in 1995 when the formula required differential payments based upon the relationship of the borrower's income and the local area median income. Under the current formula, two borrowers with identical incomes and identical PITI expenses can receive varying amounts of subsidy if the median area income for the areas in which they live is different. Effectively, borrowers who live in poorer areas receive less subsidy by virtue of the fact that they live in an area where the area median income is lower. The proposed regulations would eliminate this disparity and provide borrowers with equal PITI costs and incomes with the same level of subsidy.

Unfortunately, the new formula would likely disqualify some very low-income applicants who would have qualified for RHS loans under the existing formula from qualifying for loans under the new formula. This is because the new formula would effectively require borrowers to pay at least 25% of their income for PITI, whereas the existing formula only requires borrowers to pay at least 22% of their income for PITI if their income is

at or below 50% of area median income, and 24% if their income is above 50% of area median income but below 65% of area median. By virtue of increasing the percentage of income that is devoted to PITI, certain borrowers' capacity to meet the RHS income and debt load eligibility requirements would likely be diminished. This would not have happened had RHS fully reverted to the old interest credit formula, which only required borrowers to pay at least 20% of income for PITI. The agency, however, constrained itself from adopting this option by insisting that any new formula that was adopted for payment subsidy could not increase the program's cost to the government. Given this constraint, which undoubtedly was imposed by the Office of Management and Budget, the agency could not adopt a formula that would increase the subsidy to borrowers.

The new formula would also increase the total amount that borrowers will have to pay for shelter. Given that homeowner borrowers have to pay for utilities and ongoing maintenance and repairs, it is likely that new borrowers will pay substantially more than 30% of income for total shelter costs. While this is clearly undesirable, and would likely result in a higher delinquency and default rate, it is consistent with recent trends to increase the percentage of income that beneficiaries under the federal housing programs are paying for shelter in order to reduce the federal expenditures for housing subsidies.

It is also unfortunate that the proposed regulations would not permit borrowers who are receiving subsidies under the current Payment Assistance formula to switch to the new Payment Assistance formula if it is more advantageous for them to do so. Again, it appears that the Office of Management and Budget had its hand in this decision because allowing formula switching would have increased the subsidy costs that the agency would have to pay for some of the borrowers who have secured RHS loans in the past eleven years. Given that the agency considered the current formula to be inequitable, however, it makes little sense to force borrowers to remain in the program when it does not treat them equitably.

Conclusion

While the proposed regulations are generally welcome because they eliminate certain irrational disparities that were introduced into the program eleven years ago, RHS should modify the formula to reduce borrowers' PITI payments to 20% of income and to allow borrowers who receive subsidies under the current payment assistance plan to move to the new plan if it is to their advantage to do so.

The National Housing Law Project expects to submit comments on the proposed regulations prior to the April 18, 2006, deadline. Persons or organizations that wish to join the comments should contact Gideon Anders at NHLP at ganders@nhlp.org. ■

¹⁰*Id.* at 8542-8543.

Public Housing: Guidelines for Operating Fund Formula and Asset Management Slowly Emerging

The Department of Housing and Urban Development (HUD) is in the process of creating guidance to implement the new operating fund rule for public housing,¹ and has been meeting with representatives of the industry to discuss the implementation phase.² This article reviews a series of eight HUD documents entitled “Draft Implementation Framework” and HUD’s other implementation efforts, and points out critical problems with some underlying assumptions regarding funding. Advocates and tenants are well advised to learn more about the extensive changes HUD proposes, as they will affect tenant services and the condition of public housing units.

Background

The Quality Housing and Work Responsibility Act of 1998 established two new funds for public housing—the Capital Fund and the Operating Fund—to replace the Comprehensive Grant Program and the Performance Funding System, respectively. To implement the operating fund statutory provisions, there is a new operating fund rule which provides a new formula for distributing operating subsidies to public housing agencies (PHAs) and establishes a requirement for PHAs to convert to asset management.³

In general, the operating subsidy formula is based on the difference between the project expense level (PEL) plus the utility expense level (UEL) and add-ons, minus rent (which is also determined based upon a separate formula). The new formula creates winning and losing PHAs, with winners receiving more funding than they have in the past and the losers receiving less. All PHAs

received an email notice on February 28, 2006, informing them as to whether they were winners or losers under the new formula. However, even winners may see their operating subsidies cut. The February 28 calculations are based upon an assumption that in FY 2007 Congress will fund 100% of need. This assumption is disingenuous as the Administration admits it is requesting funding at 85% of need for FY 2007. Thus a PHA that is a winner may still see a reduction in the overall operating subsidy.

The new formula provides that the winners will receive their gains over a two-year period and the losers will gradually lose their funding over a five-year period. The new operating fund rule allows the losers to stop the loss of funds by complying with new asset management requirements. However, all losers will forfeit 5% of their operating subsidies. Thus, if a PHA complies by the first deadline, it will lose only 5%. Should the PHA not comply, it will lose an additional 24% in the first year and 19% in each subsequent year. The first deadline for compliance with asset management is October 1, 2006.⁴

The new operating fund rule sets forth new rules for funding of PHAs through 2011. Included in the rule is a commitment by HUD to convene a meeting in 2009 “to review the methodology to evaluate the PEL based upon actual cost data.”⁵ There was a one-year delay in the publication of the final operating fund rule. As a result, Fiscal Year (FY) 2006 is a transition year. The new operating fund rule does not affect funding levels for FY 2006. PHAs have received notice of their funding levels for the first six months of FY 2006; these notices are also posted on the HUD website.⁶

As previously noted, as of February 28, 2006, each PHA received a letter with information about whether the PHA will receive more or less funding under the new operating formula, assuming full funding of the operating fund. Significantly, the February 28th letter also provides the dollar amount of the resident participation funds that the PHA received in FY 2004. Resident participation funding continues to be an add-on to the operating subsidy fund. Resident participation funds should be used by PHAs to increase the capacity of residents and resident councils and to increase resident involvement in the decisions that affect their lives. Resident councils and Resident Advisory Boards (RABs) should have a say in how those funds are used and may receive funds directly.⁷

¹Revisions to the Public Housing Operating Fund Program, 70 Fed. Reg. 54,984 (Sept. 19, 2005). The operating fund regulations will be codified at 24 C.F.R. Part 990. The cites used in this article refer to the subsections of Part 990 and where they will be codified in Title 24 of the C.F.R. See *HUD Publishes the Final Public Housing Operating Subsidy Fund Rule*, 36 Hous. L. Bull. 1, 11 (2006).

²Congress directed HUD to meet with the trade groups. H. Rep. No. 109-307, at 216 (2005) (Under the section discussing the appropriations for the operating fund the conference report provided as follows: “The conferees direct HUD to provide quarterly updates to the House and Senate Committees on Appropriations on the status of the implementing rule and directs that the Department include broad participation from impacted agencies.”)

³A description of the process followed to develop the new operating fund rule is set forth in the introductory comments to the final rule. Revisions to the Public Housing Operating Fund Program, 70 Fed. Reg. 54,984 (Sept. 19, 2005).

⁴Revisions to the Public Housing Operating Fund Program, Correction to Formula Implementation Date, 70 Fed. Reg. 61,366 (Oct. 24, 2005).

⁵To be codified at 24 C.F.R. § 990.165(i).

⁶http://www.hud.gov/offices/pih/divisions/ffmd/of/obligation_letters_2006.cfm Interim Obligation Letters by State and Territory for the first half of 2006.

⁷See NHLP, \$27 Million Available for Tenant Participation Activities, 31 Hous. L. Bull. 87 (2001); Interim Instructions on Distribution and Use of Operating Subsidy Funds Received for Resident Participation Activities, PIH 2001-3 (Jan. 18, 2001).

Capital costs are not included in the operating subsidy, as these costs are funded through the public housing capital fund program (CFP). As with the operating subsidy, the capital fund has been significantly underfunded in recent years. There is currently a \$20 billion backlog of capital expenditures for public housing. Nevertheless for FY 2007, the President's budget request is \$2.178 billion, which is 10.7% below the \$2.439 billion appropriated for FY 2006.⁸

Operating Fund Formula Problems

There are many problems with the operating fund formula.

- It is based upon the Harvard Cost Study, which was based on data from other HUD-assisted housing rather than data from efficiently run public housing.⁹ There are substantial differences between these types of housing. For example, much of public housing is significantly older than the HUD-assisted stock, the needs of the tenants served by the two programs are different, and public housing traditionally provides more tenant services. Moreover there are additional federal requirements for public housing such as the PHA plan process, unique procurement processes, grievance procedures and Section 3. Finally, there are local requirements imposed upon public entities, which PHAs are subject to, such as open meetings, public records requests, union contracts or citywide pay scales, etc.¹⁰
- Although Congress required HUD, in developing the operating subsidy fund regulations, to enter into negotiated rulemaking and an agreement was reached with the rulemaking committee, HUD published a rule that deviated in significant ways from the negotiated rule.¹¹ The changes in the rule will mean that PHAs will receive less funding under the formula.
- As mentioned above, it is anticipated that under the new formula some PHAs will be winners and receive more operating subsidy funds than in the past, while others will be losers. In some cases the percentage of

decrease is dramatic, such as a projected cut for the housing authority of Rochester, N.Y. of nearly 50%.¹² The ability of the loser PHAs to reduce their losses is dependent upon their meeting objectives by October 1, 2006, and the guidelines for meeting those objectives have not yet been made available.

- The Administration has not requested or received full funding for operating subsidies for the past several years. For example, the FY 2007 Budget requests \$3.564 billion for the public housing operating fund, which is the same amount that Congress provided for FY 2006.¹³ According to the Administration's FY 2007 Budget justifications, the FY 2006 funding will result in a proration of 88.7%.¹⁴ The Administration acknowledges that for FY 2007 the requested level of funding would meet only 85% of actual need.¹⁵ By not requesting an increase from the amount of funding for FY 2006, HUD is ignoring the nearly universal substantial increase in utility rates and anticipated inflation of other costs. Also, in comparing the FY 2006 Budget justification with the FY 2007, there is an assumption that income from residents' rent payments will increase by nearly 20% and will account for 3% more of the overall income that PHAs receive nationwide.¹⁶

⁸See NLIHC, *FY 2007 Budget Chart for Selected Programs*, available at <http://www.nlihc.org/>.

⁹See NHLP, et al., *Comments on Revisions to the Public Housing Operating Subsidy Fund Program*, 70 Fed. Reg. 19,858 (Apr. 14, 2005), available at <http://www.nhlp.org/html/pubhsg/index.htm>.

¹⁰HARVARD UNIVERSITY GRADUATE SCHOOL OF DESIGN, *PUBLIC HOUSING OPERATING COST STUDY*, app. H (2003), available at http://www.gsd.harvard.edu/research/research_centers/phocs/documents.html.

¹¹See NHLP, et al., *Comments on Revisions to the Public Housing Operating Subsidy Fund Program*, 70 Fed. Reg. 19,858 (Apr. 14, 2005), available at <http://www.nhlp.org/html/pubhsg/index.htm>.

¹²HUD, *Regulatory Impact Analysis of "Revisions to the Public Housing Operating Fund Program"* (FR-4874-F-08), at 9 (undated), available at <http://www.hud.gov/offices/pih/> (Twenty of the largest decreases in operating subsidies are attributed to PHAs located in large urban areas that are predominately in the Northeast. These PHAs include New York City, Cleveland, Newark, Baltimore, Buffalo, Rochester, Syracuse, Detroit, Allegheny County, Albany, Trenton, Atlantic City, Cincinnati, Niagara Falls, and Scranton. The exceptions to that rule include San Francisco, Los Angeles, Las Vegas, Birmingham and Alaska.)

¹³For FY 2006, the Administration's request for operating subsidies was \$3.407 billion. Budget of the United States Government: Fiscal Year 2006, Appendix: Department of Housing and Urban Development, available at <http://www.whitehouse.gov/omb/budget/fy2006/appendix.html>.

¹⁴See *Public Housing Operating Fund, 2006 Summary Statement and Initiatives*, at E-4 (on file at the National Housing Law Project).

¹⁵*Id.* If the total amount of the operating subsidy is not increased for the coming year, the public housing trade groups believe that the proration will be as low as 78-81% of need.

¹⁶Compare the information that the Administration provided for FY 2006 to support the budget request with the information that it submitted for FY 2007. In the budget justification for FY 2006, HUD said that the annual income from dwelling rents was \$2,429 and that for FY 2007 it would be \$2,908. HUD claims that the information is based upon historical data supplied to HUD by PHAs. The increase is \$449 million. The increase also altered the percentages of sources of income to PHA. Whereas for FY 2006, tenant rents equaled 40% of PHAs income overall, for FY 2007 it is reported to be 43%. Compare Budget of the United States Government: Fiscal Year 2006, Appendix: Department of Housing and Urban Development, available at <http://www.whitehouse.gov/omb/budget/fy2006/index.html> with the Budget of the United States Government, Fiscal Year 2007—Appendix (Department of Hous. and Urb. Dev.), available at <http://www.whitehouse.gov/omb/budget/fy2007/index.html>.

If the asset management model benefits residents and applicants of public housing at all, it can only do so if there is full funding and a commitment to providing affordable housing to the nation's lowest-income families.

Draft Implementation Framework

HUD has circulated a series of eight documents titled "Draft Implementation Framework."¹⁷ Each portion of the draft deals with a different subject matter. These documents, which are not final, set forth some guidelines for PHAs on how to implement the new operating fund rule and how to transition to an asset management model. The guidelines are complex, filled with acronyms (see sidebar at right) and are not easily understood by individuals not steeped in PHA financing and management.

Much of the guidelines deal with the issues of how much money will flow to the PHA's central office, referred to in the Draft as the Central Office Cost Center (COCC), and how much stays at the project level as front-line costs. These are critical issues for PHAs as they transition to asset management. The outcome of these issues may affect residents as the resolution of funding issues will undoubtedly determine what services or the quality of services provided.

The new operating fund rule is a transition rule. The formula is to be in place through 2011. After that time, it is anticipated that there will be sufficient information to determine the cost of running a well-managed public housing development. There is concern within the trade groups that the level of detail and direction that HUD is requiring in the first years of implementation (2006-2011) will result in costs being predetermined and thus not reflective of real costs. If this is true, it will seriously undercut the effectiveness of the FY 2009 review of the PEL based upon actual costs.¹⁸

The eight drafts cover the following topics: asset management fees; capital fund program; excess cash flow; financial management, reporting and accounting; management and front-line service fees; management fees; mixed-finance developments; property identification (property groupings); and vacancy loss and gross potential income.

Asset Management Fees

The operating fund rule is based upon an asset management model, which includes management at the project level and strategic planning for each project.¹⁹ Under the new operating fund rule, all projects, except for some managed by small PHAs, will have to develop a system of budgeting and accounting for each project. The budgets

¹⁷These Drafts are on file at the National Housing Law Project.

¹⁸To be codified at 24 C.F.R. § 990.165(i).

¹⁹To be codified at 24 C.F.R. § 990.115.

Acronyms and Terms

Add-ons: Items added to the operating subsidy in addition to the PEL and the UEL, including items such as the asset management fee, funding for resident participation and other items listed in Section 990.190 of 24 C.F.R.

COCC (Central Office Cost Center): Generally refers to the central office of the PHA which incurs costs which are covered either by management fees paid by the project or direct charges also paid for by the project. COCC costs include overhead and centralized services.

CFP: Capital Fund Program.

FASS: Financial Assessment Subsystem.

FDS: REAC's Financial Data Schedule, a line-item balance sheet with income data but not cash flow information. The FDS is replacing the Budget Line Item (BLI). Sometimes the two acronyms are combined as FASS-PH (FDS), in which the PH stands for public housing.

Front-line costs: Expenses projects incur while delivering direct services.

GAAP: Generally Accepted Accounting Practices.

PEL: Project expense level. This term replaces the former term "allowable expense level" (AEL). The factors that are considered in developing the PEL include size of the project, age of the project, unit bedroom size mix, building type (row/townhouse, high rise or mixed), occupancy (family or senior), location (central city, non-central city and rural), neighborhood poverty rate, percent of households assisted, ownership type (nonprofit or limited dividend) and geography. The PEL is often stated as a per unit per month (PUM) figure.¹ The operating fund rule sets a floor and a ceiling on the PEL to be adjusted by an annual adjustment factor.²

UEL: Utility Expense Level.

WAPEL: Weighted Average Project Expense Level. Weights are given to the various elements that make up the PEL. For example, a project with large bedroom size units is weighted more than a project with only small bedroom units. Projects are also weighted by age, occupancy, elderly or family, neighborhood poverty rate, etc.

¹To be codified at 24 C.F.R. § 990.165.

²The floor for a senior project is \$200 PUM and for a family project \$215. The ceiling for any property is \$420, except for NYCHA. *Id.*

should provide information on revenues, expenses, asset, liabilities and equity.²⁰

Excess cash flow is the funds available after all reasonable expenses are met. Projects that have excess cash flow may fund the central office of the PHA with an asset management fee. The asset management fee is distinct from the management fee.

The operating fund rule provides that each PHA with at least 250 units will receive as an add-on to its operating subsidy a \$4 per unit per month (PUM) asset management fee and a PHA with less than 250 units that elects to transition to asset management will receive a \$2 PUM add-on.²¹ Payment of an asset management fee for a particular project is optional, thus a PHA must adopt a policy before imposing the fee. The policy must provide for the amount of the fee, not to exceed \$10 PUM, a list of the projects to be charged the fee, and provide for accrual and forgiveness of the fee. Once the policy is adopted and up until 2011, a PHA may charge up to the \$4 or \$2 PUM add-on, regardless of a project's cash flow position. Charging more than the minimum amounts will depend upon the excess cash flow from the project. A PHA may not charge the \$4 or \$2 PUM add-on if it is not in compliance with asset management. Prior to 2011, it is up to the PHA management and PHA Board to make the determination of compliance with asset management, until the PHA has an independent review.²² If, by 2011, a PHA is not in compliance with the HUD-determined asset management, the PHA will no longer receive the asset management fee.

Capital Fund Program under Project-based Requirements

The Draft seeks to explain aspects of the relationship between the capital fund program and asset management. Most PHAs receive capital funds in addition to operating subsidy funds. The capital fund program (CFP), as its name implies, is used for capital improvements. There is fungibility between the CFP and operating subsidies, which means that some capital funds may be used for operating costs and vice versa.²³

The Draft provides that no capital funds may be used to support the COCC, except through a management fee. The capital fund may be charged a management fee not to exceed 5% of the grant.²⁴ Projects may be charged a reasonable fee for costs associated with the development or

acquisition of fixed assets and these fees may be paid to the COCC. For CFP modernization projects, the construction supervisory fee covers certain items, which are enumerated in the Draft. For CFP work projects for items such as deferred maintenance, a reasonable front-line service fee may be charged to the project and paid to the COCC.

Excess Cash Flow

As previously noted, the operating fund rule recognizes the concept of excess cash flow,²⁵ which is similar to "surplus cash" in the HUD multifamily housing programs. Excess cash flow is what is available at the end of the year after liabilities are considered. The Draft provides that each project will be required to keep a minimum project working capital equal to two months of ordinary expenses for the project. HUD approval will be required to transfer excess cash flow below this level. The excess cash flow may be used for fungibility between projects, asset management fees, and other purposes such as the development of new units, certain legal costs and accrued liabilities.²⁶ A PHA must report to HUD the required financial data schedule (FDS) or the project will be considered to have no excess cash flow.

Financial Management, Reporting and Accounting

The Draft states that HUD is not requiring PHAs to use a particular operating budget format, but the local budget should match the FDS. PHA budgets must be at the project level and should also include a budget for the CCOC. PHA budgets will continue to be approved by PHA Boards on an annual basis before the beginning of the PHA's fiscal year

The Draft sets forth the following schedule for compliance with Project-Based Budgeting and Accounting:

PHA Fiscal Year End	First PBA Submission for Period
June	July 1, 2007 – June 30, 2008
September	October 1, 2007 – September 30, 2008
December	January 1, 2008 – December 31, 2008
March	April 1, 2008 – March 31, 2009

The Draft further states that HUD will provide PHAs with initial guidance in the late spring of 2006. Whether timing of the initial guidance will be sufficient for PHAs to comply remains to be seen. However, it is quite evident that this guidance will not be timely for those PHAs that are losing funds under the new formula and must comply by October 1, 2006, with asset management in order to avoid losing funds, i.e., "stop loss." PHAs will not have to

²⁰To be codified at 24 C.F.R. § 990.280.

²¹To be codified at 24 C.F.R. § 990.280(b)(5). A PHA with less than 250 units that elects to have all of its units treated as one project or which have only one project will not receive an asset management fee.

²²Independent reviews are also required for those PHAs trying to stop their reduction of operating subsidies. To be codified at 24 C.F.R. § 990.290.

²³42 U.S.C.A. § 1437g(g) (West 2003).

²⁴The capital fund program may continue to fund management improvements. 42 U.S.C.A. § 1437g(d)(1)(E) (West 2003).

²⁵To be codified at 24 C.F.R. § 990.280(b)(5).

²⁶*Id.* at §§ 990.280(b) (5)(i), (ii) and (iii).

maintain separate bank accounts for each project, but will be required to maintain a separate account for the COCC. The Public Housing Assessment System (PHAS) will be revised to track project-level financial performance.

Management and Front-Line Service Fees and Cuts

The Draft provides that policies are based upon the practices of the HUD multifamily housing. Chapter 6 of the Management Agent Handbook, 4381.5 REV-2 is referenced for general instructions, although HUD is making adjustments to those instructions for PHAs.

Management Fees

There will be two fees, a bookkeeping fee and a management fee. The bookkeeping fee cannot exceed \$7.50 PUM. It includes bookkeeping, financial reporting, payroll, central office IT costs and human resources incurred by the PHA.

HUD will set and biannually update the management fee. It will be based upon units under lease or with a HUD approved vacancy but will not be paid for vacant units that are within the 3% vacancy factor.²⁷ There is still no written information available on what that fee might be, but the Draft notes that a reasonable fee for other federal programs is approximately 10% of the grant. Also, there have been reports that the fee may be set at \$40 PUM.²⁸ Because the operating subsidies are traditionally underfunded and PHAs operate properties at a lower cost than other HUD assisted property owners, it might be better if HUD established a minimum flat fee. HUD wants all PHAs to change to the fee system and eliminate overhead allocation schemes. The management fee should cover the supervisory cost of any maintenance services provided directly to the front-line (i.e., to the project)

If a PHA supplies maintenance services to the individual projects, they may charge a reasonable amount for the service. There are four methods of charging for that cost: a pass through of bid costs; market cost of the service; market price based on hours worked; or the direct cost of the service without factoring in overhead or supervisory costs. The basis for the charge, either a reasonable amount or market costs, must be documented with three sources.

PHAs can prorate the cost of central rent collection, recertifications, processing work orders and waiting list activities. Supervisory costs may be charged only for the wait list function. The prorating must be documented and the cost must be reasonable. If there is on-site staff to provide the function, the central office of the PHA cannot charge for it. For centrally provided project level management functions, no fee may be charged until HUD adopts

²⁷*Id.* at § 990.150.

²⁸The dollar amount of the fee was calculated based on data for other HUD multifamily properties, which produced an initial management fee figure of \$35 PUM, to which \$5 was added.

a fee schedule. Costs and staff may be prorated between the central office and a project level office or between two projects, as long as the costs are reasonable. The Draft also discusses the allocation of other costs to front-line or management fees.

The Draft states that HUD prefers that resident services be site based so that they may be tracked for the project.

There is an incentive to combine smaller projects to minimize the need for financial reporting which is required for each project.

Mixed-Finance Developments

The Draft discusses items unique to mixed-finance developments. The financial reporting requirements will be determined on a case-by-case basis based upon the individual contracts for the mixed-finance projects and government accounting standards.

Project Identifications (Property Groupings)

PHAs are to group buildings and units for management purposes.²⁹ PHAs have the flexibility to group units as they wish. The determination regarding how to group projects must be made by April 28, 2006. The Draft states that groupings may be modified periodically but does not indicate whether there are limitations on the timing of such modifications. The trade groups have concerns about the early date for the determination of project groupings. They have also noted that the key issue regarding groupings—the level of funding for each project—is still unresolved and thus the determination of groupings is premature.

PHAs that operate less than 250 units may treat them as one project but if the PHA so selects, it will not receive an add-on for asset management.³⁰ Scattered site units may be combined into projects of up to 250 units and larger developments may be broken into smaller projects. Without any documentation in the Draft, HUD notes that any project with at least eighty units will have enough income to support staff for the development.³¹ There is an incentive to combine smaller projects to minimize the need for financial reporting which is required for each project.

²⁹To be codified at 24 C.F.R. § 990.265.

³⁰To be codified at 24 C.F.R. § 990.190(f).

³¹The Harvard Cost study also found that “[p]roperties with 150 or more units were found to be 1% less expensive to operate than properties of smaller size. HARVARD UNIVERSITY GRADUATE SCHOOL OF DESIGN, PUBLIC HOUSING OPERATING COST STUDY, FINAL REPORT (2003), available at http://www.gsd.harvard.edu/research/research_centers/phocs/study_results.html.

Factors to consider when making the groupings include size, physical proximity, tenancy (elderly, disabled and/or families), building type, facilities and non-dwelling structures.

Without adequate funding, the switch to asset-based management will almost certainly force PHAs to abandon some developments and may send some PHAs into bankruptcy.

HUD claims that the groupings “should not have a material effect on a PHA’s overall subsidy level” except with respect to the “project size” variable. But PHAs have reported that there are impacts on other factors. For example, when combining an elderly project with a family project with large units, the combination may result in a majority of small units in the combined project and the PHA will therefore lose the weighting that is attributed in the formula to a majority large bedroom development.

Vacancy Loss and Gross Potential Income

The Draft provides that a project’s gross potential rent is based upon all the units under Annual Contribution Contract (ACC) regardless of their status (leased or not leased regardless of the reason) times the average rental income. Net rent is the actual rent charged for the period. Rental vacancy loss is the difference between the gross potential rent and the net rent. Vacancy loss is tied to a PHA’s fiscal year. The operating fund is determined and made available on a calendar year, requiring PHAs with non-calendar fiscal years to prorate.

Conclusion

Over the past several years, public housing has been provided inadequate operating funds and inadequate capital funds. Without adequate funding, the switch to asset-based management will almost certainly force PHAs to abandon some developments and may send some PHAs into bankruptcy. Under the new funding formula and asset based management, PHAs will no longer have the ability to use a disproportionate amount of funds to address a critical need at a particular project. For some developments that are in good condition or in prime locations, the PHA may be able to seek capital funding on the private market for improvements by using, for example, low income housing tax credits. But by using these funding sources, it is possible that some public housing may be foreclosed upon or forced into bankruptcy, which more than likely would terminate the low-rent nature of the project. Moreover, as the financial pressures increase, HUD may gain additional allies amongst the PHAs to

deregulate public housing and thereby get rid of the constraints of the Brooke Amendment which controls the amount of rent that can be charged public housing residents and to eliminate other tenant benefits that purportedly increase the cost of delivering public housing.

It is important for advocates to determine whether their PHAs are aware of the dramatic changes that are taking place and preparing for the consequences. Those PHAs that are losers should be taking steps to minimize the losses and plan for the impact of lower funding. Winners should be cautious, as those PHAs may not realize an increase in their operating funds, if the operating fund is under funded. For the few PHAs that anticipate increases in the operating subsidies even if the operating fund in prorated, plans should be developed to determine how best to use the additional funds.³² The switch to asset management will impact residents as there may be staff changes, services will be more project based, and decisions will be made as to how best to deliver the services at the project level. Advocates and residents should be involved as these decisions are made so that they understand the impact and can inform staff as to how to make the changes most efficiently while maintaining the necessary services. ■

³²The PHAs that are slated to receive substantial increases in their operating subsidies include: Puerto Rico, Atlanta, El Paso, Dallas, Dade County, Hawaii, Hoboken, Houston, Charlotte, Denver, Boston, DPHA Washington, DC, New Bedford, New Orleans, Monroe, Jacksonville, Augusta, Cook County, Mobile and Metro Development Housing Authority. See HUD, *Regulatory Impact Analysis of “Revisions to the Public Housing Operating Fund Program” (FR-4874-F-08)*, at 10, available at <http://www.hud.gov/offices/pih/>.

Save the Dates

**Housing Justice Network Meeting
October 22-23, 2006**

**National Housing Training
October 21, 2006**

Please join us for the next meeting of the Housing Justice Network (HJN) in Washington, D.C. The meeting will bring housing advocates together to discuss and review issues on which HJN working groups have been concentrating, learn about critical housing issues, and formulate new plans.

The HJN meeting will be preceded by a one-day basic federal housing training sponsored by the National Housing Law Project. Low-income housing advocates are invited to both events. Details will be made available over the next several months.

Interested in helping plan the HJN meeting? Contact Gideon Anders at ganders@nhlp.org.

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 Web site.³ Copies of the cases are *not* available from NHLP.

Constitutional Law—Due Process; Housing Choice Voucher Program—Termination

Driver v. Hous. Auth. of Racine County, 2006 WL 288152 (Wis. Ct. App. Feb. 8, 2006) (final publication decision pending). In a suit by Housing Choice Voucher holders challenging termination of their voucher assistance by the Housing Authority of Racine, the Court of Appeals of Wisconsin concluded that the pre-termination notices and post-hearing termination decisions issued by the housing authority failed to meet federal constitutional requirements. Citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and voucher regulations of the Department of Housing and Urban Development (HUD), the court of appeals concluded that a pre-termination notice stating only that the voucher holder had "violated [her] family obligation under the Section 8 Rental Assistance Program" and a post-hearing decision stating that the housing authority found that the voucher holder had "violated [her] tenant responsibility" without any extenuating circumstances were insufficiently specific to comply with federal due process requirements. The court of appeals reversed trial court's decision granting summary judgment in favor of the housing authority and remanded the case. However, it did not order reinstatement of voucher assistance.

Fair Housing — Affirmative Duties; Federal Courts — Private Right of Action

Asylum Hill Problem Solving Assoc. v. King, 2006 WL 305315 (Conn. Feb. 21, 2006). In a suit by a neighborhood revitalization organization challenging the Connecticut Housing Finance Agency's Low Income Housing Tax Credit allocation policies as promoting racial and economic segregation, the Connecticut Supreme Court concluded, *inter alia*, that the provision of the Fair Housing Act requiring affirmative furtherance of fair housing by executive departments and agencies, 42 U.S.C. § 3608(d), was not privately enforceable via 42 U.S.C. § 1983.

¹<http://www.westlaw.com>.

²<http://www.lexis.com>.

³For a list of courts that are accessible through the World Wide Web, 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>.

Fair Housing — Affirmative Duties; Housing Preservation — Bond Amendment; Housing Preservation — Flexible Authority; Housing Preservation — MAHRAA

GP-UHAB Hous. Dev. Fund Corp. v. Jackson, 2006 WL 297704 (E.D.N.Y. Feb. 7, 2006). Plaintiff nonprofit HUD-assisted property owner, residents and resident organization filed suit challenging HUD's refusal to continue project-based Section 8 subsidies following a preservation transaction in order to allow residents to obtain tenant-based assistance. The United States District Court for the Eastern District of New York granted Plaintiffs' motion for preliminary injunction to direct HUD to continue the project-based subsidy—noting, in particular, HUD's statements of its policies regarding the provision of voucher assistance in situations such as those faced by the plaintiff residents. However, the court also granted in part HUD's motion to dismiss Plaintiffs' claims. In so ruling, the court held, *inter alia*: (1) a property not occupied by a majority of elderly or disabled families is not "primarily" occupied by such families for the purposes of the "Bond Amendment," Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. I, title II, § 211, 118 Stat. 3317 (2005); and (2) the Flexible Authority Statute, 12 U.S.C. § 1715z-11a, supersedes HUD's duty to continue project based Section 8 assistance under § 524(d)(1) of the Multifamily Assisted Housing Reform and Affordability Act *and also* supersedes HUD's affirmative duty to further fair housing under the Fair Housing Act, 42 U.S.C. § 3608(e)(5).

Multifamily Housing Preservation — Use Agreements; State Courts — Enforcement by Third Party Beneficiary

Mendel v. Henry Phipps Plaza West, Inc., 2006 WL 305930 (N.Y. Feb. 9, 2006) (uncorrected, subject to revision). In a decision applying state law, the Court of Appeals of New York ruled that tenants lacked third-party beneficiary standing to enforce a land disposition agreement (LDA) between the owner of an affordable housing complex and New York City. The tenants sought to require the owner of the complex to maintain the complex as housing for low- and moderate-income families. In affirming the rejection of the tenants' claims by the trial court and appellate division, the court made particular note of a provision in the LDA explicitly negating any intent to permit third-party enforcement. ■

Recent Housing-Related Regulations and Notices

The following are significant affordable housing-related regulations and notices that the Department of Housing and Urban Development (HUD) and the Department of Agriculture's (USDA) Rural Housing Service (RHS) issued in February of 2006. For the most part, the summaries are taken directly from the summary of the regulation in the *Federal Register* or each notice's introductory paragraphs.

Copies of the cited documents may be secured from various sources, including (1) the Government Printing Office's Web site on the World Wide Web,¹ (2) bound volumes of the *Federal Register*, (3) HUD Clips,² (4) HUD,³ and (5) USDA's Rural Development Web page.⁴ Citations are included with each document to help you secure copies.

HUD Federal Register Notices

71 Fed. Reg. 8,746 (Feb. 17, 2006) Notice of Regulatory Waiver Requests Granted for the Third Quarter of Calendar Year 2005

Summary: This notice contains a list of regulatory waivers granted by HUD during the period beginning on July 1, 2005, and ending on September 30, 2005.

Dates: February 17, 2006.

71 Fed. Reg. 9,676 (Feb. 24, 2006) Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986: Supplemental Designation Under the Gulf Opportunity Zone Act of 2005

Summary: This document designates "Difficult Development Areas" (DDAs) for purposes of the Low-Income Housing Tax Credit under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42) as amended by the Gulf Opportunity Zone Act of 2005 (Pub. L. 109-135; the GO Zone Act).

RHS Federal Register Rule 71 Fed. Reg. 8,523 (Feb. 17, 2006) Single Family Housing Loans, Payment Assistance

Summary: RHS proposes to amend its regulations for the Section 502 direct home loan program with respect to the payment assistance for which a borrower qualifies.⁵

Dates: Written or e-mail comments must be received on or before April 18, 2006.

¹http://www.access.gpo.gov/su_docs.

²<http://www.hudclips.org/cgi/index.cgi>.

³To order notices and handbooks from HUD, call (800) 767-7468 or fax (202) 708-2313.

⁴<http://www.rdinit.usda.gov/regs>.

HUD PIH Notices

Notice PIH 2006-9 (HA) (Feb. 3, 2006) Reinstatement—Notice PIH 2003-24 (HA), Procurement of Legal Services by Public Housing Agencies

Summary: This notice reinstates Notice PIH-2003-24 (HA), same subject, and sets forth procedures for the procurement of legal services by public housing agencies (PHAs). This notice supersedes similar guidance previously provided to HUD staff and PHAs including PIH 90-47, Procedures for Procuring Professional Services.

Expires: February 28, 2007.

Notice PIH 2006-10 (HA) (Feb. 3, 2006) Identification of Projects for Asset Management

Summary: This notice provides guidance and related instructions to public housing agencies (PHAs) and field offices regarding the identification of projects for purposes of asset management (subpart H of the final rule, OMB approval number 2577-0029, expires October 31, 2008) under the Revisions to the Public Housing Operating Fund Program, published in the *Federal Register* on September 19, 2005 (79 FR 54983). PHAs have until April 21, 2006, to submit their project identifications.

Expires: February 28, 2007.

Notice PIH 2006-11 (HA) (Feb. 3, 2006) Guidance on Integrated Pest Management

Summary: The purpose of this notice is to inform public housing agencies (PHAs) and Tribally Designated Housing Entities (TDHEs) of the additional reference materials on Integrated Pest Management (IPM) beyond Maintenance Guidebook Seven: Termite, Insect and Rodent Control. PHAs and TDHEs (HAs) may choose to share this information with families and property owners participating in their programs.

Expires: February 28, 2007.

Notice PIH 2006-12 (Feb. 3, 2006) Disaster Voucher Program (DVP) Operating Requirements – Rental Assistance for HUD-Assisted Families and Special Needs Families Displaced by Hurricanes Katrina and Rita

Summary: This notice provides instructions for the continuation of temporary rental assistance for HUD-assisted families and special needs/homeless families displaced as a result of Hurricane Katrina through implementation of the Disaster Voucher Program (DVP). The DVP also provides temporary rental assistance for certain HUD-assisted and special needs/homeless families displaced as a result of Hurricane Rita.

Expires: February 28, 2007. ■

⁵For an article summarizing the proposed regulations, see *RHS Proposes to Return to "Interest Credit" Single Family Homeownership Subsidy* on page 63 of this issue.

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